FEDERAL PUBLIC DEFENDER
Southern District of Texas
Lyric Office Centre
440 Louisiana Street, Suite 1350
Houston, Texas 77002-1634

Federal Public Defender:
Marjorie Meyers

Telephone:
713.718.4600

First Assistant:
H. Michael Sokolow

Fax:
713.718.4610

June 6, 2011

Honorable Patti B. Saris
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 2002-8002

Re: Public Comment on Retroactivity of Amendments Pertaining to Drug Offenses

Dear Judge Saris:

We submit and attach the written statement of Michael Nachmanoff on behalf of the Federal Public and Community Defenders for the hearing on June 1, 2011 as part of our public comment. This letter addresses in greater detail the following issues that arose or received special attention at the hearing: (1) the second sentence of § 1B1.10(b)(2)(B), p.s.; (2) the Justice Department's proposed exclusion of well over half of eligible prisoners; (3) new aggravating and mitigating factors that would require additional fact-finding; (4) the Justice Department's proposed presumption against retroactivity; and (5) whether the Supreme Court's decision in *Freeman* should affect the timing of the Commission's vote.

We again thank the Commission for its courage and continuing commitment to fairness for those convicted of offenses involving crack cocaine, and for its thoughtful consideration of our testimony and comments.

I. Second Sentence of § 1B1.10(b)(2)(B), p.s.

By Amendment 712, effective Mar. 3, 2008, the Commission added the following two sentences to policy statement § 1B1.10 as an exception to the general rule against

reducing an original term of imprisonment to a term less than the minimum of the amended guideline range:

> Exception.—If the original term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing, a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection may be appropriate. However, if the original term of imprisonment constituted a non-guideline sentence determined pursuant to 18 U.S.C. § 3553(a) and United States v. Booker, 543 U.S. 220 (2005), a further reduction generally would not be appropriate.

USSG § 1B1.10(b)(2)(B). The Commission also included an application note illustrating the reduction of an original term that was "less than" the term provided by the guideline range to a new term reflecting *both* the reduction in the guideline range due to the amendment *and* a further reduction "comparably less" than the amended guideline range. *Id.*, comment. (n.3).

From November 1, 1997 to March 8, 2008, the policy statement explicitly allowed for further comparable reductions below the amended guideline range when there was a departure at the original sentencing.[1] Neither the first sentence of amended § 1B1.10(b)(2)(B) nor amended Application Note 3 sought to confine a further comparable reduction to instances in which there had been a "departure" as distinct from a "variance."

The second sentence, however, appeared to discourage (rather than prohibit, through the use of the word "generally") both (a) any *further* comparable reduction below the amended guideline range and (b) *any* reduction at all, *whenever* the original sentence was a "non-guideline sentence determined pursuant to 18 U.S.C. § 3553(a) and United States v. Booker, 543 U.S. 220 (2005)."

There are generally three kinds of "non-guideline sentence" determined pursuant to § 3553(a) and *Booker*: (1) variances to take account of mitigating circumstances of the offense or mitigating characteristics of the defendant; (2) variances to take account of flaws in the guideline itself; and (3) a combination of the two.

[1] This was made explicit by Amendment 548 effective Nov. 1, 1997. The policy statement provided in relevant part: "In determining whether, and to what extent, a reduction in the term of imprisonment is warranted for a defendant eligible for consideration under 18 U.S.C. § 3582(c)(2), the court should consider the term of imprisonment that it would have imposed had the amendment(s) to the guidelines listed in subsection (c) been in effect at the time the defendant was sentenced." USSG § 1B1.10(b). The relevant application note provided: "When the original sentence represented a downward departure, a comparable reduction below the amended guideline range may be appropriate." *Id.*, comment. (n.3).

It would not make sense to "generally" disapprove any reduction at all or any further comparable reduction in any of these categories just because the sentence was determined pursuant to § 3553(a) rather than a "departure" provision. First, judges cite a variety of individualized mitigating factors, including criminal history issues, family ties and responsibilities, employment record, age, low likelihood of recidivism/not a risk to community, for both "downward departures" and "sentences below the guideline range with *Booker*/§ 3553."[2] Even policy disagreements with the guidelines, *i.e.*, "guideline adequacy issues," are sometimes called "departures."[3] And judges often cite both departure provisions and § 3553(a) when they sentence below the guideline range for individualized reasons, because of flaws in the guideline, or a combination of reasons.[4]

Second, in cases in which courts relied in whole or in part on flaws in the guideline itself, they do not always vary (or depart) for that reason to the extent reflected in the amended guideline. For example, a judge in 2005 may have sentenced a defendant with 25 grams of crack to 65 months, 13 months below the bottom of the applicable range of 78-97 months, based solely on flaws in the guideline, but the amended range under the 2010 amendments is 51-63 months. Or the judge may have sentenced the defendant to 60 months primarily because of individualized mitigating factors and only partially because of flaws in the guideline. In either case, the court should be able to consider whether to reduce the sentence further to reflect the sentence it would have imposed had the amended guideline been in effect.

Read literally, however, the second sentence in § 1B1.10(b)(2)(B) discouraged *both* any further comparable reduction from the amended guideline range *and* any reduction at all, whenever the original sentence was a "non-guideline sentence" determined pursuant to § 3553(a) and *Booker*. For example, in *United States v. Robinson*, slip op., 2011 WL 343946 (4th Cir. Feb. 4, 2011), the district court imposed a downward variance of exactly 36 months from the bottom of the applicable guideline range based on the defendant's youth and the fact that his criminal history was comprised solely of juvenile adjudications. The judge later denied any sentence reduction *at all*, finding that the "general rule" set forth in the second sentence of § 1B1.10(b)(2)(B) was "determinative" and that the "variant sentence of 132 months . . . was below even the *amended* guidelines range." *Id*. at *3. Yet, the reasons for the variance could have been

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

[3] *Id*., tbls. 25, 25B; *see also Spears v. United States*, 129 S. Ct. 840, 843 (2009) (describing a variance based on a categorical policy disagreement as an "'inside the heartland' departure"); *United States v. Hearn*, 549 F.3d 680, 683 (7th Cir. 2008) (explaining that the Supreme Court "made clear that a district court may *depart* from the Guidelines based on a policy disagreement with the Commission; that is, they may *depart* if they conclude that the Guidelines prescribe a sentence that fails to reflect Congress' purposes in creating the sentencing regime") (emphasis added).

[4] *Id*., tbl. 25A; *see, e.g., United States v. Malone*, slip op., 2008 WL 6155217 (E.D. Mich. Feb. 22, 2008) (relying on § 4A1.3 and *Kimbrough* in sentencing below career offender guideline).

reasons for a "departure" and the approved example of a further comparable reduction in Application Note 3 *also* reflects a sentence below the amended guideline range.[5] Nonetheless, the Fourth Circuit affirmed the district court's denial of any sentence reduction without discussion of whether it made any sense.

In a cryptic decision issued a month later, the Fourth Circuit appeared not to treat the second sentence of § 1B1.10(b)(2)(B) as a hard and fast rule.[6] The Third Circuit has also sent mixed signals, first issuing a decision recognizing that the second sentence of § 1B1.10(b)(2)(B) does not preclude a district court from granting a further reduction when the original sentence represented a variance (though affirming the district court's decision not to do so),[7] but just two months later, issuing a decision that treats the second sentence of § 1B1.10(b)(2)(B) as a mandatory bar against such reductions.[8] Other courts of appeals have adopted a more sensible view, recognizing that the second sentence of § 1B1.10(b)(2)(B) does *not* bar a further comparable reduction or any reduction at all.[9] Under this more sensible view, district courts have considered whether a variance at the original sentencing took account of the policy considerations underlying the 2007 amendment at all, and if so, whether the original sentence was reduced for those reasons to the extent represented by the amendment.[10]

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[5] The application note describes an original term of 56 months, 20 percent below the bottom of the applicable 70-87 month range, and an amended range of 57-71 months.

[6] *United States v. Mack*, slip op., 2011 WL 915079, *1 n.2 (Mar. 17, 2011).

[7] *United States v. Jenkins*, 376 Fed. Appx. 250, 252 (3d Cir. Apr. 14, 2010) ("While acknowledging that this provision left it with discretion to further reduce Jenkins' sentence after consideration of the § 3553(a) factors and applicable policy statements, the District Court specifically found that circumstances were not present to warrant a further reduction.").

[8] *United States v. McKinnon*, 385 Fed. Appx. 216 (3d Cir. June 28, 2010).

[9] *See, e.g., United States v. Dillon*, 400 Fed. Appx. 156, 158 (9th Cir. Oct. 8, 2010) ("In amending *Sipai*, this court clarified that district courts have 'discretion' to consider a § 3582(c)(2) reduction when a defendant received a discretionary below-Guidelines sentence."); *United States v. Sipai*, 623 F.3d 908 (9th Cir. 2010) (withdrawing and superseding earlier opinion in which panel had accepted government's argument that second sentence of § 1B1.10(b)(2)(B) deprived the district court of jurisdiction to consider a motion to reduce sentence where judge varied for a variety of reasons from the career offender guideline to a term within the applicable § 2D1.1 range); *United States v. Curry*, 606 F.3d 323, 329 (6th Cir. 2010) (rejecting government's argument that second sentence of § 1B1.10(b)(2)(B) created a presumption against any reduction in a case where judge varied based on good efforts at reform and did not take into account disparity between powder and crack; reviewing "confusion" caused by that sentence and concluding that it "does not serve to remove the sentencing court's discretion to reduce a sentence where the original sentence was, in fact, 'based on' a subsequently lowered guideline range, even if the sentence originally imposed was below the otherwise-applicable guideline range, whether pursuant to a departure or a variance").

[10] *See, e.g., United States v. Wilkerson*, slip op., 2010 WL 5437225 (D. Mass. Dec. 23, 2010) (where court initially varied from low end of 170 months to 144 months based on individualized

We recommended that the Commission eliminate the second sentence of § 1B1.10(b)(2)(B) because it has created confusion and injustice in some cases, because it appears to be based on the mistaken idea that courts "generally" do not consider the guidelines at all,[11] because it has been applied in cases in which the courts *did* consider

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factors and did not rely on the crack-powder disparity because it was not permitted at the time, court reduced sentence to 132 months, below the amended range of 152-175 months, because factors that supported the initial variance "are augmented by the subsequent reduction in the disparity in guideline ranges for powder and crack cocaine"); *United States v. Reid*, 566 F. Supp. 2d 888, 894-95 (E.D. Wis. Aug. 8, 2008) ("If the departure or variance failed to account for the crack/powder disparity, a further reduction would . . . more likely be warranted," but "if at the time of the original sentencing the court accounted for the disparity, a further reduction based on the new crack guidelines may not be warranted," and declining to further reduce the sentence because the 2-level reduction in the original sentence was based in part on the crack/powder disparity and because balance of aggravating and mitigating factors did not warrant further reduction); *United States v. Leroy*, slip op., 2008 WL 1780937, *2 (E.D. Wis. Apr. 15, 2008) (declining further reduction because "defendant has already received a reduced sentence to account for the disparity between crack and powder-a discount more generous than the one adopted by the Commission in the 2007 amendment," and because balance of aggravating and mitigating factors did not warrant further reduction); *United States v. Allen*, slip op., 2009 WL 1585793 (S.D. Ohio June 4, 2009) (where district court originally varied downward because career offender guideline overrepresented criminal history and instead based sentence on drug guideline, further reducing sentence because "because the crack cocaine guidelines were a substantial factor in determining" the sentence and the balance of aggravating and mitigating factors warranted a further reduction); *United States v. Porter*, slip op., 2009 WL 455475 (E.D.N.Y. Feb. 23, 2009) (declining to further reduce sentence because court "took into account the disparity between Guideline sentences for cocaine base and powder cocaine offenses" at the original sentencing); *United States v. Simon*, slip op., 2008 WL 820026 (E.D.N.Y. Mar. 25, 2008) (declining to further reduce sentence because original 4-level variance was "principally, if not entirely, because [court] concluded that the crack guidelines overstated the seriousness of the offense" and because balance of aggravating and mitigating factors did not warrant further reduction); *United States v. Philbrick*, slip op., 2008 WL 2550657 (D.N.H. June 23, 2008) (granting further comparable reduction where district court "already took into account the anticipated crack guideline reduction" at original sentencing but where "several other factors also animated the decision to impose a *Booker* sentence" so that no further reduction would "effectively deprive defendant of the sentence reduction allowed in substantial part on grounds unrelated to the then-proposed crack guideline amendment"); *United States v. Castillo*, slip op., 2008 WL 2971801 (S.D.N.Y. July 31, 2008) (where district court was prohibited by circuit precedent from varying based on the crack-powder disparity at the original sentencing, but varied downward based on individualized factors, further reducing sentence because "[t]o now refrain from further reducing Castillo's sentence to account for the reduced crack-cocaine sentencing disparity would deny Castillo the full benefit of the variance which the Court found was warranted under § 3553(a) factors alone" and because balance of aggravating and mitigating factors warranted further reduction).

[11] Staff explained that the sentence was intended to apply when the guideline range "was not ultimately considered in the first place." *See* Transcriptions of Portions of the Crack Amendment Retroactivity Summit Held January 24, 2008 at The Adams Mark Hotel, St. Louis, Mo, Session

the guidelines, and because all courts would adopt a more sensible approach if it were eliminated.

We now provide language in response to Judge Howell's request. At the hearing on June 1, Judge Howell asked if the Commission might say that if the judge already imposed a sentence he or she thought was fair, a further reduction may not be warranted. We do not think this would be a good approach because what many judges thought was fair before is likely to change in light of the fact that Congress and the Commission have adopted a different policy.[12] Commissioner Friedrich asked if the Commission might say that if the judge imposed a variance based on a ratio as or more lenient than 18:1, a further reduction may not be warranted. This would not be a good approach either because, before and after *Spears*, many courts do not vary based on ratios. They vary based on ratios, offense levels, years, months, or percentages.

We also believe that the Commission should avoid rigid rules and detailed examples. The reasons for variances and the extent of variances are too varied to capture in detail, and the courts are best situated and perfectly capable of determining what they did at the original sentencing and why. Moreover, the Commission should avoid any appearance of attempting to restrict the courts' jurisdiction to consider a motion under § 3582(c)(2).

The language we propose suggests that courts consider whether they already did exactly what the amendment does, that is, reduced the sentence based on the guideline's policy flaws and to the same extent as reflected in the amended guideline range. That is the most sensible approach and what we believe most judges have been doing, and it also appears to be consistent with the government's position.[13] To better assist the courts, the language we propose also brings back the concept from the former policy statement of what sentence the court would have imposed had the amendment been in effect.

1: United States Sentencing Commission, http://www.fd.org/pdf_lib/Transcript%20of%201B1.10b2B%20Excerpt%20of%20Crack%20Retroactivity%20Summit.pdf. Such sentences should not exist, since "district courts must treat the Guidelines as the 'starting point and the initial benchmark,'" even when they ultimately decide that the guideline range is not the product of the Commission's "exercise of its characteristic institutional role." *Kimbrough v. United States*, 552 U.S. 85, 108-09 (2007). Judges must "first calculate the Guidelines range, and then consider what sentence is appropriate for the individual defendant in light of the statutory sentencing factors, 18 U.S.C. § 3553(a), explaining any variance from the former with reference to the latter." *Nelson v. United States*, 129 S. Ct. 890, 891-92 (2009).

[12] As Mr. Felman reported, judges at the Commission's recent seminar in San Diego said that they waited out of respect for Congress and the Commission.

[13] According to our notes, Ms. Rose testified that the government would not be arguing that the courts should not reduce sentences any further if the original sentence was a variance, and that a reduction may be warranted if the defendant did not receive a variance based on a policy disagreement to the extent of the current amendment.

Proposed language (changes in italics)

(2) Limitation, Exception and Prohibition on Extent of Reduction .--

(A) In General .--Except as provided in subdivision (B), the court shall not reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range determined under subdivision (1) of this subsection.

(B) Exception. If the original term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing, a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection may be appropriate. *In determining whether and to what extent to further reduce the term of imprisonment, the court should consider the term of imprisonment it would have imposed had the amendment been in effect at the time the defendant was sentenced. For example, the court should consider whether the original sentence was reduced in whole or in part because of the policy considerations underlying the applicable amendment, and if so, whether the sentence was reduced based on those policy considerations to the extent reflected in the applicable amendment. A reduction in the original sentence based on those policy considerations does not preclude a comparable further reduction from the amended guideline range based on other factors the court considered in imposing the original sentence.*

(C) Prohibition .--In no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.

II. The Department's Proposed Exclusions Should Be Rejected.

We were disappointed to hear the Attorney General request that the Commission make the 2010 amendments retroactive to ensure fairness and public confidence in the criminal justice system, and then eviscerate that request by proposing to categorically exclude well over half of eligible prisoners.[14] The Department's current position is inconsistent with its previous support for complete elimination of the quantity-based disparity in cocaine sentencing,[15] its recognition that "[u]nwarranted disparities . . . can .

[14] *See* Statement of Eric H. Holder Before the U.S. Sent'g Comm'n at 2-3 (June 1, 2011) ["Holder Statement"]; Statement of Stephanie M. Rose Before the U.S. Sent'g Comm'n at 1, 8-9, (June 1, 2011) ["Rose Statement"].

[15] *Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity: Hearing Before the Subcomm. on Crime and Drugs of the S. Jud. Comm.*, 111th Cong. 1st Sess., at 4-6 (2009); *see also* Eric Holder, Attorney General, U.S. Dep't of Justice, Statement of the Attorney General on Senate Judiciary Committee's Approval of the Fair Sentencing Act (Mar. 11, 2010) ("There is no law enforcement or sentencing rationale for the current disparity between crack and cocaine powder offenses, and I have strongly supported eliminating it to ensure our sentencing

. . result from a failure to analyze carefully and distinguish the specific facts and circumstances of each particular case," and its declaration that "equal justice depends on individualized justice, and smart law enforcement demands it."[16]

The Department's position is also inconsistent with the Commission's recidivism analysis, the fact that amended sentences will still be significantly longer based on criminal history and weapon enhancements, and its admission that the categories it proposes to exclude are not perfect proxies for dangerousness.[17]

When the 2007 amendments were made retroactive, the government agreed to thousands of sentence reductions for defendants who were in Criminal History Categories IV, V and VI and for defendants who had weapon enhancements.[18] The Department explained this away at the hearing by claiming that there were too many cases for prosecutors to bring public safety concerns to the attention of the courts.[19] We think that it is inconceivable that federal prosecutors failed to protect public safety because it was not worth the effort, and we know for a fact that prosecutors did argue against reductions or for lesser reductions when they believed there were actual public safety concerns.

The Department's proposed exclusions would continue to treat African-Americans differently and categorically. As the Acting Director of the Bureau of Prisons acknowledged, a decision against retroactivity would be seen as unfair, would undermine productive re-entry, and may cause prison unrest.[20] A decision to adopt the Department's proposed categorical exclusions *is* a decision against retroactivity for well over half of eligible prisoners.

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laws are tough, predictable and fair."), http://www.justice.gov/ag/speeches/2010/ag-speech-100311.html.

[16] Memorandum to All Federal Prosecutors from Attorney General Eric H. Holder Jr. regarding Department Policy on Charging and Sentencing, at 1 (May 19, 2010).

[17] Rose Statement at 9.

[18] Defenders in the ten districts with the highest number of motions granted report that the government agreed to the vast majority of motions regardless of such factors, which appears to include 6,908 defendants who had weapon enhancements and 8,245 defendants in Criminal History Categories IV-VI. Memorandum from Glenn Schmitt to Hon. Ricardo Hinojosa, Chair, *Analysis of the Impact of the Crack Cocaine Amendment If Made Retroactive*, at 17 tbl.5 (Oct. 3, 2007).

[19] Testimony of Stephanie Rose at June 1, 2011 Hearing.

[20] Testimony of Thomas R. Kane at June 1, 2011 Hearing.

A. No group of defendants has ever been categorically excluded from retroactive relief.

Twenty-six amendments have been made retroactive without excluding any category of defendant from the possibility of relief.[21] These retroactive amendments included lower guideline ranges for drug offenses involving LSD, marijuana and oxycodone.[22] Offenders convicted of offenses involving marijuana are predominantly White or Hispanic; those involved with LSD and oxycodone are predominantly White.[23]

B. The Commission courageously rejected the Department's overstated claims of an unmanageable burden on the system and grave danger to the public in 2007.

In opposition to making retroactive the 2007 two-level reduction in base offense levels for crack offenses, the Department argued that it would be too great a burden on the system, and that if "these high-risk offenders" were "prematurely released," they would "reoffend . . . within a short time" and "imprison[] entire communities."[24]

The Commission did not accept these arguments, and the prediction of an unmanageable burden on the system and grave danger to communities did not come to pass. The Commission made the amendments retroactive and instructed judges, in determining whether and to what extent to reduce a term of imprisonment, that they "shall" consider the factors set forth in § 3553(a) and any danger to a person or the community that may be posed by reducing a defendant's term of imprisonment, and that they "may" consider the defendant's post-sentencing conduct.[25]

Judges, with their knowledge of each case and aided by the parties and probation officers, granted, denied, or partially granted sentence reductions based on relevant individualized factors. As of April 2011, 604 motions under the 2007 amendments had been completely denied based on § 3553(a) factors, public safety concerns, or post-sentencing or post-conviction conduct.[26] In many other cases, judges granted partial

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[21] USSG § 1B1.10(c).

[22] *See* USSG App. C, Amend. 502 (Nov. 1, 1993); USSG App. C, Amend. 536 (Nov. 1, 1995); USSG App. C, Amend. 662 (Nov. 5, 2003).

[23] *See* 2010 Sourcebook of Federal Sentencing Statistics, tbl. 34 (marijuana offenders are 24.5% White, 7.6% Black, 64.4% Hispanic, 3.4% Other); *id*. (offenders involved with other drugs including LSD and oxycodone are 55.8% White, 21.5% Black, 8.6% Hispanic, 14.1% Other).

[24] Statement of Gretchen C. Shappert, U.S. Attorney, Western District of North Carolina, Presented to the U.S. Sent'g Comm'n (Nov. 13, 2007).

[25] USSG § 1B1.10, comment. (n.1(B)), p.s.; USSG, App. C, Amend. 712 (Mar. 3, 2008).

[26] U.S. Sent'g Comm'n, *Preliminary Crack Cocaine Retroactivity Data Report*, tbl.9 (April 2011). It appears that another 504 were denied for reasons that are not known. *Id*.

reductions based on a balance of individualized factors. *See* Appendix 1: Sample Rulings on Sentence Reductions Under 2007 Amendment.

C. The Commission's recidivism analysis proves that it wisely relied on judges to consider on an individualized basis whether and to what extent to reduce sentences, and that no category of defendants should be denied an opportunity for relief.

The Commission's recidivism study shows that the difference in recidivism rates, including conviction of a new offense and revocation of supervised release for a technical violation, for eligible prisoners released as a result of a reduction based on the 2007 amendment and prisoners who would have been eligible but served full terms of imprisonment was not statistically significant, and if anything, was slightly *lower* for those who received a reduction (30.4% versus 32.6%).[27] The recidivism rate was lower for those who received a reduction under the 2007 amendment than for those who served their full term in each of Criminal History Categories IV-VI, and while the recidivism rate was slightly higher for those with weapon enhancements, the difference was not statistically significant.[28] In other words, keeping eligible offenders in prison longer did not reduce their recidivism.

As the Acting Director of the Bureau of Prisons testified, while prisoners eligible for retroactive relief have made mistakes in the past, they will have been incarcerated for a long time, and 60% of *all* federal prisoners do not recidivate at all after three years.[29] The average new sentence for all offenders eligible for relief under the 2010 amendments, even assuming every one of them received a full reduction, would be 10.6 years.[30] The average age of eligible offenders was 31 at sentencing so the average age upon release would be 41.6 years.[31] Offenders will be released over the course of thirty years, and many will be released in their forties, fiftiess, and sixties. "People do change"[32] regardless of age,[33] and recidivism drops significantly with age particularly after the mid-thirties.[34]

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[27] U.S. Sent'g Comm'n, *Recidivism Among Offenders with Sentence Modifications Made Pursuant to Retroactive Application of 2007 Crack Cocaine Amendment* at 2-3, 5, 7-8 (May 31, 2011) [hereinafter *Recidivism Study*].

[28] *Id*. at 10 & tbl.2.

[29] Testimony of Thomas R. Kane at June 1, 2011 Hearing.

[30] U.S. Sent'g Comm'n, Office of Research and Data, *Analysis of the Impact of Guideline Implementation of the Fair Sentencing Act of 2010 if the Amendment Were Applied Retroactively* at 28 (May 20, 2011) [hereinafter *Impact Analysis*].

[31] *Id*. at 19, tbl.4.

[32] *See* Transcript of Hearing Before the U.S. Sentencing Comm'n, Public Hearing on Retroactivity, at 28 (Nov. 13, 2007) (testimony of Judge Reggie Walton).

D. Categorical exclusion based on criminal history category would serve no legitimate purpose and would disproportionately exclude African-Americans.

Excluding all offenders in Criminal History Categories IV-VI would deny any opportunity for relief to 54.2% of eligible prisoners,[35] while serving no legitimate purpose and disproportionately excluding African-Americans.

The recidivism rate was *lower* for defendants who received a reduction under the 2007 amendment than for those who served their full term in each of these Criminal History Categories — 12% lower for those in CHC IV, 2.8% lower for those in CHC V, and 5.7% lower for those in CHC VI.[36] Just like defendants sentenced for the first time under the 2010 amendments, defendants receiving retroactive sentence reductions will continue to serve significantly longer sentences based on criminal history category. Just like defendants in lower criminal history categories, these defendants' base offense levels were driven by the unfair quantity-based disparity.

Denying relief based on criminal history category "would doubly penalize the defendant for his criminal history." *United States v. Ayala*, 540 F. Supp. 2d 676, 679 (W.D. Va. 2008). These defendants, just like defendants in lower criminal history categories, are "not the undeserving recipient[s] of blind fortune." Rather, "in the judgment of the Commission, the judiciary, Congress, and much of America . . . [their] original sentence[s] [were] unfairly harsh when compared to sentences given to defendants for powder cocaine offenses." *Id*. at 680.

Many defendants in CHC VI are ineligible in any event because they were sentenced within the career offender guideline, an unfortunate result given the Commission's finding that the career offender guideline has an unjustified racially disparate impact in precisely these kinds of cases.[37] And many defendants in CHC IV, V

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[33] *See, e.g., Pepper v. United States*, 131 S. Ct. 1229 (2011); *Dillon v. United States*, 130 S. Ct. 2683 (2010).

[34] *See* Sampson, Robert J. and John H. Laub, *Life-Course Desisters: Trajectories of Crime Among Delinquent Boys Followed to Age 70*, 451 Criminology 555 (2003)

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

[36] *Recidivism Study* at 10, tbl.2.

[37] Commission research shows that African-American offenders are disproportionately impacted by the career offender guideline, that most African-American offenders are subject to the career offender guideline based on prior drug offenses for which they are more likely to be arrested and prosecuted than similarly situated white offenders, and that the career offender guideline significantly overstates the risk of recidivism in such cases and fails to prevent drug crime. *See Fifteen Year Review* at 133-34.

or VI who are *not* career offenders have no prior conviction for a crime of violence or even a drug offense, but have amassed criminal history points for minor offenses.

While serving no purpose, categorically excluding all prisoners in any one of these Criminal History Categories would disproportionately exclude African-Americans. African-American drug offenders have a higher risk of arrest and prosecution than similarly situated white offenders,[38] and thus are more likely to be in higher Criminal History Categories.[39] In FY 2009, 52.3% of African-American crack offenders were in CHC IV-VI, while only 32.8% of white crack offenders were in CHC IV-VI; 83.1% of crack offenders in CHC IV were African-American, while only 7.6% of crack offenders in CHC IV were white; 84.4% of crack offenders in CHC V were African-American and 87.3% of crack offenders in CHC VI were African-American, while only 6.5% of crack offenders in each of those Criminal History Categories were white.[40] Excluding all prisoners in these categories would thus disproportionately exclude African-Americans.

E. Categorical exclusion based on weapon enhancements would serve no legitimate purpose and would disproportionately exclude African-Americans.

Excluding all offenders who received an enhancement for a weapon under the guidelines (29.4% of eligible defendants) or a mandatory statutory penalty (14.9%) would exclude 44.3% of eligible defendants.[41] This too would serve no legitimate purpose while disproportionately excluding African-Americans.

The difference in the recidivism rate between those with weapon enhancements who received a reduction under the 2007 amendment and those who served their full terms is not statistically significant.[42] Moreover, it appears that weapon enhancements bear no relationship to recidivism. For offenders in the Comparison Group, the recidivism rate for offenders with weapon enhancements was 2.8% lower than the overall recidivism rate (29.8% versus 32.6%). Just like defendants sentenced for the first time under the 2010 amendments, defendants receiving retroactive sentence reductions will continue to serve longer sentences based on weapon enhancements, and just like

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[38] *See* U.S. Sent'g Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 134 (2004) ["*Fifteen Year Review*"].

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

[40] *See* Appendix 2: Percentages of Drug Trafficking Offenders Involved with Crack in Each Racial Group and CHC, FY 2009.

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

[42] *Id*. at 10.

defendants without weapon enhancements, these defendants' base offense levels were driven by the unfair quantity-based disparity.

Weapon enhancements are a poor proxy for violence on the part of the defendant. Under the *Pinkerton* doctrine, defendants who did not possess or use a weapon or even know that a co-conspirator possessed or used a weapon receive § 924(c) enhancements.[43] The SOC under § 2D1.1(b) applies even more broadly due to its passive phrasing and interaction with the relevant conduct rule. It too is regularly applied to defendants who did not themselves possess or use any weapon or know that a co-conspirator possessed or used a weapon.[44]

Denying all offenders who received a weapon enhancement the opportunity to have a judge decide if they pose a danger to the community would be entirely unnecessary to protect the public and thus an unfair waste of human lives. Natasha Darrington, who received an enhancement for possessing a weapon because her boyfriend possessed a gun that was found with drugs when she was not in the vicinity, would still be in prison rather than with her family and working toward a college degree. Percy Dillon was originally sentenced to 322 months for trafficking in crack and using a firearm during and in relation to a drug trafficking crime. He has spent his years in prison educating at-risk youth about the perils of involvement in the drug trade, helping to establish educational programs for youth in the community and fellow inmates, and furthering his own education.[45] He will be released in January 2013 based on a reduction

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[43] *See, e.g.*, *United States v. Zavala*, 286 Fed. Appx. 170, 175 (5th Cir. 2008) (upholding mandatory consecutive 55-year sentence under § 924(c) under *Pinkerton* based on large amount of drugs present at time of drug transaction conducted by co-conspirator at defendants' residence, though defendants were not present and there was no evidence that they knew of co-conspirator's possession of a firearm in furtherance of the conspiracy); *United States v. Vazquez-Castro*, __ F.3d __, 2011 WL 1315739 (1st Cir. Apr. 7, 2011) (upholding *Pinkerton* liability for conviction under § 924(c) where it was "reasonably foreseeable" that a co-conspirator would constructively possess a weapon in furtherance of the conspiracy).

[44] *See, e.g.*, *United States v. Napier*, slip op., 2011 WL 1682906 (6th Cir. May 5, 2011) (affirming 2-level increase under § 2D1.1(b)(1) when government conceded there was no evidence that the defendant ever possessed a firearm himself or even knew that his co-conspirator father had firearms because it was "reasonably foreseeable" that his father would possess firearms); *United States v. Pham*, 463 F.3d 1239, 1246 (11th Cir. 2006) (upholding 2-level increase under § 2D1.1(b)(1) where no evidence defendant possessed a firearm or knew that co-conspirators possessed any firearms, and where firearm was not found at location where charged conduct occurred, because it was reasonably foreseeable that a firearm would be possessed by a co-conspirator "in light of the vastness of the conspiracy and the large amount of drugs and money being exchanged in this case"); *United States v. Canania*, 532 F.3d 764, 771 (8th Cir. 2008) (affirming 2-level increase under § 2D1.1(b)(1) though the firearm was found unloaded and tucked in the bed in which defendants slept and jury acquitted defendants of firearms charges, as it was not "clearly improbable that the weapon was connected [to their] offense[s]").

[45] Mr. Dillon "reached out to juvenile offenders at Pike County Juvenile Detention Center, in Mississippi, encouraging them with literature to take a path away from crime," worked "with the Executive Director of Hunters Point Family, a nationally recognized youth development agency

under the 2007 amendments which the government did not oppose. If the Department's proposal were in effect, Mr. Dillon would spend an additional 52 months in prison.

Willie Mays Aikens was convicted of trafficking in crack cocaine and using a weapon during and in relation to a drug trafficking offense under § 924(c). Evidence of the gun charge consisted of the testimony of an undercover policewoman that she saw a shotgun leaning against a couch near where Mr. Aikens was cooking powder into crack at her request.[46] Mr. Aikens was a major league baseball player with a World Series home run record who succumbed to a drug habit, dropped out of baseball, and was eventually convicted and sentenced in 1994 to 248 months in prison. After being released in 2008 when his sentence was reduced to time served under the 2007 amendments, he married the mother of his children, established a close relationship with his children, returned to work with the Kansas City Royals as a coach on a farm team, and is an inspiration to others.[47] Under the Department's proposed exclusion, Mr. Aikens would still be in prison. And, of course, there are thousands of lesser known others with weapon enhancements who are putting their lives back together after being released under the 2007 amendments, many with the government's agreement.

While serving no purpose and wasting human lives, the Department's proposed exclusion would disproportionately exclude African-Americans. As Mr. Nachmanoff testified a year ago, Commission data show that African-Americans are disproportionately over-represented among offenders who receive the statutory enhancement under § 924(c) instead of the weapon SOC adjustment.[48] Previous

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that serves high-risk youth and families in San Francisco's Bayview Hunters Point" and "the University of California at Berkeley and San Francisco State [to] establish an African-American studies program at Hunters Point Family to 'educate [local] youth about their rich heritage and uplift them,'" and "helped create an African-American Studies program for inmates at the United States Penitentiary at Atwater" in conjunction with the University of California at Berkeley. Mr. Dillon also obtained a GED, pursued vocational training through a nationally accredited distance education program, and graduated in 2004 from the Professional Career Development Institute, completing its Professional Property Management Program. *See* Brief for the Petitioner at 5-7, *Dillon v. United States*, 130 S. Ct. 2683 (2010) (No. 09-6338).

[46] *See United States v. Aikens*, 132 F.3d 452 (8th Cir. 1998); *United States v. Aikens*, 64 F.3d 372 (8th Cir. 1995).

[47] Testimony of Willie M. Aikens before the Subcom. on Crime, Terrorism, and Homeland Security, House Judiciary Committee, "Unfairness in Federal Cocaine Sentencing: Is it Time to Crack the 100 to 1 Disparity?" (May 21, 2009), http://judiciary.house.gov/hearings/pdf/Aikens090521.pdf; William Weinbaum, Royals Hire Willie Aikens, ESPN, Feb. 1, 2011.

[48] Testimony of Michael Nachmanoff Before the U.S. Sent'g Comm'n at 10 (May 27, 2010) (In FY2008, of "drug trafficking offenders who received *either* a two-level guideline enhancement for possession of a firearm or a § 924(c), about 35% of black defendants but only 26% of white defendants received the § 924(c)."); *see also Fifteen Year Review* at 90 (In FY 1995, "Blacks accounted for 48 percent of the offenders who appeared to qualify for a charge under 18 U.S.C. §

Commission research using the Intensive Study Samples has shown that between one third and one half of offenders who legally qualify for a weapon increase receive no increase under either the statute or the guideline.[49] Although data from the Intensive Study Sample are not publicly available for analysis, based on this finding it seems very likely that African-Americans are over-represented among qualifying offenders who receive either firearm enhancement, while white offenders who are involved with guns are more likely to receive no enhancement. Denying reductions on the basis of firearm involvement would disproportionately and unfairly impact African-American offenders.

F. The Department's proposed exclusions would turn what should be a simple process into a needlessly litigious one.

The Department's proposed exclusions would create needless litigation. Excluded inmates would file motions for sentence reductions in any event, and once denied, they would have a meritorious argument that that their exclusion violated the Equal Protection Clause. Equal protection of the law, guaranteed by the Fifth Amendment, requires that a law, though "otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race." *Washington v. Davis*, 426 U.S. 229, 241 (1976) (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)). Even if purposeful racial discrimination cannot be shown, equal protection of the law requires that "a law must bear a rational relationship to a legitimate governmental purpose." *Romer v. Evans*, 517 U.S. 620, 635 (1996). When a law does not bear a rational relationship to a legitimate governmental purpose and has a racially disparate impact on a protected group, it violates the Equal Protection Clause.

Without the government's proposed exclusions, the process will be even easier than it was the last time. The estimated number of eligible defendants is only 12,040,[50] compared to 19,500 in 2007.[51] The Supreme Court has held that *Booker* does not apply at a sentence modification proceeding, an issue that was previously litigated in many cases, and the facts relevant to the reduction – drug quantity, and minimal role if the Commission makes that change retroactive – were already found at the original sentencing. The courts have resolved most other legal issues. One issue, applicable in the small number of cases involving agreed sentences under Rule 11(c)(1)(C), remains outstanding and will soon be resolved in *Freeman v. United States*, No. 09-10245 (argued

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924(c) but represented 56 percent of those who were charged under the statute and 64 percent of those" for whom the charge was not dismissed and were "convicted under it.").

[49] *Fifteen Year Review* at 90; *see also* Paul J. Hofer, *Federal Sentencing for Violent and Drug Trafficking Crimes Involving Firearms: Recent Changes and Prospects for Improvement*, 37 Am. Crim. L. Rev. 41, 55-57 (2000).

[50] *Id*. at 9-10.

[51] Memorandum from Glenn Schmitt to Hon. Ricardo Hinojosa, Chair, *Analysis of the Impact of the Crack Cocaine Amendment If Made Retroactive*, at 23 (Oct. 3, 2007).

Feb. 23, 2011). Whatever the outcome, the decision will clarify the law and obviate further litigation of this issue.[52]

III. Aggravating and Mitigating Factors that Would Require Additional Fact-finding if Made Retroactive

We recommend against making retroactive all of the new aggravating factors, and one of the new mitigating factors that the FSA directed the Commission to include in § 2D1.1. Those factors would require new fact-finding in order to calculate the amended guideline range, but the facts are unlikely to have been recorded in the presentence report or discovery documents and if anyone happened to recall them years later, the evidence would be stale and unreliable. *See* Statement of Michael Nachmanoff Before the U.S. Sentencing Commission at 11-13 (June 1, 2011).

Making these factors retroactive would result in arbitrary disparity. Before these factors existed in the guidelines as of November 1, 2010, prosecutors, agents, probation officers, judges and defense lawyers were not conscious of them. Therefore, these factors are highly unlikely to have been recorded in discovery materials or in the PSR, are unlikely to be recalled by anyone years later, and certainly were not litigated when the evidence, if any, was fresh.[53] Thus, for example, there may be ten defendants who in fact sold crack to a person over 64 years old, but that fact is not recorded in any case and the case agent recalls it in one case. Retroactive application of these factors would be rare and arbitrary.

When the government or the defendant is aware of any of these factors and has the evidence to prove it, they can do so, but the effect will be limited to whether and to what extent to grant a reduction in accordance with the amended base offense levels.

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[52] Six circuits have held or stated in *dicta* that an agreed sentence under Rule 11(c)(1)(C) may be "based on" a subsequently lowered guideline range. *See United States v. Bride*, 581 F.3d 888, 891 (9th Cir. 2009); *United States v. Cobb*, 584 F.3d 979, 983-84 (10th Cir. 2009); *United States v. Franklin*, 600 F.3d 893, 897 (7th Cir. 2010); *United States v. Williams*, 609 F.3d 368, 372-73 (5th Cir. 2010); *United States v. Main*, 579 F.3d 200, 204 (2d Cir. 2009); *United States v. Berry*, 618 F.3d 13, 17 (D.C. Cir. 2010). Three circuits have held that such a sentence may not be "based on" a subsequently lowered guideline range. *See United States v. Peveler*, 359 F.3d 369 (6th Cir. 2004); *United States v. Scurlark*, 560 F.3d 839, 841-43 (8th Cir. 2009); *United States v. Sanchez*, 562 F.3d 275, 282 & n.8 (3d Cir. 2009).

[53] Many of these factors would be especially difficult to prove years after the fact, *e.g.*, whether the defendant "knowingly" maintained an "enclosure" for the purpose of "storage . . . for the purpose of distribution," not incidentally or collaterally but primarily; whether the defendant make a "credible" threat to use violence; whether the defendant used "impulse" to involve another person who had "minimum knowledge" of the illegal enterprise in the offense; and whether the defendant distributed to or involved a person who was under 18 or over 64 or was "unusually vulnerable."

IV. The Commission Should Reject the Department's Proposal to Adopt a Presumption Against Retroactivity.

The Department also urges the Commission to adopt a "general presumption against retroactive application of guideline amendments," invoking finality, deterrence, and the advisory nature of the guidelines.[54] The Commission should not adopt such a policy.

First, the Department's arguments about finality are misplaced. "Section 3582(c)(2) establishes an exception to the general rule of finality." *Dillon v. United States*, 130 S. Ct. 2683, 2690 (2010); *see also* 18 U.S.C. § 3582(b) ("Notwithstanding the fact that a sentence to imprisonment can subsequently be . . . modified pursuant to the provisions of subsection (c) . . . a judgment of conviction that includes such a sentence constitutes a final judgment for all *other* purposes.") (emphasis supplied).

Second, if the Commission were to adopt such a policy, it would conflict with 18 U.S.C. § 3582(c)(2), 28 U.S.C. § 994(u), and the legislative history of the Sentencing Reform Act. "The value of the . . . 'safety valve[]' contained in [§ 3582(c)(2)] lies in the fact that [it] assures[s] the availability of specific review and reduction of a term of imprisonment . . . to respond to changes in the guidelines," which Congress considered to be a "particularly compelling situation[]." S. Rep. No. 98-225, at 121 (1983).

Third, the Department's argument that the concerns that animated the need for retroactive application of guideline amendments are reduced depends on the assumptions that Congress expected the guidelines to be followed in all but "extraordinary circumstances," and that after *Booker*, judges "impose what they believe is a fair sentence in all cases, regardless of what the guidelines recommend."[55] The first assumption is unfounded because Congress did not expect that departures would be confined to "extraordinary circumstances" when it enacted the Sentencing Reform Act in 1984, including the retroactivity provisions.[56] The second assumption is undermined by the

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[54] Rose Statement at 3-7.

[55] *Id*. at 6.

[56] "The bill requires the judge, before imposing sentence, to consider the history and characteristics of the offender, the nature and circumstances of the offense, and the purposes of sentencing," is "then to determine which sentencing guidelines and policy statements apply to the case," and then "[e]ither he may decide that the guideline recommendation appropriately reflects the offense and offender characteristics or he may conclude that the guidelines fail to reflect adequately a pertinent aggravating or mitigating circumstance." S. Rep. No. 98-225, at 52 (1983). "The Committee does not intend that the guidelines be imposed in a mechanistic fashion. It believes that the sentencing judge has an *obligation* to consider all the relevant factors in a case and to impose a sentence outside the guidelines in an appropriate case." *Id*. "All of these considerations [set forth in § 3553(a)] would . . . help the judge to determine whether there were circumstances or factors that were not taken into account in the sentencing guidelines and that call for the imposition of a sentence outside the applicable guideline." *Id*. at 75.

Department's own admissions that even in crack cases, judges "listened to the government" and sentenced within the guideline range in the vast majority of cases, and thus sentence reductions should not be limited to defendants sentenced before *Booker*, *Kimbrough* or *Spears*.[57] Even in 2010, the rate of non-government sponsored below-range sentences in crack cases was only 26.8%.[58] As Mr. Felman reported, judges at the Commission's recent seminar in San Diego said that they waited out of respect for Congress and the Commission. The fact is, some judges adhere to unsound rules and will continue to do so unless and until the Commission acts. If the Commission were to adopt a presumption against retroactivity based on the theory that judges impose sentences they believe are just regardless of the guidelines, judges would undoubtedly sentence outside the guideline range more often and to a greater extent because they would have only one opportunity to get it right.

Fourth, the Department's claim that "[i]f sentences are changing and being applied retroactively, the deterrent effect of sentences is reduced" is unsupportable.[59] Sentence severity has no deterrent effect largely because would-be offenders are not generally aware of penalties for their prospective crimes, do not believe they will be apprehended and convicted, and do not consider sentencing consequences as one might expect of rational decision makers.[60] The notion that a potential offender is more likely to offend because the applicable guideline range might be retroactively reduced by some unknown amount in the future is without basis.

Fifth, the Commission should not adopt a policy that would leave people languishing in prison without good reason when the Bureau of Prisons is so severely overcrowded, at great financial cost to the taxpayers, and at great risk to the inmates' personal safety. Seventy thousand inmates will be triple bunked in three years even if new prisons are opened as projected.[61] As Judge Walton testified, a major contributor to prison rape is overcrowding. The Commission is obligated to minimize the likelihood that the prison population will exceed prison capacity,[62] and making amendments retroactive is one way it can and should do so.

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[57] Testimony of Stephanie Rose at June 1, 2011 Hearing.

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

[59] Rose Statement at 4-5.

[60] Michael Tonry, *Purposes and Functions of Sentencing*, 34 Crime and Justice: A Review of Research 28-29 (2006); *see also* Andrew von Hirsch *et al.*, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (1999); Gary Kleck *et al.*, *The Missing Link in General Deterrence Theory*, 43 Criminology 623 (2005); David Weisburd *et al.*, *Specific Deterrence in a Sample of Offenders Convicted of White-Collar Crimes*, 33 Criminology 587 (1995).

[61] Transcript of Public Hearing Before the U.S. Sent'g Comm'n at 28-29, 50-51 (Mar. 17, 2011) (testimony of Harley G. Lappin, Director Federal Bureau of Prisons).

[62] 28 U.S.C. § 994(g).

V. The Commission Need Not Wait for *Freeman* to be Decided.

Mr. Wroblewski suggested at the hearing that the Commission should possibly wait until *Freeman* is decided to vote on retroactivity.[63] Although the Court may rule before the Commission is planning to vote, it need not wait because the decision is most unlikely to have any relevant impact on its vote. If we understand correctly, Mr. Wroblewski believes that the Court may say that no sentence imposed after *Booker* can be "based on" the guideline range. If so, the Commission would then presumably incorporate that statement into its policy statement.

We do not believe that such a ruling is possible. The issue in *Freeman* is whether a sentence agreed to by the parties in a plea agreement under Fed. R. Crim. P. 11(c)(1)(C) can be "based on" a subsequently lowered guideline range. The sentence was imposed after *Booker* and it was within the correctly calculated guideline range. The government argued that even though the sentence was within the guideline range, the presence of a binding plea agreement meant that the sentence was "based on" the agreement rather than the guideline range. It did not argue that the sentence could not be "based on" the guideline range because it was imposed after *Booker*.

We think that it is inconceivable that the Court would issue a decision stating that no sentence imposed after *Booker* can be "based on" a retroactively lowered guideline range. First, that issue was not briefed or argued. Second, when raised in questions to the government (only) at oral argument, the government said that a sentence imposed after *Booker* may be "based on" the guidelines because courts must still apply the guidelines and may appeal an error in application of the guidelines, but that under a Rule 11(c)(1)(C) agreement, the agreement controls the sentence and the guidelines therefore are not applied.[64] Third, the Court in *Dillon* implicitly recognized that a sentence imposed after *Booker* may be "based on" the guideline range, as the Commission has.[65] Fourth, no lower court has held that a sentence imposed after *Booker* may not be "based on" the guideline range. We do not think that the Court will overthrow six years of practice without briefing, any argument by the defense, or any support from the government or the courts below.

Thank you for considering our comments.

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[63] Mr. Debold did not suggest that the Commission wait until *Freeman* is decided.

[64] *See* Transcript of Oral Argument at 35-39.

[65] *Dillon*, 130 S. Ct. at 2691-92 ("[I]f the sentencing court originally imposed a term of imprisonment below the Guidelines range," "a court proceeding under § 3582(c)(2) [may] impose a term 'comparably' below the amended range.") (citing § 1B1.10(b)(2)(B), p.s.).

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

cc (w/encl.): William B. Carr, Jr., Vice Chair
Ketanji Brown Jackson, Vice Chair
Hon. Ricardo H. Hinojosa, Commissioner
Dabney Friedrich, Commissioner
Hon. Beryl A. Howell, Commissioner
Isaac Fulwood, Jr., Commissioner *Ex Officio*
Jonathan J. Wroblewski, Commissioner *Ex Officio*
Judith M. Sheon, Staff Director
Kenneth Cohen, General Counsel

APPENDIX 1:
Sample Rulings on Motions Under 2007 Amendments

Denied in full

United States v. Martin, 602 F. Supp. 2d 611 (E.D. Pa. 2009) (denying reduction where defendant was found with several dangerous weapons in his personal possession, and although in Criminal History Category I, was arrested and convicted of first degree murder in state court after sentencing in this case)

United States v. Gregory, 350 Fed. App'x (2d Cir. 2009) (affirming denial of reduction where district court found defendant's "prior criminal record as well as his behavior while incarcerated on the instant offense," which included several assaults, one with serious injury, "indicates the need to protect the public from further crimes")

United States v. Bell, 1:97-cr-00028, Order (N.D.N.Y. Mar. 10, 2008) (denying reduction because court resolved disputed issues of weapon possession, acceptance of responsibility and criminal history category in defendant's favor at original sentencing)

United States v. Gibbs, 5:98cr192, Order (W.D.N.C. July 29, 2008) (denying reduction "due to the violent role of the Defendant in the conspiracy for which he stands convicted, and also because of his disciplinary citation while in custody")

United States v. Moffett, 3:96cr170, Order (W.D.N.C. July 29, 2008) (denying reduction "due to the violent role of the Defendant in the conspiracy for which he stands convicted, and also because of his several disciplinary citations received while in custody")

United States v. Alejo, 1:02-cr-00275, Order (N.D.N.Y.) (Nov. 7, 2008) (denying reduction because defendant engaged in drug trafficking after guilty plea and court did not increase guideline range for possession of weapon at original sentencing)

Granted in part

United States v. Breeden, 04-cr-0206, Order (N.D. Okl. Dec. 2, 2008) (reducing 90-month term including 60-month mandatory enhancement for firearm to 84 months, three months above bottom of amended range, balancing history of drug addiction and treatment failures with no misconduct or violations of law in prison)

United States v. Clinton, 96-14051-cr, Docket #s 326-335 (S.D. Fla., Sept. 17, 2009) (reducing 293-month term to 194 months, 6 months above bottom of amended range; prison record of positive accomplishments, several minor infractions, no serious infractions for past 7 years; Criminal History Category III; government agreed)

United States v. Coleman, 89-CR-0090, Order (N.D. Okl. July 18, 2008) (reducing term from 360 months to 302 months, 10 months above amended range; criminal history included crimes of violence, good conduct in prison since 1998)

United States v. Armstrong, CR-04-202, Order (N.D. Okl. Oct. 9, 2008) (reducing term of 150 months within original range of 130-162 months to 137 months at top of amended range of 120-137 months; generally positive post-incarceration conduct, substantial criminal history; Criminal History Category V; government agreed to a reduction to "some point within amended guideline range")

United States v. Miller, 3:01-CR-118, 2008 WL 782566 (E.D. Tenn. Mar. 21, 2008) (reducing 91-month term to 84 months rather than full reduction to 78 months; defendant obtained GED and completed classes in English, financial responsibility, masonry and drug education, but was disciplined for conduct relating to possession and use of drugs; Criminal History Category V)

United States v. Malone, 1:06-cr-274 Order (W.D. Mich. Oct. 18, 2010) (reducing 165-month sentence (including 60-month mandatory enhancement for firearm) to 156 months, 9 months above amended range; offense included violent conduct; Criminal History Category V; disciplinary infractions in prison)

United States v. Herrera, 1:05cr250 Order (E.D. Cal. Oct. 9, 2008) (reducing 168-month sentence to 148 months, rather than the full reduction to 140 months due to defendant's significant criminal history; Criminal History Category V)

Granted in full

United States v. Bolden, 5:99-cr-59, Order (W.D. Okla. Mar. 20, 2009) (reducing term from 360 to 324 months; three institutional infractions but completed numerous educational programs; Criminal History Category VI; government did not oppose)

United States v. Wilson, 3:0-cr-30078, Text Order (C.D. Ill. June 11, 2009) (reducing term of imprisonment from 168 months to 144 months; Criminal History Category VI; government agreed)

United States v. Price, 89-CR-0091, 2009 WL 909633 (N.D. Okl. Mar. 30, 2009) (reducing life sentence to 360 months of defendant in Criminal History Category I; rejecting government's argument to deny reduction based on role in offense, obstructive conduct and failure to accept responsibility as those matters significantly enhanced amended range; majority of 16 incidents of prison misconduct were minor, clean conduct history since 2004, ability to accrue good time credit will provide more incentive to behave)

United States v. Scott, 04-CR-0036, Order (N.D. Okl. July 23, 2009) (reducing term of 130 months consisting of 70 months for drug offense and 60-month consecutive mandatory enhancement for firearm to 120 months at bottom of amended range; Criminal History Category IV; government did not oppose)

United States v. Story, 3:02-cr-00003, Transcript and Order (N.D. Tex. July 23, 2008) (reducing term from 210 to 168 months; consecutive mandatory minimum for firearm;

model prisoner, good work record in prison, genuine remorse; Criminal History Category III; government agreed)

United States v. Parker, 2:03-CR-053, Transcript and Order (N.D. Tex. Aug. 11, 2008) (reducing term from 135 to 108 months; defendant completed GED and numerous classes, good work record, no infractions except one for being untidy; Criminal History Category II; government agreed)

United States v. Ayala, 540 F. Supp. 2d 676 (W.D. Va. 2008) (reducing term from 30 to 20 months; rejected government's arguments to deny reduction based on criminal history since criminal history already taken into account in amended guideline range and government presented no evidence that Criminal History Category V uniquely fails to reflect any danger to the public)

United States v. Brown, 96-539-07, Memorandum and Order (E.D. Pa. Aug. 28, 2008) (reducing term from 324 to 262 months; rejected government's argument that reduction should be denied based on offense conduct because already reflected in guideline range; disciplinary infractions do not constitute cause to deny reduction where defendant was sentenced at age 24, will be 45 years old upon release and subject to ten years' supervised release)

United States v. Collins, CR-06-00030, Order (E.D. Okl. Aug. 1, 2008) (granting full reduction from 135 to 110 months; defendant completed several educational programs, good work ratings, participation in financial responsibility program, one disciplinary action; Criminal History Category IV; government did not object)

United States v. Hayes, 98-CR-0174, Order (N.D. Okl. July 14, 2008) (reducing original sentence of 175 months, 7 months above bottom of guideline range, to 135 months at bottom of amended range based on amendment's purpose to avoid disparity, nonviolent nature of offense, rehabilitation efforts; Criminal History Category III; government agreed)

United States v. Cotton, 3:02-00170, Transcript and Order (M.D. Tenn. Aug. 1, 2008) (reducing term from 92 months to 77 months based on amendment, positive conduct in prison, family support; includes 60-month mandatory enhancement for firearm, Criminal History Category IV; government agreed)

United States v. Solomon, 03-CR-0078, Order (N.D. Okl. July 14, 2008) (reducing original term of 124 months (consisting of 64 months for drug offense, 7 months above bottom of range, plus mandatory 60 months for firearm offense), to 106 months (consisting of 46 months for drug offense at bottom of amended range plus 60 mandatory months for firearm) based on amendment's purpose to avoid disparity, mother's health problems, defendant's rehabilitative efforts and employment opportunities; Criminal History Category II; government agreed)

United States v. Dobbins, 3:01-CR-174, 2008 WL 3897535 (E.D. Tenn. Aug. 19, 2008) (reducing term of 128 months to mandatory minimum of 120 months; defendant had one prior conviction for a violent offense included in his Criminal History Category III, had no incident reports, was enrolled in GED classes and working in Unicor, probation officer could locate no evidence he posed a danger to the community, need to avoid unwarranted disparity)

APPENDIX 2:
Percentages of Drug Trafficking Offenders Involved with Crack in Each Racial Group and CHC
FY 2009

			XCRHISSR						Total
			1	2	3	4	5	6	
NEWRACE	White	Count	176	71	110	50	27	97	531
		% within NEWRACE	33.1%	13.4%	20.7%	9.4%	5.1%	18.3%	100.0%
		% within XCRHISSR	14.3%	11.8%	11.3%	7.6%	6.5%	6.5%	9.9%
	Black	Count	794	454	761	545	352	1308	4214
		% within NEWRACE	18.8%	10.8%	18.1%	12.9%	8.4%	31.0%	100.0%
		% within XCRHISSR	64.3%	75.3%	77.9%	83.1%	84.4%	87.3%	78.2%
	Hispanic	Count	247	72	95	57	35	88	594
		% within NEWRACE	41.6%	12.1%	16.0%	9.6%	5.9%	14.8%	100.0%
		% within XCRHISSR	20.0%	11.9%	9.7%	8.7%	8.4%	5.9%	11.0%
	Other	Count	18	6	11	4	3	6	48
		% within NEWRACE	37.5%	12.5%	22.9%	8.3%	6.3%	12.5%	100.0%
		% within XCRHISSR	1.5%	1.0%	1.1%	.6%	.7%	.4%	.9%
Total		Count	1235	603	977	656	417	1499	5387
		% within NEWRACE	22.9%	11.2%	18.1%	12.2%	7.7%	27.8%	100.0%
		% within XCRHISSR	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

Source: U.S. Sent'g Comm'n, FY 2009 Monitoring Dataset

FEDERAL PUBLIC DEFENDER
Southern District of Texas
Lyric Office Centre
440 Louisiana Street, Suite 1350
Houston, Texas 77002-1634

Federal Public Defender:
Marjorie Meyers

Telephone:
713.718.4600

First Assistant:
H. Michael Sokolow

Fax:
713.718.4610

June 7, 2011

Honorable Patti B. Saris
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 2002-8002

Re: Supplement to Public Comment on Retroactivity

Dear Judge Saris:

After we sent our public comment yesterday, the following further information about Percy Dillon's case was brought to our attention. His case is described at pp. 12-13 of the comments sent yesterday as one illustration of why excluding offenders with weapon enhancements would be unnecessary and unfair.

As noted, Mr. Dillon was convicted of using a firearm during and in relation to a drug trafficking crime. He received a mandatory consecutive 60-month sentence under 18 U.S.C. § 924(c) for this conviction. He was, however, never accused of using, carrying or possessing the gun and was neither present nor implicated in the incident described in the presentence report involving the gun.[1] Jerron Lollis supplied the gun, Eric Williams stored the gun, and Malik Wade instructed Williams to bring the gun to Michelle Donahue's house, where Wade used the gun to threaten Donahue. Mr. Dillon was not present during or otherwise involved in this incident or even in the city when the gun was used. He was convicted of the § 924(c) solely under a *Pinkerton* theory, as the government acknowledged. *See United States v. Dillon*, Case No. 93-84 (W.D. Pa.), Docket # 143, Government's Response to Motion to Review Sentence at 6-7.

Thank you for considering this additional information.

[1] Per Mr. Dillon's lawyer, Lisa Freeland, that incident is described in paragraphs 14-17 of the presentence report.

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

cc (w/encl.): William B. Carr, Jr., Vice Chair
Ketanji Brown Jackson, Vice Chair
Hon. Ricardo H. Hinojosa, Commissioner
Dabney Friedrich, Commissioner
Hon. Beryl A. Howell, Commissioner
Isaac Fulwood, Jr., Commissioner *Ex Officio*
Jonathan J. Wroblewski, Commissioner *Ex Officio*
Judith M. Sheon, Staff Director
Kenneth Cohen, General Counsel