Testimony of

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on behalf of the

Practitioners Advisory Group

before the

United States Sentencing Commission

Public Hearing on Retroactivity of 2014 Drug Guidelines Amendments

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As Chair of the Practitioners Advisory Group to the United States Sentencing Commission, I am pleased to offer our views on the question whether the Commission should give retroactive effect to the amendment, set to take effect on November 1, 2014, that decreases offense levels by two levels throughout the drug quantity table at USSG §2D1.1. The PAG firmly believes that the Commission should make the drug amendment available retroactively for all inmates whose guidelines range would have been lower if the amendment had previously been in effect. The PAG knows that many other groups, including the American Bar Association, Families Against Mandatory Minimums, and the Federal Defenders are providing detailed testimony covering many of the relevant factors. Rather than repeat much of that detail, we would like to emphasize a few of the key points.

First, and foremost, making the amendment retroactive is simply the right thing to do. The amendment serves the worthy objective of more carefully calibrating the penalties for drug offenses and deemphasizing the effects of mandatory minimum penalties on those to whom those harsh and inflexible statutory penalty provisions were never meant to apply. For defendants sentenced after the amendment takes effect, the recommended sentence under the new guideline is a superior measure of the seriousness of the offense. And what is true for someone who will be sentenced in November 2014 is just as true for someone who was already sentenced in November 2010 or January 2005: the new guideline is a superior sentencing tool.

Second, experience tells us that retroactive application will produce significant benefits that far outweigh any cost or inconvenience from implementation or any risk of recidivism by those who obtain earlier release from prison. There is no question that retroactivity would create a bulge in the pipeline, just as it did with previous retroactive amendments to the crack guidelines. Judges, attorneys, and probation officers will have extra work processing the large number of motions, not to mention an increase in supervised release caseloads. And the burden will not be felt evenly. Some districts will have more work to do than

others. Those are valid considerations, but they are far outweighed by the substantial benefits from retroactivity.

Some of the benefits are measurable and tangible. Others are harder to quantify. Starting with the tangible, as Chief Judge Saris articulated in her "Remarks for Public Meeting" on April 10, 2014, "[r]educing the federal prison population has become urgent, with that population almost three times where it was in 1991. Federal prisons are 32% overcapacity, and federal prison spending exceeds $6 billion a year, making up more than a quarter of the budget of the entire Department of Justice and reducing the resources available for federal prosecutors and law enforcement, aid to state and local law enforcement, crime victim services, and crime prevention programs – all of which promote public safety." Chief Judge Patti B. Saris, Remarks for Public Meeting (Apr. 10, 2014).

There is a broad consensus that de-emphasizing drug quantity as a sentencing factor will allow us to better allocate resources. The Department of Justice's recent Smart on Crime Initiative encourages federal prosecutors to decline charging drug amounts that otherwise would trigger mandatory minimum penalties. As Attorney General Holder stated in his testimony before the Commission in March, "[t]his proposed amendment is consistent with the Smart on Crime Initiative that I announced last August. Its implementation would further our ongoing effort to advance common sense criminal justice reforms, and it would deepen the Department's work to make the federal criminal justice system both more effective and more efficient when battling crime in the conditions and the 14 behaviors that breed it." Transcript, *Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines* 14 (Mar. 13, 2014). Chief Judge Saris explained why quantity-based guidelines are no longer needed to punish dangerous criminals. "When the drug quantity tables were set at their current level, above the mandatory minimum penalties, drug quantity was the primary driver of drug sentences. There was only one other specific offense characteristic in the drug guideline. Now, there are sixteen specific offense characteristics, including enhancements for violence, firearms, aggravating role, and a whole host of other factors to help ensure that dangerous offenders receive long sentences. *Quantity, while still an important proxy for seriousness, no longer needs to be quite as central to the calculation*." *Id.* (emphasis added).

Assuming an average bed-year cost of $28,948, total savings is projected to be 83,525 bed years, or just over $2.4 billion. U.S. Sentencing Commission

Memorandum, *Analysis of the Impact of the 2014 Drug Guidelines Amendment If Made Retroactive* 8 (May 27, 2014). These savings will be realized in full over the next 30 years. And in the short-term alone, with 56.2% of eligible offenders (28,220 inmates) projected to be released within the first three years, there will be a savings of over $1.3 billion. *Id.* at 9, tbl. 1; 15.

Cost savings such as those are quantifiable. But there is more to the benefit of retroactivity than just dollars and cents. A reduction in prison overcrowding is of significant value in other ways, not just to our clients but to the persons who work in our federal prisons. We see the ill effects of overcrowding when we visit our clients. A prison sentence is not just pure retributive punishment. If that were all it accomplished, it would be a wasted opportunity. A person's incarceration should be used to begin writing a fresh chapter and to prepare for re-entry into society as a contributor, not a drain on the system. Those who work in our federal prisons should not have to feel stretched so thin that all they have time to do is keep things under control. A reduction in overcrowding would free up resources for programs that prepare inmates for their release, while allowing those who work in our federal prisons to do their jobs more effectively and in a safer and healthier environment.

Another less tangible benefit—but a benefit nonetheless—is the "justice" and equal treatment that comes from retroactivity. As noted at the outset, there is no policy reason for concluding that someone sentenced after the amendment takes effect is more deserving of a lower guideline range than the person who was sentenced earlier this year or some number of years ago. It is very hard to look an incarcerated client in the eye—or, as is more frequently the case, the inmate's spouse or child—and explain why a change that the Commission's work so strongly supports is unavailable to those to whom the change is directly relevant. The Commission changed the guideline to better reflect the appropriate punishment for each relevant drug quantity. Implicit in that change is the recognition that the guideline was not calibrated as well as it could have been for several years now, and that thousands and thousands of inmates are serving more time than necessary to achieve the purposes of punishment.

The effect of retroactivity would be significant for many inmates—leading to several months of freedom that could be spent reuniting with loved ones and starting life anew. We would find it very difficult to explain that a mere quirk in timing is all that stands between them and their freedom. We all benefit when the

fruits of accumulated wisdom are applied as widely as possible. The Commission unanimously agreed that a lower guideline range better serves the statutory purposes set forth in 18 U.S.C. § 3553(a). Applying that better range to incarcerated non-violent drug defendants sends the right message about how our system of justice should operate.

Finally, we think it is neither necessary nor appropriate to limit the amendment to persons sentenced before the guidelines were made advisory or those who qualified for a safety valve downward adjustment when originally sentenced. As the Commission is well aware, it took several years after the decision in *United States v. Booker* for courts to work through a number of questions about how advisory guidelines would operate. Change did not happen overnight. And there has also been a wide variety of approaches, from circuit to circuit, from district to district, and from judge to judge, on how to sentence drug defendants (and defendants more generally) after *Booker*. The premise for drawing a pre-*Booker* line would be that defendants sentenced under the advisory regime already received the benefit of the new amendment through greater judicial discretion to disregard the harshness of the drug quantity table. But if that were so, the Commission would not be predicting such major changes from the *prospective* application of the amendment. Nobody seriously believes that a sentence imposed on a drug defendant after November 1, 2014 will be much the same as the sentence that would have been imposed in the years since *Booker* was decided.

As for a limitation to those who previously received a safety valve adjustment to their offense level, we think it would be artificial and even contrary to the purpose of retroactivity. The Commission deemed the amendment worthy of prospective application to all drug defendants, not just those who meet the safety valve reduction criteria. For defendants already sentenced, the inability to qualify for the safety valve adjustment—including cases where the defendant had no information to report about others—has made it less likely that their sentence was moderated from the influence that mandatory minimums have on all drug sentences. These defendants should not be denied that chance a second time.

Just as we enthusiastically welcomed this amendment to the drug guidelines, we strongly support making it applicable to any drug defendant who still feels the direct effects of a drug guideline that overstates offense seriousness.