June 26, 2014

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

Re: Public Comment on Retroactivity of "All Drugs Minus 2" Amendment

Dear Judge Saris:

With this letter, we provide comments pursuant to the Commission's request for such on the issue of retroactivity on federal drug convictions. Specifically, we limit our comments to whether the Commission should retroactively apply the amendment to the drug quantity tables in U.S.S.G. §§ 2D1.1 and 2D1.11, in which base offense levels assigned to all quantities are decreased by a factor of two.

These comments are submitted and endorsed by a diverse working group of judges, police, sheriffs, and probation officers, corrections officials, community and business leaders, sentencing reform advocates, and distinguished scholars in law, public policy, sociology, theology, political and social science, and criminal justice. For the reasons discussed below, we strongly support retroactivity of the amendment.

We thank the Commission for the opportunity to submit these comments and look forward to contributing to the ongoing discussion on drug policy, public safety, and a fair and effective criminal justice system.

The Commission has already reviewed voluminous testimony and commentary on the reduction of drug offense levels themselves, and is well aware of the arguments in favor of reform.

- The amendment would address the fiscal and humanitarian crisis of prison overcrowding.
- The reasoning behind the original benchmark levels is moot.
- Modestly shorter sentences will not harm public safety.
- The current lengthy sentences create significant social harm, especially in communities of color.
- Shorter sentences will better serve the purposes of sentencing set out in 18 U.S.C. § 3553(a).

These and similar reasons have been promulgated by a diverse array of supporters, from the American Civil Liberties Union to conservative lawmakers. As these scholars, lawmakers, and judges have recognized, lowering base offense levels by two across all drug types is a modest but important step in addressing prison overcapacity without harming public safety. The Commission has noted that the reductions would affect nearly 70 percent of all drug offenses, reducing the average sentence by 11

months. Applied prospectively, the amendment looks to reduce the federal prison population by 6,550 inmates in the first five years.

We agree that the amendment is an important step in the right direction. We firmly believe, though, that its benefits can only be fully realized if applied retroactively, allowing prisoners currently serving drug sentences to request resentencing.

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."[1] Overall, 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."[2]

We organize our comments around these considerations:

I. First, we believe the stated purposes of the amendment cannot be properly addressed without making it retroactive. While prospective application will reduce the growth rate of the prison population, the change will fail to create the degree of impact necessary to truly and effectively address the problem. We believe retroactivity is necessary for that purpose, and that practically every argument in favor of the reductions themselves – overcrowding, moot reasoning, public safety, and the social ills created by the current system – also cries out in favor of retroactivity.

II. Second, we note that the amendment's reach is modest in light of the magnitude of the problem it seeks to address. Retroactivity would substantially increase the number of people the amendment would affect and, as discussed, more adequately address the prison overcrowding crisis.

III. Third, we conclude, as the Commission concluded regarding the two previous crack cocaine amendments, that the administrative burden of retroactive application would not overwhelm the courts or the Commission.

IV. Finally, we believe that retroactive application is necessary if the amendment is to conform to the Commission's statutory responsibilities to conform the guidelines to the purposes of sentencing set out in 18 U.S.C. § 3553(a)(2),[3] provide fairness and avoid unwarranted disparity,[4] and to minimize the Guidelines' contribution to overcrowding in the federal penal system.[5]

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[1] U.S.S.G. § 1B1.10, Reduction in Term of Imprisonment as a Result of Amended Guideline Range, p.s., comment (backg'd) (2013).
[2] *Id.*
[3] *See* 28 U.S.C. § 991(b)(1)(A).
[4] *See Id.* at (b)(1)(B).
[5] 28 U.S.C. § 994(g).

I. THE PURPOSES OF THE AMENDMENT ARE BETTER SERVED BY RETROACTIVE APPLICATION.

Each and every one of the above-listed reasons for the amendment itself also militates in favor of retroactivity. Indeed, while the amendment's prospective application would create a modest drop in the federal prison population, it would come nowhere near *really* addressing the fiscal and humanitarian crisis. Retroactivity is essential if the amendment is to achieve its stated purposes.

a. Prison overcrowding is a fiscal and humanitarian crisis that requires more than the projected 6,550-inmate reduction over five years.

By now, the Commission is undoubtedly familiar with the problem as it stands. The United States comprises five percent of the world's population, yet houses almost 25 percent of its prisoners.[6] While our population has grown by 32 percent since 1980, the federal prison population has increased by over 700 percent.[7] This enormous prison population strains prison budgets and infrastructure. According to Charles E. Samuels, Jr., Director of the Federal Bureau of Prisons ("BOP"), federal prisons are now operating at 36 percent above capacity.[8] Overcrowding is most significant at higher security facilities, where managing the inmate population proves most challenging.[9] 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.[10]

The rise in the prison population is driven most heavily by increased drug crime penalties. Almost half of federal prisoners are drug offenders, and drug sentences are typically longer than others.[11] As the length of prison terms is the primary driver of inmate population growth, changes in drug sentencing policy can make a significant difference.[12]

The explosion in the federal prison population has created a fiscal crisis. Since 1980, BOP's budget has increased by over two thousand percent, from $330 million to over $6 billion.[13] BOP now

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[6] Press Release, U.S. Dept. of Justice, *Attorney General Holder Urges Changes in Federal Sentencing Guidelines to Reserve Harshest Penalties for Most Serious Drug Traffickers*, March 13, 2014, http://www.justice.gov/opa/pr/2014/March/14-ag-263.html.

[7] Congressional Research Service, *The Federal Prison Population Buildup: Overview, Policy Changes, Issues, and Options*, at 1 (Jan. 22, 2013) (federal prison population was about 25,000 in 1980, now nearly 219,000), available at http://www.fas.org/sgp/crs/misc/R42937.pdf; *see* Vikrant P. Reddy, Sen. Pol'y Analyst, Tex. Pub. Pol'y Found. and Right on Crime, prepared testimony before the U.S. Sent'g Comm'n, at 2 (March 13, 2014), at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_ Meetings/20140313/Testimony_Reddy.pdf.

[8] 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.

[9] *Id.*

[10] The Urban Institute, *Stemming the Tide: Strategies to Reduce the Growth and Cut the Cost of the Federal Prison System*, at 1 (Nov. 2013), available at http://www.urban.org/UploadedPDF/412932-stemming-the-tide.pdf.

[11] Brennan Center for Justice, Public Comments on the Proposed Amendments, at 2-3 (March 18, 2014), available at http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20140326/public-comment-Brennan-Center.pdf.

[12] Urban Institute, at 11.

[13] Congressional Research Service, *The Federal Prison Population Buildup: Overview, Policy Changes, Issues, and Options*, at 11 (Jan. 22, 2013).

takes up approximately 25 percent of DOJ's total budget, eclipsing other budget priorities like federal law enforcement officers and prosecutors.[14]

On the ground, the overcrowding crisis has made prisons less safe for inmates and staff, and threatens BOP's ability to provide effective, evidence-based programming aimed at reducing recidivism. Many facilities are triple-bunked, and the inmate-to-staff ratio has increased tremendously.[15] With fewer corrections officers per inmate – a ratio of about 1:10 in 2012[16] – it is no surprise that safety has suffered. The Bureau has found such high inmate-to-corrections officer ratios are correlated with increases in serious assault.[17] Indeed, in 2013 a corrections officer was killed for the first time in 5 years while working alone in a unit housing 130 inmates.[18] Overcrowding also decreases the availability of work opportunities and recreation for inmates, and has generated long waiting lists for rehabilitative programming such as residential drug treatment and educational training.[19] According to Director Samuels, these programs are crucial to assist inmates in "becoming law-abiding citizens when they return to our communities."[20]

Because mandatory minimums are a major determinant in the length of sentences, the Commission has a limited ability to attack overcrowding. Prospectively reducing drug sentences, as this proposed amendment does, will help. The Urban Institute estimated that a 20 percent reduction in drug sentences across the board – applying to all drug offenders not yet sentenced – would save BOP over $1.133 billion over 10 years.[21] Prospective sentence reductions cannot halt overcrowding, though – an across-the-board 20 percent reduction would still leave BOP at 41 percent overcapacity by 2023.[22] "[T]o yield a meaningful impact on population and costs, a mix of reforms to sentencing, prosecution, and early release policies is required."[23]

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. Further, as mentioned above, overcrowding is not a prospective problem – it currently affects over 219,000 inmates in the federal prison system. Retroactivity would free up money, bed space, and program slots, and would decrease inmate-to-staff ratios, making prisons safer for both and helping reduce recidivism through evidence-based services and treatment for a greater portion of the inmate population.

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[14] The Urban Institute, *Stemming the Tide: Strategies to Reduce the Growth and Cut the Cost of the Federal Prison System*, at 14 (Nov. 2013), available at http://www.urban.org/UploadedPDF/412932-stemming-the-tide.pdf.
[15] Congressional Research Service, *The Federal Prison Population Buildup: Overview, Policy Changes, Issues, and Options*, at 27 (Jan. 22, 2013).
[16] *Id.*
[17] Federal Bureau of Prisons. "*The Effects of Changing Crowding and Staffing Levels in Federal Prisons on Inmate Violence Rates.*" Washington, DC:BOP (2005).
[18] Urban Institute, at 15.
[19] CRS report, at 25.
[20] 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.
[21] Urban Institute, at 22.
[22] *Id.* The two-level reduction, if applied to 100 percent of drug offenders, would be approximately equal to the 20 percent reductions the Urban Institute used in this estimation. As the Commission projects only about 70% of future drug offenders would receive the reduction, the effect on overcrowding will be less.
[23] Urban Institute, at 43.

b. The original reason behind the benchmark levels has been moot for years.

As the Commission pointed out in its amendment proposal, the original reasoning behind the current guideline levels is no longer valid. At first, the Commission chose to set the "benchmark" levels – i.e. those drug quantities that matched the mandatory minimum quantities – slightly higher than the mandatory minimums, even for the lowest level drug offenders with minimal criminal history, reasoning that doing so would give prosecutors room to negotiate with defendants for guilty pleas.[24] Since the Guidelines were originally written, though, that reasoning has eroded.

First, as the Commission notes, several enhancements and downward adjustments now exist that are much more useful to a prosecutor's bargaining position. Originally, § 2D1.1 contained a single enhancement for possessing a firearm. Now, the guideline contains fourteen enhancements and three downward adjustments.[25]

The second innovation cited by the Commission is the statutory "safety valve," which allows certain qualifying drug offenders to receive sentences below the mandatory minimum under certain conditions.[26] Commission data indicate that the safety valve has a significant effect on plea rates for those who are facing mandatory minimums.[27]

Additionally, though not cited in the Commission's proposal, *United States v. Booker*[28] provided prosecutors with yet another tool to induce guilty pleas. In addition to the threat of guidelines enhancements and upward departures, prosecutors may threaten to seek upward variances;[29] and in addition to agreeing to or not opposing downward departures, *Booker* expands this incentive bargaining chip with variances.

In contrast to these innovations, it is unclear whether the slightly-above-minimum benchmarks ever "worked." Recent experience, though, demonstrates that, if they once did augment the government's plea bargaining posture, they no longer have that effect. The Commission notes, for example, that the moderate reductions in the crack ranges from 2007 – reductions that mirror the current proposed change in the guidelines' relationship to the mandatory minimums – had no noticeable effect on guilty pleas and substantial assistance.[30]

Correcting this problem for future defendants is important, as the current ranges cause the courts to impose greater-than-necessary sentences across the board. But if the Commission recognizes the injustice of sentencing *future* defendants under the current benchmarks, it must necessarily recognize that thousands of already-sentenced defendants are *currently* serving unjust and excessive sentences. Indeed, some of the innovations cited by the Commission came about early in guidelines history. The

[24] Proposed Amendment, Drugs (January 17, 2014).
[25] *Id.* at 34.
[26] *See* 18 U.S.C. § 3553(f).
[27] Proposed Amendment, Drugs (January 17, 2014).
[28] 543 U.S. 220 (2005).
[29] *See, e.g., United States v. Dehghani*, 550 F.3d 716 (8th Cir. 2008).
[30] Proposed Amendment, Drugs (January 17, 2014).

safety valve, for instance, was created by Congress in 1994,[31] and of the fourteen enhancements, six have been in place since 2004.

One thing is clear: while it may be impossible to know *exactly when* the Commission's original reasoning *became* moot, it did not occur suddenly. And in 2012 alone, 24,299 defendants were sentenced with § 2D1.1 as their primary guideline.[32] The safety valve was operative, all fourteen of the cited enhancements were in place, and *Booker* was the law. In essence, all 24,299 were sentenced under what the Commission now recognizes as greater-than-necessary guidelines ranges. Only through retroactivity can these prisoners, and thousands more, receive appropriate sentences.

c. Retroactive sentence reductions will not harm public safety.

As many commentators have noted during the general discussion over the amendment, 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.[33]

As the Commission knows, the same principles apply to retroactive reductions – producing "early" release" – as to prospective ones. Its proposal notes that, when a number of prisoners were released early pursuant to the similar crack reduction in 2007, released prisoners were no more recidivist than those who had served their "full," pre-amendment term.[34] "[T]here is no evidence that offenders whose sentence lengths were reduced pursuant to retroactive application of the 2007 Crack Cocaine Amendment had higher recidivism rates."[35]

This conclusion tracks the emerging body of research showing that lengthy prison sentences may not have any specific deterrent effect at all, but instead may actually *increase* the likelihood that a prisoner will reoffend upon reentry.[36] Even the incapacitation benefit of lengthy incarceration seems to have diminishing returns,[37] as the extended social interaction with other prisoners, along with problems associated with reentry, have a criminogenic effect on prisoners.[38]

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[31] *See* Violent Crime Control and Law Enforcement Act of 1994, PL 103-322, 108 Stat. 1796, Title VIII § 80001 (1994)
[32] U.S. Sent'g Comm'n, *2012 Sourcebook of Federal Sentencing Statistics*, at 39, Table 17 (2012).
[33] U.S. Sent'g Com'n, *Measureing Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines*, at 13 (2004).
[34] *See* Memorandum from Office of Research and Data, U.S. Sent'g Comm'n, to Chair Saris, et al., re: *Recidivism Among Offenders with Sentence Modifications Made Pursuant to Retroactive Application of 2007 Crack Amendment* (May 31, 2011), available at http://www.ussc.gov/Research_and_Statistics/Research_Projects/Miscellaneous/20110527_Recidivism_2007_Crack_Cocaine_Amendment.pdf.
[35] *Id.* at 3.
[36] Fancis 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.");
[37] Vikrant P. Reddy, Sen. Pol'y Analyst, Tex. Pub. Pol'y Found. and Right on Crime, prepared testimony before the U.S. Sent'g Comm'n, at 2 (March 13, 2014), at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20140313/Testimony_Reddy.pdf.
[38] Molly Roth testimony 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 effectively reenter society).

The Commission's conclusion also agrees with the experience of the states, several of which have experienced *lower* crime rates, even as their prison populations have decreased pursuant to changes in sentencing. For example, in 2010, South Carolina reclassified a number of offenses and made nonviolent drug offenders eligible for more alternative punishment options and early release. It experienced an 8.2 percent decrease in its prison population, all while lowering its crime rate 14 percent.[39]

New York's experience is even more poignant. After opening up 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."[40] Central to this success was the degree of judicial discretion in resentencing, 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."[41]

With the re-sentencing system we have now, and the aggravators, mitigators, departures, and variances available to judges on a case by case basis, there is little doubt that retroactivity would have any effect – much less a bad effect – on public safety, and may, in fact, lead to *lower* crime rates.

It is important to underscore that no prisoner is eligible for release under the retroactive application of the amendment without judicial approval. Release is not automatic. The amendment's retroactivity provides judges with discretion to determine whether to make the adjustment in the offenders' sentences. And the Commission's policy statement at § 1B1.10 directs judges 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., institutional adjustment in prison). We are confident that judges will be deliberative and thoughtful in making individualized determinations in the exercise of their discretion.

d. The same reasoning supporting retroactivity of crack cocaine reductions applies with equal weight to all drugs.

In September of last year, Judge Saris urged the Senate Judiciary Committee to make the Fair Sentencing Act retroactive. After addressing potential public safety concerns, she testified that "[j]ust as restoring fairness and reducing disparities are principles that govern our consideration of sentencing policy going forward, they should also govern our evaluation of sentencing decisions already made."[42] This testimony came two years after the Commission had already made Amendment 750, implementing the Fair Sentencing Act retroactive, about which Attorney General Holder had said, "achieving [the

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[39] *Id.* Reddy testimony at 7-8.
[40] Gibney, The Legal Aid Society, *Drug Law Resentencing: Saving Tax Dollars with Minimal Community Risk*, at 9 (2010).
[41] *Id.*
[42] Statement of Judge Patti B. Saris, Chari, U.S.S.C., hearing on "Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences," Committee on the Judiciary, United States Senate, at 9-10 (September 18, 2013), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Submissions/20130918_SJC_Mandatory_Minimums.pdf.

FSA's] central goals of promoting public safety and public trust – and ensuring a fair and effective criminal justice system – requires retroactive application of this guideline amendment."[43]

There thus existed strong support for retroactivity, in recognition of the unfairness of the crack cocaine sentencing regime. But the myriad social harms resulting from the current drug sentencing regime – across the board – are practically indistinguishable from those the Commission has long recognized are associated with crack cocaine sentencing. Those arguments are well documented and are only repeated here to the extent necessary to demonstrate that identical concerns apply to nearly all drug offenders across the board.

Racial disparity persists across drug types – in fact, limiting the racial disparity discussion to the crack/powder ratio, while an important issue, may have too-narrowly framed the debate to ignore the racial disparity of the entire drug regime toward Hispanic people. In FY 2013, across drug types, 47.9 percent of all offenders were Hispanic,[44] with strong majorities in powder cocaine (58.1 percent), marijuana (63.4 percent), and methamphetamine (55.7 percent, up from 44.7 percent last year). Overall, 77.5 percent of all drug offenders were nonwhite, 74.4 percent being black or Hispanic. This disparate impact on minorities shapes social attitudes and engenders perceptions of unfairness and racism. It is important that federal courts are recognized as dispensing equal justice rather than discriminatory.

Like the crack cocaine sentencing regime, the drug regime in general skews toward capturing low-level offenders, again confounding the expectations of the Anti-Drug Abuse Act framers.[45] A majority – over 60 percent – of all drug offenders were in Criminal History Category I or II, and only 7 percent received aggravating role adjustments.

Also like crack, drug offenses across the board typically involve relatively low rates violence. In FY 2013, 83.3 percent of drug offenses involved no weapon.[46] While a marginally greater number of crack cocaine offenses involved weapons (still less than 30 percent), the numbers were otherwise stable across the board (between 10 and 18 percent). Additionally, an aggravating role adjustment applied to only 7% of drug offenders.[47]

As this Commission has heard from numerous stakeholders, the drug sentencing regime – with its emphasis on lengthy, prison-only sentencing – comes at a high cost, particularly in communities of color. As the Commission heard in its March, 2014 hearing on the amendment, lower drug sentences would help "ameliorate the negative impacts on family and community that have resulted from current

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[43] Statement of Eric H. Holder, Jr., Attorney General of the United States, Hearing on Retroactive Application of the Proposed Amendment to the Federal Sentencing Guidelines Implementing the Fair Sentencing Act, U.S.S.C. at 2 (June 1, 2011).

[44] U.S. Sent'g Com'n, 2013 Sourcebook at Table 34 (hereinafter "2013 Sourcebook"). Unless otherwise specified, all statistics are taken from the 2013 Sourcebook, available at http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2013/sbtoc13.htm.

[45] As the Commission has noted, another primary driver behind the Anti-Drug Abuse Act's long sentences and mandatory minimums was a belief that drug type and quantity would serve as a proxy for an offender's role in the offense, allowing Congress to go after "serious" and "major" traffickers rather than low-level dealers and simple possessors. *See* U.S.S.C., *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, at 23-24 (2011).

[46] 2013 Sourcebook at Table 39.

[47] 2013 Sourcebook at Table 40.

drug sentences."[48] For example, long prison terms place a heavy burden on the families of incarcerated people, removing income – not to mention a parent – from the home. This effect is particularly devastating to black and Latino communities, of whom 1 in 15 black and 1 in 41 Hispanic children have at least one incarcerated parent. This high proportion of incarcerated parents is not only associated with a greater risk of "material hardship and family instability" for these children, but also harms public safety, for parental incarceration increases the likelihood that a child will also get in trouble with the criminal justice system, leading to intergenerational incarceration.[49]

II. THE MAGNITUDE OF THE AMENDMENT IS MODEST AND ADMINISTRATIVE BURDENS OF RETROACTIVITY ARE MANAGEABLE.

The second factor the Commission considers is the magnitude of the change the amendment effects on the target guideline ranges. For each individual inmate, the change mirrors the two-level reductions for crack cocaine promulgated in 2007 by Amendment 713.[50] Like Amendment 713, two characteristics are present: "the number of cases potentially involved is substantial, and the magnitude of the change in the guideline range, i.e., two levels, is not difficult to apply in individual cases."[51]

The Commission found that, on average, about 70 percent of future drug offenders would receive sentences that are shorter by an average of about eleven months. This effect would obviously be greater for some offenders with greater quantities. For instance, on the current quantity table, with an assumed criminal history category of III, 500 g. of heroin yields a range of 97-121 months. On the amended table, the low end of this defendant's range is reduced by 19 months to 78, and the high end by 24 months to 97.

The Commission will no-doubt release official analysis on the number of inmates who would be affected (as it has done for prior retroactivity discussions), so we are loathe to include rough estimates here. Still, analysis of the "magnitude" and "administrative burden" prongs of § 1B1.10 requires at least an illustrative glance into the difference between retroactive and non-retroactive application, especially in light of the purposes of the amendment.

As the Commission has explained, the amendment, applied prospectively, would decrease the federal prison population by 6,550 inmates in five years. This reduction, roughly comparable to the Urban Institute's proposed 20 percent across-the-board analysis, would still leave BOP operating at worse overcapacity than it faces now.[52]

Applying the amendment retroactively, though, would *substantially* increase the magnitude of the change. As noted above, the amendment is probably applicable to 70 percent of drug offenders, who already make up around 50.1 percent of the prison population.[53] Presumably, then, around 35% of the

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[48] Testimony of Molly Roth on behalf of Federal Public and Community Defenders, U.S.S.C. (March 13, 2014).
[49] Roth Testimony, at 9.
[50] U.S.S.G. App. C, Vol. III, at 253 (2011).
[51] U.S.S.C., *Notice of final action regarding amendments to Policy Statement §1B1.10, effective March 3, 2008.* at 17, available at http://www.ussc.gov/Legal/Federal_Register_Notices/finalaction-12_2007.pdf.
[52] Urban Institute report at 22.
[53] *See* BOP, *Statistics: Offenses* (last updated Feb. 22, 2014), available at http://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp.

prison population – or roughly 75,840 out of 216,687 totally inmates – would be eligible to apply for reductions.

Prior retroactive reductions admittedly have not involved so many eligible inmates. In the Commission's retroactivity study on the 2007 "crack minus two" amendment, for example, it estimated 19,500 people would be eligible to apply for reductions, which would lead to releases staggered over three decades.[54] For the Fair Sentencing Act amendment, the Commission estimated that 12,835 offenders would be eligible to apply for reductions, with release against staggered over three decades.

In the first round of these reductions, the Justice Department raised concerns that the system could not fairly and efficiently handle such a large influx of sentence reductions,[55] but reversed its position and supported retroactivity of the Fair Sentencing Act amendment.[56] The experience of implementing the 2007 reductions strongly informed the Attorney General's views on the potential administrative burden:

> Three years ago, the Bureau of Prisons, Marshals Service, federal prosecutors, judges, probation officers, and others stepped up and did the necessary work to ensure the successful and effective retroactive application of the "crack minus two" amendment. Today – despite growing demands and limited budgets – my colleagues across the Department of Justice and the criminal justice community stand ready to do that which is necessary to make our sentencing system fairer and more effective. And, once again, we are relying on the Commission to lead the way.[57]

Despite the raw numbers, resentencing courts now would have access to a more robust body of law,[58] along with more very recent experience (with three prior rounds of sentence reductions, the "*Booker* pipeline" round of cases,[59] the crack minus two reductions, and the Fair Sentencing Act reductions), than they had at the start of any previous round of retroactive sentence modifications. Despite the large numbers of eligible prisoners, the judiciary proved adept – with cooperation from United States Attorneys, BOP, court staff, federal probation officers, and federal defenders – to accept large influxes of sentence reductions in the past. Given the gravity of the need, outlined above, the administrative burden would not be prohibitive for these reductions either.

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[54] U.S.S.C., *Analysis of the Impact of the Crack Cocaine Amendment If Made Retroactive*, at 4-5 (2007), available at http://www.ussc.gov/Research/Retroactivity_Analyses/Impact_Analysis_Crack_Amendment/20071003_Impact_Analysis.pdf.

[55] Dept. of Justice, Public Affairs – *Retroactivity Public Comment* (2007), available at http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20071100/PC200711_001.pdf

[56] Statement of Eric H. Holder, Jr., Attorney General of the United States, U.S.S.C., hearing on retroactive application of the proposed amendment to the federal sentencing guidelines implementing the fair sentencing act, at (2011) http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20110601/Testimony_AG_Eric_Holder.pdf

[57] *Id.* at 4.

[58] *See, e.g.*, *Pepper v. United States*, 131 S. Ct. 1229 (2011); *Dillon v. United States*, 560 U.S. 817 (2010).

[59] *See, e.g.*, *United States v. Heldeman*, 402 F.3d 220, 224 (1st Cir. 2005).

III. RETROACTIVITY IS NECESSARY IN ORDER FOR THE COMMISSION TO MEET ITS STATUTORY DUTIES.

As the facts outlined in the above discussion demonstrate, the Commission's statutory duties would be *much* better served by retroactivity than by prospective-only application of the new guidelines ranges. The factual and legal circumstances outlined above must be considered in light of those duties.

First – and most significantly – the Commission is directed to promulgate guidelines that further the purposes of sentencing outline in 18 U.S.C. § 3553(a)(2).[60] Those goals – from the retributive goal of just punishment to the utilitarian goals of incapacitation, providing adequate specific and general deterrence, promoting respect for the law, and providing necessary corrective programs and treatment – are far better served by retroactivity. Indeed, they require retroactivity, because when the Commission or Congress make an ameliorative change to sentences, that change reflects a changed understanding of how much punishment is "sufficient, but not greater than necessary, to comply with the purposes" of sentencing.[61]

Proportionality is central to § 3553(a)(2)'s command to "reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense."[62] This principle requires a sentence to be "proportionate to the offense and the individual's blameworthiness."[63] But the lower offense levels reflect the Commission's judgment that the current ones are not proportionate to the offense. In contrast, retroactive application better furthers these goals, because it reflects the Commission's new understanding that lower offense levels adequately meet § 3553(a)'s parsimony command.

Logic dictates that specific and general deterrence are also ill-served by prospective-only application. When the Commission or Congress makes an ameliorative change that necessarily reflects a tacit admission that the prior punishment was not just, forcing current prisoners to continue to serve such sentences erodes respect for the law, which itself erodes specific and general deterrence.[64] For specific deterrence, someone who offended under the older, *greater* penalties would hardly be deterred from reoffending by lowering her sentence.[65]

For the public at large, the rarity of *reductions* in sentences, when sentences are dominated by politicians, are rare enough that there is little likelihood that anyone will offend because she believes her sentence will later be reduced.[66] Indeed, with the recognized criminogenic effect of lengthy prison sentences on families and communities, along with the lack of respect the disparate treatment (between offenders who offended before the amendment is operative and those who offended from that day forward) would promote disrespect for the law, in turn undermines general deterrence.

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[60] *See* 28 U.S.C. § 991(b)(1)(A).
[61] *See, generally*, S. David Mitchell, *In With the New, Out With the Old: Expanding the Scope of Retroactive Amelioration*, 37 AM. J. CRIM. L. 1 (2009).
[62] 18 U.S.C. § 3553(a)(2).
[63] Public Comments, Human Rights Watch, at 1 (2014), available at http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20140326/public-comment-Human-Rights-Watch.pdf.
[64] *See, generally*, S. David Mitchell, *In With the New, Out With the Old: Expanding the Scope of Retroactive Amelioration*, 37 AM. J. CRIM. L. 1, at 14-16 (2009).
[65] *See* Mitchell, *supra* note 58, at 14.
[66] *Id.*

As discussed above, overcrowding also makes it impossible for many prisoners to access correctional treatment programs.[67] The Attorney General and BOP Director have repeatedly recognized that evidence-based rehabilitative programs are the most effective means to prevent recidivism and protect the public. Overcrowding – with its associated waiting lists and reduced staff-to-inmate ratio – makes it more difficult (sometimes impossible) for many inmates to benefit from these 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 program and reduce waiting lists to participate in them.

Second, the Commission has a duty to avoid unwarranted sentencing disparity,[68] which would definitely result from sentencing individuals based on one level on October 31, 2014, and sentencing others based on two fewer levels beginning on November 1, 2014.

Finally, the Commission has the duty to "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons."[69] The Federal prison population is currently 32 percent overcapacity. As discussed above, with prospective-only application, the amendment will allow that overcapacity to reach 41 percent by 2023. Retrospective application of the changes is necessary for the Commission to fulfill its duty, to whatever extent possible, to ameliorate the crisis of prison overcrowding.

CONCLUSION:

The amendment cannot fulfill its stated purposes if it is applied only prospectively. We the undersigned strongly urge the Commission to make this amendment retroactive, allowing already-sentenced defendants and inmates to request sentence reductions down to the amended levels. We thank the Commission for the opportunity to comment on the amendment and look forward to furthering the discussion around our country's efforts to combat drugs and crime effectively, efficiently, and humanely.

Very truly yours,

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[67] 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.
[68] 28 U.S.C.A. § 991(b)(1)(B).
[69] 28 U.S.C. § 994(g).

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