



2005 Market Street, Suite 2800 215.575.9050 Phone
Philadelphia, PA 19103-7077

901 E Street NW 202.552.2000 Phone
Washington, DC 20004
www.pewtrusts.org

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

**Re: Pew Charitable Trusts Public Comment on Retroactivity of “Drugs Minus 2”
Amendment**

Dear Judge Saris:

The Pew Charitable Trusts submits these comments in response to the Commission’s request for comments on the issue of retroactivity of the new guideline amendments to U.S.S.G. §§ 2D1.1 and 2D.1.11 (Drugs Minus 2). Research shows that for a substantial number of offenders, there is little or no evidence that keeping them behind bars longer prevents additional crime. Research also has found that retroactive application of sentence reductions has no discernable impact on recidivism rates. This evidence strongly suggests that applying retroactively the Commission’s decision to adjust sentences for certain offenders convicted of drug offenses, reviewed on a case-by-case basis by the judiciary, would protect public safety and control corrections costs. If savings from reduced prison terms were reinvested in evidence-based programs and supervision, the net effect of the retroactive application of the Drugs Minus 2 amendment could be a greater public safety return on federal corrections spending.

Pew’s Public Safety Performance Project helps states advance fiscally sound, data-driven policies and practices in adult and juvenile sentencing and corrections that protect public safety, hold offenders accountable, and control corrections costs. The project does not advocate preset solutions, but rather collaborates in partnership with policy leaders and criminal justice stakeholders in selected states to develop policy options based on analysis of the jurisdiction’s particular challenges, the most recent and rigorous research, and lessons learned from other states. Pew and its partners, including the federal Bureau of Justice Assistance and the Council of State Governments Justice Center, have worked with 30 states to develop such policies as part of the Justice Reinvestment Initiative, which was formally established by Congress and the Department of Justice in 2010.

The federal criminal justice system is different from the state systems. Nevertheless, many of the lessons learned from the state experiences with justice reinvestment can be adapted and applied to the federal corrections system.

I. Research on Time Served and Reoffending

Over the past four decades, criminal justice policy in the United States was guided largely by a central premise: the best way to protect the public was to put more people in prison. A corollary was that offenders should spend longer and longer time behind bars. The logic of the strategy seemed inescapable—more inmates serving more time surely equals less crime—and policy makers were quite effective at putting the approach into action.

As Pew has documented, the state prison population spiked more than 700 percent between 1972 and 2011, and in 2008 the combined federal-state-local inmate count reached 2.3 million or one in 100 adults. Annual state spending on corrections topped \$50 billion, with prisons accounting for the vast majority of the cost, even though offenders on parole and probation dramatically outnumber those behind bars. A similar prison expansion has occurred at the federal level.

Prison expansion has delivered some public safety payoff. Serious crime has been declining for the past two decades, and imprisonment deserves some of the credit. But the interaction between incarceration and crime is not simple. As noted in a recent report by the National Academy of Sciences: “On balance ... studies support the conclusion that the growth in incarceration rates reduced crime, but the magnitude of the crime reduction remains highly uncertain and the evidence suggests it was unlikely to have been large.”¹ Criminologists and policy makers increasingly agree that we have reached a “tipping point” with incarceration, where additional imprisonment will have little if any effect on crime.

There is also a significant question about sentence length and the amount of time offenders should serve behind bars – or length of stay. In 2012, Pew published a study showing that longer prison terms have been a key driver of state prison populations and costs, *Time Served: The High Cost, Low Return of Longer Prison Terms*.² While the *Time Served* report showed that states over the last decade significantly increased inmates’ length of stay, the relationship between time served in prison and public safety has proven to be complicated.

a. Incapacitation, Deterrence, and Length of Stay

Incapacitation: Reducing *current* criminal involvement by holding offenders in prison where they cannot commit crimes against the public.

Deterrence: Reducing the likelihood of *future* criminal involvement by increasing the punishment for the current offense.

There are two methods by which increasing time spent in prison could impact public safety: incapacitation and deterrence. Incapacitation is a guaranteed method of ensuring an individual offender does not commit additional crimes. However, incarcerating people comes at substantial cost and the number of crimes averted by locking someone up will vary greatly by offender and offense type. Deterrence, on the other hand, is a theory rather than a guarantee. Deterrence theory suggests that

¹ National Research Council. (2014). *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, Washington, DC: The National Academies Press (NRC Report), at 155.

² The Pew Charitable Trusts, *Time Served: The High Cost, Low Return of Longer Prison Terms*, June 2012. http://www.pewtrusts.org/~media/Imported-and-Legacy/uploadedfiles/pcs_assets/2012/PewTimeServedreportpdf.pdf.

offenders who are punished more harshly are less likely to commit crimes in the future because they will want to avoid the prospect of repeat punishment.

The interaction between length of stay and incapacitation and/or deterrence is complex. An increase in length of stay will obviously result in an offender being incapacitated longer, but the additional weeks, months or years may be associated with a diminishing beneficial impact on crime rates. Additional time served also may be related to a declining deterrent effect and, in some cases, actually could contribute to criminal offending after release. This dynamic is the foundation of the argument that prisons are “schools of crime.”³ Thus, the return on investment becomes questionable. This underscores the need to subject length of stay to rigorous analysis, paying particular attention to key offender characteristics that may be correlated with an increased risk of re-offending.

b. Modeling Shorter Length of Stay in Florida, Maryland and Michigan

While prior research has struggled to accurately measure the *aggregate* impact of length of stay on criminal offending, there is promise in understanding the impact of time served by looking at past criminal offending trajectory patterns as a model for future outcomes. Researchers cannot predict future behavior with perfect accuracy, but they can create trajectories of individual offending behavior that will closely resemble what individuals might have done had they not been incarcerated.⁴ These modeled trajectories are created using detailed information on past arrest history and individual characteristics.⁵ Once created, these trajectories of individual behavior can be compared to *actual* individual behavior post-release to estimate the number of crimes prevented by incarceration—both those prevented through incapacitation and those prevented through deterrence.⁶

To explore this approach using data from states with different sentencing structures and practices, Pew collected incarceration and arrest data for release cohorts in three states: Florida, Maryland, and Michigan. Looking at non-violent offenders inmates released from these three states in 2004, Pew’s analysis found that a significant portion of the state prison populations could have been released sooner with no impact at all on public safety. Looking only at non-violent offenders, 14 percent of the Florida release cohort, 18 percent of the Maryland release cohort, and 24 percent of the Michigan release cohort could have been safely released after serving between three months and two years less time behind bars without jeopardizing public safety.

³ Lynne M. Vieraitis, Tomislav V. Kovandzic, and Thomas B. Marvell, “The Criminogenic Effects of Imprisonment: Evidence from State Panel Data, 1974-2002,” *Criminology & Public Policy* 6 (2007):589–622.; Paul Gendreau and Claire Goggin, *The Effects of Prison Sentences on Recidivism* (Ottawa, Canada: Department of the Solicitor General, 1999).

⁴ A. S. Bhati, “Estimating the Number of Crimes Averted by Incapacitation: An Information-Theoretic Approach,” *Journal of Quantitative Criminology*. 23(4, 2007):355–375; A. S. Bhati, *Quantifying the Specific Deterrent Effects of DNA Databases* (Washington, DC: The Urban Institute, 2010); A. S. Bhati and A. R. Piquero, “Estimating the Impacts of Incarceration on Subsequent Offending Trajectories: Deterrent, Criminogenic, or Null Effects?” *Journal of Criminal Law and Criminology* 98(1, 2008):207–253.

⁵ These characteristics are age of first crime, criminal career duration, criminal career termination, and offense type.

⁶ See Appendix B in the *Time Served* report for further description of this methodology.

c. Retroactivity

While the risk profile of the federal inmate population may be different from the risk profile of inmates in state corrections systems, the time served research remains relevant. The Commission's own research has shown that moderately shorter sentences do not increase recidivism rates. Indeed, the Commission has recognized that offense levels – the primary driver of sentence length in the Guidelines – has no predictive relationship to the likelihood of recidivism.⁷ Also, the Commission's May 2014 report regarding the retroactive application of the 2007 crack cocaine amendment found that "[t]he overall recidivism rate for the offenders who received retroactive application of the 2007 Crack Cocaine Amendment (the 'Retroactivity Group') was similar to the recidivism rate for offenders who were released prior to the effective date of the 2007 Crack Cocaine Amendment and who had therefore served their full sentences (the 'Comparison Group')."⁸ It should also be noted that the average age of those eligible for retroactive application of the "Drugs Minus 2" amendment is older (38 years old) than the average age of those eligible for retroactivity of the crack cocaine amendment (36 years old) and research on criminal careers has shown that recidivism rates decline with age.⁹

The Commission's findings track the emerging body of research showing that lengthy prison sentences may not have any specific deterrent effect at all.¹⁰ Even the incapacitation benefit of lengthy incarceration has diminishing returns, as the extended social interaction with other prisoners, along with problems associated with reentry, can have a criminogenic effect on prisoners.¹¹ As noted above, Pew's research showed that for a substantial number of offenders, keeping them incarcerated longer may not prevent any additional crime. Several studies, looking at different populations and using varied methodologies, have attempted to find a relationship between the length of prison terms and recidivism but have failed to find a consistent impact, either positive or negative.¹²

⁷ U.S.S.C., *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines*, at 13 (2004).

⁸ U.S.S.C., *Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment* (May 2014). http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20140527_Recidivism_2007_Crack_Cocaine_Amendment.pdf.

⁹ NRC Report, at 345.

¹⁰ Francis T. Cullen, et al., *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 PRISON J. 48S at 53S (2011) ("Most criminologists would predict that, on balance, offenders become more, rather than less, criminally oriented due to their prison experience.").

¹¹ NRC Report, pp. 337-339, 344-346; Testimony of Molly Roth on behalf of Federal Defenders, at 19 (noting the criminogenic social environment as well as the destabilizing effect of imprisonment on family and its impact on prisoner's ability to successfully reenter society), http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20140313/Testimony_Roth.pdf.

¹² Paul Gendreau, Claire Goggin, and Francis T. Cullen, *The Effects of Prison Sentences on Recidivism* (1999). —Thomas Orsagh and Jong-Rong Chen, "The Effect of Time Served on Recidivism: An Interdisciplinary Theory," *Journal of Quantitative Criminology* 4(2) (1988): 155-171; Washington State Institute for Public Policy, *Sentences for Adult Felons in Washington: Options to Address Prison Overcrowding* (Olympia, WA: 2004); Ilyana Kuziemko, *Going Off Parole: How the Elimination of Discretionary Prison Release Affects the Social Cost of Crime*, National Bureau of Economic Research Working Paper (2007), <http://www.nber.org/papers/w13380>; National Council of Crime and Delinquency, *Accelerated Release: A Literature Review* (Oakland, CA: January 2008); G. Matthew Snodgrass, Arjan A. J. Blokland, Amelia Haviand, Paul Nieuwebeerta, Daniel S. Nagin, "Does the Time Cause the Crime? An Examination of the Relationship Between Time Served and Reoffending in the Netherlands," *Criminology* 49 (2011):1149–1194; Thomas A. Loughran, Edward P. Mulvey, Carol A. Schubert, Jeffrey Fagan, Alex R. Piquero, and Sandra H. Losoya, "Estimating a Dose-Response Relationship Between Length of Stay and Future Recidivism in Serious Juvenile Offenders," *Criminology* 47 (2009): 699-740.

II. State Drug Law Reforms and Retroactivity

The Drugs Minus 2 amendment would reduce by two levels the offense levels assigned to the drug quantities that trigger the statutory penalties, so that the mandatory minimums are located within the corresponding guideline range. The Commission agreed with those in favor of the amendment that reducing drug sentences will reduce prison spending and overcrowding, free up money for other more effective criminal justice priorities, increase cooperation with law enforcement in certain communities, and lead to more just results, all without harming public safety or undercutting law enforcement.¹³

In making its decision, the Commission relied on evidence from many states that have revised their drug penalty statutes and reduced their prison populations without seeing an increase in crime rates.¹⁴ Over the last 10 years, many states have made adjustments to sentence lengths and penalties for drug offenses that serve to update and modernize their criminal codes. For example, in 2010, South Carolina eliminated mandatory minimums for the manufacture, distribution, dispensing, delivery or purchase of drugs below certain weight thresholds for first and second offenses. South Carolina's reform bill passed unanimously in the Senate and 97-4 in the House of Representatives. Since the enactment of the legislation in 2010, the state prison population has decreased by 8.2 percent and violent prisoners make up a larger proportion of the state's inmates. At the same time, the state crime rate has dropped by 14 percent over the last five years.

In 2013, Georgia provided judges a "safety valve" for departing below mandatory minimums for trafficking and manufacturing, if the court makes certain findings. Michigan, New York, and Rhode Island also significantly decreased drug sentences, with Michigan and Rhode Island rolling back mandatory minimum penalties for drug offenses. Each of these states reduced both their prison populations and their crime rates.

The example of New York is particularly appropriate in examining retroactivity. After establishing a resentencing process for people serving lengthy drug sentences, the state experienced no rise in recidivism rates. One study concluded that "[e]arly release from prison has not only created considerable cost savings, but has also resulted in a very low rate of return to prison."¹⁵ In each case, judges had discretion to consider the offender's circumstances and history, similar to the discretion federal district judges would have in resentencing drug offenders under this amendment. In New York, "[t]he process by which judges exercise discretion in deciding, on a case by case basis, who among the list of eligible people should be re-sentenced and for what length of time is proving to act as an effective screen."¹⁶

There are other state examples of retroactivity as well. In many cases, states have adopted changes to their parole eligibility provisions (Connecticut, Mississippi, Louisiana) and geriatric/medical parole provisions (Arkansas, Louisiana, South Carolina), changed the amount of good time available to inmates

¹³ http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20140430_RF_Amendments.pdf, pp. 21-26; see also remarks of U.S.S.C. Chair Patti Saris, <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20140410/Chairs-Remarks.pdf>; and public comments on Drugs Minus 2 amendment, <http://www.ussc.gov/amendment-process/public-comment/public-comment-march-26-2014>.

¹⁴ See The Pew Charitable Trusts, *States Cut Both Crime and Imprisonment* (Dec. 2013).

¹⁵ Gibney, The Legal Aid Society, *Drug Law Resentencing: Saving Tax Dollars with Minimal Community Risk*, at 9 (2010). <http://www.legal-aid.org/media/127984/drug-law-reform-paper-2009.pdf>.

¹⁶ *Id.*

(Louisiana, Rhode Island), or provided additional sentencing credits or earned time reductions to offenders who participated in certain programs (Connecticut, Nevada, Oregon, Rhode Island, Washington), and applied those provisions to existing inmates. Ohio in 2011 included a provision in its justice reinvestment legislation that allows the director of the Department of Rehabilitation and Corrections to recommend that the sentencing court consider judicial release of an inmate who has served at least 80 percent of his/her sentence, so long as the prison term is more than one year and the offense is a non-violent offense. Other states shortened the period of incarceration so that offenders would not “max out” without any supervision (Kentucky, Oregon, and South Carolina).

A study by the Washington State Institute of Public Policy evaluated a 2003 reform that increased from 33 percent to 50 percent of sentence the maximum amount of time that nonviolent property and drug offenders could earn off of their prison terms by participating in treatment programs. The study found that the recidivism rate of offenders who received the increased earned time (and thus were released earlier) was lower than the comparison group of offenders who also participated in programs but did not benefit from increased earned time.¹⁷

III. Federal Retroactivity Considerations

The Commission considers three main factors in deciding whether to add an amendment to the list of retroactive amendments in § 1B1.10(c): “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.”¹⁸ An amendment’s inclusion in the retroactivity list “reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing and that, in the sound discretion of the court, a reduction of the term of imprisonment may be appropriate for previously sentenced, qualified defendants.”¹⁹

a. Risk- and Offense-based Discretion

Under the federal retroactivity procedures, inmates eligible for a sentence reduction would not be released without judicial review. Judges would have discretion to determine whether to make the adjustment in the offenders’ sentences; release is not automatic. Under the Commission’s policy statement judges are directed to consider the sentencing factors in 18 U.S.C. § 3553(a), the nature and seriousness of the offense, the danger to any person or the community that the offender might pose, and the offender’s post-sentencing conduct (e.g., conduct in prison). These individualized judicial determinations, coupled with the explicit direction in U.S.S.G. § 1B1.10 to consider public safety when reviewing motions for sentence reduction, require that courts take public safety into account.

b. Post-Prison Supervision

Under the proposed policy, offenders whose sentences are reduced after judicial review would not simply be released to the street, without monitoring or supervision. After an offender’s petition is

¹⁷ E.K. Drake, R. Barnoski, and S. Aos (2009). *Increased Earned Release From Prison: Impacts of a 2003 Law on Recidivism and Crime Costs, Revised*. Olympia: Washington State Institute for Public Policy, Document No. 09-04-1201. <http://wsipp.wa.gov/ReportFile/1039>.

¹⁸ U.S.S.G. § 1B1.10, Reduction in Term of Imprisonment as a Result of Amended Guideline Range, p.s., comment (2013).

¹⁹ *Id.*

reviewed by a federal judge and the judge determines that an amendment is appropriate, upon release from the Bureau of Prisons the offender would be supervised by federal probation for several years. Research has shown that inmates released to post-incarceration supervision are less likely to be rearrested, reconvicted, and reincarcerated for new crimes than inmates who serve, or “max out,” their full prison sentences and are released without supervision.²⁰

c. Impact on Overall Public Safety Priorities

The federal prison population has skyrocketed from fewer than 25,000 inmates in 1980 to nearly 220,000 today, making it by far the largest and fastest growing prison system in the nation. Projections are for continued growth over at least the next five years. Just as in the state corrections systems, this population growth has come at a substantial cost to federal taxpayers. In FY2000, the Bureau of Prisons (BOP) budget was approximately \$3.67 billion and accounted for less than 20 percent of the Department of Justice’s budget. Today, the \$6.9 billion BOP budget is more than 25 percent of the Justice Department’s budget.²¹ The Justice Department estimates that the BOP budget will be as high as 29 percent of the entire Justice Department budget by 2020. The rate of growth of the BOP budget since 2000 is twice the rate of growth of the budget for the rest of the Justice Department.

This growth has put pressure on other important public safety and justice goals. Justice Department grant funding to state and local jurisdictions for law enforcement and other public safety programs has been reduced. The Department also was under a hiring freeze for several years, so it has been hindered in hiring new law enforcement agents, investigators, prosecutors, civil attorneys and others. Indeed, the Justice Department’s Inspector General in December 2013 listed “Addressing the Growing Crisis in the Federal Prison System” as the very first of its “Top Management and Performance Challenges” faced by the Department of Justice:

The crisis in the federal prison system is two-fold. First, the costs of the federal prison system continue to escalate, consuming an ever-larger share of the Department’s budget with no relief in sight. In the current era of flat or declining budgets, the continued growth of the prison system budget poses a threat to the Department’s other critical programs – including those designed to protect national security, enforce criminal laws, and defend civil rights. As I have stated in testimony to Congress during the past year, the path the Department is on is unsustainable in the current budget environment. Second, federal prisons are facing a number of important safety and security issues, including, most significantly, that they have been overcrowded for years and the problem is only getting worse. Since 2006, Department officials have acknowledged the threat overcrowding poses to the safety and security of its prisons, yet

²⁰ Pew Charitable Trusts, *The Impact of Parole in New Jersey*, November 2013, http://www.pewtrusts.org/~media/Imported-and-Leqacy/uploadedfiles/pcs_assets/2013/PSPPNJParoleBriefpdf.pdf; Pew Charitable Trusts, *Max Out: The Rise in Prison Inmates Released Without Supervision*, (June 2014), http://www.pewtrusts.org/~media/Assets/2014/06/04/MaxOut_Report.pdf; Pew Charitable Trusts, *Mandatory Reentry Supervision: An Evaluation of the Kentucky Experience* (June 2014), http://www.pewtrusts.org/~media/Assets/2014/06/PSPP_Kentucky_brief.pdf.

²¹ The Urban Institute, *Stemming the Tide: Strategies to Reduce the Growth and Cut the Cost of the Federal Prison System*, (Nov. 2013), at 14 (“Urban Institute Report”). <http://www.urban.org/UploadedPDF/412932-stemming-the-tide.pdf>.

the Department has not put in place a plan that can reasonably be expected to alleviate the problem.²²

d. Safety and Programming

The growth in federal inmates has led to serious overcrowding in the system, which jeopardizes the safety of both inmates and staff.²³ BOP facilities, on average, currently operate between 35 percent and 40 percent above their rated capacity.²⁴ High-security facilities are the most crowded, at 51 percent overcapacity in 2012.²⁵ If growth continues unabated, the prison system will incarcerate over 50,000 inmates over capacity per year through 2020, potentially reaching more than 50 percent over capacity by 2023.²⁶ The ratio of staff to inmates has declined as BOP has attempted to squeeze as much as possible out of its budget. Overcrowding also limits the opportunity for effective programming that can reduce recidivism.²⁷ Federal prison overcrowding also hinders BOP's ability to provide prisoners with access to correctional treatment programs.²⁸ The Attorney General and BOP Director have recognized that evidence-based rehabilitative programs are an effective means to prevent recidivism and protect the public.²⁹ Overcrowding – with its associated waiting lists and reduced staff-to-inmate ratio – makes it more difficult, and sometimes impossible, for BOP to offer these risk-reduction programs. Public safety, along with current and future prisoners, would be positively affected by retroactive application because it would both free up money for such programs and reduce waiting lists to participate in them.

e. Impact of Retroactivity

Retroactive application of the amendment would have a much greater impact on federal prison overcrowding than prospective application alone. Applying the amendment retroactively would substantially increase the magnitude of the change. The Commission estimates that the amendment will likely be applicable to 70 percent of drug offenders, who already make up half of the prison population.³⁰ Retroactive application of the amended guideline ranges, by decreasing the lengths of many sentences, would dramatically increase the impact of the amendment on the prison population. The Commission's Office of Research and Data estimates that 51,141 offenders sentenced between

²² <http://www.justice.gov/oig/challenges/2013.htm>.

²³ Federal Bureau of Prisons. *The Effects of Changing Crowding and Staffing Levels in Federal Prisons on Inmate Violence Rates*. Washington, DC: BOP (2005).

²⁴ Charles E. Samuels, Jr., Director, BOP, before the U.S. Senate Committee on the Judiciary, at 1 (Oct. 22, 2013), at <http://www.justice.gov/iso/opa/ola/witness/11-06-13-bop-samuels-testimony-re-oversight-of-the-federal-bureau-of-prisons.201312231.pdf>.

²⁵ *Id.*

²⁶ Urban Institute Report, at 1.

²⁷ Nathan James, Congressional Research Service, *The Federal Prison Population Buildup: Overview, Policy Changes, Issues and Options*, at 24 (April 2014). <http://fas.org/sgp/crs/misc/R42937.pdf>. See also Charles E. Samuels, Jr., Director, BOP, before the U.S. Senate Committee on the Judiciary, at 1 (Oct. 22, 2013), at <http://www.justice.gov/iso/opa/ola/witness/11-06-13-bop-samuels-testimony-re-oversight-of-the-federal-bureau-of-prisons.201312231.pdf>.

²⁸ Gov't Accountability Office, *Bureau of Prison: Growing Inmate Crowding Negatively Affects Inmates, Staff, and Infrastructure*, at 19-21 (2012), available at <http://gao.gov/assets/650/648123.pdf>.

²⁹ Charles E. Samuels, Jr., Director, BOP, before the U.S. Senate Committee on the Judiciary, at 1 (Oct. 22, 2013), at <http://www.justice.gov/iso/opa/ola/witness/11-06-13-bop-samuels-testimony-re-oversight-of-the-federal-bureau-of-prisons.201312231.pdf>.

³⁰ See BOP, *Statistics: Offenses*, available at http://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp.

October 1, 1991 and October 31, 2014 would be eligible to seek reductions in their current sentences. It is estimated that the average sentence reduction would be 23 months.

IV. Reinvestment

Retroactive application of the amendment would have a significant impact on the federal prison population and the costs of the federal prison system. The average cost of housing an inmate in a BOP facility is over \$29,000.³¹ This figure includes the fixed costs of maintaining and staffing facilities. The average marginal costs of increasing or decreasing the federal inmate population by one offender is estimated to be \$10,363.³² Thus, retroactive application of the amendment could result in millions of dollars in savings, even if only a percentage of the petitions for sentence reductions are approved. Some of these savings could, and should, be applied to recidivism reduction programs for offenders in the BOP system and to bolster supervised release to manage any increased workload and improve supervision. The annual cost of supervision by probation officers is approximately \$3,347 per offender.³³ Reinvesting savings from retroactive application of the amendment in this way would result in a greater public safety return on federal corrections spending. In the same way, states have reinvested a portion of the savings from their justice reinvestment reforms in evidence-based strategies and high performing criminal justice programs to improve public safety.³⁴

V. Conclusion

The Commission has approved its Drug Minus 2 amendment prospectively. Applying the amendment retroactively would substantially increase the impact of the amendment on cost containment and recidivism. By maintaining judicial discretion, the amendment allows the courts, on a case-by-case basis and taking public safety into account, to determine whether eligible inmates should be granted shorter prison terms. State-level experiences with similar policies have shown that they can protect public safety and control the cost of the corrections system, especially when some of the prison savings are reinvested in effective supervision of released offenders.

³¹ Urban Institute report at 13.

³² *Id.*

³³ *Id.*

³⁴ Nancy LaVigne, *Justice Reinvestment Initiative State Assessment Report*, Urban Institute (Washington, DC 2014), at 3, 43-48. <http://www.urban.org/uploadedpdf/412994-Justice-Reinvestment-Initiative-State-Assessment-Report.pdf>