

November 1, 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

Re: Crack and Criminal History Guideline Retroactivity

Dear Judge Hinojosa:

We write on behalf of Families Against Mandatory Minimums (FAMM) to urge that the Commission include the amendments to the crack and criminal history guidelines among those amendments made retroactive in § 1B1.10(c) of the guidelines.

***Crack cocaine: Amendment 706***

We believe that besides meeting the criteria set out by the Commission for evaluating whether to make a guideline change retroactive, retroactivity of this guideline is required by justice. It is, above all, simply and sufficiently the right thing to do.

Section 1B1.10 of the guidelines explains that, when determining retroactivity, the Commission considers “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>1</sup> We believe that each criterion is met in the case of the crack amendment.

Purpose:

The Commission promulgated the amendment to the crack guideline because the 100-to-1 drug quantity ratio between crack cocaine and powder cocaine has created problems that “are so urgent and compelling” that an interim measure was deemed necessary. The Commission expressed its hope that Congress would act to address the disparity comprehensively.<sup>2</sup> In its latest report, the Commission found that the current penalties for crack cocaine overstate the harm of crack compared to powder cocaine, are too broad and apply mostly to low-level offenders; primarily affect African American defendants; overstate the seriousness of most crack offenses and fail to provide adequate

<sup>1</sup> U.S.S.G. § 1B1.10, Background.

<sup>2</sup> United States Sentencing Comm’n., Amendments to the Sentencing Guidelines, 66 (May 11, 2007), available at <http://www.uscc.gov/2007guid/may2007rf.pdf>.

proportionality.<sup>3</sup> The Commission has repeatedly criticized the 100-to-1 ratio since its 1995 report on Cocaine and Federal Sentencing Policy because of the gravity of the problems caused by the harshness of the crack cocaine sentencing structure.<sup>4</sup>

The conclusions that the Commission reached were based on lessons drawn from the prison terms imposed on tens of thousands of people sentenced for crack cocaine offenses since the inception of the sentencing guidelines. It would be a cruel injustice to base the reduction on an assessment that they have suffered under an unjust structure and then deny the benefit of the amendment to the very people whose experiences you relied on and now decry. The purposes of this amendment are noble and are equally valid for people serving time as for those sentenced after November 1.

Magnitude of change:

The Commission predicts that the amendment to the crack guideline will affect 19,500 people, resulting in an estimated average reduction of 27 months,<sup>5</sup> well above the six-month threshold reduction generally required for consideration of retroactivity.<sup>6</sup>

The large number of prisoners who would benefit from retroactivity of a guideline amendment that the Commission concedes is only a partial fix to the severe problems with the current crack guidelines, creates a moral imperative for the Commission to act. Fully 1,500 of them would be immediately eligible for release and we cannot think of a way to explain to them why they would not deserve the same treatment as those who enter prison after November 1, 2007.

Application:

Although the Commission may have practical concerns about the application of retroactivity to a large number of defendants, the concerns can be addressed.

We understand that one concern was that the sheer number of cases would unduly burden the courts and interfere with the administration of justice. The Criminal Law Committee of the United States Judicial Conference considered this issue when formulating its position on retroactivity. As the policy making body of the federal judiciary, the Judicial Conference is best suited to gauge whether retroactivity's burdens would outweigh other considerations. They have resolved in favor of retroactivity and made certain recommendations for its implementation. Any concerns the Commission

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<sup>3</sup> United States Sentencing Comm'n, Report to Congress, COCAINE AND FEDERAL SENTENCING POLICY, 8, (May 2007).

<sup>4</sup> United States Sentencing Comm'n, Report to Congress, COCAINE AND FEDERAL SENTENCING POLICY, 196 (Feb. 1995).

<sup>5</sup> United States Sentencing Comm'n, Memorandum from Glenn Schmitt to Hon. Ricardo Hinojosa, *Analysis of the Impact of the Crack Cocaine Amendment if Made Retroactive*, 23 (October 3, 2007).

<sup>6</sup> §1B1.10, Commentary.

might have that the federal courts would be too burdened by the administration of retroactivity should be allayed by the Conference's endorsement.

Moreover, preparation and coordination will lessen the burden on all parties. The experience of the Federal Public and Community Defenders in coordinating with the relevant agencies and the courts to implement sentence reduction motions when the marijuana amendment was made retroactive in 1995 is outlined in their November 1 comments.<sup>7</sup> Their account should reassure the Commission that retroactivity can be handled in an organized, even streamlined fashion, with some planning and coordination among the parties. Therefore, FAMM endorses the Defenders' proposed application note that encourages coordination among the Bureau of Prisons, the U.S. Attorneys' offices, the U.S. Probation Offices, and the defense bar.<sup>8</sup>

Furthermore, as a practical matter, retroactivity makes a great deal of sense. Motions filed under § 3582(c) would be far more efficient than the same number of *pro se* or assisted filings using such vehicles as 28 U.S.C. §§ 2241, 2255, Rule 60 motions and other potential vehicles. Indeed, FAMM is hearing from a number of prisoners who are being solicited by groups who promise, for steep sums of money, to bring motions on their behalf. Some even promise that if the guideline amendment is not made retroactive they can still get relief because the guideline is a clarifying amendment. Declaring retroactivity and encouraging coordination will lessen the number of such misguided filings and undermine some of these predatory efforts.

Even were there valid or enduring concerns about the efficient application of a retroactive crack amendment, those concerns are insufficient to justify voting against retroactivity. It would be a terrible message to everyone involved in the criminal justice system, and a mark on the Commission's reputation if the Commission chooses ease over justice.

FAMM, which has an extensive membership in the federal prisons, stands ready to assist in any way it can, by ensuring that timely and accurate information and resources are made available to our members and distributed to others. We would be happy to work with the Commission, the defense bar and federal agencies to facilitate the flow of information.

Conclusion:

We commend the Commission for strongly supporting reform in crack cocaine sentencing, recognizing the injustice that has resulted from the 100-to-1 ratio. Thus far, the Commission has made amendments to the drug guidelines retroactive that have benefited defendants.

<sup>7</sup> Letter from Jon M. Sands to Hon. Ricardo Hinojosa, 7 (November 1, 2007) ("Sands Letter").

<sup>8</sup> Sands Letter at 8.

We urge the Commission to do the same for the amendment to the crack guideline on its own merits, but also with a consideration of public perception. There is no denying that the crack cocaine guideline has a disproportionate impact on Blacks. Blacks have comprised 80-88% of all crack cocaine sentences from 1995-2006.<sup>9</sup> There is something amiss if the Commission refuses to grant retroactivity for an amendment that would reduce sentences of largely Black defendants, while granting retroactivity for the LSD, marijuana, and Percocet amendments, which affected comparatively few Black defendants.

Part of the Commission's justification for the crack amendment was that even the perception of racism in the criminal justice system is dangerous because that perception diminishes respect for the Guidelines in minority communities. By failing to make the crack amendment retroactive, the Commission will only add fuel to the perception that the criminal justice system is unfair. The Commission has an opportunity to send a clear and powerful message that the Guidelines are colorblind. Sending this message will only produce more respect for the criminal justice system, the Guidelines, and for the Commission itself in the communities most severely impacted by the current crack guidelines.

The Commission notes that a grant of retroactivity "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>10</sup> Given the Commission's Reports to Congress in 1995, 1997, 2002, and 2007, there can be no doubt that the Commission firmly believes that a reduced guideline range for crack is not only sufficient for purposes of sentencing, but necessary.

We agree with the Commission that Congress must act to provide a full remedy to the problem of the crack disparity, and we applaud the Commission for acting when it was clear that Congress was not moving to fix the problems associated with the 100-to-1 ratio. We urge the Commission to apply its partial remedy to those who have already been convicted because the defendants who have already been sentenced are the ones who have provided the stories and statistics that have been the backbone of the Commission's recommendations to Congress and the reason why the Commission was so compelled to act by enacting the amendment in the first place.

### ***Criminal History, Amendment 709***

As with crack cocaine, the purpose of the amendment, the magnitude of the change and the ease of application all favor applying the changes to criminal history scoring retroactively.

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<sup>9</sup> Table 34. Table 38 in 2005.

<sup>10</sup> § 1B1.10, Commentary.

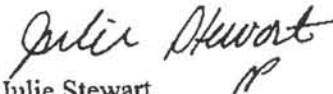
The amendments were adopted to more justly and accurately account for criminal history, based on the Commission's examination of outcomes and confusion resulting from single sentence and minor offense rules. The Commission found that the rules were inconsistently applied, promoted unwarranted disparity based on the peculiarities of different state practices, resulted at times in double counting history, and required sentences that overstated the risk of recidivism and culpability. Those considerations are significant and apply with equal force to the appropriateness of sentences currently being served that were enhanced by these now corrected criminal history rules. As with the crack cocaine amendment, justice requires the relief be granted.

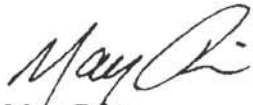
It appears the majority of prisoners who would be eligible for reductions would receive relatively modest benefit. A not insignificant number of others though would see more substantial reductions, particularly those sentenced under the career offender guideline. The career offender changes would correct sentences, some of which are, by the Commission's reckoning, years too long. This measure far outstrips the six-month standard enunciated by the Commission.

Finally, the amendment should be relatively easy to apply retroactivity. All the information the court needs is in the public records and the Federal Public and Community Defenders have committed to working with the other parties and the courts to create an efficient method to handle such cases.<sup>11</sup>

Thank you for the opportunity to provide our thoughts on the wisdom of including the amendments involving crack cocaine and criminal history in § 1B1.10(c) of the guidelines. We are happy to provide additional information as the Commission sees fit, and we look forward to working with you in the upcoming year.

Sincerely,

  
Julie Stewart  
President

  
Mary Price  
Vice President and General Counsel

cc: Hon. Ruben Castillo, Vice Chair  
Hon. William K. Sessions III, Vice Chair  
Commissioner John R. Steer, Vice Chair  
Commissioner Michael E. Horowitz  
Commissioner Beryl A. Howell  
Commissioner Dabney Friedrich  
Commissioner Edward F. Reilly, Jr.  
Commissioner Kelli Ferry

<sup>11</sup> Sands Letter at 13.

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