



Recidivism Among Federal Offenders  
Receiving Retroactive Sentence Reductions:  
The 2011 Fair Sentencing Act Guideline Amendment

**UNITED STATES SENTENCING COMMISSION**



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## Introduction

The Fair Sentencing Act of 2010<sup>1</sup> (“FSA”) reduced the statutory penalties for crack cocaine offenses in two ways. First, it increased the drug quantity thresholds required to trigger the statutory mandatory minimum terms of imprisonment for manufacturing or trafficking crack cocaine. Second, it eliminated the statutory mandatory minimum penalty for possession of crack cocaine. In the FSA, Congress directed the United States Sentencing Commission (the “Commission”) to amend the federal sentencing guidelines to incorporate the reduced statutory penalty structure for crack cocaine offenses effective November 1, 2010. Congress did not make the FSA statutory penalty reductions retroactive, but the Commission *did* give retroactive effect to the FSA guideline amendment (the “FSA Guideline Amendment”) as of November 1, 2011.<sup>2</sup> Following that action, 7,748 crack cocaine offenders have received an estimated average sentence reduction of 30 months, lowering their sentence from an average of 153 months to 123 months of imprisonment.<sup>3</sup>

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In 2015, as required by the FSA, the Commission submitted a report to Congress assessing the impact of the FSA on the federal criminal justice system (the “2015 FSA Report”).<sup>4</sup> The Commission noted in that report that its earlier research had found that a previous population of crack cocaine offenders released early as a result of retroactive application of a guideline amendment did not show a statistically significant increase in the likelihood of recidivating,<sup>5</sup> but it was too soon to assess the recidivism of crack cocaine offenders released early through retroactive application of the FSA Guideline Amendment.<sup>6</sup> In the 2015 FSA Report, the Commission further stated its intent to separately study the effect of retroactive application of the FSA Guideline Amendment on recidivism. This publication provides that analysis.

### **Finding:**

The Commission finds no difference between the recidivism rates for offenders who were released early due to retroactive application of the FSA Guideline Amendment and offenders who had served their full sentences before the FSA Guideline Amendment reduction retroactively took effect.

## The Fair Sentencing Act Amendment to the Sentencing Guidelines

On August 3, 2010, Congress passed the FSA, which, among other things, reduced the disparity between the amount of crack cocaine and powder cocaine that triggered statutory mandatory minimum penalties from a 100-to-1 drug quantity ratio to an 18-to-1 drug quantity ratio. Specifically, the quantity threshold of crack cocaine required to trigger the 5-year mandatory minimum term of imprisonment was increased from 5 grams to 28 grams, and the quantity threshold required to trigger the 10-year mandatory minimum term of imprisonment was increased from 50 to 280 grams. The FSA also eliminated the 5-year mandatory minimum penalty for simple possession of crack cocaine.

**Table 1.** The Fair Sentencing Act (FSA) Amendment

	Pre-FSA Crack Quantity	Post-FSA Crack Quantity
<b>21 U.S.C. § 841</b>		
5-year minimum	5 g	28 g
10-year minimum	50 g	280 g
<b>21 U.S.C. § 960</b>		
5-year minimum	5 g	28 g
10-year minimum	50 g	280 g

As directed by the FSA, the Commission conformed the drug guideline penalty structure for crack cocaine offenses to the amended statutory quantities. The Base Offense Levels for crack cocaine were set in the Drug Quantity Table so that the statutory minimum penalties corresponded to offense

levels 26 and 32.<sup>7</sup> Accordingly, using the new drug quantities established by the FSA, offenses involving 28 grams or more of crack cocaine were assigned a Base Offense Level of 26, offenses involving 280 grams or more of crack cocaine were assigned a Base Offense Level of 32. The offense levels for other quantities were established by extrapolating upward and downward as appropriate. The revised Drug Quantity Table was effective November 1, 2010.

Congress did not give retroactive effect to the statutory reductions made by the FSA, but the Commission did give retroactive effect to the FSA Guideline Amendment as of November 1, 2011.<sup>8</sup> That action allowed incarcerated crack cocaine offenders whose guideline range would have been lower if the FSA Guideline Amendment had been in effect when they were originally sentenced to file a motion with the sentencing court for a reduced sentence pursuant to 18 U.S.C. § 3582(c)(2) and USSG §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range).<sup>9</sup> Courts granted 7,748 (55.4%) of the 13,990 motions filed seeking

retroactive application of the FSA Guideline Amendment. Offenders whose motions were granted received an estimated sentence reduction of 30 months (19.9%) from an average of 153 months to 123 months of imprisonment.

In order to determine whether this earlier release affected recidivism, the Commission studied two groups of offenders. The Commission studied a group of offenders who received a reduced sentence through retroactive application of the FSA Guideline Amendment (the “FSA Retroactivity Group”) and compared their recidivism rates with a group of similar crack cocaine offenders who had served their full sentences before the FSA guideline reduction retroactively took effect (the “Comparison Group”). The Commission followed each group for three years after release from incarceration to look for recidivism events.

**Table 2.** Recidivism Study Offenders

**The offenders studied in this project are 7,823 offenders who:**

- are citizens;
- re-entered the community after serving a sentence with or without the FSA Guideline Amendment applying retroactively;
- were not reported dead, escaped, or detained; and
- have a pre-sentence investigation report that was submitted to the Commission with a federal sentence that was not vacated.

## Key Findings

The key findings of the Commission’s study are:

- The recidivism rates were virtually identical for offenders who were released early through retroactive application of the FSA Guideline Amendment and offenders who had served their full sentences before the FSA guideline reduction retroactively took effect. Over a three-year period following their release, the “FSA Retroactivity Group” and the “Comparison Group” each had a recidivism rate of 37.9 percent.
- Among offenders who did recidivate, for both groups a “court or supervision violation”<sup>10</sup> was most often the most serious recidivist event reported. Approximately one-third of the offenders who recidivated in both groups (32.9% for the FSA Retroactivity Group and 30.8% for the Comparison Group) had court or supervision violation as their most serious recidivist event.
- Among offenders who did recidivate, the times to recidivism for both groups were nearly identical. The median time to recidivism for offenders who recidivated in both groups was approximately 14½ months.

## Methodology

The Commission previously reduced the penalties for crack cocaine offenses in 2007, before the enactment of the FSA, and made those reductions retroactive (“2007 Crack Cocaine Amendment”).<sup>11</sup> That amendment reduced by two levels the Base Offense Levels assigned by the Drug Quantity Table for each quantity of crack cocaine.<sup>12</sup> In 2014 the Commission reported on recidivism rates for offenders who received retroactive sentence reductions upon application of the 2007 Crack Cocaine Amendment and concluded that retroactive application of the 2007 Crack Cocaine Amendment did not result in increased recidivism.<sup>13</sup> The research discussed in this publication addresses whether the retroactive application of the FSA Guideline Amendment resulted in increased recidivism and uses the same single measure of recidivism as was used in the 2014 Crack Cocaine Recidivism Report in order to facilitate comparisons.<sup>14</sup>

For purposes of this study, recidivism is defined as any of the following criminal record events occurring within a three-year period following release from incarceration:

- a re-conviction for a new offense;
- a re-arrest with no case disposition information available; or
- a violation or revocation of an offender’s supervised release.

In other words, recidivism events include all reports of 1) arrests for new crimes that did not result in acquittal or dismissal of all charges, and 2) court or supervision violations that resulted in court action reported on criminal history records.<sup>15</sup> All recidivism events within a three-year period after release were counted, including felonies, misdemeanors, and court and supervision violations, but minor traffic offenses were excluded.

The Commission used a follow-up period of three years for this study, a length of time sufficient to answer the question of whether retroactive application of the FSA Guideline Amendment increased the risk of recidivism.<sup>16</sup> This report focuses on the time from release until the first recidivism event for offenders who did recidivate within three years. Studying the timing of recidivism can help in understanding the process of desistance, as some offenders may be able to remain in the community for a considerable time before recidivating, while others recidivate very quickly.

For offenders who did recidivate following their release, the Commission also examined the type of recidivism event and ranked those recidivism events in order from most to least serious.<sup>17</sup> The ranking generally begins with the most serious violent crimes, proceeds to less serious violent crimes, and then ranks drug trafficking, property, non-trafficking drug offenses, and public order crimes. Next, the “most serious” recidivism events were compiled to indicate which events appeared most frequently as the “most serious” recidivism event committed during the three-year period after release. Reporting offense types in this manner is intended to allow the reader to assess the relative threat to public safety posed by offenders who did recidivate.

Finally, the report discusses the association between recidivism and factors affecting sentence length, including both offender factors such as criminal history and other factors such as the use of a weapon, and notes how those factors relate to the FSA Retroactivity Group and the Comparison Group.

### The Study Groups

The two groups of crack cocaine offenders studied for this report are described below in Table 3.

**Table 3.** Study Groups

	FSA Retroactivity Group	Comparison Group
<i>Number of Offenders</i>	<b>5,525 offenders</b>	<b>2,298 offenders</b>
<i>Release Date</i>	<b>Nov. 1, 2011 – Nov. 30, 2013</b>	<b>Nov. 1, 2010 – Oct. 31, 2011</b>
<i>Release Basis</i>	<b>Received retroactive sentence reduction through the FSA Guideline Amendment.</b>	<b>Served full sentence before FSA Guideline Amendment;  Otherwise would have been eligible for sentence reduction motion.</b>

This report relies on a major advancement in technology since the Commission's 2014 Crack Cocaine Recidivism Report. That report studied a random sample of 1,319 offenders who met that study's criteria for one of its two groups. For this study, technological advances have allowed the Commission to study all federal offenders who were convicted of crack cocaine offenses and released during the study period and who met the study criteria, a total of 7,823 offenders. The technology involves a nationwide FBI network for criminal record retrieval. The Commission entered into a data sharing agreement with the FBI's Criminal Justice Information Services Division (CJIS) and the Administrative Office of the United States Courts to provide the Commission with electronic access to criminal history records ("RAP sheets") through the CJIS's Interstate Identification Index (III). The system returns all known records of arrests, prosecutions, court actions, and supervision actions for which participating jurisdictions keep automated records. Using an automated software program that analyzed and classified offender criminal records, the Commission identified and processed the criminal records of these 7,823 citizen offenders who had a valid FBI number in either Commission or Bureau of Prisons (BOP) records and who were released during the study period.

**Research Question:**

Did the reduced sentences for the FSA Retroactivity Group result in increased recidivism?

As discussed in greater detail in the Appendix, the FSA Retroactivity Group and the Comparison Group are closely matched with respect to offense, offender, and other characteristics. Both groups are similar in terms of personal characteristics such as age, gender, race, criminal history, and education. Some of these characteristics, such as age and criminal history, have been previously shown to be associated with recidivism rates.<sup>18</sup> Because the two groups are generally well matched in terms of these and other characteristics, neither group should have been more prone to reoffend as a result of these underlying characteristics. Well-matched groups allow for a fair test of the proposed research question: Did the reduced sentences for the FSA Retroactivity Group result in increased recidivism?

## Detailed Recidivism Findings

### Overview of Recidivism Study Findings

The recidivism rates of the FSA Retroactivity Group and the Comparison Group were virtually identical, even though the FSA Retroactivity Group was released early after serving an estimated average of 30 fewer months of imprisonment. The recidivism rate for both groups was 37.9 percent.<sup>19</sup>

**Table 4.** Overview of Recidivism Study Findings

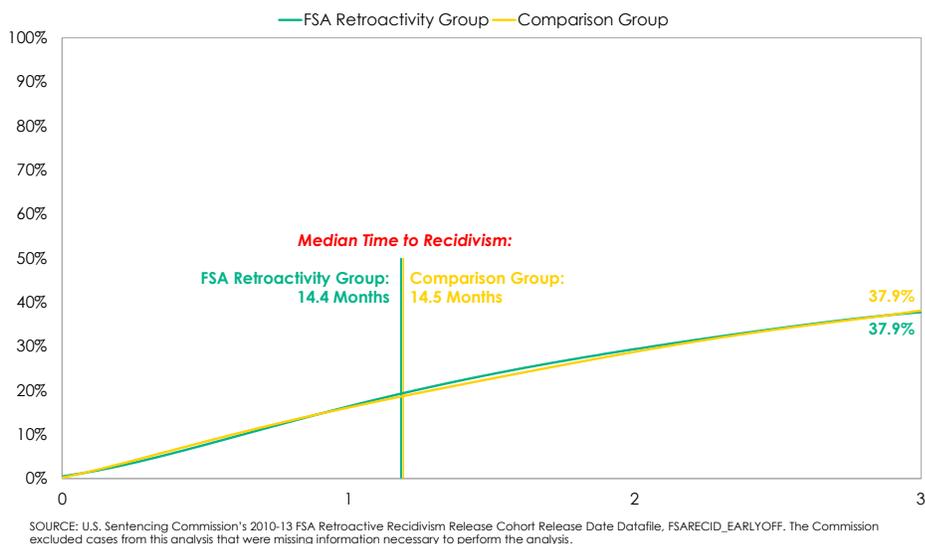
	FSA Retroactivity Group	Comparison Group
Recidivism Rate	37.9%	37.9%
Median Time to Recidivism	14.4 Months	14.5 Months
Most Serious Post-Release Event (Percent)	Court or Supervision Violations (32.9%)	Court or Supervision Violations (30.8%)

SOURCE: U.S. Sentencing Commission's 2010-13 FSA Retroactive Recidivism Release Cohort Datafile, FSARECID. The Commission excluded cases from this analysis that were missing information necessary to perform the analysis.

For both the FSA Retroactivity Group and the Comparison Group, the offenders who did recidivate most commonly had a “most serious” post-release recidivism event that was categorized as a court or supervision violation.<sup>20</sup> Almost one-third of offenders in each group who recidivated—32.9 percent of the FSA Retroactivity Group and 30.8 percent of the Comparison Group—had such a violation as their most serious post-release recidivism event during the three-year period. Both groups also had drug trafficking as the next most common most serious post-release recidivism event, followed by simple assault (typically classified as a misdemeanor).

For the 37.9 percent of offenders in both groups who did recidivate, the median time from release to recidivism was nearly identical for both the FSA Retroactivity Group and the Comparison Group. Among offenders in the FSA Retroactivity Group who did recidivate, the median time to recidivism was 14.4 months, while the Comparison Group’s median time to recidivism was 14.5 months.

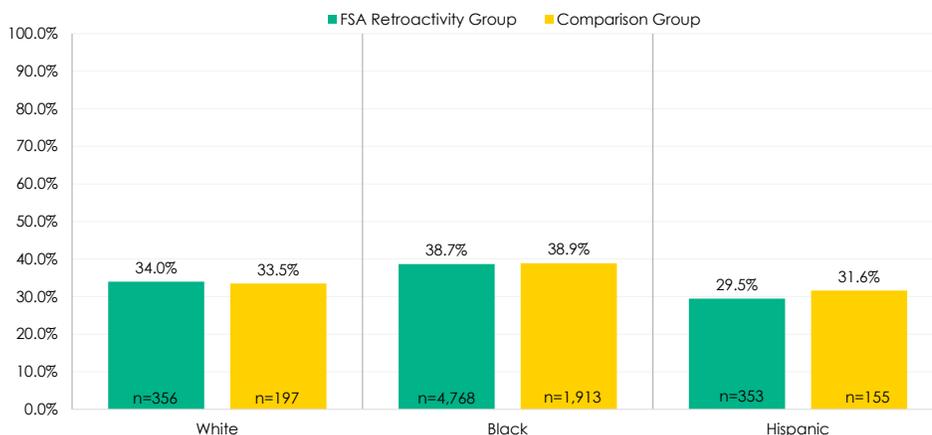
**Figure 1. Time to Recidivism by Group**



### Recidivism by Offender Characteristics

The Commission also examined the recidivism rates for offenders in the two groups in light of several offender characteristics. For example, recidivism rates for the several demographic groups of offenders in this study were similar in both groups. Black offenders, who accounted for 85.5 percent of offenders in the study, had recidivism rates of 38.7 percent in the FSA Retroactivity Group and 38.9 percent in the Comparison Group. White offenders, the next most numerous racial group at 7.1 percent, had recidivism rates of 34.0 percent in the FSA Retroactivity Group and 33.5 percent in the Comparison Group.

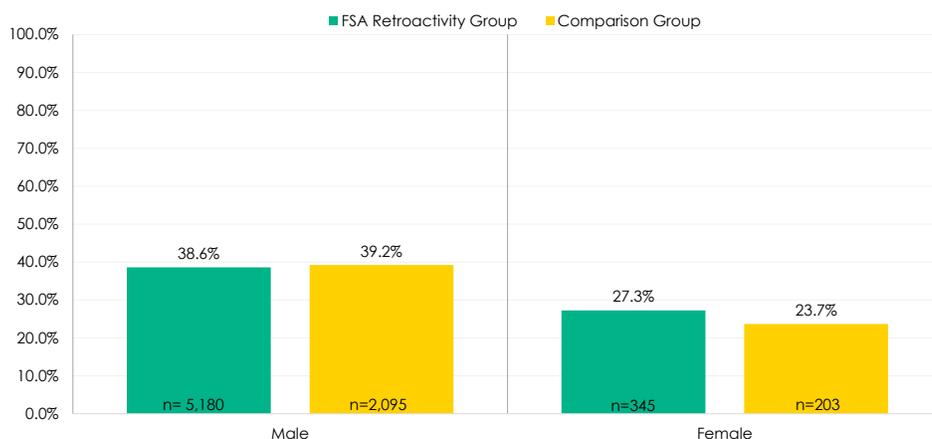
**Figure 2.** Recidivism Rates by Race/Ethnicity



SOURCE: U.S. Sentencing Commission's 2010-13 FSA Retroactive Recidivism Release Cohort Datafile, FSARECID. The Commission excluded cases from this analysis that were missing information necessary to perform the analysis.

Male offenders, who comprised over 90 percent of each group, had recidivism rates of 38.6 percent in the FSA Retroactivity Group and 39.2 percent in the Comparison Group. Female offenders had recidivism rates of 27.3 percent in the FSA Retroactivity Group and 23.7 percent in the Comparison Group.

**Figure 3.** Recidivism Rates by Gender

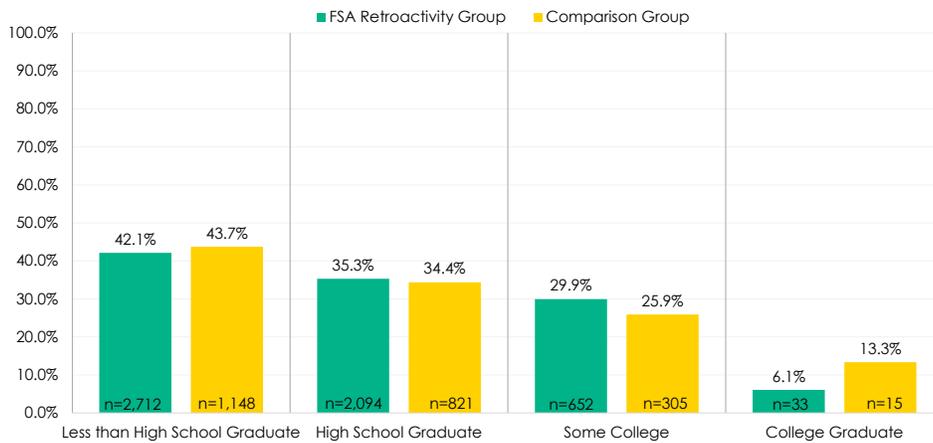


SOURCE: U.S. Sentencing Commission's 2010-13 FSA Retroactive Recidivism Release Cohort Datafile, FSARECID. The Commission excluded cases from this analysis that were missing information necessary to perform the analysis.

Among offenders who had completed less than a high school education at the time they were sentenced, the recidivism rates were 42.1 percent in the FSA Retroactivity Group and 43.7 percent in the

Comparison Group. Among offenders who had completed high school but did not attend college, the recidivism rates were 35.3 percent in the FSA Retroactivity Group and 34.4 percent in the Comparison Group. For those offenders who had attended some college but had not graduated, the recidivism rates were 29.9 percent in the FSA Retroactivity Group and 25.9 percent in the Comparison Group. For those offenders who had graduated from college, the recidivism rates were 6.1 percent in the FSA Retroactivity Group and 13.3 percent in the Comparison Group.

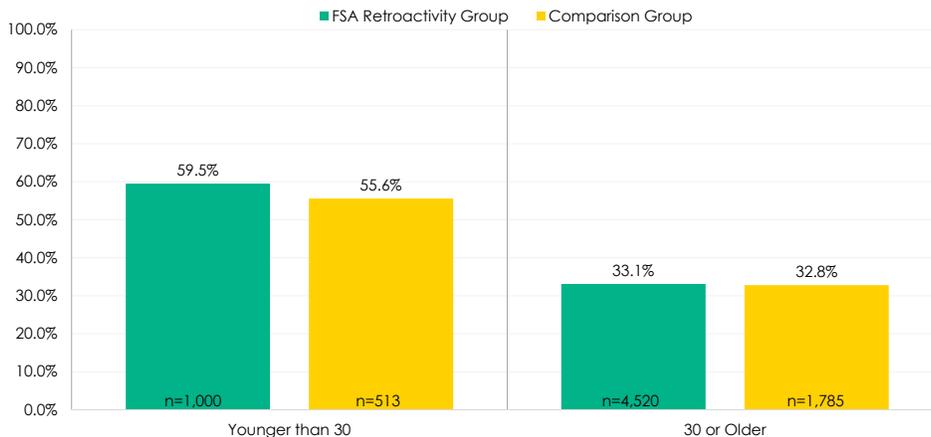
**Figure 4.** Recidivism Rates by Educational Attainment



SOURCE: U.S. Sentencing Commission's 2010-13 FSA Retroactive Recidivism Release Cohort Datafile, FSARECID. The Commission excluded cases from this analysis that were missing information necessary to perform the analysis.

The Commission has previously found offender age to be an important factor influencing recidivism.<sup>21</sup> Among offenders released prior to age 30, the recidivism rates were 59.5 percent in the FSA Retroactivity Group and 55.6 percent in the Comparison Group. In contrast, among offenders released after reaching age 30, the recidivism rates were 33.1 percent and 32.8 percent, respectively.

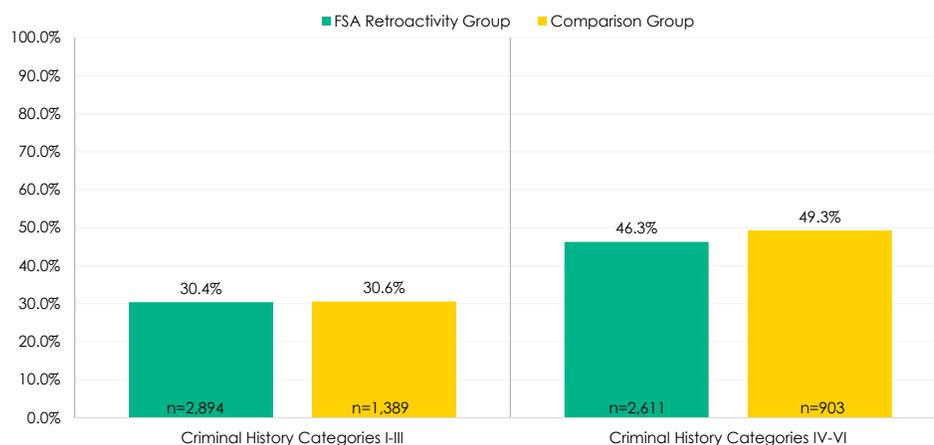
**Figure 5.** Recidivism Rates by Age at Release



SOURCE: U.S. Sentencing Commission's 2010-13 FSA Retroactive Recidivism Release Cohort Datafile, FSARECID. The Commission excluded cases from this analysis that were missing information necessary to perform the analysis.

The Commission has also previously found that the seriousness of an offender’s criminal record is an important factor influencing recidivism.<sup>22</sup> The Commission assigns offenders to one of six Criminal History Categories (CHC), depending on the number and sentence length of their prior convictions. Among offenders in the lowest three categories, Criminal History Categories I, II, and III, the recidivism rates were 30.4 percent for the FSA Retroactivity Group and 30.6 percent for the Comparison Group. In contrast, among offenders in Criminal History Categories IV, V, and VI, the recidivism rates were 46.3 percent for the FSA Retroactivity Group and 49.3 percent for the Comparison Group.

**Figure 6.** Recidivism Rates by Criminal History Categories

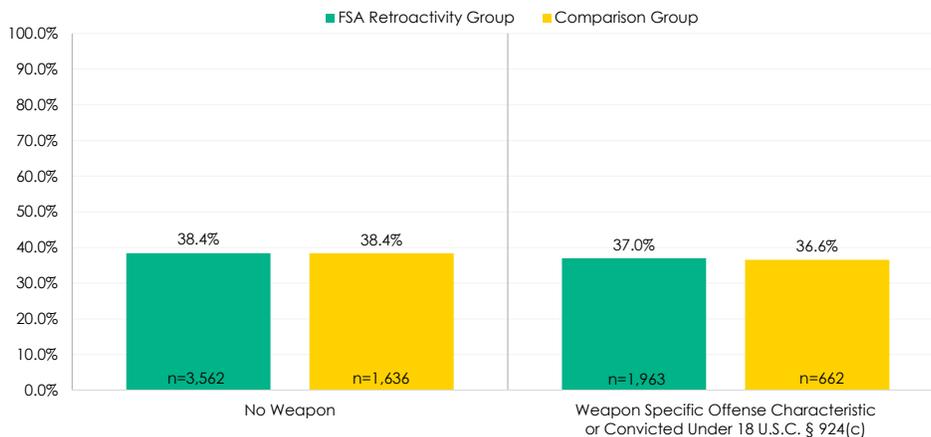


SOURCE: U.S. Sentencing Commission’s 2010-13 FSA Retroactive Recidivism Release Cohort Datafile, FSARECID. The Commission excluded cases from this analysis that were missing information necessary to perform the analysis.

## Recidivism by Other Characteristics

The recidivism rates for other factors were also generally similar in both groups. For example, whether the offense for which the offender was originally sentenced involved a weapon or not was not found to be a strong factor in either group. For offenders who committed an offense involving a weapon,<sup>23</sup> the recidivism rates were 37.0 percent in the FSA Retroactivity Group and 36.6 percent in the Comparison Group. For offenders who did not commit an offense involving a weapon, the recidivism rates were 38.4 percent in the FSA Retroactivity Group and 38.4 percent in the Comparison Group.

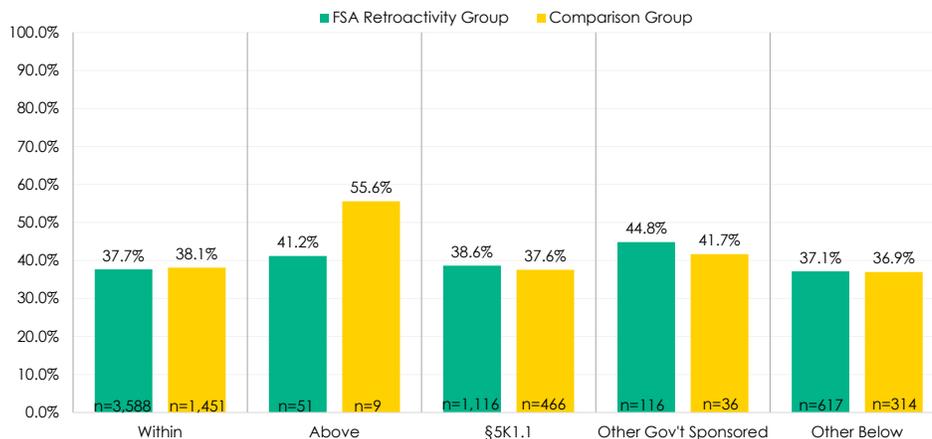
**Figure 7. Recidivism Rates by Weapon Involvement**



SOURCE: U.S. Sentencing Commission's 2010-13 FSA Retroactive Recidivism Release Cohort Datafile, FSARECID. The Commission excluded cases from this analysis that were missing information necessary to perform the analysis.

The length of the original sentence imposed relative to the guideline range that applied at the original sentencing was not found to be a strong factor influencing recidivism rates for either the FSA Retroactivity Group or the Comparison Group, and the recidivism rates were similar across the two groups. For offenders sentenced within the guideline range, the recidivism rates were 37.7 percent in the FSA Retroactivity Group and 38.1 percent in the Comparison Group. For offenders sentenced below the guideline range for providing substantial assistance to the government (under USSG §5K1.1), the recidivism rates were 38.6 percent in the FSA Retroactivity Group and 37.6 percent in the Comparison Group. The recidivism rates for offenders sentenced below the guideline range and not sponsored by the government were 37.1 percent in the FSA Retroactivity Group and 36.9 percent in the Comparison Group. While the recidivism rate for offenders sentenced above the guideline range shows a large difference between the groups, the number of cases in this category is too low to allow conclusions to be drawn, with only 51 cases in the FSA Retroactivity Group and nine cases in the Comparison Group.

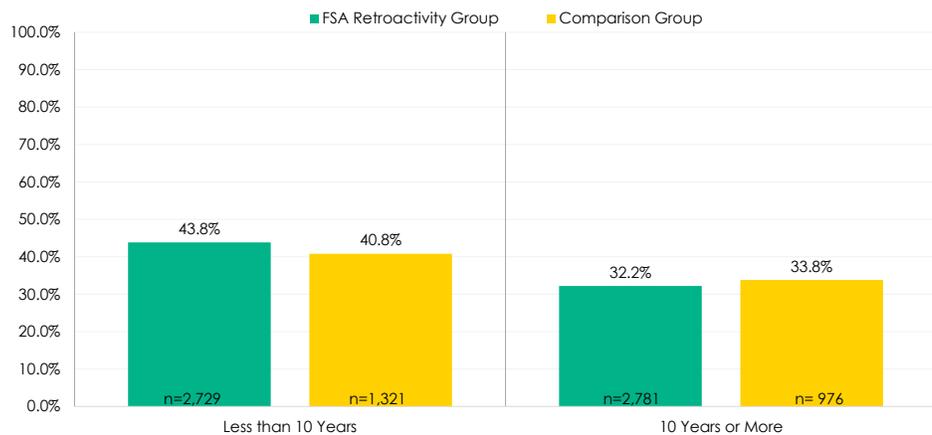
**Figure 8.** Recidivism Rates by Sentence Relative to the Guideline Range



SOURCE: U.S. Sentencing Commission's 2010-13 FSA Retroactive Recidivism Release Cohort Datafile, FSARECID. The Commission excluded cases from this analysis that were missing information necessary to perform the analysis.

There was little difference between the rates of the two groups when considering recidivism in light of the length of the sentence imposed. For example, for offenders with original sentences of ten years or more, the recidivism rates were 32.2 percent in the FSA Retroactivity Group and 33.8 percent in the Comparison Group. For offenders with original sentences of less than ten years, the recidivism rates were 43.8 percent in the FSA Retroactivity Group and 40.8 percent in the Comparison Group.

**Figure 9.** Recidivism Rates by Sentence Length



SOURCE: U.S. Sentencing Commission's 2010-13 FSA Retroactive Recidivism Release Cohort Datafile, FSARECID. The Commission excluded cases from this analysis that were missing information necessary to perform the analysis.

## Conclusion

The Commission found no difference in the recidivism rates of offenders who were released an estimated average of 30 months early through retroactive application of the FSA Guideline Amendment and similar offenders who served their full sentences and were released before the FSA guideline reductions took effect. The recidivism rate for both groups was 37.9 percent within three years of release from incarceration.

The Commission's findings in this study are consistent with the Commission's other recent studies of federal crack cocaine offenders.<sup>24</sup> In 2014, the Commission conducted a recidivism study of offenders who received sentence reductions and were released early through retroactive application of the 2007 Crack Cocaine Amendment.<sup>25</sup> In that study, the Commission examined federal crack cocaine offenders released between 2007 and 2008 and found similar recidivism rates three years after release for both the retroactivity and comparison groups, 36.7 percent and 39.8 percent, respectively. The difference in the rates of recidivism, derived from a sample of offenders, was not found to be statistically significant. Both rates closely compare to the results of this study (37.9%) and the same measure of recidivism was used in both studies.

In 2017, the Commission released a publication that studied federal crack cocaine offenders released during 2005 and reported the rates of three measures of recidivism—rearrest, reconviction, and reincarceration—three years after release.<sup>26</sup> That study found that the rearrest rate (the measure of recidivism most analogous to the measure of recidivism in this study) for federal crack cocaine offenders released in 2005 was found to be 40.0 percent, similar to both the current study and the 2014 study.



## Appendix

### *A Natural Experiment*

This FSA retroactivity recidivism study, as with the previous 2014 Crack Cocaine Recidivism study, takes the form of a natural experiment. In a standard experiment such as a randomized clinical trial, subjects are allocated at random (by chance alone) to receive a clinical intervention while others are assigned to the standard protocol and act as a comparison group. In a natural experiment, by contrast, the assignment to the treatment and comparison groups occurs “as if” at random<sup>27</sup> but is not controlled directly. Natural experiments rely on a credible claim that the assignment of the nonexperimental subjects to treatment and comparison conditions is “as if” the assignment was random.<sup>28</sup> Outcomes are compared across treatment and comparison groups, and the comparison is judged to be a fair one if the assignment to treatment and comparison groups does appear to be “as if” at random.

In the FSA retroactivity policy change, the two groups (the FSA Retroactivity Group who received FSA sentence reduction retroactively and the Comparison Group who were released from prison prior to the eligibility period, but otherwise met the eligibility requirements for sentence reduction) are primarily separated by the start time of the policy change, November 1, 2011. Most qualified inmates who sought sentence reductions under the FSA Retroactivity Amendment received it, and most who were refused were not eligible. Given the close equivalence between eligibility and subsequent sentence reduction, it is credible to assume that, similarly, if the same reductions had been available one year earlier, most of the Comparison Group would have also received it.<sup>29</sup>

The foundation of the close equivalence between the FSA Retroactivity and Comparison Groups lies with the eligibility criteria for the Comparison Group. Eligibility criteria required that: the drug involved was crack cocaine; the Base Offense Level was between 12 and 38; the offender was not convicted under the Career Offender (USSG §4B1.1) or Armed Career Criminal (USSG §4B1.4) guidelines; the original guideline range could change under the FSA,<sup>30</sup> and the offender’s applicable Base Offense Level could change under the FSA.<sup>31</sup> These eligibility criteria identified the 2,298 offenders included in the Comparison Group. To receive a reduced sentence under the retroactive provisions of the FSA Guideline Amendment, offenders within the

eligibility period also had to file a motion for a reduced sentence. Of the 13,990 such motions decided through October 31, 2014 (the last date for which such information was compiled), only 7,748 (55.4%) of the 13,990 motions received were granted. However, of the 6,242 (44.6%) motions denied, most (4,635) were denied due to ineligibility under §1B1.10. No more than 367 (5.9%) of the 6,242 reasons for denial were due to concerns for public safety.<sup>32</sup> Thus, applying this denial percentage of 5.9 percent to our Comparison Group, no more than approximately 136 of the 2,298 offenders in the Comparison Group would likely have been denied a sentence reduction due to concerns for public safety.

### *Similarity of the Study Groups*

As described above, the Comparison Group was selected to match the FSA Retroactivity Group as closely as possible in important ways. Both offender characteristics (especially those that have previously been found to be correlated with recidivism) and other characteristics should be as similar as possible to result in a fair comparison of recidivism rates between the groups.

Offender characteristics of particular interest include race/ethnicity, gender, education, age, and Criminal History Category. The groups were demographically similar, including race/ethnicity and gender, and were well-matched across offender characteristics that have previously been shown to be associated with recidivism such as education level, age, and criminal history.<sup>33</sup>

Both groups are predominantly Black and male. The FSA Retroactivity Group has only a slightly higher proportion of Black offenders (86.4%) than the Comparison Group (83.5%). The FSA Retroactivity Group has only a slightly higher proportion of males (93.8%) than the Comparison Group (91.2%). The FSA Retroactivity Group has only a slightly lower proportion of offenders who did not complete high school (49.4%) than the Comparison Group (50.2%). The FSA Retroactivity Group has a slightly lower proportion of offenders released before age 30 (18.1%) than the Comparison Group (22.3%). The FSA Retroactivity Group has a higher proportion of offenders in CHC IV through VI (47.4%) than the Comparison Group (39.4%).

The likely reason that the FSA Retroactivity Group has a higher proportion of more serious criminal histories is related to the flow of offenders through the prison population. Daily counts of current prison

population show a larger percentage of offenders with longer sentences than those entering prison on that day (the admission count). The current prison population at any given time tends to overrepresent more serious offenders with longer sentences because these offenders accumulate in prison over time while those with shorter sentences are released relatively quickly.<sup>34</sup> Retroactive releases of the FSA Retroactivity Group show many offenders being released quickly within the initial weeks of the effective date of the Amendment. Retroactive releases of the FSA Retroactivity Group resulted in 451 offenders released on November 1, 2011 as the backlog of more offenders with longer sentences was released in large numbers, compared to the Comparison Group release of ten offenders one year earlier on November 1, 2010.<sup>35</sup> Therefore, it is likely that the higher criminal history of the FSA Retroactivity Group is due to the large numbers of serious offenders with longer sentences being released in unusually high numbers.

Other characteristics are also important in judging the comparability of the FSA Retroactivity Group to the Comparison Group. The position of the original sentence relative to the guideline range was similar between the two groups. Most offenders in both groups were originally sentenced within the guideline range (65.4% in the FSA Retroactivity Group and 63.8% in the Comparison Group). However, with respect to both weapon involvement as part of the instant offense and the original sentence length, the two groups are somewhat different. The FSA Retroactivity Group is more likely to have received a sentence increase for weapon involvement (35.5%) as part of the instant offense than the Comparison Group (28.8%). More offenders in the FSA Retroactivity Group received original sentences of ten years or more (50.3%), than did those offenders in the Comparison Group (42.5%). As previously discussed, the higher totals for both weapon involvement and sentences of ten years or more are probably due to the large numbers of serious offenders released in unusually high numbers in the period following the effective date of retroactive releases on November 1, 2011.

In summary, with respect to the offender and other characteristics measured, these two groups are well-matched. However, the FSA Retroactivity Group is more likely to have a serious criminal history, weapon involvement in the instant offense, and longer sentences than the Comparison Group. At least in the case of more serious criminal history, which has been shown in the Commission's recent publications to be strongly associated with higher rates of recidivism,<sup>36</sup> this difference should disadvantage the FSA Retroactivity Group. Therefore, it seems

reasonable to conclude that the two groups are generally well matched for purposes of comparing recidivism rates, and when offender and other characteristics between the two groups diverge somewhat, it is unlikely to redound to the benefit of the FSA Retroactivity Group and the criteria for a natural experiment are satisfied.

## Endnotes

- 1 Fair Sentencing Act of 2010, Pub. L. No. 111–220.
- 2 U.S. SENTENCING COMM’N, *Guidelines Manual*, App. C, amend. 759 (effective Nov. 1, 2011) [hereinafter USSG] (making retroactive USSG, App. C, amend. 750 (effective Nov. 1, 2011) (implementing as permanent the temporary, emergency amendment (USSG, App. C, amend. 748 (effective Nov. 1, 2010)) that implemented the FSA)).
- 3 See U.S. SENTENCING COMM’N, FINAL CRACK RETROACTIVITY DATA REPORT FAIR SENTENCING ACT (2014), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/fair-sentencing-act/Final\\_USSC\\_Crack\\_Retro\\_Data\\_Report\\_FSA.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/fair-sentencing-act/Final_USSC_Crack_Retro_Data_Report_FSA.pdf). [hereinafter FINAL CRACK RETROACTIVITY REPORT].
- 4 U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: IMPACT OF THE FAIR SENTENCING ACT OF 2010 (2015), <https://www.ussc.gov/research/congressional-reports/2015-report-congress-impact-fair-sentencing-act-2010> [hereinafter 2015 FSA REPORT].
- 5 See U.S. SENTENCING COMM’N, RECIDIVISM AMONG OFFENDERS RECEIVING RETROACTIVE SENTENCE REDUCTIONS: THE 2007 CRACK COCAINE AMENDMENT (2014), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20140527\\_Recidivism\\_2007\\_Crack\\_Cocaine\\_Amendment.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20140527_Recidivism_2007_Crack_Cocaine_Amendment.pdf) [hereinafter 2014 CRACK COCAINE RECIDIVISM REPORT].
- 6 2015 FSA REPORT, *supra* note 4, at 8.
- 7 On April 30, 2014 the Commission promulgated an amendment to further reduce by two the offense levels assigned in the Drug Quantity Table and voted to give retroactive effect to the reductions as of November 1, 2014. USSG, App. C, amend. 782 (effective Nov. 1, 2014) (“Drugs Minus Two” or “2014 Drug Guideline Amendment”). The further retroactive reduction of the Drugs Minus Two amendment is beyond the scope of this study.
- 8 USSG, App. C, amend. 759 (effective Nov. 1, 2011).
- 9 18 U.S.C. § 3582(c)(2) provides that, when the Commission lowers a sentencing guideline range, a court may reduce the term of imprisonment of a defendant sentenced to a term of imprisonment based on that range upon motion of the defendant, or the Director of the Bureau of Prisons, or on its own motion, provided that the reduction is consistent with any applicable policy statement issued by the Commission.
- 10 This category includes supervision violations, contempt of court, failure to appear, violation of a restraining order, and sex offender registration violations.

11 USSG, App C. amend. 706 (effective Nov. 1, 2007), as amended by  
amend. 711 (effective Nov. 1, 2007).

12 See 18 U.S.C. § 3582(c)(2) (authorizing courts to modify the sentence of  
offenders which were based on a sentencing range that has been subsequently  
lowered by the Sentencing Commission).

13 See 2014 CRACK COCAINE RECIDIVISM REPORT, [https://www.ussc.gov/  
sites/default/files/pdf/research-and-publications/research-projects-and-surveys/  
miscellaneous/20140527\\_Recidivism\\_2007\\_Crack\\_Cocaine\\_Amendment.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20140527_Recidivism_2007_Crack_Cocaine_Amendment.pdf)  
[hereinafter 2014 CRACK COCAINE RECIDIVISM REPORT].

14 *Id.* at 3.

15 Typically, the violations appeared as an arrest (*e.g.*, the court ordered  
a law enforcement agency such as the United States Marshals Service to  
apprehend the offender).

16 The National Advisory Commission on Criminal Justice Standards  
and Goals recommends a follow-up time of three years. See MICHAEL D. MALTZ,  
RECIDIVISM 22 (2001). The eight-year follow-up period used in recent publications  
such as U.S. SENTENCING COMM'N, RECIDIVISM AMONG FEDERAL OFFENDERS: A  
COMPREHENSIVE OVERVIEW (2016), [https://www.ussc.gov/sites/default/files/pdf/  
research-and-publications/research-publications/2016/20160309\\_Recidivism-  
Overview.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/20160309_Recidivism-Overview.pdf) [hereinafter 2016 RECIDIVISM OVERVIEW], while providing a more complete  
analysis, would delay the reporting of recidivism rates for the two groups of an  
additional five years.

17 In general, the Commission followed a widely accepted ranking scheme  
used in the Commission's recent recidivism reports. See 2016 RECIDIVISM  
OVERVIEW, *supra* note 16; U.S. SENTENCING COMM'N, RECIDIVISM AMONG FEDERAL  
DRUG TRAFFICKING OFFENDERS (2017), [https://www.ussc.gov/sites/default/files/pdf/  
research-and-publications/research-publications/2017/20170221\\_Recidivism-  
Drugs.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170221_Recidivism-Drugs.pdf); [hereinafter 2017 DRUG TRAFFICKING RECIDIVISM REPORT]; U.S.  
SENTENCING COMM'N, THE PAST PREDICTS THE FUTURE: CRIMINAL HISTORY AND  
RECIDIVISM OF FEDERAL OFFENDERS (2017) [hereinafter 2017 CRIMINAL HISTORY AND  
RECIDIVISM OF FEDERAL OFFENDERS], [https://www.ussc.gov/sites/default/files/pdf/  
research-and-publications/research-publications/2017/20170309\\_Recidivism-CH.  
pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170309_Recidivism-CH.pdf); and U.S. SENTENCING COMM'N, THE EFFECTS OF AGING ON RECIDIVISM AMONG  
FEDERAL OFFENDERS (2017), [https://www.ussc.gov/sites/default/files/pdf/research-  
and-publications/research-publications/2017/20171207\\_Recidivism-Age.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171207_Recidivism-Age.pdf).  
[hereinafter 2017 EFFECTS OF AGING ON RECIDIVISM AMONG FEDERAL OFFENDERS].

18 See 2016 RECIDIVISM OVERVIEW, *supra* note 16, at 18 to 19 and 23.

19 Offenders served their full sentences, less reductions for earned credit.

20 Court or supervision violations include revocations of supervised release  
for technical violations, failure to appear, contempt of court, etc.

21 See 2017 EFFECTS OF AGING ON RECIDIVISM AMONG FEDERAL OFFENDERS, *supra* note 17.

22 See 2017 CRIMINAL HISTORY AND RECIDIVISM OF FEDERAL OFFENDERS, *supra* note 17.

23 “Offense involving a weapon” is defined here as a conviction under 18 U.S.C. § 924(c) or the application by the sentencing court of a Specific Offense Characteristic (SOC) in the sentencing guidelines indicating the involvement of a weapon in the offense.

24 Previous recidivism studies conducted by the Commission have studied similar three-year recidivism rates for federal crack cocaine offenders using different study cohorts, that is federal crack cocaine offenders released during different time periods.

25 See 2014 CRACK COCAINE RECIDIVISM REPORT, *supra* note 13.

26 See 2017 DRUG TRAFFICKING RECIDIVISM REPORT, *supra* note 17.

27 Thad Dunning, *Improving Causal Inference: Strengths and Limitations of Natural Experiments*, 61 POL. RES. Q. 282-93 (2008).

28 *Id.* at 283.

29 See FINAL CRACK RETROACTIVITY REPORT, *supra* note 2.

30 Situations in which the guideline range could *not* change include when the offender had a guideline range less than or equal to the statutory mandatory minimum penalty and received a sentence below the minimum pursuant to 18 U.S.C. § 3553(e) in conjunction with a departure for substantial assistance pursuant to USSG §5K1.1 (Substantial Assistance to Authorities).

31 The Base Offense Level could not change for (1) cases in which more than one drug was involved and the combined weights of these drugs was such that the Base Offense Level did not change; or (2) cases in which the drug quantity of the single drug involved in the offense was sufficient that the offender remained at Base Offense Level 38.

32 The reasons given by courts for denials due to public safety concerns were: 18 U.S.C. § 3553(a) factors (170), protection of the public (114), and post-sentencing or post-conviction conduct (83). See FINAL CRACK RETROACTIVITY REPORT, *supra* note 2. Some offenders may have been denied under more than one of these reasons related to public safety.

33 See 2016 RECIDIVISM OVERVIEW, *supra* note 16; see also 2017 EFFECTS OF AGING ON RECIDIVISM REPORT, *supra* note 17.

34 See James P. Lynch, *A Comparison of Prison Use in England, Canada, West Germany, and the United States: A Limited Test of the Punitive Hypothesis*, 79 J. CRIM. LAW & CRIMINOLOGY 180-217 (1988) (“Static or stock studies of

incarceration measure the use of imprisonment by the number of prisoners in custody on a given day. Flow designs use the number of admissions to prison over a particular unit of time.... However, because the probability of an offender being in prison on a given day is a function of the length of his sentence, stock statistics tend to overrepresent more serious offenders with longer sentences.”).

35 Similarly, retroactive releases returned to normal on November 1, 2012, with nine offenders from the FSA Retroactivity Group released on that day.

36 See 2017 CRIMINAL HISTORY AND RECIDIVISM OF FEDERAL OFFENDERS, *supra* note 17.

