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FOR JUSTICE

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Via E-Mail

The Honorable Patti B. Saris, Chair  
United States Sentencing Commission  
One Columbus Circle NE.  
Suite 2-500, South Lobby  
Washington, DC 20002-8002

**Attention: Public Affairs-Retroactivity Public Comment**

**Re: Brennan Center Comments on Retroactive Application of the Drugs-Minus-Two Sentencing Guideline Amendment**

Dear Judge Saris and Hon. Commissioners:

The Brennan Center for Justice at New York University School of Law writes to support retroactive application of Amendment 3, otherwise referred to as the “drugs minus two” amendment, submitted to Congress on April 30, 2014.

The Brennan Center is a non-partisan public policy and law institute that focuses on improving the systems of democracy and justice.<sup>1</sup> The Brennan Center’s Justice Program seeks to ensure a rational, effective and fair criminal justice system for all. As part of that mission, we seek to reduce mass incarceration by reducing the criminal justice system’s size and severity and its significant racial disparities, while improving public safety.

The Brennan Center supports retroactive application of Amendment 3 without restrictions or limitations. Amendment 3 reduces by two levels the base offense level for drug trafficking crimes under guideline section 2D1.1 across all drug types. Retroactive application of this amendment could modestly reduce the length of sentences for as many as 51,000 prisoners currently incarcerated in federal prison.<sup>2</sup>

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<sup>1</sup> This letter does not represent the opinions of NYU School of Law.

<sup>2</sup> Memorandum from the U.S. Sentencing Comm’n, Office of Research and Data, to Hon. Patti B. Saris, Re: *Analysis of the Impact of the 2014 Drug Guidelines Amendment If Made Retroactive 7* (May 27, 2014), available at [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/drug-guidelines-amendment/20140527\\_Drug\\_Retro\\_Analysis.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/drug-guidelines-amendment/20140527_Drug_Retro_Analysis.pdf) (estimating “that 51,141 offenders sentenced between October 1,

With more than 2.2 million people behind bars, the United States incarcerates more people than any other nation. The federal government is the largest incarcerator in the country, with more inmates than any single state. Since 1980, the federal prison population has increased by almost 800 percent.<sup>3</sup> Even as several states have implemented innovative sentencing reforms to alleviate the pressures of incarceration, the federal prison population continues to grow.<sup>4</sup> There is little indication that the federal prison population will decrease in coming years.<sup>5</sup> In 2013, the Inspector General of the Department of Justice bluntly rated the federal Bureau of Prisons' outlook as "bleak," and projected "system-wide crowding to exceed 45 percent over rated capacity through 2018."<sup>6</sup>

The Commission is required to "take into account the nature and capacity of the penal, correctional, and other facilities and services available" when formulating the guidelines so as to "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons."<sup>7</sup> The Commission's proposed amendment – a reduction of two levels off the base offense level for drug trafficking guideline calculation across all drug types – is a response to that congressional directive. It will reduce federal sentences for 70 percent of all federal drug trafficking offenders by an average of 11 months – a nearly 18 percent drop. It will also reduce the current federal prison population by 6,550 inmates over the next five years, all while maintaining public safety.

Amendment 3 modestly reduces the size and severity of the federal justice system. As discussed in more detail below, the Brennan Center supports retroactive application of this amendment for the following reasons:

- By reducing excessively severe sentences for as many as 51,000 prisoners, it will alleviate the pressures of overcrowding in federal prisons.

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1991 and October 31, 2014, would be eligible to seek a reduction in their current sentence if the Commission were to make the 2014 drug guidelines amendment retroactive").

<sup>3</sup> NATHAN JAMES, CONG. RESEARCH SERV., THE FEDERAL PRISON POPULATION BUILDUP: OVERVIEW, POLICY CHANGES, ISSUES, AND OPTIONS 50 (2014) (noting "a nearly 790% increase in the federal prison population" since FY1980).

<sup>4</sup> E. ANN CARSON & DANIELA GOLINELLI, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2012 –ADVANCED COUNTS 1 (July 2013) (noting that the total U.S. prison population declined three consecutive years in a row). However, this decrease is entirely on account of state reform efforts, particularly in California. See Inimai Chettiar, Letter to the Editor, *The Decline of the Prison Population*, N.Y. TIMES, Aug. 2, 2013, available at [http://www.nytimes.com/2013/08/03/opinion/the-decline-of-the-prison-population.html?\\_r=1&](http://www.nytimes.com/2013/08/03/opinion/the-decline-of-the-prison-population.html?_r=1&).

<sup>5</sup> See *id.* (based on trends in federal inmate population); see also Bureau of Prisons, Salaries and Expenses, FY 2015 Performance Budget, Congressional Submission 10 (2014), available at <http://www.justice.gov/jmd/2015justification/pdf/bop-se-justification.pdf> (projecting an increase of 2,500 federal inmates between FY 2014 and FY 2015).

<sup>6</sup> *Oversight of the Department of Justice: Hearing Before the H.Subcomm. on Commerce, Justice, Science and Related Agencies, Comm. on Appropriations*, 113th Cong. 9 (2013) (statement of Michael E. Horowitz, Inspector General, U.S. Dep't of Justice), available at <http://appropriations.house.gov/uploadedfiles/hhrg-113-ap19-wstate-horowitzm-20130314.pdf>.

<sup>7</sup> 28 U.S.C. § 994(g).

- Previous experiences with similar sentencing reforms at the federal and state level suggest that retroactive application of Amendment 3 should not negatively impact public safety or judicial economy.
- This modest reform – without the carve-outs or limitations proposed by the Department of Justice (DOJ) – is consistent with federal reform efforts to address mass incarceration.
- Because of structural shortcomings in the federal sentencing system, DOJ’s proposed carve-outs for retroactive application of Amendment 3 are overly broad and exclusionary. The Brennan Center urges the Commission to make Amendment 3 retroactive for all qualifying offenders. Judicial discretion at resentencing should allay the concerns raised by DOJ.
- Broad retroactive application of Amendment 3 would improve the perception of fairness in the federal system, particularly given the racial implications of the proposed limitations by DOJ.

We thank the Commission for the opportunity to share our perspective on this issue.

### **I. Retroactive Application of Amendment 3 Would Immediately Alleviate the Pressures of Overincarceration in the Federal System.**

Mass incarceration has placed intense and untenable pressures on the criminal justice system. Currently, the federal Bureau of Prisons (“BOP”) operates at 32 percent above rated capacity system-wide and 51 percent over rated capacity in high security facilities.<sup>8</sup> The BOP budget has doubled in the past decade. The BOP budget – requested at \$8.4 billion for 2015 – amounts to almost one third of the overall Department of Justice budget.<sup>9</sup> This amount only captures federal spending on corrections.

Retroactive application of the “drugs-minus-two” amendment will immediately relieve the pressures of overincarceration in the federal system. The amendment affects as many as 51,000 federal prisoners. BOP will realize cost savings of \$30,000 per prisoner each year that sentences are shortened. Should even half these prisoners receive just a one-year sentence reduction, the BOP would experience a budget surplus of \$750 million over the course of the amendment’s application. The impact of this reform would quickly alleviate the fiscal pressures on BOP to manage its overcrowded facilities.

### **II. Retroactive Application of Amendment 3 Should Not Negatively Impact Public Safety or Judicial Economy Based Upon Analogous Experiences.**

Retroactive application will not overburden the justice system. In the wake of the 2007 and 2011 amendments, courts, prosecutors, defenders, and probation officers ably handled retroactive

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<sup>8</sup> Bureau of Prisons, Salaries and Expenses, FY 2015 Performance Budget, Congressional Submission 10 (2014), available at <http://www.justice.gov/jmd/2015justification/pdf/bop-se-justification.pdf>.

<sup>9</sup> OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE U.S. GOV’T, FISCAL YEAR 2015 102-03 (2014), available at <http://www.whitehouse.gov/omb/budget/Overview>.

sentence reduction requests from 25,000 and 17,000 applicants, respectively, when the Commission changed crack cocaine sentencing guidelines. Courts, probation officers, federal defenders, and the Justice Department rose to the challenge of retroactive guideline application. With planning and foresight, they can do it again now, with minimal disruption to ongoing case and docket management.

In another context, California recently enacted sentencing legislation that applies retroactively to incarcerated individuals. In November 2012, California voters passed Proposition 36, thus reducing the severity of the state’s three strikes legislation implemented in 1994. There, the amendment reduced the length of sentences for those offenders whose third offense was a nonviolent offense.<sup>10</sup> The first state sentencing amendment to apply retroactively to those offenders already incarcerated, California’s experience provides some context for what the federal system may experience with retroactive application of Amendment 3. While the courts were apprehensive about the influx in resentencing petitions, the “floodgates” did not unduly inhibit the judicial economy.<sup>11</sup> Within the first year, approximately 1,613 petitions – or 96 percent of the petitions adjudicated – were granted, and 1,500 additional cases await review.<sup>12</sup>

Retroactive application should not detrimentally affect public safety. The 2007 and 2011 amendments to the federal sentencing guidelines did not decrease public safety. Indeed, data shows that the 2007 amendment did not result in statistically different recidivism rates amongst offenders who received reduced sentences compared to those similarly situated offenders who did not.<sup>13</sup> And while recidivism rate statistics do not exist on the 2011 amendment, FBI data demonstrates a decrease in crack-related arrests.<sup>14</sup>

Similarly, the recidivism rate amongst offenders released under Proposition 36 in California is significantly lower. Despite concerns raised that Proposition 36 would be “kind of like a Pandora’s box being opened,” more than 98 percent of offenders released have not re-offended.<sup>15</sup>

<sup>10</sup> Three Strikes Reform Act of 2012, CAL. PENAL CODE §1170.126(b) (West 2014).

<sup>11</sup> See *THE RETURN* (Loteria Films 2014) (forthcoming) (chronicling the release of third strike offenders after California’s sentencing amendment through perspectives of judges, lawyers, prisoners and family members).

<sup>12</sup> THREE STRIKES PROJECT, STANFORD LAW SCHOOL, PROPOSITION 36 PROGRESS REPORT: OVER 1,500 PRISONERS RELEASED, HISTORICALLY LOW RECIDIVISM RATE 2-3 (2014), available at <http://www.law.stanford.edu/sites/default/files/child-page/595365/doc/slspublic/ThreeStrikesReport.pdf>.

<sup>13</sup> U.S. SENTENCING COMM’N, RECIDIVISM AMONG OFFENDERS RECEIVING RETROACTIVE SENTENCE REDUCTIONS: THE 2007 CRACK COCAINE AMENDMENT 4 (2014), available at [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20140527\\_Recidivism\\_2007\\_Crack\\_Cocaine\\_Amendment.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20140527_Recidivism_2007_Crack_Cocaine_Amendment.pdf) (finding that, following a five-year period, those resentenced under the guidelines had a recidivism rate of 43.3%, whereas the comparison group had a recidivism rate of 47.8%. This difference was not statistically significant.).

<sup>14</sup> There has been a marked decrease in the number of arrests for the sale, manufacturing, and possession of heroin, cocaine, and their derivatives, steadily declining from 541,308 arrests in 2007, to 350,850 arrests in 2012. See FBI UNIFORM CRIME REPORTS, available at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/> (collecting data from “Crime in the United States [year] – Arrests” Reports, from 2007 through 2012).

<sup>15</sup> Compare Josh Harkinson, *Will California Strike Down “3 Strikes” in November?*, MOTHER JONES, Oct. 19, 2012, available at <http://www.motherjones.com/politics/2012/10/california-republicans-support-prop-36-three-strikes> (quoting Ron Cottingham, the President of the Peace Officers Research Association of California as stating that “Prop. 36 is kind of like a Pandora’s box being opened . . . These are people with criminal records, and they will prey on the people of California, guaranteed.”) with THREE STRIKES PROJECT, STANFORD LAW SCHOOL, PROPOSITION 36 PROGRESS REPORT: OVER 1,500 PRISONERS RELEASED, HISTORICALLY LOW RECIDIVISM RATE 1

Moreover, these were offenders with multiple previous offenses. Not only does the experience in California suggest that the federal courts are capable of addressing the resentencing petitions, it also indicates that the broadest scope of offenders should be considered.

### **III. Retroactive Application of Amendment 3 Will Further Federal Policy Efforts to Address Mass Incarceration**

The necessity for immediate reform cannot be understated. While the states have taken significant steps to implement reforms to address growing prison populations – from California to South Carolina to Texas for example – the federal government has been much slower in its ability to make reforms. And during this period, the prison population continued to grow.

Congress has taken some steps to address reduce the severity of the federal justice system. In 2010, Congress passed the Fair Sentencing Act (“FSA”).<sup>16</sup> This legislation reduced the disparate drug weights necessary to trigger mandatory penalties for crack versus powder cocaine offenses from a 100:1 to 18:1 ratio. It also eliminated the five-year mandatory minimum sentence for simple possession of crack cocaine. Though the FSA did not completely eliminate disparities in sentencing between crack and powder cocaine offenders, it did result in sentence reductions for thousands of inmates suffering from long sentences under an outdated sentencing structure.<sup>17</sup>

More recently, Attorney General Holder and the Department of Justice changed practices and policies to right-size the federal prison population. In August 2013, Attorney General Eric Holder announced the “Smart on Crime” Initiative. This initiative offers many justice reforms and specifically calls on federal prosecutors to avoid seeking mandatory minimum sentences for lower level nonviolent drug offenders.<sup>18</sup> This reform affects offenders currently being processed through the system or prospectively entering the system.

The Department of Justice additionally announced that President Obama would increase review of clemency petitions for offenders – particularly drug offenders – serving long terms of incarceration in the federal system for lower level, nonviolent crimes.<sup>19</sup> The Brennan Center

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(2014), available at <http://www.law.stanford.edu/sites/default/files/child-page/595365/doc/slspublic/ThreeStrikesReport.pdf> (noting that the recidivism rate of inmates released under Proposition 36 is 1.3 percent, while the average recidivism rate of all other inmates released from California prisons over the same period of time is over 30 percent).

<sup>16</sup> Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (codified as amended in scattered sections of 21 U.S.C.) (2010).

<sup>17</sup> See USSG App. C, amend. 748 & 750 (applying Fair Sentencing Act into the guidelines). According to Sentencing Commission data, 7,539 applications for reduced sentences based upon application of the Fair Sentencing Act’s amendment to crack cocaine penalties have been granted. U.S. SENT’G COMM’N, PRELIMINARY CRACK RETROACTIVITY DATA REPORT: FAIR SENTENCING ACT tbl.1 (Apr. 2014), available at <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/fsa-amendment/20140415-USSC-Crack-Retro-Report-Post-FSA.pdf>.

<sup>18</sup> See DEP’T OF JUSTICE, SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY 2-3 (2013), available at <http://www.justice.gov/ag/smart-on-crime.pdf>.

<sup>19</sup> See James Cole, Dep. Att’y Gen., Remarks at New York State Bar Association Annual Meeting (Jan. 30, 2014); see also Press Release, White House, President Obama Grants Pardons and Commutations, Dec. 19, 2013, available at <http://www.whitehouse.gov/the-press-office/2013/12/19/president-obama-grants-pardons-and-commutation>; Press Release, Statement by President on Clemency, Dec. 19, 2013, available at <http://www.whitehouse.gov/the-press->

welcomes this development, and in 2014 published a report urging the Administration to expand the scope of its criteria beyond offenders who have served more than ten years in prison and specifically those offenders who were sentenced prior to the Fair Sentencing Act.<sup>20</sup>

These policy changes, while encouraging and meaningful, do not apply to thousands of offenders currently incarcerated whose sentences are now considered unduly severe. The Commission's modest amendment to the drug guidelines – by reducing the base guideline by two levels for all drug trafficking offenses – was consistent with steps taken by the other federal bodies involved in the justice system to manage the growing federal prison population and reduce excessive sentences for a large population of offenders in the system. Retroactive application of the amendment would affect a broad scope of offenders in the system through a modest reform, and accordingly would be consistent with the trend in current federal reforms to reduce the deleterious effects of policies driving mass incarceration.

#### **IV. The Commission Should Not Adopt Carve-Outs to Retroactive Application of Amendment 3**

Most recently, DOJ proposed limitations to the Commission's amendment so that it retroactively applies to only "lower level, nonviolent drug trafficking offenders without significant criminal histories."<sup>21</sup> DOJ proposed carve-outs for individuals with Category III or above criminal history scores, individuals with sentences increased for possession or use of a weapon, or for those offenders who obstructed justice, played an aggravating role, or used threat of violence in the commission of the offense.<sup>22</sup> These restrictions, says DOJ, are consistent with the Smart on Crime reforms supported by the Department.<sup>23</sup>

These categorical restrictions would exclude the majority of offenders otherwise qualified for modest sentence reductions. According to the Federal Defenders impact analysis, nearly 24,000 defendants would be excluded based upon their criminal history category.<sup>24</sup> Nearly 15,694 defendants would be excluded due to enhancements for possession or use of a weapon.<sup>25</sup> Nearly 2,500 defendants would be excluded because their sentence lengths were lengthened for obstruction of justice adjustments.<sup>26</sup> And nearly 8,000 would be excluded based upon an aggravating role in the offense.<sup>27</sup>

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office/2013/12/19/statement-president-clemency ("Commuting the sentences of these eight Americans is an important step towards restoring fundamental ideals of justice and fairness.").

<sup>20</sup> MICHAEL WALDMAN & INIMAI CHETTIAR, BRENNAN CENTER FOR JUSTICE, 15 EXECUTIVE ACTIONS 19 (2014).

<sup>21</sup> *Hearing on Retroactive Application of the Pending Drug Guideline Amendment to the Federal Sentencing Guidelines Before the U.S. Sentencing Comm'n* 4, (2014) (statement of Sally Quillian Yates, U.S. Attorney, Northern District of Georgia), available at [http://www.uscc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20140610/Testimony\\_DOJ.pdf](http://www.uscc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20140610/Testimony_DOJ.pdf).

<sup>22</sup> *Id.* at 7-8.

<sup>23</sup> *Id.* at 3-4.

<sup>24</sup> Sentencing Resource Counsel Project of the Federal Public and Community Defenders, Fact Sheet: Impact Analysis of DOJ's Proposed Limitations on Retroactive Application of 2014 Drug Guidelines Amendment 2 (June 27, 2014) (available from National Sentencing Resource Counsel Project) [hereinafter "FPD Fact Sheet"].

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

These exclusions are troubling in terms of the ability of the amendment to reduce pressures from overincarceration; however, the Brennan Center is equally concerned about the inherent structure of the sentencing process exacerbates DOJ's limitations such that they are unnecessarily restrictive and overly broad. So while we support any retroactive application of this amendment (for the reasons discussed above), we believe the broadest application of the amendment is warranted for the following reasons:

- *Preponderance of the Evidence Standards at Sentencing.* While the standard of proof during a criminal trial is beyond a reasonable doubt, it drops to preponderance of the evidence standard at sentencing.<sup>28</sup> This standard for reviewing evidence allows judges to make the individualized sentences based upon a broader scope of the characteristics of the offenders and the aggravating or mitigating factors of the offense, but it also allows judges to base their findings on a lower standard of evidence. To exclude offenders from qualification for resentencing based upon a finding made on less than the most stringent basis would be unjust.
- *Concerns with Criminal History Category Calculations.* The calculation of federal criminal history scores is a widely criticized aspect of the federal sentencing guidelines.<sup>29</sup> As the Commission acknowledged in 2011, “[c]riminal history can have a disproportionate and excessively severe cumulative sentencing impact on certain drug offenders” in part due to “the interaction between the mandatory minimum penalties, the safety valve, and the guidelines.”<sup>30</sup> Because lower level offenders can accrue criminal history points very quickly and without committing the types of offenses that do not, in all circumstances, present public safety concerns, categorically excluding offenders based upon this calculation is unnecessary and unjust as it would be overly broad.

Both of these concerns suggest that categorical exclusion of offenders based upon these characteristics will not further the goals of the Department in narrowing the scope of qualifying offenders. Rather, the Brennan Center asserts that judges, with their institutional knowledge and daily experience, are best suited to determine whether these offenders with more sensitive characteristics should qualify for reduced sentences. The Commission used the same reasoning in the past when it made the 2007 and 2011 amendments retroactive, noting that section 1B1.10

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<sup>28</sup> See *Williams v. New York*, 377 U.S. 241, 246-47 (1949) (“Highly relevant – if not essential – to [a sentencing judge’s] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant’s life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.”); USSG, Ch. 1, Pt. A 5-6 (2013) (describing the real offense sentencing structure in the federal system).

<sup>29</sup> See, e.g., U.S. SENTENCING COMM’N, SIMPLIFICATION DRAFT PAPER (1996), available at <http://www.ussc.gov/research-and-publications/working-group-reports/simplification/simplification-draft-paper-4> (“[C]ritics of Chapter Four question the basic premise behind the Commission’s criminal history score. Unlike many state guideline systems, the federal guidelines base the assignment of criminal history points on sentence length rather than on the past offense. This, according to some critics, builds in past discriminatory practice.”).

<sup>30</sup> See U.S. SENTENCING COMM’N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 352 (2011), available at [http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter\\_12.pdf](http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_12.pdf).

“requires the court, in determining whether and to what extent a reduction in the defendant’s term of imprisonment is warranted, to consider the nature and seriousness of the danger to any person or community that may be posed by such a reduction.”<sup>31</sup> We urge the Commission apply this reasoning again by making Amendment 3 retroactive without carve-outs, thus permitting judges to use their discretion in applying the amendment to specific offenders.

## V. BROAD APPLICATION OF THE AMENDMENT INCREASES RATIONALITY AND FAIRNESS IN THE FEDERAL JUSTICE SYSTEM

A more just and proportional guideline system will also be valuable to the public’s perception of the Sentencing Commission, Congress, and the federal judiciary. Legitimacy amongst the public – those being punished and those imposing the punishment – is critical to the success of an effective criminal justice system. It encourages relevant players to “play by the rules” rather than find ways around systemic flaws – like overuse of plea-bargaining, strategic mischarging, or withholding of facts.

The Commission previously amended guidelines to increase the perception of fairness. In 2007, the Commission created the “crack-minus-two” amendment. That amendment – Amendment 706 – is the basis for the current proposed amendment. It reduced the base offense level for most crack cocaine offenses under guideline section 2D1.1 by two levels as a measure to decrease the harsh disparate effects of the previous 100:1 ratio for drug weights that triggered the mandatory minimum penalties for powder versus cocaine sentences.<sup>32</sup> In that instance, there were no carve-out or caveats for application of the amendment.

The “success” of Amendment 706 cannot be understated. This amendment narrowed the difference in average sentence length between crack cocaine and powder cocaine offenses significantly.<sup>33</sup> While the disparity continued to exist, this amendment addressed a contributing factor to the drastic racial disparities in federal sentencing.<sup>34</sup> Moreover, data shows that drug offenders sentenced under the crack-minus-two amendment have a modestly lower rate of recidivism as compared to other drug offenders.<sup>35</sup> Moreover, the Amendment bolstered later judicial and legislative decisions which ultimately led to the Fair Sentencing Act in 2010 to

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<sup>31</sup> USSG, Amend. 759 (Nov. 2011); USSG, Amend. 713 (Mar. 2008).

<sup>32</sup> USSG, App. C, Amendment 706 (Nov. 1, 2007).

<sup>33</sup> By fiscal year 2008, the difference in average sentence length between crack and powder cocaine offenses narrowed from 50% longer in 2007 to 26.4% longer in 2008. *Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity*, Subcomm. on Crime and Drugs, S. Comm. on the Judiciary, 111th Cong. 5 (2009) (statement of Hon. Ricardo Hinojosa, Acting Chair, U.S. Sentencing Commission), available at [http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/testimony/20090428\\_Hinojosa\\_Testimony.pdf](http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/testimony/20090428_Hinojosa_Testimony.pdf).

<sup>34</sup> See THE SENTENCING PROJECT, FEDERAL CRACK COCAINE SENTENCING BRIEFING SHEET (2010), available at [http://sentencingproject.org/doc/publications/dp\\_CrackBriefingSheet.pdf](http://sentencingproject.org/doc/publications/dp_CrackBriefingSheet.pdf).

<sup>35</sup> In May 2014, the Commission released updated data from its study on recidivism rates between offenders’ who received reduced sentences under the crack cocaine amendment of 2007 versus those who did not. The results indicate that those who benefited from the minus-two amendment had a slightly reduced recidivism rate – 43.3% for 2007 Crack Cocaine Amendment group compared to 47.8% for the Comparison Group. U.S. SENTENCING COMM’N, RECIDIVISM AMONG OFFENDERS RECEIVING RETROACTIVE SENTENCE REDUCTIONS: THE 2007 CRACK COCAINE AMENDMENT 4 (2014), available at [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20140527\\_Recidivism\\_2007\\_Crack\\_Cocaine\\_Amendment.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20140527_Recidivism_2007_Crack_Cocaine_Amendment.pdf).



reform sentencing policies in the federal system. All the while, the amendment did not lead to a decrease in public safety.

Similarly, retroactive application of Amendment 3 without carve outs would likely increase the perception of fairness in the federal system with equal success. Currently, extreme racial disparities exist in the federal prisons and justice system. In FY 2013, Blacks and Hispanics comprised almost 75 percent of all federal drug offenders.<sup>36</sup> Almost 40 percent of all federal inmates are Black and 35 percent are Hispanic.<sup>37</sup> Amendment 3 addresses a specific driver of racial disparities in the system – drug trafficking offenders. Retroactively reducing sentences for this category of offenders will dissipate some of the extreme racial disparities in our system. Carving out certain sub-categories of offenders – as proposed by DOJ and discussed above – would disproportionately exclude minority defendants. For example, the Federal Defenders estimate that “only 18% of otherwise eligible black defendants continue to qualify for retroactive application of the guideline amendment” compared to the 34% of white defendants and 52% of Hispanic defendants who continue to qualify.<sup>38</sup> Beyond the economic and social incentives to apply this amendment to the broadest pool of offenders, these facts suggest that the most just approach would be to eliminate carve-outs with such stark racial implications.

## CONCLUSION

The Brennan Center supports retroactive application of the Commission’s proposed amendment to the drug trafficking guidelines without limitations or carve-outs. The opportunity to consider modestly reducing sentences for as many as 51,000 individuals currently incarcerated in federal prisons would be a meaningful step towards reducing mass incarceration at the federal level while maintaining public safety.

Respectfully submitted,

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<sup>36</sup> See U.S. SENTENCING COMM’N, 2013 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, tbl.34 (2014).

<sup>37</sup> *Inmate Statistics*, FEDERAL BUREAU OF PRISONS (May 24, 2014), <http://www.bop.gov/about/statistics/>.

<sup>38</sup> FPD Fact Sheet, *supra* note 24, at 2.