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of the  
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Honorable Paul Cassell, Chair

November 2, 2007

Honorable Ricardo H. Hinojosa, Chair  
United States Sentencing Commission  
One Columbus Circle, N.E.  
Suite 2-500, South Lobby  
Washington, D.C. 20002-8002  
Attention: Public Affairs-Retroactivity Public Comment

Re: Comments on Retroactivity of Crack Cocaine Amendments

Dear Chairman Hinojosa:

I am writing on behalf of the Judicial Conference's Criminal Law Committee to recommend to the Sentencing Commission that its amendment lowering cocaine base (i.e., "crack" cocaine) penalties apply retroactively. While concerned about the impact that retroactivity may have on the safety of communities, a majority of the Committee believes that the Commission's precedents, and a general sense of fairness, dictate retroactive application. The Committee also believes that the burden to the courts and probation officers associated with resentencings is not a sufficiently countervailing consideration. The Committee's recommendation rests on the hope that the Commission will implement procedures to reduce the administrative burden on the federal judiciary associated with the resentencings that would attend retroactive application. The Committee is prepared to help develop and implement such procedures and respectfully suggests that the Commission do what it can to put them in place before applying its amendment retroactively.

### The Judicial Conference Position on Crack Penalties

The Judicial Conference has previously expressed its view that the disparity between penalties for powder cocaine and crack cocaine is not supportable and harms public confidence in the federal judiciary.<sup>1</sup> A bit of background about that decision may be in order.

In June 2006, the Criminal Law Committee discussed the fact that 100 times as much powder cocaine as crack cocaine is needed to trigger the same five-year and ten-year mandatory minimum penalties. Accordingly, the sentencing guideline penalties for crack cocaine offenses are 1.3 to 8.3 times longer than powder sentences, depending on the amount of cocaine involved and the specific characteristics of the offender.<sup>2</sup> In 2000, the average prison sentence for trafficking in powder cocaine was 74 months, while the average sentence for trafficking in crack was 117 months. *See id.* at 21.

Ever since Congress passed the Anti-Drug Abuse Act of 1986,<sup>3</sup> the law that established the 100-to-1 ratio of penalties, controversy has swirled around it. As you well know, the Sentencing Commission has condemned the crack-powder disparity on three different occasions: in 1995, 1997, and in 2002.<sup>4</sup> When, in 1994, Congress directed the Commission to issue a report and recommendations on cocaine and federal sentencing policy, it proposed amendments to the sentencing guidelines that would have adjusted the guideline quantity ratio so that the base offense levels would be the same for both powder cocaine and crack cocaine offenses, set the mandatory five-year minimums for both crack and powder cocaine at 500 grams, and eliminated the unique five-year mandatory minimum for simple possession of more than five grams of crack cocaine.

After its 1995 guideline amendments were rejected, the Commission issued a 1997 report to Congress that did not propose amendments but did suggest the thresholds to trigger a five-year mandatory minimum should be raised for crack and reduced for powder cocaine. More recently, the Commission released a 2002 report on cocaine and federal sentencing policy. The Commission found that—

- Current penalties exaggerate the relative harmfulness of crack cocaine.
- Current penalties sweep too broadly and apply most often to lower level offenders.
- Current quantity-based penalties overstate the seriousness of most crack cocaine offenses and fail to provide adequate proportionality.
- The severity of the current penalties mostly impacts minorities.

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<sup>1</sup> JCUS-SEP 06, p. 18.

<sup>2</sup> *See* U.S. Department of Justice, *Federal Cocaine Offenses: An Analysis of Crack and Powder Penalties* 19 (2002), available at <http://www.usdoj.gov/olp/cocaine.pdf>.

<sup>3</sup> Pub. L. 99–570, 100 Stat. 3207 (1986).

<sup>4</sup> *See* U.S. Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* (February 1995); U.S. Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* (April 1997); U.S. Sentencing Commission, *Report to the Congress: Cocaine and Federal Sentencing Policy* (May 2002).

Accordingly, the Sentencing Commission unanimously and firmly concluded that congressional objectives can be achieved more effectively by decreasing the 100-to-1 drug quantity ratio.

Given the possibility of real disparity in cocaine sentences and the corrosive effect of perceived disparity on public confidence in the courts, the Criminal Law Committee determined that it was appropriate to recommend that the Judicial Conference oppose the existing sentencing difference between crack and powder cocaine sentences and support the reduction of the difference. Accordingly, the Criminal Law Committee made the following recommendation:

Recommendation: That the Judicial Conference oppose the existing sentencing difference between crack and powder cocaine sentences and support the reduction of that difference.

At its September 2006 meeting, the Judicial Conference endorsed that recommendation.<sup>5</sup>

#### The Criminal Law Committee Favors Retroactivity

In light of this Judicial Conference position, the Criminal Law Committee believes that the logical thing to do with the crack amendment is to apply it retroactively. In its report accompanying the amendment, the Commission explained that the amendment was based on its long-held position that “the 100-to-1 drug quantity ratio [for crack cocaine] significantly undermines the various congressional objectives set forth in the Sentencing Reform Act.”<sup>6</sup> Given that this is the rationale for the amendment, the amendment equally applies to offenders who were sentenced in the past as well as offenders who will be sentenced in the future. Regardless of the date on which they were sentenced, they were sentenced under a guideline that “undermined” Congress’ sentencing objectives. If the guideline is faulty and has been fixed for future cases, then we also need to undo past errors as well. Put another way, a crack offender’s sentence should not turn on the happenstance of the date on which he or she was sentenced. Equity and fundamental fairness suggest that a crack offender who committed a crime in 2006 should be treated the same as a crack offender who committed exactly the same crime in 2008.

Retroactive application is also suggested by the legislative history underlying the Commission’s retroactivity power. As the *Guidelines Manual* recounts, the Commission does not generally make guideline changes retroactive if they reduce the maximum of the guideline range by only six months. The Commission has explained why:

This [six-month] criterion is in accord with the legislative history of 28 U.S.C. § 994(u) . . . which states: “It should be noted that the [Senate Judiciary] Committee does not expect that the Commission will recommend adjusting existing sentences under the provision when guidelines are simply refined in a way that might cause *isolated instances* of existing sentences falling above the [amended] guidelines or

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<sup>5</sup> JCUS-SEP 06, p. 18.

<sup>6</sup> See U.S. Sentencing Commission, *Report to Congress: Cocaine and Federal Sentencing Policy* 8 (2007).

when there is only a *minor downward* adjustment in the guidelines. The Committee does not believe the courts should be burdened with adjustments in these cases.<sup>7</sup>

Of course, the crack amendment does not create mere “isolated instances” of sentences now falling above the amended guideline, but rather many thousands of sentences. This legislative history suggests to us that Congress would want the courts to take the time necessary to determine what is an appropriate sentence in light of the new guideline.

One possible countervailing consideration to this conclusion is the administrative burden upon the courts that would be associated with resentencing crack offenders whose sentences have previously been determined. The Criminal Law Committee believes that, in evaluating such considerations, an extremely serious administrative problem would have to exist to justify *not* applying the amendment retroactively. After all, some offenders are spending several additional years in prison because of the now-disavowed guideline level. Presumably this is why the Commission has frequently made its amendments to drug quantity guidelines retroactive in the past rather than have an offender spend substantial time in prison on a discredited guideline. More important, we believe that steps can be taken to reduce the amount of court time that will be required to sentence crack offenders who qualify for the reduction. We outline some steps that we think might be useful below and strongly urge the Commission to put procedures such as this in place.

Public safety is also potentially implicated in the release of crack offenders. It is important to underscore, however, that *no* offender would be eligible for release without judicial approval. All retroactive application of the amendment would do is give judges discretion to determine whether to make a downward adjustment in an offender’s sentence. We believe that judges can adequately take public safety into account when resentencing offenders. We outline some steps that judges might take to ensure adequate supervision of newly-released offenders below. But the main point remains that judicial flexibility is consistent with the long-articulated view of the Judicial Conference that sentencing guidelines should not deprive a judge of the discretion to reach an appropriate sentence.<sup>8</sup> Judges have had to sentence more than 19,000 offenders with the advice of a sentencing guideline that the Sentencing Commission has now determined is not appropriate. Fairness requires that judges be given the opportunity – if they so choose – to resentence these offenders.

#### Procedures to Reduce Burden on the Courts

While supporting retroactivity, the Committee has concerns about the impact on the workload of the courts and probation officers and the ability of officials to ensure the safe reentry of inmates who may receive a reduction in their sentences. As the estimates prepared by the Commission’s staff show, more than 19,000 inmates may be impacted by this amendment.<sup>9</sup> To

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<sup>7</sup> U.S.S.G., § 1B1.10, Background (citing S. Rep. 225, 98<sup>th</sup> Cong., 1<sup>st</sup> Sess. 180 (1983) (emphasis added)).

<sup>8</sup> JCUS-MAR 93, p. 13, JCUS-SEP 95, p. 47.

<sup>9</sup> See Memorandum of U.S. Sentencing Commission, *Analysis of the Impact of the Crack Cocaine Amendment If Made Retroactive*, October 3, 2007.

apply the two-level downward adjustment requires judicial action to change the original sentencing judgment. That said, a defendant's presence is *not* required for a reduction of sentence under 18 U.S.C. § 3582(c), so there should be no need to transport thousands of prisoners across the country for the mere application of the adjustment. Instead, a resentencing could be a simple, clerical procedure. If this approach were followed, the costs of resentencing eligible inmates would be minimal.

It may not be possible to do things so simply, however. Many of the offenders who could take advantage of the two-level reduction were sentenced before the Supreme Court's decision in *U.S. v. Booker*.<sup>10</sup> The issue then arises as to whether they can argue at the "resentencing" that they should receive not only the two-level adjustment but an even lower sentence – a variance – because the § 3553(a) factors that are now in play were not in play when they were originally sentenced. The only decisions to speak to this issue have held that a defendant *can* raise new *Booker* issues at resentencing proceedings for modification of a sentence based on the lowering of a guideline range by the Commission.<sup>11</sup> Thus, it is possible that defense attorneys may be required to consider whether to file *Booker* motions for their clients in these cases and, if they do file, courts may be required to spend time considering them. A court considering a *Booker* variance issue may also wish to transport the defendant to the resentencing hearing as a matter of fairness to that defendant, although no court would be required to transport a defendant to the hearing.

To streamline the resentencing procedures as much as possible, the Commission should issue a policy statement in which it indicates that the only subject that is under consideration in reviewing an offender's motion for a sentence reduction under the retroactive amendment is the change in the crack guidelines. The authority for the Commission to do this comes from 18 U.S.C. 3582(c)(2), under which a court is empowered to lower a sentence for retroactive guideline changes, but must do so in accord with the Commission's policy statements:

[I]n 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), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, 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.*

In light of the italicized language, we believe that the Sentencing Commission has authority to narrow the range of issues considered at a resentencing hearing through a policy statement. *United States v. Hicks*,<sup>12</sup> – the one appellate case that holds that *Booker* applies to resentencings on

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<sup>10</sup> 543 U.S. 220 (2005).

<sup>11</sup> *United States v. Hicks*, 472 F.3d 1167 (9<sup>th</sup> Cir. 2007); *United States v. Forty Estremera*, 498 F.Supp.2d 468 (D. Puerto Rico 2007); *United States v. Jones*, 2007 WL 2703122 (D. Kans. Sept. 17, 2007).

<sup>12</sup> 472 F.3d 1167, 1171 (9<sup>th</sup> Cir. 2007).

retroactive guideline changes – even recognizes this possibility. *Hicks* notes that, in that case, there was no policy statement limiting the factors to be considered at the resentencing hearing.<sup>13</sup> It is important to note that *Hicks* goes on to say that, “Finally, under *Booker*, to the extent that the policy statements would have the effect of making the guidelines mandatory (even in the restricted context of § 3582(c)(2)), they must be void.”<sup>14</sup> This makes clear that, in the wake of *Booker*, all resentencings now have to be done under an advisory guidelines system. But that conclusion still leaves open the question of what factors the court should consider in resentencing a defendant. I believe that the Commission could, by policy statement, specify a very narrow range of issues for resentencing. A possible policy statement would be:

In resentencing a defendant in light of this retroactive guideline change, the court should only consider the change in the crack guideline made by the Commission and whether this change now suggests a lower sentence in light of the factors set forth in 18 U.S.C. § 3553(a) to the extent that they are applicable.

Any policy statement should also expressly address the fact that such resentencings do not require the presence of the defendant or the preparation of a new presentence report, and that the reduction in sentence, if warranted, can be recorded in a simple order. The Commission and the Criminal Law Committee should work together to develop a one-page form that a sentencing judge could use to reduce an eligible offender’s sentence. While judges would not be required to use this form, it would be available for those who wanted to move expeditiously.

Also, the Sentencing Commission, in cooperation with the Criminal Law Committee and the Bureau of Prisons (BOP), should send notice as swiftly as practicable to judges who have sentenced offenders who would be eligible for resentencing. That will permit judges to determine what kinds of procedures they would like to put in place to handle resentencings and to request modified presentence reports if they believe that such a report is necessary. The Sentencing Commission should also work with the Criminal Law Committee to call to the attention of sentencing judges their clear authority<sup>15</sup> not to transport inmates and recommend that no inmate be transported unless there were very significant reasons for doing so.

#### Impact on Probation Officers – Presentence Reports

We have also consulted with probation officers who might be affected by the change. The Probation and Pretrial Services Chiefs Advisory Group (CAG) – the body responsible for providing the views of probation officers to the Criminal Law Committee – has recommended that the amendment be applied retroactively. The CAG believes that probation officers can absorb the influx of work that will be associated with retroactive application. Because we may be uniquely situated to provide information on probation costs, we wanted to pass along our information on the subject.

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<sup>13</sup> *Id.* (“none of these policy statements [presented by the government] is applicable to the question of whether, after *Booker*, a court can go below the Guidelines’ minimum when modifying a sentence under § 3582(c)(2).”).

<sup>14</sup> *Id.*

<sup>15</sup> *See* Fed. R. Crim. P. 43(b)(4) and U.S.C. § 3582(c).

Determining the role of the probation officer at resentencing requires some guesswork. If full resentencing hearings are expected, will courts also expect updated presentence reports, or at least updated guideline calculations? If *Booker* and § 3553(a) factors will be considered, will the court want the officer to reinterview the offender to identify what changes in circumstances have occurred since the original sentence was imposed? To what degree, if any, should the probation offices be given workload credit for their efforts on these cases?

While these questions will remain unanswered for now, the Criminal Law Committee staff have developed several scenarios that might unfold and the table below shows the estimated costs associated with each option:

1. In all cases, the courts will order full resentencing hearings and require a full updated report (including reinterviews).
2. In all cases, the courts will require an updated/modified report, but limited in scope (e.g., updating guideline calculations, contact BOP officials to identify institutional conduct and achievements while imprisoned).
3. The courts will order full reports for pre-*Booker* cases, and no reports for post-*Booker* cases.<sup>16</sup>
4. The courts will order modified reports for pre-*Booker* cases, and no reports for post-*Booker* cases.
5. The final scenario assumes that the court will not require the officer's assistance or only minimal assistance, and workload would be negligible.

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<sup>16</sup>According to the Commission's data, roughly 12,364 of the 19,500 eligible offenders were sentenced before the *Booker* decision was issued.

| <b>Workload Impact for Presentence Investigations and Reports</b> |               |                         |                          |
|---|---------------|-------------------------|--------------------------|
|   | <b>Number</b> | <b>AWU<sup>17</sup></b> | <b>Cost<sup>18</sup></b> |
| <b>Full PSR</b>   | 19,500        | 385.57                  | \$21,707,591             |
| <b>Modified/Updated PSR</b>                                       | 19,500        | 215.69                  | \$12,143,347             |
| <b>Pre-Booker Full PSR</b>  | 12,364        | 244.47                  | \$13,763,661             |
| <b>Pre-Booker Modified PSR</b>                                    | 12,364        | 135.75                  | \$7,642,725              |
| <b>No Update</b>  | 19,500        | 0                       | \$0                      |

In addition to the possible presentence workload, there will certainly be an increase in the supervision workload. Based on the Commission's analysis, the average sentence reduction would be 27 months, and "[t]he 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."<sup>19</sup> The Commission's estimate is over and above the number of inmates regularly received for supervision. To absorb that surge in new cases, 94.72 additional AWUs would be needed. But, as with the presentence workload, not all districts will be equally impacted. Thirty-eight districts will need at least one additional AWU and 12 districts will need over two AWUs, while the remaining districts would require less than one AWU to absorb the increase in workload. The increase in AWUs will cost \$5,332,736 during the first year.

The Sentencing Commission should understand that Congress has already appropriated funds sufficient to cover this incremental increase in AWUs needed to supervise crack offenders. For this reason, the Criminal Law Committee agrees with the Chiefs Advisory Group that the increased workload to the probation system does not provide an adequate justification for failing to make the amendment retroactive.

#### Impact on Probation Officers – Supervision to Ensure Public Safety

Of particular concern to the Committee is the safe and successful reentry of inmates who receive reduced sentences. The offenders who would be potentially eligible for early release cover a wide spectrum in terms of risk of reoffending. Of course, sentencing judges will look at these risks when considering whether to resentencing an offender under the retroactive guideline. But it is notable that the Commission's analysis suggests that some of the offenders eligible for a reduced

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<sup>17</sup> Under the workload formula, an Authorized Work Unit (AWU) is the equivalent of one staff member.

<sup>18</sup> The estimated cost is derived by multiplying the number of staff required, according to the work measurement formula, by the National Average Salary for probation officers (\$56,300).

<sup>19</sup> See Memorandum of U.S. Sentencing Commission, *Analysis of the Impact of the Crack Cocaine Amendment If Made Retroactive*, October 3, 2007.

sentence may pose greater risks to the community than average offenders. While 54 percent of the general offender population fall into Criminal History Categories II through VI, the Commission's data shows that 78 percent of the those eligible for release fall into these higher-risk categories. Similarly, while 16 percent of the general drug offender population possessed or used a weapon in connection with offense, the Commission's data shows that 35.6 percent of the eligible population did so.<sup>20</sup> In any event, it is clear that careful release planning is essential to the safe and successful reentry of these inmates so as to avoid victimizing the communities to which they will return.

Probation officers will need time to work with the BOP and staff in the Residential Reentry Centers (RRCs) to identify and arrange for appropriate housing, employment, and transitional services. Earlier this week, the Criminal Law Committee asked the Office of Probation and Pretrial Services to begin to discuss possible release procedures with staff from the BOP. Primary attention is being given to identifying those inmates who would be eligible for immediate release. The Committee suggests that, as soon as practicable, notice be sent to the chief probation officer in the district in which the offender would potentially be resentenced along with a projected release date if the sentencing judge determines to make a two-level downward adjustment. This will give probation officers an opportunity to begin quickly any pre-release planning that may be necessary.

If the Commission decides to make the amendment retroactive, a short term problem will occur. Because the Commission's retroactivity decision will be effective on one particular date, there may be a one-time "surge" of offenders being released in a short period of time. The Chiefs Advisory Group considered whether it would be useful if the Commission delayed the effect of its retroactivity decision in order to prepare for the surge. CAG concluded, however, that this might actually exacerbate the problem by allowing an even larger backload of cases to develop. CAG therefore recommended to the Criminal Law Committee – and we agree – that no delay in the effective date is appropriate.

While the surge is problematic, some amelioration will inevitably occur. Before any resentencing can take place, a motion for resentencing will have to be filed either by defense counsel or the offender. Obviously, this may stagger the date on which motions for resentencing are received by sentencing judges. A sentencing judge will then have to provide an opportunity for the Justice Department to respond to the motion.<sup>21</sup> The sentencing judge would then need to act to approve any sentence reduction. All of these events will take some varying amount of time and could help dissipate a surge problem. If, in spite of this, a particular judicial district still faced a short term problem with a large number of releases on a single date, nothing would prevent judges in that district from delaying action on the resentencing motions. For example, judges might sign a certain number of amended judgments each week after determining an appropriate prioritization (e.g., signing amended judgments for the offenders based on how much time they have served).

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<sup>20</sup> See U.S. Sentencing Commission, *Sourcebook of Federal Sentencing Statistics*, Table 39, 2006; Memorandum of U.S. Sentencing Commission, *Analysis of the Impact of the Crack Cocaine Amendment If Made Retroactive*, October 3, 2007.

<sup>21</sup> We understand that the Justice Department is presenting to the Commission its own views on retroactivity, including any workload problems that prosecutors may face as a result of retroactivity.

At the direction of the Criminal Law Committee, the Office of Probation and Pretrial Services is already considering how to handle any potential surge. In some situations, it may be necessary for probation officers to seek a modification of the conditions of supervised release already in place in the sentencing judgments, to include interim strategies such as halfway house placement or home confinement. This would avoid simply dumping offenders back on the street and would give officers more time to conduct a comprehensive assessment and ensure that any identified risks or needs are appropriately addressed before an offender is completely released from confinement. If a judge wished to shorten a prison sentence and simultaneously modify conditions of release to ensure public safety, a hearing with the defendant present is arguably required under Fed. R. Crim. P. 32.1(c). In many cases, however, offenders would presumably consent to such modifications. Moreover, Rule 32.1(c)(2)(B) does not require a hearing where “the relief sought is favorable to the person and does not extend the term of probation or of supervised release.” In light of this language, we believe that no hearing would be required if a judge determined to shorten a term of imprisonment and substitute a less onerous condition of confinement in its place. For example, a judge who had an offender who was eligible for a six-month reduction in his prison sentence that would produce an immediate release could, without a hearing, grant the six-month reduction and add a new condition of supervised release of three months in a halfway house or on home confinement. Such a change would be favorable to the offender and therefore not trigger any need for a hearing.

All of this suggests that retroactive application of the crack amendment is something that will pose potential challenges to the supervision system. But it is the judgment of a majority of the Criminal Law Committee that these challenges do not outweigh the fairness arguments in favor of retroactivity.

#### Conclusion

The Criminal Law Committee fully understands that the decision whether to make the crack amendment retroactive rests with the Sentencing Commission. In light of this fact, the Committee is very appreciative of the Commission’s request that we present our views. The Criminal Law Committee recommends that the amendment be made retroactive. At the same time, however, the Committee also strongly recommends that procedures be put in place to reduce administrative burdens associated with retroactivity and ensure adequate supervision of the offenders who are released.

If the Committee can provide any further additional information, please feel free to contact me at (801) 524-3005 or Judge Reggie B. Walton at (202) 354-3290. Judge Walton looks forward to testifying at the Commission’s upcoming hearing on the subject.

Sincerely



Paul Cassell

P.S. On a personal note, this is my last day as a federal district court judge, as I am returning to the S.J. Quinney College of Law at the University of Utah to teach. I very much appreciate all the consideration you have extended to the Criminal Law Committee and to me personally over the last two years. I am certain that my successor will want to continue the very close working relationship that the Criminal Law Committee and the Sentencing Commission have developed.