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October 30, 2007

The Honorable Ricardo H. Hinojosa
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Attention: Public Affairs-Retroactivity

Re: Retroactivity of Amendments 9 and 12 to Previously Sentenced Defendants

Dear Judge Hinojosa:

The National Association of Assistant United States Attorneys strongly urges the Commission *not* to make the above-referenced amendments to the federal sentencing guidelines retroactive to defendants previously sentenced for crack-related offenses.

The National Association of Assistant United States Attorneys (NAAUSA) protects, promotes, and advances the mission of Assistant United States Attorneys and their responsibilities in promoting and preserving the Constitution of the United States, encouraging loyalty and dedication among Assistant United States Attorneys in support of the Department of Justice and encouraging the just enforcement of laws of the United States. NAAUSA is the voluntary "bar association" for the more than 5,600 AUSAs throughout the country and the U.S. territories.

Everyday, Assistant United States Attorneys around the country work to enforce the criminal laws of our nation and to keep their communities safe. They have achieved remarkable success in these efforts, despite limited resources. The retroactivity proposal under consideration by the Commission threatens to undo these achievements by imposing an extraordinary burden upon our judicial system, diverting valuable resources from the prosecution of current crime, injecting years of uncertainty in the finality of sentences and returning serious crack offenders back to the community unexpectedly early.

According to the Commission's estimates, retroactive application of the pending crack amendments would result in approximately 20,000 crack dealers being eligible for reductions in their sentences. To our knowledge, this amendment would affect far more offenders than any other amendment the Commission has made retroactive. This substantial number is equivalent to over 25% of all offenders sentenced in fiscal year

2006. *See* U.S. Sentencing Commission, 2006 Sourcebook of Federal Sentencing Statistics, Table 1, available at http://www.ussc.gov/ANNRPT/2006/ar06toc.htm. At a minimum, AUSAs, public defenders, defense counsel and courts will be forced to prepare and respond to such motions. More troubling, some courts already have determined that *Booker* should apply to these hearings. *See United States v. Hicks,* 472 F.3d 1167 (9th Cir. 2007); *United States v. Forty Estrema,* 498 F.Supp.2d 468 (D. P.R. 2007). If this is the case, courts likely will hold full hearings on such motions, requiring additional briefing, an updated pre-sentence report and the presence of the defendant. Such full-blown hearings will place a tremendous strain upon the judicial system. Probation officers could be overwhelmed by the influx of new pre-sentence report investigations and additional prisoners placed on supervised release unexpectedly early. The United States Marshal's Service will bear the significant cost of transporting these defendants back to court. Housing these prisoners locally, even for a brief period of time, likely will negatively impact the Marshal's Service's ability to house current and future defendants.*

Many of these will be older cases, for which files will be closed and archived in the U.S. Attorneys' and district court clerks' offices. The judges, AUSAs, investigators, probation officers and defense counsel who handled the case may no longer be available. In order to assess claims for additional leniency under *Booker*, multiple parties, including AUSAs, will be forced to resurrect the facts and circumstances of past crimes and perhaps conduct new investigations years after the completion of the case. Due to the staleness of the case, the reduction hearing could be more burdensome and complicated than the original sentencing hearing.

Regardless of the applicability of *Booker* to the motions, the sheer volume of these motions will be disruptive to the judicial system, if not downright crippling in some districts. Even though the Commission estimates that approximately 20,000 offenders would be eligible for a reduction – which is a huge number in its own right – many thousands more will file merit less motions. Courts and AUSAs will be required to wade through these motions to separate the legitimate from the frivolous, thus wasting additional valuable resources. Moreover, because these cases are not distributed evenly among the judicial districts, some districts and AUSAs will bear the brunt of this surge. For example, over 25% of the estimated eligible offenders were prosecuted in the Fourth Circuit. The disproportionate impact of this wave of litigation should not be underestimated. For example, if the Eastern District of Virginia were to process in a single year the hearings for the estimated 1,400 eligible offenders – which is an ambitious timetable, to say the least – these additional hearings would nearly double the number of sentencing hearings handled by that court in year. *See* 2006

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* Of course, if *Booker* applied to such hearings, courts would not be limited by the two-level reduction and could cut many years off of a defendant's sentence or impose a sentence of time-served. Thus, the Commission's estimates of when offenders would be released could be grossly understated.

Sourcebook of Federal Sentencing Statistics, Table 2 (noting that 1,746 defendants were sentenced in the Eastern District of Virginia in FY2006).

Of course, the substantial burdens described above relate only to the district court proceedings. In many instances, either the defendant or the United States will appeal the outcome of the hearing. Lengthy appellate litigation and the attendant resource drain are inevitable in light of the uncertainty surrounding the application of *Booker* to such hearings. The litigation costs will continue to rise long after the district court proceedings end and will be transferred in part to the appellate courts. The lengthy judicial process and the consequent lack of finality to these sentences will wreak havoc upon the system.

Equally as troubling, the deluge of litigation inevitably will impact our ability to prosecute ongoing crimes. Every hour spent litigating these motions – and many will require substantial time – is an hour that AUSAs, judges and defenders will not be working on current prosecutions. The diversion of prosecutorial and law enforcement resources to re-investigate these long-closed cases necessarily means that prosecutors and agents will be unable to devote their full attention to ongoing cases and investigations. Thus, retroactive application of the pending crack amendment will have the unintended and perverse effect of hampering current criminal law enforcement.

Lastly, releasing these often violent offenders early to the community will compromise the safety of our communities. Based upon our experience and the Commission's own report, crack offenders tend to possess weapons in connection with their drug trade at higher rates than other offenders. Crack offenders also are more likely to have lengthy criminal histories. Releasing these offenders early into our community potentially will undermine the successes that we have achieved in ridding neighborhoods of open-air drug markets, drug gangs and violent crime.

Due to the extraordinary costs associated with implementing retroactivity, the legal uncertainty of how courts should approach reduction motions and the negative impact upon public safety, we strongly oppose retroactive application of the crack amendment.

We appreciate the opportunity to provide our views on this very important issue.

Sincerely,

Richard L. Delonis

Richard L. Delonis
National President