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FOR JUSTICE

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March 18, 2014

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**

**Re: Brennan Center Comments on the United States Sentencing Commission's Notice of Proposed Amendments to the Sentencing Guidelines**

Dear Judge Saris and Hon. Commissioners:

The Brennan Center for Justice at New York University School of Law writes to address the proposed amendments to the federal sentencing guidelines set forth by the U.S. Sentencing Commission ("the Commission") on January 17, 2014.<sup>1</sup> We appreciate the opportunity to provide comments on these proposed amendments.

The Brennan Center is a non-partisan public policy and law institute that focuses on improving the systems of democracy and justice.<sup>2</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.

We write in support of the Commission's proposed amendments to the drug guidelines. That reform would reduce by two levels the base offense level for drug trafficking crimes under section 2D1.1 across all drug types. 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. More importantly, this modest reform would reduce the current federal prison population by 6,550 inmates over the next five years, all while maintaining public safety.

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<sup>1</sup> See 79 Fed. Reg. 3279.

<sup>2</sup> This letter does not represent the opinions of NYU School of Law.

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>

At the same time, 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>7</sup> The BOP budget has doubled in the past decade. The BOP budget – requested at \$8.4 billion for 2015 – amounts to approximately one quarter of the overall Department of Justice budget.<sup>8</sup> This amount only captures federal spending on corrections.

The Commission is directly tasked with balancing sentencing policy with fiscal realities. Section 994(g) of the Chapter 18 of the U.S. Code requires the Commission 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>9</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.

While numerous factors contributed to the rise in federal incarceration rates, the largest culprit has been the increase in drug crime penalties.<sup>10</sup> Today, almost half of all federal prisoners are

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<sup>3</sup> NATHAN JAMES, CONG. RESEARCH SERV., THE FEDERAL PRISON POPULATION BUILDUP: OVERVIEW, POLICY CHANGES, ISSUES AND OPTIONS 51 (2013) (noting "a nearly 790% increase in the federal prison population" since FY 1980).

<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&). During this period, the federal prison population continued to grow. CARSON & GOLINELLI, *supra* note 4.

<sup>5</sup> *Id.* (estimating a net increase of 6,000 inmates annually through 2015).

<sup>6</sup> *Oversight of the Department of Justice: Hearing Before the U.S. House of Representatives Committee on Appropriations, Subcommittee on Commerce, Justice and Related Agencies*, Statement of Michael E. Horowitz, Inspector General, U.S. Dep't of Justice 9 (March 14, 2013), available at <http://appropriations.house.gov/uploadedfiles/hhrg-113-ap19-wstate-horowitzm-20130314.pdf>.

<sup>7</sup> BOP Salaries & Expenses, FY 2015 Budget and Performance Summary (2014), available at <http://www.justice.gov/jmd/2015justification/pdf/bop-se-justification.pdf>.

<sup>8</sup> OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE U.S. GOV'T, FISCAL YEAR 2015 (2014), available at <http://www.whitehouse.gov/omb/budget/Overview>.

<sup>9</sup> 28 U.S.C. § 994(g).

<sup>10</sup> See, e.g., U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 48 (Nov. 2004)

incarcerated for drug offenses.<sup>11</sup> As the BOP recently explained, “[d]rug offenders comprise the largest single offender group admitted to Federal prison and sentences for drug offenses are much longer than those for most other offense categories.”<sup>12</sup> Studies indicate that extended drug offense sentences contribute significantly to the increase in the federal prison population.<sup>13</sup> This guideline amendment directly targets this specific offender population.

Such a reform aimed at reducing the severity of the federal sentencing system would also reverberate nationwide, triggering a shift away from “business-as-usual” in the criminal justice system more broadly.

We thank the Commission for introducing this modest but critical proposed amendment, and we appreciate the opportunity to further explain our support for this reform. Below, we discuss in further detail why this amendment should be accepted by Congress without delay. First, this guideline reform is consistent with efforts by the other federal branches to reduce the federal prison population. Second, the reform is consistent with successful state efforts to reduce prison populations across the country. Third, this amendment is consistent with the broad trend amongst federal judges to sentence drug trafficking offenders outside the sentencing guidelines in recent years. Finally, this amendment would improve the perception of fairness in the federal system.

## **I. The Amendment is Consistent with Federal Efforts to Reduce the Prison Population**

Since the Commission sought comments on its proposed priorities in July 2013, there has been a shift in momentum away from mass incarceration at the federal level. 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>14</sup> Since then, the Attorney General has continuously acknowledged that “too many Americans go to prison for too long, and at times for no truly good public safety reason.”<sup>15</sup>

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(“Increases in sentence lengths for drug trafficking offenders are the major cause of federal prison population growth over the past fifteen years”) [hereinafter FIFTEEN YEARS REPORT].

<sup>11</sup> See CARSON & GOLINELLI, *supra* note 4.

<sup>12</sup> *Federal Bureau of Prisons FY 2014 Budget Request: Hearing Before U.S. House of Representatives Committee on Appropriations, Subcommittee on Commerce, Justice, Science, and Related Agencies*, Statement of Charles E. Samuels, Jr., Director of the Federal Bureau of Prisons 3 (April 17, 2013).

<sup>13</sup> THE SENTENCING PROJECT, *THE EXPANDING FEDERAL PRISON POPULATION 2* (2011), available at [http://sentencingproject.org/doc/publications/inc\\_FederalPrisonFactsheet\\_March2012.pdf](http://sentencingproject.org/doc/publications/inc_FederalPrisonFactsheet_March2012.pdf) (“The increased incarceration of drug offenders represents the most significant source of growth in the federal prison population.”); NANCY LAVIGNE & JULIE SAMUELS, *URBAN INSTITUTE, THE GROWTH & INCREASING COST OF THE FEDERAL PRISON SYSTEM: DRIVERS AND POTENTIAL SOLUTIONS 5* (2012) (“The length of sentences – particularly for drug offenders – is an important determinant of the stock population and driver of population growth.”).

<sup>14</sup> See DEP’T OF JUSTICE, *SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY 2-4* (Aug. 2013), available at <http://www.justice.gov/ag/smart-on-crime.pdf>.

<sup>15</sup> See, e.g., *U.S. Sentencing Commission Hearing on Proposed Amendments to the Federal Sentencing Guidelines*, Statement of Att’y Gen. Eric Holder (Mar. 13, 2014), available at <http://www.justice.gov/opa/pr/2014/March/14-ag-263.html>.

But the Smart on Crime Initiative is not the only demonstration of momentum for a change in federal drug sentence practices from the executive branch. In December 2013, President Obama commuted the sentences of eight drug offenders serving excessive sentences for lower level, nonviolent drug crimes.<sup>16</sup> Moreover, the Administration announced its intention to increase review of clemency applications for offenders – particularly drug offenders – serving long terms of incarceration in the federal system.<sup>17</sup>

Congress, too, has taken steps towards right-sizing the federal prison population. In 2010, it passed the Fair Sentencing Act (“FSA”).<sup>18</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>19</sup>

Congress continues efforts to improve the criminal justice system. Most recently, two bipartisan bills aimed at reducing the size of the federal prison population were passed out of the Senate Judiciary Committee. The Smarter Sentencing Act (S. 1410), introduced by Senators Dick Durbin (D-IL) and Mike Lee (R-UT) would reduce mandatory minimum penalties for all drug offenders. It would broaden application of the FSA so the law would apply to more inmates currently incarcerated. The Brennan Center supports this legislation as a rationale and effective reform that would improve public safety and help reduce mass incarceration. The second bill, the Recidivism Reduction and Public Safety Act (S. 1675), sponsored by Senators Whitehouse (D-RI) and Cornyn (R-TX), focuses on programs in federal prison to reduce recidivism. The traction gained by these bipartisan bills reflects the Senate Judiciary Committee’s commitment to reforming the federal justice system, particularly for lower level drug offenders.

In light of the momentum building at the federal level, the Commission’s modest amendment to the drug guidelines – by reducing the base guideline by two levels for all drug trafficking offenses – is consistent with steps taken by the other federal bodies involved in the justice system to manage the growing federal prison population.

## **II. The Amendment is Consistent with State Efforts to Reduce Prison Populations**

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<sup>16</sup> See 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>. See also Press Release, Statement by President on Clemency, Dec. 19, 2013, *available at* <http://www.whitehouse.gov/the-press-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>17</sup> James Cole, Dep. Att’y Gen., Remarks at New York State Bar Association Annual Meeting (Jan. 30, 2014).

<sup>18</sup> Fair Sentencing Act of 2010, Pub. L. No. 111-220 (Aug. 3, 2010).

<sup>19</sup> See USSG App. C, amend. 748 & 750 (applying Fair Sentencing Act into the guidelines). According to Sentencing Commission data, 7,460 applications for reduced sentences based upon application of the Fair Sentencing Act’s amendment to crack cocaine penalties. U.S. SENT’G COMM’N, PRELIMINARY CRACK RETROACTIVITY DATA REPORT: FAIR SENTENCING ACT TBL. 5 (Jan. 2014), *available at* [http://www.ussc.gov/Research\\_and\\_Statistics/Federal\\_Sentencing\\_Statistics/FSA\\_Amendment/2014-01\\_USSC\\_Prelim\\_Crack\\_Retro\\_Data\\_Report\\_FSA.pdf](http://www.ussc.gov/Research_and_Statistics/Federal_Sentencing_Statistics/FSA_Amendment/2014-01_USSC_Prelim_Crack_Retro_Data_Report_FSA.pdf).

Several states have implemented meaningful and innovative reforms to reduce the size of their prison populations by reforming drug sentencing policies.<sup>20</sup> For example, New York reduced its prison population and increased public safety after scaling back its harsh “Rockefeller drug laws.”<sup>21</sup> Similarly, Michigan repealed extreme mandatory drug sentences as a measure to reduce its increasing prison population.<sup>22</sup> Texas and South Carolina amended their drug laws to prevent first time, nonviolent drug offenders from serving extended sentences in prison.<sup>23</sup>

The Commission’s proposed amendment represents a modest reform consistent with the trends with states’ efforts, but it also provides the federal government with an opportunity to be a leader amongst reformers. A recent report issued by the Vera Institute for Justice identifies three typical types of sentencing reforms implemented within the states during the 2000s: legislation expanding judicial discretion; legislation narrowing the scope of automatic sentencing enhancements; and legislation repealing or revising mandatory minimum penalties for certain lower level offenses.<sup>24</sup> Since the 2000s, several states’ prison populations have declined even as the federal prison population continued to grow.<sup>25</sup> Indeed, the recent national declines in total prison population are due to decreases in state prison populations that offset the increasing federal prison populations.<sup>26</sup> Accordingly, these types of reforms at the very least stabilized prison populations.<sup>27</sup> To the extent that the Commission’s proposed amendment attempts to address the federal prison population by amending recommended drug sentences, it is consistent with the reforms in the states and will likely stabilize the prison population as well.

But the Commission’s proposed amendment goes a step further than the states. As the Vera Report suggests, most state sentencing reforms implemented to reduce the prison population have been incredibly narrow in scope, thus making it difficult to assess the success of the reform in reducing the pressures of growing prison populations.<sup>28</sup> The Commission’s guideline amendment will not suffer that shortcoming. Because the Commission’s guideline amendments apply to all drug trafficking sentences across all drug types, there will be a significant impact on

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<sup>20</sup> See, e.g., JUDITH GREENE & MARC MAUER, THE SENTENCING PROJECT, DOWNSCALING PRISONS: LESSONS FROM FOUR STATES (2010), available at [http://www.sentencingproject.org/doc/publications/publications/inc\\_DownscalingPrisons2010.pdf](http://www.sentencingproject.org/doc/publications/publications/inc_DownscalingPrisons2010.pdf) (describing reforms that led to declines in incarceration rate in New York, New Jersey, Michigan and Kansas); ACLU, SMART REFORM IS POSSIBLE: STATES REDUCING INCARCERATION RATES AND COSTS WHILE PROTECTING COMMUNITIES (2011) [hereinafter ACLU REPORT], available at [http://www.aclu.org/files/assets/smartreformispossible\\_web.pdf](http://www.aclu.org/files/assets/smartreformispossible_web.pdf) (describing reforms that led to declines in incarceration in Texas, Kansas, Mississippi, South Carolina, Kentucky and Ohio).

<sup>21</sup> GREENE & MAUER, *supra* note 20, at 16-18.

<sup>22</sup> *Id.* at 29-30.

<sup>23</sup> AMERICAN CIVIL LIBERTIES UNION, SMART REFORM IS POSSIBLE: STATES REDUCING INCARCERATION RATES AND COSTS WHILE PROTECTING COMMUNITIES 17, 36 (2011) [hereinafter ACLU REPORT], available at <http://www.aclu.org/files/assets/smartreformispossible.pdf>.

<sup>24</sup> RAM SUBRAMANIAN & RUTH DELANEY, VERA INSTITUTE OF JUSTICE, PLAYBOOK FOR CHANGE? STATES RECONSIDER MANDATORY SENTENCES 8-11 (2014), available at [https://www.aclu.org/files/assets/statement\\_of\\_groups\\_participating\\_in\\_clemency\\_project\\_2014.pdf](https://www.aclu.org/files/assets/statement_of_groups_participating_in_clemency_project_2014.pdf) [hereinafter VERA REPORT].

<sup>25</sup> See generally ACLU REPORT, *supra* note 23; CARSON & GOLINELLI, *supra* note 4.

<sup>26</sup> CARSON & GOLINELLI, *supra* note 4.

<sup>27</sup> See *id.* (illustrating the stabilizing state prison populations); ACLU REPORT, *supra* note 23 (describing stabilizing effect of several states’ reform efforts aimed particularly at drug sentencing policies).

<sup>28</sup> VERA REPORT, *supra* note 24, at 12 (describing these reforms impact as unknown).

sentence lengths for most drug offenders in the federal system.<sup>29</sup> This reform, in turn, will have a real effect on the size of the federal prison population in short order.

Reforms aimed at reducing the severity of the federal sentencing system could also reverberate nationwide, triggering a shift away from “business-as-usual” in criminal justice system more broadly. Such high-level and visible changes could have a broad effect on offenders both within and outside the federal criminal justice system as the reforms may influence state and federal actors.<sup>30</sup> Both the Commission and Congress, by implementing more efficient reforms than those adopted in several states, would endorse a more comprehensive approach to justice reform amongst all the states.

### III. The Amendment is Consistent with Federal Judges’ Sentencing Practices

The Commission was tasked with two equally important roles in the federal sentencing structure: implementing Congress’s vision of a fair and just sentencing system,<sup>31</sup> and translating judicial trends into national standards through the collection and analysis of empirical data.<sup>32</sup> The proposed amendment reflects the Commission’s effort to meet both these functions.

The Commission’s data illustrates that the average sentence imposed by federal judges for all drug trafficking sentences under guideline section 2D1.1 is closer to the minus two amendment rather than the current sentences.<sup>33</sup> As Judge John Gleeson of the U.S. District Court of the Eastern District of New York describes, “sentences below the Guideline range remain the rule rather than the exception for drug trafficking offenses.”<sup>34</sup> He calculates that for every non-

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<sup>29</sup> The guidelines are advisory, so there is always a possibility that judges will not adhere to the guideline amendment. However, data show that judges already sentence more in line with the sentence averages resulting from this proposed amendment. . See *infra* notes 31-33. Moreover, the guidelines clearly have an influential effect on sentencing. See UNITED STATES SENTENCING COMM’N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 348 (2011) [hereinafter MANDATORY MINIMUMS REPORT] (“[t]he overwhelming majority of offenders – 80.4 percent in fiscal year 2010 – still receive a sentence either within the guideline sentencing range or below the guideline sentencing range for a reason sponsored by the government.”).

<sup>30</sup> Indeed, “Congress uses its grant power chiefly to influence sentencing . . .” Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 574 (2011). Accordingly, changing the approach to punishment at the federal level would inevitably produce effects at the state level because Congress could create incentives to encourage states’ to follow suit. See *id.* (discussing Congressional incentives to adopt truth-in-sentencing policies and minimum sentencing terms).

<sup>31</sup> In particular, Congress instructed the Commission to promote uniformity and proportionality as the hallmarks of a fair sentencing system. See U.S. SENTENCING GUIDELINES MANUAL § 1A.1.3 (“Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar criminal offenders. . . . Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.”).

<sup>32</sup> *Id.* (“In its initial set of guidelines, the Commission sought to solve the practical and philosophical problems of developing a coherent sentencing system by taking an empirical approach that used as its starting point data estimating pre-guidelines sentencing practices.”). *Id.* at § 1A.2 (noting the Commission’s commitment to considering “application experience” as it revises federal sentencing policies).

<sup>33</sup> The average sentence for all crack cases has been 30 months below the applicable Guideline range minimum, and the average sentence for cocaine and heroin cases have been about 20 months below the bottom end of the applicable range. This amendment would bring the guideline sentencing range closer in line to the actual sentencing practices of most federal judges because it reduces the average sentence range by 11 months. See *United States v. Diaz*, 11-CR-00821-2, 2013 WL 322243 \*22 (E.D.N.Y. 2013) (JG).

<sup>34</sup> *Id.* at \*21.

government sponsored upward departure there are 23 downward departures from the guidelines.<sup>35</sup> However, to the extent that some judges are deviating from the guidelines more than others, this amendment would standardize that sentencing practice. Such reform allows the guidelines to more effectively meet its goal of creating more consistent sentences amongst offenders appearing before different judges. It also reflects the collection and dissemination of empirical data.

Many federal judges have been vocal in decrying the experience of sentencing drug trafficking offenders with harsh sentences under the guidelines.<sup>36</sup> And while mandatory minimum penalties will still require disparate sentences, this amendment reduces the harshness of those statutorily required penalties. Because this amendment creates a fairer guideline system, it will encourage judges to adhere to the guidelines in more instances. In turn, this reduces concerns by the Commission and Congress for disparities in sentencing amongst judges.

#### **IV. The Amendment Increases 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 has previously amended guidelines to increase the perception of fairness. In 2007, the Commission created the “crack-minus-two” amendment. That amendment 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>37</sup>

The “success” of that amendment cannot be understated. This amendment narrowed the difference in average sentence length between crack cocaine and powder cocaine offenses significantly.<sup>38</sup> While the disparity continued to exist, this amendment addressed a contributing factor to the drastic racial disparities in federal sentencing.<sup>39</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>40</sup>

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<sup>35</sup> *Id.* at \*21.

<sup>36</sup> *See, e.g., id.* (U.S. District Judge John Gleeson); *United States v. Hayes*, 948 F.Supp.2d 1009 (N.D. Iowa 2013) (U.S. District Judge Mark W. Bennett).

<sup>37</sup> USSG, App. C, Amendment 706 (Nov. 1, 2007).

<sup>38</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. *Senate Judiciary Committee Subcommittee on Crime and Drugs*, (Apr. 29, 2009) (statement of Hon. Ricardo Hinojosa, Acting Chair, U.S. Sentencing Commission).

<sup>39</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>40</sup> In 2011, the Commission released 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 – 30.4% for 2007 Crack

But the implications of that reform went much further by creating momentum to improve the federal justice system. In 2009, the Supreme Court used the Commission's 2007 decision to bolster its legal findings that judicial discretion could not be hindered in departing from the guidelines based upon policy reasons.<sup>41</sup> Then, as mentioned, in 2010, Congress enacted the FSA, which is the most significant step to date by Congress to reform the draconian sentencing policies driving federal mass incarceration. Moreover, data demonstrates that the application of that sentencing amendment has not resulted in a decrease in public safety.<sup>42</sup> If anything, the opposite may be true as the crime rate across the country has decreased over the same period that these modest but meaningful reforms were implemented.<sup>43</sup>

## CONCLUSION

The Brennan Center supports the Commission's proposed amendment to the drug trafficking guidelines. A two level reduction in the base offense level across all drug types will be a critical step toward reducing mass incarceration at the federal level while maintaining public safety. This amendment is consistent with the actions of the other federal branches to address the exploding federal prison population, consistent with state efforts to reduce state prison populations, and consistent with judicial practices. It will also improve the perception of justice in the federal system. Finally, the reform would help catalyze further sentencing changes across the country to address mass incarceration.

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Cocaine Amendment group compared to 32.6% for the Comparison Group. See Memorandum from Kim Steven Hunt & Andrew Peterson to Hon. Patti Saris on Recidivism Among Offenders with Sentence Modifications Made Pursuant to Retroactive Application of 2007 Crack Cocaine Amendment (May 31, 2011), *available at* [http://www.ussc.gov/Research\\_and\\_Statistics/Research\\_Projects/Miscellaneous/20110527\\_Recidivism\\_2007\\_Crack\\_Cocaine\\_Amendment.pdf](http://www.ussc.gov/Research_and_Statistics/Research_Projects/Miscellaneous/20110527_Recidivism_2007_Crack_Cocaine_Amendment.pdf).

<sup>41</sup> *Kimbrough v. United States*, 552 U.S. 85, 100 (2009).

<sup>42</sup> See *supra* note 40.

<sup>43</sup> OLIVER ROEDER ET AL, BRENNAN CENTER FOR JUSTICE, *DID MASS INCARCERATION BRING DOWN CRIME?* (forthcoming 2014).

This amendment demonstrates the continued value that the Sentencing Commission brings to maintaining and effective, efficient, and rational federal justice system. As such, the Brennan Center continues to believe that the Commission plays a pivotal role in improving the federal criminal justice system, and we are encouraged by the proposed amendments issued in this cycle that reflect the Commission's recognition of its unique and valuable institutional role.

Respectfully submitted,

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