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To: Chair Hinojosa  
Commissioners  
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From: Glenn Schmitt  
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Subject: Analysis of the Impact of the Crack Cocaine Amendment If Made Retroactive

## **I. Cocaine Base Amendment**

On May 1, 2007, pursuant to 28 U.S.C. § 994(a) and (p), the United States Sentencing Commission (the "Commission") submitted to Congress amendments to the federal sentencing guidelines that, absent congressional action to the contrary, will become effective November 1, 2007. Amendment 9, which pertains to offenses involving cocaine base ("crack") has the effect of lowering the guideline sentencing range for certain categories of offenses and offenders.<sup>1</sup>

The crack cocaine amendment adjusts downward by two levels the base offense level assigned to each threshold quantity of crack cocaine listed in the Drug Quantity Table in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). The amendment assigns, for crack cocaine offenses, base offense levels corresponding to guideline ranges that include the statutory mandatory minimum penalties for cocaine base. Accordingly, pursuant to the amendment, five grams of cocaine base are assigned a base offense level of 24 (51 to 63 months at Criminal History Category I, which includes the five-year (60 month) statutory minimum term of imprisonment for such offenses), and 50 grams of cocaine base are assigned a base offense level of 30 (97 to 121 months at Criminal History Category I, which includes the ten-year (120 month)

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<sup>1</sup> See 72 FR 28557 (May 21, 2007).

statutory minimum for such offenses). The amendment also includes a mechanism to determine a combined base offense level in an offense involving crack cocaine and other controlled substances.<sup>2</sup>

## **II. Legal Framework for Retroactively Reducing Sentences Based on Guideline Amendments**

### **A. Statutory Authority**

The Commission is statutorily authorized to determine whether a guideline amendment that reduces the sentencing range may be retroactively applied. Section 994(u) of title 28, United States Code, specifically provides that:

[i]f the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.<sup>3</sup>

Furthermore, sentencing courts are statutorily precluded from applying a guideline amendment retroactively unless the Commission has designated such amendment for retroactive application. Section 3582(c)(2) of title 18, United States Code, provides that the court may not modify a term of imprisonment once it has been imposed except that C

in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), . . . the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.<sup>4</sup>

### **B. Guidelines Manual Policy Statement**

To implement 28 U.S.C. § 994(u) and to provide guidance for a court when considering a motion under 18 U.S.C. § 3582(c)(2), the Commission promulgated §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range) (Policy Statement). Subsection (a) of §1B1.10 specifies when an 18 U.S.C. § 3582(c)(2) reduction is available:

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<sup>2</sup> In addition to publication of the amendment in the *Federal Register*, a reader friendly version is available on the Commission's website at [www.ussc.gov/FEDREG/may07final.pdf](http://www.ussc.gov/FEDREG/may07final.pdf). See also, 72 FR 51882 (September 11, 2007).

<sup>3</sup> 28 U.S.C. § 994(u).

<sup>4</sup> 18 U.S.C. § 3582(c)(2).

Where a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (c) below, a reduction in the defendant's term of imprisonment is authorized under 18 U.S.C. § 3582(c)(2). If none of the amendments listed in subsection (c) is applicable, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) is not consistent with this policy statement and thus is not authorized.

Application Note 1 further states: "Eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (c) that lowers the applicable guideline range."<sup>5</sup>

Listing an amendment in §1B1.10(c) reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing and that, in the sound discretion of the court, a reduction in the term of imprisonment may be appropriate for previously sentenced, qualified defendants.<sup>6</sup> The background commentary further provides that "authorization of such a discretionary reduction does not otherwise affect the lawfulness of a previously imposed sentence, does not authorize a reduction in any other component of the sentence, and does not entitle a defendant to a reduced term of imprisonment as a matter of right."<sup>7</sup>

Among the factors considered by the Commission in selecting the amendments included in subsection (c) are "the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under subsection (b)."<sup>8</sup>

In addition to specifying which guideline amendments may be retroactively applied, consistent with 28 U.S.C. § 994(u), §1B1.10 guides courts as to the amount by which a sentence may be reduced under 18 U.S.C. § 3582(c)(2). Subsection (b) of §1B1.10 states:

In determining whether, and to what extent, a reduction in the term of imprisonment is warranted for a defendant eligible for consideration under 18 U.S.C. § 3582(c)(2), the court should consider the term of imprisonment that it would have imposed had the amendment(s) to the guidelines listed in subsection (c) been in effect at the time the defendant was sentenced ....<sup>9</sup>

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<sup>5</sup> United States Sentencing Commission, *Guidelines Manual*, USSG §1B1.10, comment (n.1) (Nov. 2006) [hereinafter USSG].

<sup>6</sup> USSG §1B1.10, Background.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> USSG §1B1.10(b).

Commentary further directs how courts should proceed on 18 U.S.C. § 3582(c)(2) motions. Application Note 2 states: AIn determining the amended guideline range under subsection (b), the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced. All other guideline application decisions remain unaffected.<sup>10</sup> Application Note 3 further provides that A[w]hen the original sentence represented a downward departure, a comparable reduction below the amended guideline range may be appropriate.<sup>11</sup>

Accordingly, the data presented below are based on the constraints imposed by 18 U.S.C. § 3582(c)(2) and §1B1.10 and its commentary on the extent of any reduction under § 3582(c)(2) to the amended guideline range, subject to the exception stated in the commentary for departures given in the original sentence. The data presented below, therefore, account only for the application of the two-level reduction provided by the crack cocaine amendment and do not assume any other reduction in the sentence, consistent with Application Note 2 of §1B1.10. The data do not account for the applicability, if any, of the United States Supreme Court decision in *United States v. Booker*,<sup>12</sup> to 18 U.S.C. § 3582(c)(2) sentence modifications.

### **III. The Analysis of the Impact of the 2007 Crack Cocaine Amendment**

#### **A. Introduction to the Data Analysis**

This section of the memorandum provides an analysis of the estimated impact of the Commission's 2007 crack cocaine amendment<sup>13</sup> on those offenders incarcerated as of November 1, 2007 in the federal prison system should the Commission vote to make that amendment retroactive. This analysis was prepared by the Commission's Office of Research and Data (ORD). ORD estimates that 19,500 offenders sentenced between October 1, 1991 and June 30, 2007 (fiscal years 1992 through third quarter 2007),<sup>14</sup> would be eligible to seek a reduced

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<sup>10</sup> USSG §1B1.10, comment (n.2).

<sup>11</sup> USSG §1B1.10, comment (n.3).

<sup>12</sup> 543 U.S. 220 (2005).

<sup>13</sup> References to the "2007 crack cocaine amendment," "the amendment," or any similar references mean the amendment the Commission submitted to Congress on May 1, 2007, that modified the guideline drug quantity thresholds for crack cocaine offenses.

<sup>14</sup> The analysis is limited to data from fiscal year 1992 through the third quarter of fiscal year 2007 because the Commission did not collect information on the type of drug involved in the offense prior to fiscal year 1992. However, it is anticipated that relatively few offenders were sentenced for crack cocaine offenses prior to fiscal year 1992 because of the relatively low percentage of crack cocaine cases, vis-a-vis powder cocaine cases, occurring in fiscal year 1992. In fiscal year 1992, of the 7,873 cocaine offenses for which the Commission received information, 5,802 of these (73.7%) were powder cocaine offenses and 2,071 (26.3%) were crack

sentence if the Commission were to make the 2007 crack cocaine amendment retroactive. These offenders would be released over a period of more than three decades.

## **B. Estimate of Total Number of Incarcerated Offenders Eligible for Sentence Modification**

The estimate of 19,500 offenders who would appear to be eligible to seek a reduced sentence under this amendment includes: (A) 17,127 offenders sentenced between fiscal years 1992 and 2006 who have been verified by the Federal Bureau of Prisons (BOP) as still incarcerated (as explained in further detail below); and (B) 2,373 offenders sentenced during the first three quarters of fiscal year 2007 (as explained in further detail below).<sup>15</sup> Of the 19,500 offenders, more than one-third (n=7,187) were sentenced after the decision in *Booker*. This estimate was derived through the following process:

### 1. Examination of the Commission's Files for Fiscal Years 1992 Through Third Quarter of 2007 to Determine the Number of Crack Cocaine Offenders in Those Years and, of Those, the Number Still Incarcerated Who Appear to Be Eligible For Sentence Modification

ORD examined the Commission's datasets from fiscal years 1992 through the third quarter of 2007 to determine the number of cases in those datasets in which the offender appears to be eligible to seek a reduced sentence if the crack cocaine amendment were made retroactive. For purposes of this analysis, a case was considered to be eligible for retroactive application of the 2007 crack cocaine amendment if it met the following criteria:

- (A) crack cocaine was involved in the offense;
- (B) the base offense level was greater than level 12;<sup>16</sup>
- (C) the base offense level was not level 43;<sup>17</sup>

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cocaine offenses. In addition, information for fiscal year 2007 includes information on only those cases sentenced by June 30, 2007, and for which the Commission received, coded, and edited sentencing information by August 22, 2007.

<sup>15</sup> This analysis does not include an estimate of the number of offenders who will be sentenced in the fourth quarter of fiscal year 2007 or first month of fiscal year 2008 (i.e., from October 1, 2007 through October 31, 2007).

<sup>16</sup> Crack cocaine offenders with a base offense level (BOL) of 12 are excluded from the analysis because under the Drug Quantity Table in USSG §2D1.1 crack cocaine offenders cannot receive a lower BOL and so are unaffected by the amendment.

<sup>17</sup> Offenders sentenced under USSG §2D1.1(a)(1) with a BOL of 43: (1) were convicted under 21 U.S.C § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3); and (2) the offense of conviction establishes that death or serious bodily injury resulted from use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense. The BOL in these cases will not be affected by the 2007 crack cocaine amendment because the BOL was not based on drug quantity. In contrast, offenders sentenced

(D) the quantity of crack cocaine involved in the offense was less than 4,500 grams;<sup>18</sup>

(F) the offender's final offense level was not derived from the career offender or armed career offender guideline;<sup>19</sup>

(G) the offender's original sentence was greater than any applicable statutory mandatory minimum punishment, unless the offender received relief from the mandatory minimum punishment pursuant to the statutory safety valve of 18 U.S.C. § 3553(f) (incorporated into the guidelines at §5C1.2) or the offender received a departure under §5K1.1 for substantial assistance when originally sentenced.<sup>20</sup>

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under USSG §2D1.1(a)(2) (*i.e.*, those with a BOL of 38 who were convicted under 21 U.S.C § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3) and whose offense of conviction establishes that death or serious bodily injury resulted from use of the substance) are included in this analysis because the Commission's data do not currently distinguish those offenders and offenders who received a BOL of 38 as determined under USSG §2D1.1(a)(3). This fact could result in a slight overestimate of the number of offenders affected by the amendment.

<sup>18</sup> This quantity is the threshold in the Drug Quantity Table for base offense level 38 under the amendment, the highest BOL possible based on quantity alone. Cases in which the crack cocaine quantity is 4,500 grams or greater will not benefit from the Drug Quantity Table modification in the crack cocaine amendment as these offenders will remain at level 38. A case missing information on the quantity of drug involved in the offense is nevertheless included in the estimate because information on the applicable BOL is sufficient to draw an inference about the minimum quantity of drug involved in the offense. For purposes of this analysis, such cases are presumed to have the quantity of drug corresponding to the bottom of the BOL quantity range.

<sup>19</sup> Offenders classified as career offenders or armed career criminals under USSG §4B1.1 and §4B1.4 of the guidelines receive final offense levels pursuant to either these guideline provisions or the applicable Chapter 2 and Chapter 3 guidelines, whichever is higher. Offenders whose original final offense level was controlled by the career offender or armed career criminal sections of the guidelines, therefore, were excluded from the analysis because the crack cocaine amendment to the drug guideline will not affect their sentencing range.

<sup>20</sup> Offenders sentenced at the applicable mandatory minimum term of imprisonment, who did not receive relief under the statutory safety valve of 18 U.S.C. § 3553(f) (referenced in the Guidelines at USSG §5C1.2), or who did not receive a substantial assistance departure under USSG §5K1.1, were excluded because their sentence cannot be reduced below the existing mandatory minimum punishment. Despite a reduction in their guideline level based on the crack cocaine amendment, these offenders were originally sentenced to the shortest sentence of imprisonment available to the court, the statutory minimum for the offense. The Commission's data do not reflect any reduction in sentence that may have occurred for crack cocaine offenders

For the cases from fiscal years 1992 to 2006 that met these criteria, the number of offenders still incarcerated was estimated by adding to the date of sentencing the term of imprisonment imposed and then subtracting an estimate of the maximum amount of good-time credit that an offender can earn (currently 54 days per year served for imposed sentences greater than one year but not life imprisonment). Offenders sentenced during the first three quarters of fiscal year 2007 are assumed to be in prison.<sup>21</sup>

To ensure that all crack cocaine offenders sentenced between fiscal years 1992 through 2006 who were still incarcerated and who appear to be eligible to seek a reduced sentence if the amendment were made retroactive were included in its analysis, ORD conducted a comprehensive cross-check of Commission data with the BOP. ORD and BOP were able to match records for 97.9 percent (n=31,323) of the cases. Of these, the BOP identified 84.2 percent (n=26,383) as cases in which the offenders were still incarcerated. Of the 4,940 cases in Commission files that the BOP was able to match but where the offender was no longer incarcerated, the reasons for release were as follows:

(A) 48.5 percent (n= 2,397) were released due to the expiration of their sentence,<sup>22</sup>

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after the date of the original sentence, for example, pursuant to Federal Rule of Criminal Procedure 35(b) based on an offender's substantial assistance to the government. Under this rule, the court may sentence an offender below any otherwise applicable mandatory minimum term of imprisonment. Therefore, an offender who received a sentence reduction pursuant to Rule 35(b) would be eligible to seek a reduced sentence under the crack cocaine amendment if it were to be made retroactive (assuming all other criteria above are met). Commission data do not include the information necessary to determine which offenders originally sentenced at a mandatory minimum term of imprisonment receive a reduced sentence pursuant to Rule 35(b) after the original sentence was imposed. Therefore, ORD's estimate of the number of offenders who appear to be eligible to seek a reduced sentence if the crack cocaine amendment were to be made retroactive may underestimate the actual number of such offenders.

<sup>21</sup> Offenders sentenced in the first three quarters of fiscal year 2007 who meet the criteria described above were also included into the overall estimate of those offenders who appear to be eligible for retroactive application of the amendment. The number of 2007 offenders includes only those sentenced by June 30, 2007 and for whom the Commission received, coded, and edited sentencing information by August 22, 2007. These offenders were assumed to still be incarcerated and, therefore, ORD did not undertake to match these offenders to BOP records. The total number of offenders sentenced in fiscal year 2007 who would be eligible for retroactive application of the amendment will, of course, be higher than the number included in this analysis.

<sup>22</sup> ORD had projected that these offenders would still be incarcerated based on information available in documents routinely submitted to the Commission by the courts. However, the actual start and release dates of an offender's sentence are not available to the Commission because the data that courts provide to the Commission do not include the date on which an offender actually begins serving a prison sentence or the amount of any sentence credit awarded for time already served. The Commission's data do not reflect any reduction in sentence that

(B) 22.5 percent (n=1,112) were released due to participation in a drug treatment program;<sup>23</sup>

(C) 22.9 percent (n=1,129) were released but information as to the reason for release is missing;

(D) 2.2 percent (n=110) were released for a variety of other reasons; and

(E) 3.9 percent (n=192) had died in custody.

As described on Figure A, 875,368 offenders have been sentenced under the guidelines since 1992. Of these, 39.0 percent (n=341,338) were sentenced under the drug guidelines. Of these 341,338 drug offenders, 22.3 percent (n=75,978) involved crack cocaine. Of the crack cocaine offenders, 26,383 met all the inclusion criteria described above and were identified in BOP records as still incarcerated.

After the matching process with BOP was completed, an additional 4,914 offenders were removed from this total because the final offense level that applied in those cases was derived from the career offender (USSG §4B1.1) or armed career criminal (USSG §4B1.4) guidelines rather than from the Drug Quantity Table of the drug guideline at §2D1.1.<sup>24</sup> Therefore, the crack amendment to §2D1.1 would have no effect on the sentencing range that applies in those cases. After these offenders were excluded from the analysis, the number of offenders remaining for the analysis was 21,469.

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may have occurred for crack cocaine offenders after the date of the original sentence, for example, pursuant to Federal Rule of Criminal Procedure 35(b) based on an offender's substantial assistance to the government. Therefore, for this analysis, ORD assumed that imprisonment began on the sentencing date and runs for the length of the sentence imposed, less the maximum amount of good time credit that can be awarded. For some offenders, however, the length of incarceration is actually less than this, because they earn credit for time served while detained prior to trial and/or sentencing, or because the sentence of some offenders is reduced after they are sentenced under Rule 35(b) as the result of continuing cooperation with the government. Because of this, ORD's projected release dates may overestimate the amount of time an offender will actually serve.

<sup>23</sup> Section 3621(e)(2)(B) of title 18, United States Code, authorizes the BOP to reduce the sentence for any inmate convicted of a nonviolent offense when the inmate successfully completes a residential substance abuse treatment program. The reduction in sentence may not exceed one year.

<sup>24</sup> See footnote 19 and accompanying text.



## 2. Total Number of Offenders Who Appear to Be Eligible for Retroactive Application of the Crack Cocaine Amendment

ORD initially identified 21,469 offenders who met all of the above criteria and, therefore, appeared eligible to seek a reduced sentence under 18 U.S.C. § 3582(c)(2) should the crack cocaine amendment be made retroactive. ORD then recalculated the sentence for these offenders using its Prison Impact Model (described below).

Using this model, it was determined that for 1,969 offenders who met the criteria for inclusion in the analysis, no change was observed in the sentencing range that would apply in their cases if the crack cocaine amendment were made retroactive. These offenders, therefore, were removed from further analysis. The reasons why these offenders would experience no change in the respective sentencing ranges applicable in their cases are as follows:

- (A) 1,593 offenders were convicted of an offense in which more than one drug was involved and the combined weights of these drugs was sufficient so that the Base Offense Level did not change for those offenders;
- (B) 208 offenders were sentenced at points on the Sentencing Table where a reduction of two levels to the applicable offense level would not result in a lower sentencing range;
- (C) 77 offenders were sentenced under a statutory minimum term of life imprisonment;
- (D) 74 offenders had an original BOL that was capped at level 30 under the “mitigating role cap provision” of the guidelines and would have the same level under the crack amendment;<sup>25</sup>
- (E) three offenders were projected to die before the end of their sentence, even if those sentences were reduced under the crack cocaine amendment; and<sup>26</sup>
- (F) 14 offenders had a sentence reduction of less than one month.<sup>27</sup>

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<sup>25</sup> The mitigating role cap provision is found at USSG §2D1.1(a)(3). An offender convicted of a drug offense for which the base offense level as determined under the Drug Quantity Table of the USSG §2D1.1 drug guideline would be 32 or higher, and who receives a mitigating role adjustment under USSG §3B1.2, receives a base offense level capped at specified levels. There are 74 offenders whose original base offense level was capped at level 30 under this provision but whose base offense level under the Drug Quantity Table as modified by the crack cocaine amendment would now also be 30 and, therefore, would not receive a lower sentencing range under the amendment.

<sup>26</sup> The Commission’s Prison Impact Model incorporates actuarial tables based on race and gender to predict life expectancy.

<sup>27</sup> These offenders would be eligible to seek a sentence reduction for the fractional portion of the

Based on this, the total number of crack cocaine offenders currently incarcerated who appear to be eligible to seek a reduced sentence under 18 U.S.C. § 3582(c)(2) should the Commission's 2007 crack cocaine amendment be made retroactive, is 19,500.<sup>28</sup> Figure A summarizes the manner by which this number was derived as described above.

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month, however, the model ORD uses to conduct the analysis described in this memorandum categorizes cases with a change in sentence of less than a month as a case in which no change will occur.

<sup>28</sup> This estimate includes 2,824 offenders for whom the information necessary to perform the analysis in the Commission's Prison Impact Model was missing. They are included in the total number of offenders who appear to be eligible to seek a reduced sentence if the amendment were made retroactive because they meet all of the criteria for inclusion based on the information that is available.

**Figure A**  
**Summary Analysis of Retroactive Eligible Crack Cocaine Cases**  
**Fiscal Years 1992 – 2007 (3<sup>rd</sup> Quarter)**

Number of offenders in USSC dataset  
**N = 875,368**

Number of 2D Guideline (drug) offenders in USSC dataset  
**N = 341,338**

Number of 2D Guideline crack cocaine offenders in USSC dataset  
**N = 75,978**

Number of 2D Guideline crack cocaine offenders with a BOL higher than 12 (1,540 offenders at BOL 12 removed)  
**N = 74,438**

Remaining 2D Guideline crack cocaine offenders with a BOL of less than 43 (127 offenders at BOL 43 removed)  
**N = 74,311**

Remaining offenders sentenced above any statutory mandatory minimum punishment  
(9,034 at statutory mandatory minimums removed)  
**N = 65,277**

Remaining offenders with crack cocaine as the primary drug type and drug weight below 4,500 grams  
(2,941 offenders with a drug weight of 4,500 grams or more removed)  
**N = 62,336**

Remaining offenders projected to be incarcerated after considering potential “good time” credit  
(30,353 removed)  
**N = 31,983**

Offenders who could be matched to a BOP record  
(660 offenders removed for whom no record was found at the BOP)\*  
**N = 31,323**

Remaining offenders that BOP confirmed as currently incarcerated  
(4,940 released offenders removed)  
**N = 26,383**

Remaining offenders after excluding those for whom the sentencing range was controlled by  
Career Offender and/or Armed Career Criminal status  
(4,914 offenders as to whom this status controlled the sentencing range removed)  
**N = 21,469**

Final number of offenders remaining after excluding those with no change in the sentencing range when analyzed  
(1,969 removed due to no change in sentencing range)

**N=19,500**

\* Of these 660 offenders, 212 were identified through other Department of Justice records, however, none met the criteria to be retained in this analysis.

### C. Distribution of Offenders by Year of Sentence

Table 1 presents the number of offenders who appear to be eligible for retroactive application of the amendment by the year in which the offender was sentenced. As would be expected, the more recent the sentencing year, the greater the number of offenders who appear to be eligible to petition for a reduced sentence under § 3582(c)(2). As discussed above, the number of offenders for fiscal year 2007 is calculated only through the end of the third quarter of that year. Therefore, the actual number of offenders sentenced in that year who would be eligible will be higher.

**Table 1**  
**Retroactive Eligible Crack Cocaine Offenders**

<b>RETROACTIVE ELIGIBLE CRACK COCAINE OFFENDERS</b>			
<b>FISCAL YEAR</b>		<b>N</b>	<b>%</b>
<b>TOTAL</b>		<b>19,500</b>	<b>100.0</b>
<b>2007 (first three quarters)</b>		2,373	12.2
<b>2006</b>		2,900	14.9
<b>2005</b>		2,484	12.7
<b>2004</b>		2,141	11.0
<b>2003</b>		2,023	10.4
<b>2002</b>		1,528	7.8
<b>2001</b>		1,238	6.4
<b>2000</b>		1,003	5.1
<b>1999</b>		890	4.6
<b>1998</b>		730	3.7
<b>1997</b>		590	3.0
<b>1996</b>		529	2.7
<b>1995</b>		448	2.3
<b>1994</b>		265	1.4
<b>1993</b>		209	1.1
<b>1992</b>		149	0.8

SOURCE: U.S. Sentencing Commission, 1992-2006 and Preliminary 3rd Quarter Datafiles, MONFY92-USSCFY06 and pre12\_OPAFY07.

#### **D. Geographic Distribution of Offenders and Year of Sentence**

The 19,500 offenders who appear to be eligible to seek a reduced sentence, if the crack cocaine amendment were to be made retroactive, were sentenced across all federal judicial districts except Guam and Northern Marianas. The number of offenders in each district ranges from 1,404 offenders (Eastern District of Virginia, accounting for 7.2 percent of all eligible offenders) to one offender (District of North Dakota). Nineteen of the 94 federal judicial districts account for half of all offenders who appear to be eligible to seek a reduced sentence. Only three districts account for three percent or more of the total number of these offenders (Eastern District of Virginia, 7.2 percent; Middle District of Florida, 4.0 percent; and District of South Carolina, 3.9 percent).

Table 2 presents information on the judicial districts in which each of the 19,500 offenders was sentenced, and thus where the consideration of the issue of retroactive application of the amendment in their cases would most likely occur. This list presents the offenders in descending order by the number of offenders in each district.

**Table 2**  
**Geographic Distribution of Retroactive Eligible Crack Cocaine Amendment Offenders,**  
**By District**

District	n	%			
<b>TOTAL</b>	<b>19,500</b>	<b>100.0</b>			
Eastern Virginia	1,404	7.2	Eastern New York	146	0.7
Middle Florida	772	4.0	Northern New York	146	0.7
South Carolina	753	3.9	Northern Georgia	142	0.7
Western Virginia	540	2.8	New Jersey	136	0.7
Western North Carolina	536	2.7	Eastern Wisconsin	134	0.7
Western Texas	509	2.6	Southern Iowa	127	0.7
Eastern North Carolina	489	2.5	Eastern Kentucky	127	0.7
Eastern Texas	484	2.5	Western Pennsylvania	126	0.6
Northern West Virginia	470	2.4	Eastern Arkansas	125	0.6
Eastern Missouri	445	2.3	Western Wisconsin	125	0.6
Middle North Carolina	436	2.2	Central California	124	0.6
Northern Ohio	396	2.0	Middle Alabama	120	0.6
Northern Illinois	377	1.9	Puerto Rico	116	0.6
Southern Illinois	370	1.9	Colorado	115	0.6
Southern Florida	361	1.9	Southern Indiana	113	0.6
Middle Pennsylvania	358	1.8	Eastern California	108	0.6
Northern Texas	342	1.8	Western Kentucky	102	0.5
Southern Texas	342	1.8	Western Oklahoma	91	0.5
Northern Florida	323	1.7	Rhode Island	83	0.4
Middle Georgia	299	1.5	Maine	81	0.4
Southern Alabama	296	1.5	New Mexico	78	0.4
Southern New York	295	1.5	New Hampshire	71	0.4
Eastern Tennessee	289	1.5	Middle Louisiana	70	0.4
Eastern Pennsylvania	288	1.5	Nevada	67	0.3
Maryland	279	1.4	Western Washington	60	0.3
Southern West Virginia	278	1.4	Middle Tennessee	59	0.3
Northern Indiana	276	1.4	Western Arkansas	54	0.3
District of Columbia	269	1.4	Northern California	54	0.3
Southern Georgia	269	1.4	Alaska	43	0.2
Eastern Michigan	268	1.4	Northern Oklahoma	43	0.2
Nebraska	256	1.3	Eastern Washington	31	0.2
Central Illinois	250	1.3	Delaware	30	0.2
Western Louisiana	249	1.3	Vermont	29	0.1
Eastern Louisiana	231	1.2	Hawaii	26	0.1
Western Missouri	227	1.2	Arizona	25	0.1
Southern Mississippi	226	1.2	Southern California	21	0.1
Southern Ohio	224	1.1	Oregon	17	0.1
Connecticut	217	1.1	Utah	15	0.1
Kansas	201	1.0	Eastern Oklahoma	13	0.1
Western Michigan	198	1.0	South Dakota	9	0.0
Western New York	195	1.0	Virgin Islands	6	0.0
Minnesota	192	1.0	Wyoming	6	0.0
Northern Alabama	183	0.9	Montana	5	0.0
Northern Iowa	160	0.8	Idaho	3	0.0
Northern Mississippi	159	0.8	North Dakota	1	0.0
Western Tennessee	149	0.8	Guam	0	0.0
Massachusetts	147	0.8	Northern Mariana Islands	0	0.0

SOURCE: U.S. Sentencing Commission, 1992-2006 and Preliminary 3rd Quarter Datafiles, MONFY92-USSCFY06 and pre12\_OPAFY07.

Table 3 presents this same information displayed by the circuit in which the district court that imposed the sentence is located. More than 26 percent of the offenders were sentenced in district courts in the Fourth Circuit, more than in any other circuit. The fewest of the offenders were sentenced in the District of Columbia Circuit (which has only one district court) and the First Circuit.

**Table 3**  
**Geographic Distribution of Retroactive Eligible Crack Cocaine Amendment**  
**Offenders, By Judicial Circuit**

<b>CIRCUIT</b>	<b>N</b>
Fourth Circuit	5,185
Eleventh Circuit	2,765
Fifth Circuit	2,612
Sixth Circuit	1,812
Seventh Circuit	1,645
Eighth Circuit	1,596
Second Circuit	1,028
Third Circuit	944
Ninth Circuit	584
Tenth Circuit	562
First Circuit	498
DC Circuit	269
<b>TOTAL</b>	<b>19,500</b>

SOURCE: U.S. Sentencing Commission, 1992-2006 and Preliminary 3rd Quarter Datafiles, MONFY92-USSCFY06 and pre12\_OPAFY07.

## E. Offender and Offense Characteristics

Table 4 presents information on the demographic characteristics of the offenders who appear to be eligible for retroactive application of the amendment. The vast majority are U.S. citizens (94.5%), male (94.2%), and African-American (85.9%). The average age of these offenders on November 1, 2007 will be 35 years.

**Table 4**  
**Demographic Characteristics of Retroactive Eligible Crack Cocaine Offenders (FY1992 through Third Quarter FY2007)**<sup>29</sup>

<b>DEMOGRAPHICS</b>		
<b>Race/Ethnicity</b>		
White	1,121	5.8%
Black	16,726	85.9%
Hispanic	1,480	7.6%
Other	155	0.8%
<b>Total</b>	<b>19,482</b>	<b>100%</b>
<b>Citizenship</b>		
U.S. Citizen	18,403	94.5%
Non-Citizen	1,071	5.5%
<b>Total</b>	<b>19,474</b>	<b>100%</b>
<b>Gender</b>		
Male	18,371	94.2%
Female	1,125	5.8%
<b>Total</b>	<b>19,496</b>	<b>100%</b>
<b>Average Age</b>		
	<b>35</b> (as of November 1, 2007)	<b>30</b> (at sentencing)
SOURCE: U.S. Sentencing Commission, 1992-2006 and Preliminary 3rd Quarter Datafiles, MONFY92-USSCFY06 and pre12_OPAFY07.		

In order to better understand the offense conduct of the offenders who appear to be eligible for retroactive application of the amendment, ORD staff analyzed offense-related factors that contributed to the sentence originally imposed on each offender, as well as the criminal history categories of these offenders, and the extent to which their original sentences were within the applicable guideline ranges. Table 5 displays these factors for the 19,500 offenders as a group.

Table 5A displays the average base offense level and guideline-relevant offense characteristics for these offenders sorted by the year in which the offender was sentenced for the

<sup>29</sup> The analysis involves a total of 19,500 cases; however, cases missing information for any specific analysis are excluded from that analysis.



crack cocaine offense. Table 5B displays the criminal history category of these offenders by the year in which they were sentenced. Table 5C displays the position of the sentences relative to the guideline range each year for these offenders. The data in each of these tables does not represent the characteristics of all crack offenders sentenced in each of the years listed. The information presented is only for those offenders whose sentence was sufficiently long such that they would still be incarcerated as of November 1, 2007, and who otherwise met the criteria for inclusion in the analysis.

**Table 5**  
**Guideline Sentencing Characteristics, Criminal History, and Position Relative to the**  
**Guideline Range of Retroactive Eligible, Crack Cocaine Offenders**  
**(FY1992 through Third Quarter FY2007)**<sup>30</sup>

<b>CHARACTERISTICS</b>		
<b>Average Base Offense Level</b>		32
<b>Weapon Specific Offense Characteristic</b>	4,729	24.3%
<b>Safety Valve §5C1.2</b>	1,750	9.0%
<b>Firearms Mandatory Minimum Applied</b>	2,179	11.3%
<b>Aggravating Role §3B1.1</b>	2,286	11.7%
<b>Mitigating Role §3B1.2</b>	630	3.2%
<b>Obstruction Adjustment §3C1.1</b>	1,291	6.6%
<b>Career Offender Status §4B1.1</b>	664	3.4%
<b><u>Criminal History Category</u></b>		
<b>I</b>	4,252	21.9%
<b>II</b>	2,488	12.8%
<b>III</b>	4,411	22.7%
<b>IV</b>	3,227	16.6%
<b>V</b>	1,980	10.2%
<b>VI</b>	3,038	15.7%
<b>Total</b>	<b>19,396</b>	<b>100.0%</b>
<b><u>Sentence Relative to Guideline Range</u></b>		
<b>Within Range</b>	13,348	69.4%
<b>Above Range</b>	101	0.5%
<b>Substantial Assistance §5K1.1</b>	4,317	22.5%
<b>Otherwise Below Range</b>	1,455	7.6%
<b>Total</b>	<b>19,221</b>	<b>100.0%</b>
SOURCE: U.S. Sentencing Commission, 1992-2006 and Preliminary 3rd Quarter Datafiles, MONFY92-USSCFY06 and pre12_OPAFY07.		

<sup>30</sup> The analysis involves a total of 19,500 cases; however, cases missing information for any specific analysis are excluded from that analysis.

**Table 5A**  
**Guideline Sentencing Characteristics of Retroactive Eligible Crack Cocaine Offenders<sup>1</sup>**

	Fiscal Year	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
<b>Average Base Offense Level</b>	N	35	35	35	36	36	35	35	35	34	34	33	32	32	31	30	30
	%																
<b>Weapon Specific Offense Characteristic</b>	N	47	53	67	158	183	206	207	292	264	346	382	497	524	549	466	488
	%	31.5	25.4	25.3	35.3	34.6	34.9	28.4	32.8	26.3	28.0	25.0	24.6	24.5	22.1	16.1	20.6
<b>Safety Valve<sup>2</sup></b>	N	n/a	n/a	n/a	n/a	1	4	3	20	28	51	84	169	202	295	470	423
	%	n/a	n/a	n/a	n/a	0.2	0.7	0.4	2.2	2.8	4.1	5.5	8.4	9.5	11.9	16.3	17.9
<b>Firearm Mandatory Minimum</b>	N	n/a	70	89	109	81	61	46	64	90	110	153	201	238	298	336	233
	%	n/a	33.5	33.6	24.3	15.3	10.3	6.3	7.2	9.0	8.9	10.0	9.9	11.1	12.0	11.6	9.8
<b>Aggravating Role</b>	N	67	80	77	157	155	162	173	174	155	174	164	174	147	153	153	121
	%	45.0	38.3	29.1	35.0	29.3	27.5	23.7	19.6	15.5	14.1	10.7	8.6	6.9	6.2	5.3	5.1
<b>Mitigating Role</b>	N	3	0	6	13	21	22	16	20	36	20	38	44	51	96	120	124
	%	2.0	0.0	2.3	2.9	4.0	3.7	2.2	2.3	3.6	1.6	2.5	2.2	2.4	3.9	4.1	5.2
<b>Obstruction of Justice</b>	N	26	49	64	73	78	85	91	84	88	95	115	121	81	81	92	68
	%	17.5	23.4	24.2	16.3	14.7	14.4	12.5	9.4	8.8	7.7	7.5	6.0	3.8	3.3	3.2	2.9
<b>Career Offender</b>	N	3	15	32	30	36	43	43	42	51	40	49	63	40	56	64	57
	%	2.0	7.2	12.1	6.7	6.8	7.3	5.9	4.7	5.1	3.2	3.2	3.1	1.9	2.3	2.2	2.4

<sup>1</sup> The analysis involves a total of 19,500 cases, however, cases missing information for any specific analysis are excluded from that analysis.

<sup>2</sup> The statutory safety valve, codified as 18 U.S.C. §3553(f), was enacted in September 1994.

SOURCE: U.S. Sentencing Commission, 1992-2006 and Preliminary 3rd Quarter Datafiles, MONFY92-USSCFY06 and pre12\_OPAFY07.

**Table 5B**  
**Criminal History Category of Retroactive Eligible Crack Cocaine Offenders<sup>1</sup>**

Fiscal Year		1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
<b>Criminal History Category I</b>	<b>N</b>	47	68	59	130	115	154	161	180	162	221	276	391	435	532	712	609
	<b>%</b>	33.1	34.7	22.8	29.6	22.1	27.4	22.9	20.3	16.2	17.9	18.1	19.3	20.3	21.4	24.6	25.7
<b>Criminal History Category II</b>	<b>N</b>	25	26	39	47	74	66	93	98	117	160	197	262	269	347	365	303
	<b>%</b>	17.6	13.3	15.1	10.7	14.2	11.7	13.2	11.0	11.7	12.9	12.9	13.0	12.6	14.0	12.6	12.8
<b>Criminal History Category III</b>	<b>N</b>	25	39	52	96	121	117	163	205	232	273	362	466	509	570	661	520
	<b>%</b>	17.6	19.9	20.1	21.9	23.3	20.8	23.2	23.1	23.1	22.1	23.7	23.1	23.8	23.0	22.8	21.9
<b>Criminal History Category IV</b>	<b>N</b>	22	25	34	60	77	75	112	132	174	233	254	380	411	410	454	374
	<b>%</b>	15.5	12.8	13.1	13.7	14.8	13.4	15.9	14.9	17.4	18.8	16.6	18.8	19.2	16.5	15.7	15.8
<b>Criminal History Category V</b>	<b>N</b>	9	15	18	36	37	44	65	86	118	138	175	204	216	278	310	231
	<b>%</b>	6.3	7.7	7.0	8.2	7.1	7.8	9.2	9.7	11.8	11.2	11.5	10.1	10.1	11.2	10.7	9.7
<b>Criminal History Category VI</b>	<b>N</b>	14	23	57	70	96	106	110	188	200	213	262	319	300	346	398	336
	<b>%</b>	9.9	11.7	22.0	16.0	18.5	18.9	15.6	21.2	19.9	17.2	17.2	15.8	14.0	13.9	13.7	14.2

<sup>1</sup>The analysis involves a total of 19,500 cases, however, cases missing information for any specific analysis are excluded from that analysis. Total percentages for any specific year may not sum to exactly 100% due to rounding.

SOURCE: U.S. Sentencing Commission, 1992-2006 and Preliminary 3rd Quarter Datafiles, MONFY92-USSCFY06 and pre12\_OPAPY07.

**Table 5C**  
**Position of Sentence Relative to the Guideline Range of Retroactive Eligible Crack Cocaine Offenders<sup>1</sup>**

Fiscal Year	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	
<b>Within Range</b>	<b>N</b>	138	193	247	396	460	494	587	667	720	876	1052	1409	1468	1471	1769	1401
	<b>%</b>	93.9	92.8	93.2	89.4	87.3	85.5	82.2	76.2	73.5	74.0	72.2	70.6	69.4	59.7	61.1	59.1
<b>Above Range</b>	<b>N</b>	1	3	4	0	4	4	9	2	5	4	3	7	4	19	19	13
	<b>%</b>	0.7	1.4	1.5	0.0	0.8	0.7	1.3	0.2	0.5	0.3	0.2	0.4	0.2	0.8	0.7	0.6
<b>Substantial Assistance §5K1.1</b>	<b>N</b>	4	7	9	30	45	60	96	163	191	226	330	478	537	698	757	686
	<b>%</b>	2.7	3.4	3.4	6.8	8.5	10.4	13.5	18.6	19.5	19.1	22.6	23.9	25.4	28.3	26.2	28.9
<b>Otherwise Below Range</b>	<b>N</b>	4	5	5	17	18	20	22	43	64	78	73	103	107	276	349	271
	<b>%</b>	2.7	2.4	1.9	3.8	3.4	3.5	3.1	4.9	6.5	6.6	5.0	5.2	5.1	11.2	12.1	11.4

<sup>1</sup>The analysis involves a total of 19,500 cases, however, cases missing information for any specific analysis are excluded from that analysis. Total percentages for any specific year may not sum to exactly 100% due to rounding.

SOURCE: U.S. Sentencing Commission, 1992-2006 and Preliminary 3rd Quarter Datafiles, MONFY92-USSCFY06 and pre12\_OPAFY07.

## F. Extent of Possible Sentence Reduction and Projected Release Dates

As part of its analysis, ORD estimated the release date for each offender who appears to be eligible to seek a reduced sentence under 18 U.S.C. § 3582(c)(2) should the crack amendment be made retroactive, provided the documentation received for that offender's case was sufficient to perform this analysis.<sup>31</sup> This calculation provides an estimate of the number of offenders whose sentence would expire in each fiscal year, and for each federal judicial district, if the offender received retroactive application of the crack cocaine amendment to an extent consistent with the limitation of the reduction outlined in §1B1.10 of the guidelines.

### 1. Methodology for Determining Sentence Reduction and Release Dates

The methodology for this analysis is based on the Commission's Prison Impact Model, which has been in use in some form since the guidelines were first developed. This model is used to estimate the impact of proposed guideline amendments on newly sentenced offenders and to project into the future the impact of those amendments on bed space in the BOP. For this analysis, those offenders who appear to be eligible to seek a reduced sentence under 18 U.S.C. § 3582(c)(2) were hypothetically "resentenced" with the computer program as if the amended guideline had been in effect in the year in which they were sentenced. Their new sentences were then compared with their original (*i.e.*, actual) sentences to determine the average reduction in sentence length. A new release date for each offender was also calculated in order to determine the year in which each offender would be eligible for release if they were provided the full reduction in sentence provided by the amendment.

In performing this analysis, ORD was required to make some assumptions concerning the decisions that courts would make in resentencing the offenders. Of course, these assumptions may not hold in every case. Further, this analysis does not account for the applicability, if any, of the *Booker* decision to 18 U.S.C. § 3582(c)(2) sentence modifications. The analysis accounts only for the application of the two-level reduction provided by the crack cocaine amendment and does not assume any other reduction in the sentence, consistent with Application Note 2 of §1B1.10.<sup>32</sup> The assumptions are as follows:

- (1) each offender would be resentenced at the same point in the new guideline range as they were when originally sentenced;<sup>33</sup>

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<sup>31</sup> Of the 19,500 offenders who appear to be eligible for relief under the amendment, Commission records contained sufficient information to perform this analysis for 16,676 offenders.

<sup>32</sup> The analysis does not account for the applicability, if any, of the United States Supreme Court decision in *United States v. Booker*, to 18 U.S.C. § 3582(c)(2) sentence modifications.

<sup>33</sup> As discussed in Part II of this memorandum, courts are not required to reduce the sentence for any offender seeking such a reduction under the amendment, should it be made retroactive. Courts may also sentence an offender to any point in the new guideline range, and would not be

(2) offenders sentenced outside the applicable guideline range at the time they were sentenced would be resentenced to a new position outside the amended guideline range that is the same proportional distance above or below the amended guideline range as their original sentence was from the guideline range in effect at the original sentencing;

(3) offenders for whom the new estimated sentence is below an existing mandatory minimum, and where no safety valve or substantial assistance reduction was applied when the offender was originally sentenced, would be resentenced at the applicable mandatory minimum;<sup>34</sup>

(4) offenders classified as Career Offenders or Armed Career Criminals for whom the new estimated sentence is below the guideline minimums provided for those offenders would be resentenced in accordance with those guidelines;<sup>35</sup>

(5) the “mitigating role cap” on the base offense level of the guidelines<sup>36</sup> would be applied, if appropriate, based upon the new the BOL;

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required to impose a sentence at the same point in the new range as it did when first sentencing the offender. For offenders sentenced to a higher point in the new sentencing range than in the original range, the assumption discussed in the text above would overestimate the amount of the offender's sentence reduction. For offenders sentenced to a lower point in the new sentencing range than in the original range, the assumption discussed in the text above would underestimate the amount of the offender's sentence reduction.

<sup>34</sup> This assumption is likely to underestimate the amount of the sentence reduction and projected release dates for some offenders. Because of limitations in Commission data, the final sentence imposed on offenders who received a reduced sentence pursuant to Federal Rule of Criminal Procedure 35(b) for cooperating with the government after they were incarcerated is unknown. Some offenders who received a resentencing under Rule 35(b) in this manner may currently have a sentence that is below the otherwise applicable statutory mandatory minimum penalty, because the court was authorized to impose a sentence without regard to that mandatory minimum punishment. For these offenders, ORD's assumption that any resentencing pursuant to the crack cocaine amendment would be limited by the statutory mandatory minimum punishment would be inaccurate and, therefore, underestimate the magnitude of sentence reduction for some offenders. In such cases, the actual release dates for these offenders would be earlier than the projected release dates used in this analysis. There were 3,570 offenders who were resentenced in accordance with a statutory mandatory minimum term of imprisonment.

<sup>35</sup> USSG §§4B1.1 and 4B1.4. There were 125 offenders who were resentenced in accordance with those guidelines.

<sup>36</sup> USSG §2D1.1(a)(3). There were 41 offenders in the analysis who continued to meet the criteria for application of the mitigating role cap.

(6) the sentence for each offender would be reduced based on the maximum good conduct credit allowed by the BOP; and

(7) offenders would serve the lesser of the newly calculated sentence or their life expectancy.<sup>37</sup>

ORD also assumed that the effective date of the amendment if it were to be applied retroactively to these offenders would be November 1, 2007 (the date the amendment becomes effective for newly-sentenced offenders) and (2) that pursuant to 18 U.S.C. § 3582(c)(2) courts applying the amendment retroactively would adhere to the limitations of the extent of sentence reduction outlined in USSG §1B1.10.

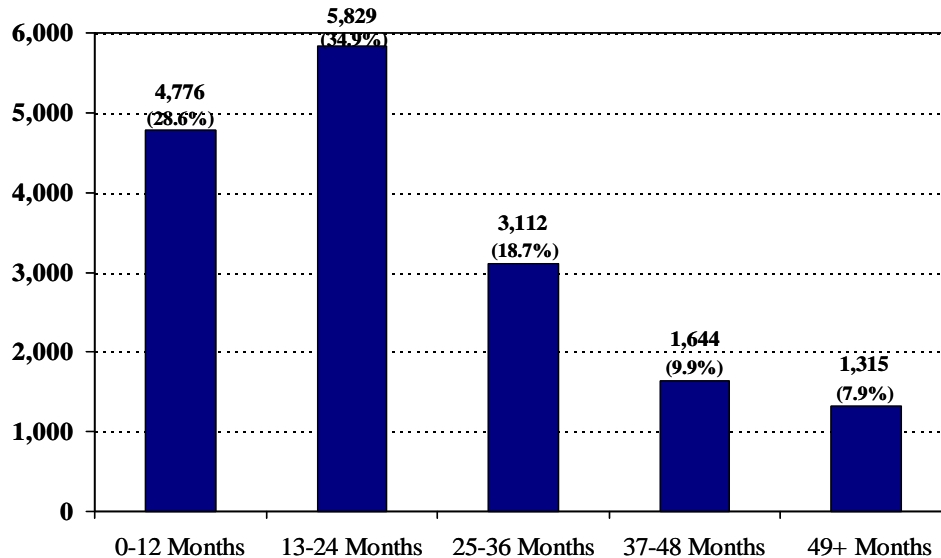
## 2. Estimated Sentence Reduction

Based on these assumptions, the average sentence reduction for those offenders who appear to be eligible to seek a reduced sentence would be 27 months (from 152 months to 125 months). Table 6 shows that 10,605 offenders (63.5 %) would receive a sentence reduction of 24 months or less, with 4,776 (28.6%) offenders receiving a sentence reduction of one year or less. Conversely, 1,315 offenders (7.9 %) would receive a sentence reduction of 49 months or more.

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<sup>37</sup> The Commission's Prison Impact Model incorporates actuarial tables based on race and gender to predict life expectancy. There are 365 offenders who are projected to die while incarcerated under their current sentence.

**Table 6**  
**Average Sentence Reduction for Retroactive Eligible Crack Cocaine Offenders**<sup>38</sup>



SOURCE: U.S. Sentencing Commission, 1992-2006 and Preliminary 3rd Quarter Datafiles, MONFY92-USSCFY06 and pre12\_OPAPFY07.

### 3. Projected Release Dates

Based on the assumptions discussed above, the offenders who appear to be eligible to seek a reduced sentence under 18 U.S.C. § 3582(c)(2) if the amendment were made retroactive are projected to be eligible for release at various times over a period of more than three decades. Approximately 3,804 offenders (22.8% of the offenders for whom the Commission had sufficient data to perform this analysis) are projected to be released at various points within the first year after November 1, 2007, if the amendment were made retroactive as of that date. Approximately 5,661 offenders (33.9%) are projected to remain incarcerated during the first five years, and 1,706 offenders (10.2%) are projected to remain incarcerated for ten or more years. ORD estimates that 321 offenders will be released who would otherwise die in prison if the amendment were not made retroactive.

Table 7 shows the projected release dates for these offenders by year and compares them to the estimated release dates for these same offenders if the crack cocaine amendment were not made retroactive. The most significant impact of the amendment is seen in the first year after the amendment becomes effective. In that year, 3,804 offenders would be released if the amendment were made retroactive and courts were to follow the assumptions regarding resentencing outlined above. If the amendment were not made retroactive, 1,284 of those offenders would be released, a difference of 2,520 offenders. In the second year, however, 2,218 of the offenders would be released if the amendment were made retroactive, but 1,995 of the offenders would be released if the amendment were not made retroactive.

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<sup>38</sup> Of the 19,500 offenders who appear to be eligible to seek a reduced sentence under the amendment, Commission records contained sufficient information to perform this analysis for 16,676.



**Table 7**  
**Projected Year of Release for Retroactive Eligible Crack Cocaine Offenders**<sup>39</sup>

<b>Release Date</b>	<b>IF AMENDMENT RETROACTIVE</b>		<b>IF AMENDMENT NOT RETROACTIVE</b>	
		<b>N</b>		<b>N</b>
<b>within 1 yr</b>		3,804		1,284
<b>within 2 yr</b>		2,118		1,995
<b>within 3 yr</b>		1,967		1,894
<b>within 4 yr</b>		1,773		1,833
<b>within 5 yr</b>		1,353		1,577
<b>within 6 yr +</b>		5,661		8,093

SOURCE: U.S. Sentencing Commission, 1992-2006 and Preliminary 3rd Quarter Datafiles, MONFY92-USSCFY06 and pre12\_OPAFY07.

Table 8 shows the projected release dates, by the year, circuit, and district in which each offender was sentenced, for all offenders who appear to be eligible to seek a reduced sentence should the amendment be made retroactive.

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<sup>39</sup> Of the 19,500 offenders who appear to be eligible to seek a reduced sentence under the amendment, Commission records contained sufficient information to perform this analysis for 16,676 offenders.

**Table 8**  
**POSSIBLE RELEASE TIMING FOR RETROACTIVE ELIGIBLE OFFENDERS BY DISTRICT**

CIRCUIT District	Eligible for Immediate Release 11-1-2007		Eligible for Release in Year One		Eligible for Release in Year Two		Eligible for Release in Year Three		Eligible for Release in Year Four		Eligible for Release in Year Five		Eligible for Release in Six or More Years		TOTAL
	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N
<b>TOTAL</b>	<b>1,585</b>	<b>9.5</b>	<b>2,219</b>	<b>13.3</b>	<b>2,118</b>	<b>12.7</b>	<b>1,967</b>	<b>11.8</b>	<b>1,773</b>	<b>10.6</b>	<b>1,353</b>	<b>8.1</b>	<b>5,661</b>	<b>33.9</b>	<b>16,676</b>
D.C. CIRCUIT	32	14.8	30	13.9	35	16.2	33	15.3	29	13.4	10	4.6	47	21.8	216
District of Columbia	32	14.8	30	13.9	35	16.2	33	15.3	29	13.4	10	4.6	47	21.8	216
FIRST CIRCUIT	34	8.1	79	18.8	79	18.8	55	13.1	49	11.6	33	7.8	92	21.9	421
Maine	4	5.4	13	17.6	20	27.0	5	6.8	5	6.8	7	9.5	20	27.0	74
Massachusetts	8	6.7	17	14.3	22	18.5	17	14.3	14	11.8	13	10.9	28	23.5	119
New Hampshire	8	12.3	19	29.2	16	24.6	8	12.3	5	7.7	2	3.1	7	10.8	65
Puerto Rico	4	4.6	17	19.3	16	18.2	13	14.8	12	13.6	7	8.0	19	21.6	88
Rhode Island	10	13.3	13	17.3	5	6.7	12	16.0	13	17.3	4	5.3	18	24.0	75
SECOND CIRCUIT	83	9.2	174	19.3	125	13.9	129	14.3	100	11.1	66	7.3	223	24.8	900
Connecticut	14	7.3	43	22.5	25	13.1	27	14.1	24	12.6	11	5.8	47	24.6	191
New York															
Eastern	16	13.6	35	29.7	18	15.3	11	9.3	6	5.1	4	3.4	28	23.7	118
Northern	12	9.0	21	15.7	21	15.7	28	20.9	20	14.9	6	4.5	26	19.4	134
Southern	29	11.0	37	14.1	33	12.6	33	12.6	27	10.3	24	9.1	80	30.4	263
Western	12	7.1	31	18.5	22	13.1	24	14.3	21	12.5	20	11.9	38	22.6	168
Vermont	0	0.0	7	26.9	6	23.1	6	23.1	2	7.7	1	3.9	4	15.4	26
THIRD CIRCUIT	58	7.9	109	14.9	127	17.4	93	12.7	71	9.7	70	9.6	203	27.8	731
Delaware	6	23.1	2	7.7	3	11.5	4	15.4	1	3.9	4	15.4	6	23.1	26
New Jersey	4	3.6	12	10.7	22	19.6	16	14.3	16	14.3	14	12.5	28	25.0	112
Pennsylvania															
Eastern	16	9.3	23	13.3	35	20.2	18	10.4	12	6.9	15	8.7	54	31.2	173
Middle	20	6.5	53	17.2	55	17.8	47	15.2	26	8.4	30	9.7	78	25.2	309
Western	12	11.3	17	16.0	11	10.4	8	7.6	15	14.2	7	6.6	36	34.0	106
Virgin Islands	0	0.0	2	40.0	1	20.0	0	0.0	1	20.0	0	0.0	1	20.0	5
FOURTH CIRCUIT	355	8.1	489	11.1	437	9.9	429	9.8	446	10.1	337	7.7	1,904	43.3	4,397
Maryland	21	9.6	28	12.7	23	10.5	28	12.7	22	10.0	10	4.6	88	40.0	220
North Carolina															
Eastern	30	7.3	36	8.7	48	11.6	36	8.7	43	10.4	33	8.0	188	45.4	414
Middle	51	13.3	38	9.9	39	10.2	39	10.2	41	10.7	26	6.8	150	39.1	384
Western	46	10.6	55	12.6	40	9.2	43	9.9	40	9.2	30	6.9	182	41.7	436
South Carolina	53	8.1	81	12.4	76	11.6	63	9.6	59	9.0	49	7.5	273	41.7	654
Virginia															
Eastern	48	4.0	103	8.5	87	7.2	96	8.0	118	9.8	99	8.2	657	54.4	1,208
Western	32	6.4	56	11.2	53	10.6	51	10.2	69	13.8	47	9.4	194	38.7	502
West Virginia															
Northern	37	10.8	56	16.3	45	13.1	44	12.8	37	10.8	26	7.6	98	28.6	343
Southern	37	15.7	36	15.3	26	11.0	29	12.3	17	7.2	17	7.2	74	31.4	236

**Table 8**  
**POSSIBLE RELEASE TIMING FOR RETROACTIVE ELIGIBLE OFFENDERS BY DISTRICT**

CIRCUIT District	Eligible for Immediate Release 11-1-2007		Eligible for Release in Year One		Eligible for Release in Year Two		Eligible for Release in Year Three		Eligible for Release in Year Four		Eligible for Release in Year Five		Eligible for Release in Six or More Years		TOTAL
	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N
<b>FIFTH CIRCUIT</b>	265	11.7	322	14.2	288	12.7	273	12.0	262	11.5	187	8.2	672	29.6	2,269
Louisiana															
Eastern	24	11.6	38	18.4	26	12.6	17	8.2	33	15.9	15	7.3	54	26.1	207
Middle	6	9.2	12	18.5	14	21.5	5	7.7	6	9.2	4	6.2	18	27.7	65
Western	20	9.1	21	9.6	25	11.4	20	9.1	19	8.7	24	11.0	90	41.1	219
Mississippi															
Northern	20	14.0	19	13.3	25	17.5	24	16.8	18	12.6	10	7.0	27	18.9	143
Southern	27	13.4	31	15.4	27	13.4	24	11.9	27	13.4	14	6.9	52	25.7	202
Texas															
Eastern	56	13.6	58	14.1	40	9.7	63	15.3	47	11.4	32	7.8	116	28.2	412
Northern	29	9.8	28	9.5	29	9.8	42	14.2	25	8.5	22	7.4	121	40.9	296
Southern	42	13.6	56	18.2	45	14.6	27	8.8	32	10.4	22	7.1	84	27.3	308
Western	41	9.8	59	14.2	57	13.7	51	12.2	55	13.2	44	10.6	110	26.4	417
<b>SIXTH CIRCUIT</b>	159	10.1	229	14.6	230	14.7	223	14.2	166	10.6	120	7.6	442	28.2	1,569
Kentucky															
Eastern	17	14.5	19	16.2	25	21.4	25	21.4	12	10.3	4	3.4	15	12.8	117
Western	3	3.4	12	13.6	12	13.6	11	12.5	16	18.2	12	13.6	22	25.0	88
Michigan															
Eastern	33	14.2	39	16.7	39	16.7	28	12.0	23	9.9	14	6.0	57	24.5	233
Western	14	8.4	20	12.0	18	10.8	21	12.6	18	10.8	17	10.2	59	35.3	167
Ohio															
Northern	48	14.5	59	17.8	56	16.9	51	15.4	28	8.4	26	7.8	64	19.3	332
Southern	13	6.5	24	12.0	18	9.0	27	13.5	28	14.0	13	6.5	77	38.5	200
Tennessee															
Eastern	19	7.4	31	12.1	39	15.2	35	13.6	23	9.0	20	7.8	90	35.0	257
Middle	3	7.1	5	11.9	5	11.9	5	11.9	2	4.8	1	2.4	21	50.0	42
Western	9	6.8	20	15.0	18	13.5	20	15.0	16	12.0	13	9.8	37	27.8	133
<b>SEVENTH CIRCUIT</b>	97	6.8	145	10.2	166	11.6	172	12.1	140	9.8	130	9.1	575	40.4	1,425
Illinois															
Central	13	5.9	32	14.6	18	8.2	19	8.7	24	11.0	21	9.6	92	42.0	219
Northern	9	3.0	27	9.1	34	11.5	49	16.6	27	9.1	33	11.2	117	39.5	296
Southern	27	8.0	25	7.4	30	8.9	43	12.7	34	10.1	29	8.6	150	44.4	338
Indiana															
Northern	21	8.1	38	14.6	52	19.9	38	14.6	25	9.6	20	7.7	67	25.7	261
Southern	8	10.7	4	5.3	8	10.7	9	12.0	8	10.7	5	6.7	33	44.0	75
Wisconsin															
Eastern	11	9.5	12	10.3	14	12.1	7	6.0	17	14.7	15	12.9	40	34.5	116
Western	8	6.7	7	5.8	10	8.3	7	5.8	5	4.2	7	5.8	76	63.3	120

**Table 8**  
**POSSIBLE RELEASE TIMING FOR RETROACTIVE ELIGIBLE OFFENDERS BY DISTRICT**

CIRCUIT District	Eligible for Immediate Release 11-1-2007		Eligible for Release in Year One		Eligible for Release in Year Two		Eligible for Release in Year Three		Eligible for Release in Year Four		Eligible for Release in Year Five		Eligible for Release in Six or More Years		TOTAL
	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N
<b>EIGHTH CIRCUIT</b>	119	8.5	191	13.7	194	13.9	176	12.6	144	10.3	134	9.6	441	31.5	1,399
Arkansas															
Eastern	16	14.3	14	12.5	11	9.8	17	15.2	12	10.7	13	11.6	29	25.9	112
Western	3	5.9	9	17.7	13	25.5	9	17.7	3	5.9	6	11.8	8	15.7	51
Iowa															
Northern	6	5.8	11	10.6	14	13.5	11	10.6	8	7.7	7	6.7	47	45.2	104
Southern	5	4.5	8	7.2	13	11.7	9	8.1	7	6.3	8	7.2	61	55.0	111
Minnesota	20	13.3	27	17.9	22	14.6	23	15.2	17	11.3	12	8.0	30	19.9	151
Missouri															
Eastern	38	9.1	72	17.1	72	17.1	69	16.4	56	13.3	40	9.5	73	17.4	420
Western	26	13.1	27	13.6	26	13.1	17	8.5	21	10.6	16	8.0	66	33.2	199
Nebraska	5	2.1	22	9.1	22	9.1	21	8.6	20	8.2	31	12.8	122	50.2	243
North Dakota	0	0.0	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1
South Dakota	0	0.0	0	0.0	1	14.3	0	0.0	0	0.0	1	14.3	5	71.4	7
<b>NINTH CIRCUIT</b>	40	8.3	58	12.1	76	15.8	71	14.8	58	12.1	42	8.7	136	28.3	481
Alaska	3	7.7	3	7.7	5	12.8	5	12.8	5	12.8	2	5.1	16	41.0	39
Arizona	1	5.6	5	27.8	3	16.7	1	5.6	1	5.6	1	5.6	6	33.3	18
California															
Central	4	4.4	5	5.6	15	16.7	15	16.7	10	11.1	9	10.0	32	35.6	90
Eastern	4	4.3	10	10.8	14	15.1	21	22.6	8	8.6	6	6.5	30	32.3	93
Northern	6	12.5	7	14.6	9	18.8	10	20.8	8	16.7	4	8.3	4	8.3	48
Southern	2	13.3	6	40.0	0	0.0	1	6.7	2	13.3	0	0.0	4	26.7	15
Guam	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Hawaii	0	0.0	8	42.1	4	21.1	1	5.3	1	5.3	1	5.3	4	21.1	19
Idaho	0	0.0	1	33.3	1	33.3	0	0.0	0	0.0	0	0.0	1	33.3	3
Montana	0	0.0	1	25.0	0	0.0	0	0.0	0	0.0	2	50.0	1	25.0	4
Nevada	7	11.9	4	6.8	11	18.6	6	10.2	8	13.6	7	11.9	16	27.1	59
Northern Mariana Islands	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Oregon	2	13.3	3	20.0	4	26.7	2	13.3	1	6.7	0	0.0	3	20.0	15
Washington															
Eastern	6	20.7	2	6.9	6	20.7	3	10.3	2	6.9	4	13.8	6	20.7	29
Western	5	10.2	3	6.1	4	8.2	6	12.2	12	24.5	6	12.2	13	26.5	49

**Table 8**  
**POSSIBLE RELEASE TIMING FOR RETROACTIVE ELIGIBLE OFFENDERS BY CIRCUIT**

CIRCUIT	Eligible for Immediate Release 11-1-2007		Eligible for Release in Year One		Eligible for Release in Year Two		Eligible for Release in Year Three		Eligible for Release in Year Four		Eligible for Release in Year Five		Eligible for Release in Six or More Years		TOTAL
	N	%	N	%	N	%	N	%	N	%	N	%	N	%	
District															
TENTH CIRCUIT	52	11.1	71	15.2	65	13.9	47	10.0	60	12.8	26	5.6	147	31.4	468
Colorado	12	12.0	12	12.0	16	16.0	17	17.0	8	8.0	4	4.0	31	31.0	100
Kansas	20	11.8	40	23.7	18	10.7	19	11.2	24	14.2	12	7.1	36	21.3	169
New Mexico	4	6.6	9	14.8	12	19.7	4	6.6	10	16.4	3	4.9	19	31.2	61
Oklahoma															
Eastern	1	7.7	0	0.0	1	7.7	1	7.7	1	7.7	1	7.7	8	61.5	13
Northern	2	5.9	4	11.8	3	8.8	1	2.9	4	11.8	2	5.9	18	52.9	34
Western	10	13.7	5	6.9	12	16.4	4	5.5	10	13.7	3	4.1	29	39.7	73
Utah	2	15.4	1	7.7	3	23.1	1	7.7	3	23.1	1	7.7	2	15.4	13
Wyoming	1	20.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	4	80.0	5
ELEVENTH CIRCUIT	291	12.1	322	13.4	296	12.3	266	11.1	248	10.3	198	8.3	779	32.5	2,400
Alabama															
Middle	14	13.2	16	15.1	12	11.3	12	11.3	10	9.4	5	4.7	37	34.9	106
Northern	25	15.2	17	10.3	26	15.8	18	10.9	14	8.5	13	7.9	52	31.5	165
Southern	37	14.0	39	14.7	20	7.6	20	7.6	23	8.7	26	9.8	100	37.7	265
Florida															
Middle	76	11.1	97	14.2	91	13.3	78	11.4	72	10.6	54	7.9	214	31.4	682
Northern	25	9.6	35	13.5	15	5.8	19	7.3	21	8.1	14	5.4	131	50.4	260
Southern	33	11.2	36	12.2	42	14.2	41	13.9	42	14.2	20	6.8	82	27.7	296
Georgia															
Middle	35	12.9	41	15.1	50	18.5	35	12.9	28	10.3	23	8.5	59	21.8	271
Northern	10	9.3	13	12.0	10	9.3	13	12.0	14	13.0	14	13.0	34	31.5	108
Southern	36	14.6	28	11.3	30	12.2	30	12.2	24	9.7	29	11.7	70	28.3	247

Of the 19,500 offenders identified as eligible for relief under the amendment, Commission records contained sufficient information to perform this analysis for 16,676.

Estimated release dates are determined using the Commission's prison and sentencing impact model which applies proposed guideline changes to affected offenders and re-sentences these offenders in a proportional manner. Under the model, affected offenders: 1) receive a new offense level; 2) have a new sentencing range determined (using the ranges from the Sentencing Table); 3) are resentenced to the same relative position within (or outside) the original guideline range (e.g., an offender currently sentenced at the midpoint of the original guideline range then will be sentenced to the midpoint of the new guideline range); and, 4) receive statutory and guideline trumps when applicable. Other assumptions incorporated into the model include: 1) offenders earn the maximum allowable good-time (currently 54 days per year served for imposed sentences greater than one year but not life imprisonment); and 2) offenders serve the lesser of A) the sentence imposed less the maximum allowable good conduct time, or B) their estimated remaining life expectancy, based upon an actuary table incorporating age, race, and sex

SOURCE: U.S. Sentencing Commission, 1992-2006 and Preliminary 3rd Quarter Datafiles, MONFY92-USSCFY06 and pre12\_OPAPFY07.