

**U.S. Sentencing Commission Public Meeting Minutes
December 11, 2007¹**

Chair Ricardo H. Hinojosa called the meeting to order at 3:33 p.m. in the Mecham Conference Center at the Thurgood Marshall Federal Judicial Building, Washington, D.C.

The following Commissioners were present:

Judge Ricardo H. Hinojosa, Chair
Judge Ruben Castillo, Vice Chair
Judge William K. Sessions, III, Vice Chair
John R. Steer, Vice Chair
Dabney L. Friedrich, Commissioner
Michael E. Horowitz, Commissioner
Beryl Howell, Commissioner
Kelli Ferry, Commissioner Ex Officio
Edward F. Reilly, Jr., Commissioner Ex Officio

The following staff participated in the meeting:

Judith Sheon, Staff Director
Kenneth Cohen, General Counsel

Chair Hinojosa called for a motion to adopt the minutes of the September 20, 2007, public meeting. Vice Chair Steer made a motion to adopt the minutes, with Commissioner Howell seconding the motion. Hearing no discussion, the Chair called for a vote and the motion was adopted by voice vote.

Chair Hinojosa called on Mr. Cohen to advise the Commission on a possible vote to amend §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range).

Mr. Cohen stated that the proposed amendment, attached hereto as Exhibit A, to §1B1.10 clarifies when, and to what extent, a reduction in sentence is consistent with §1B1.10 and therefore is authorized under 18 U.S.C. § 3582(c)(2). The proposed amendment also clarifies circumstances in which a defendant may be excluded from consideration for a reduction in sentence, including for public safety considerations. Mr. Cohen advised the Commissioners that a motion to adopt the proposed amendment would be in order, with an effective date of March 3, 2008, with the staff being authorized to make technical and conforming changes if needed.

The Chair called for a motion as suggested by Mr. Cohen. Commissioner Howell made a motion to adopt the proposed amendment, with Vice Chair Castillo seconding. The Chair opened the

¹As adopted April 16, 2008, and amended August 28, 2008.

floor for discussion on the motion. Vice Chair Steer noted that the vote on the proposed amendment was very important with respect to possible votes on retroactivity, both now and in the future. The proposed amendment will strengthen the policy statement in several significant ways, including making public safety a central concern when a court considers a sentence reduction. Vice Chair Steer congratulated both the staff and the Commissioners for their work on the proposed amendment.

Hearing no further discussion, the Chair called for a vote and the motion was adopted with the Chair noting that at least four Commissioners voted in favor of the motion.

Chair Hinojosa noted that a motion pursuant to Rule 1.2(b) of the Commission's Rules of Practice and Procedure, which allows for the temporary suspension of a rule, was in order with regard to Rules 2.2 (Voting Rules for Action by the Commission) and 4.1 (Promulgation of Amendments). The Chair called on Mr. Cohen to advise the Commission.

Mr. Cohen stated that Rule 4.1 provides that "in those cases in which the Commission considers an amendment for retroactive application to previously sentenced, imprisoned defendants, it shall decide whether to make the amendments retroactive at the same meeting." Rule 2.2 provides that "the decision to instruct Commission staff to prepare a Retroactivity Impact Analysis for a proposed amendment shall require the affirmative vote of at least three members at a public meeting." On April 18th, 2007, and April 27th, 2007, the Commission promulgated amendments to the guidelines that have the effect of lowering the guideline range for certain offenders. The Commission did not vote on retroactivity or instruct staff to prepare a Retroactivity Impact Analysis of those amendments at either the April 18 or April 27 meeting. However, on July 31, 2007, and again on September 27, 2007, the Commission published an issue for comment in the Federal Register requesting comment regarding whether either amendment should be included in §1B1.10(c) as an amendment that may be applied retroactively. Mr. Cohen further informed the Commission that it may temporarily suspend Rules 2.2 and 4.1 as they pertain to retroactivity decisions pursuant to Rule 1.2, which provides that "the Commission may temporarily suspend any rule contained herein and/or adopt a supplemental or superseding rule by affirmative vote in a public meeting of a majority of the voting members then serving." Mr. Cohen advised the Commission that a motion to that effect would be in order.

The Chair called for a motion as suggested by Mr. Cohen. Vice Chair Castillo made a motion to temporarily suspend Rules 2.2 and 4.1, with Vice Chair Sessions seconding. The Chair opened the floor for discussion on the motion. Vice Chair Castillo thanked the Chair for proceeding on the question of retroactivity in a very deliberate fashion. He observed that when the crack amendment was approved in April and sent to Congress for possible consideration, it was too soon to do the analysis needed or to have a public hearing on the issue of retroactivity. Vice Chair Castillo stated that the need to take a careful and deliberate approach conflicted with the Commission's rules, which require retroactivity to be considered at the same time that an amendment is passed. Vice Chair Castillo stated that in the future he intends to move to change that rule, but for the meeting today, suspension of the rules is adequate.

Hearing no further discussion, the Chair called for a vote and the motion was adopted with the Chair noting that at least four Commissioners voted in favor of the motion.

Chair Hinojosa called on Mr. Cohen to inform the Commission on a possible vote to make Amendment 709 (Criminal History) retroactive.

Mr. Cohen stated that Amendment 709 modified the criminal history rules concerning related cases and minor offenses and has the effect of lowering the guideline range for certain offenders. The Commission may add Amendment 709, or any portion thereof, to the list of amendments in §1B1.10(c) as an amendment that may be applied retroactively. Mr. Cohen advised the Commissioners that a motion to make Amendment 709 retroactive would be in order, with an effective date of March 3, 2008, with the staff being authorized to make technical and conforming changes if needed.

The Chair called for a motion as suggested by Mr. Cohen. Hearing none, the Chair stated that Amendment 709 will not become retroactive for lack of a motion to that effect. The Chair opened the floor for comments on the issue. Commissioner Howell stated three reasons not to make Amendment 709 retroactive. First, the criminal history amendment was intended to clarify the criminal history rules and not to address a fundamental fairness concern as with certain other amendments given retroactive effect. Second, it is difficult to determine how many defendants may be affected by making the amendment retroactive. Third, retroactive application of the amendment would require additional fact-finding in particular cases and result in an extraordinary burden on the courts.

Vice Chair Steer agreed with Commissioner Howell's statements. Vice Chair Steer noted further that §4A1.3 (Departures Based on Inadequacy of Criminal History Category) contains a policy statement on downward departures that applies in a case in which the defendant's criminal history may overstate the seriousness of the offense, which addresses concerns which might otherwise argue for retroactivity for Amendment 709.

Chair Hinojosa called on Mr. Cohen to inform the Commission on a possible vote to make Amendment 706, as amended by Amendment 711, both relating to federal cocaine sentencing policy, retroactive.

Mr. Cohen stated that Amendment 706 reduced by two levels the base offense levels assigned to each quantity of cocaine base or "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), and has the effect of lowering the guideline range for certain offenders. The Commission also promulgated Amendment 711, which makes technical and conforming changes to the mechanism that had been included in Amendment 706 for determining a combined base offense level in cases involving crack cocaine and another controlled substance. The Commission may add Amendment 706, as amended by Amendment 711, to the list of amendments in §1B1.10(c) as an amendment that may be applied retroactively.

See Exhibit B, attached hereto. Mr. Cohen advised the Commissioners that a motion to make Amendment 706, as amended by Amendment 711, retroactive would be in order, with an effective date of March 3, 2008, with the staff being authorized to make technical and conforming changes if needed.

The Chair called for a motion as suggested by Mr. Cohen. Vice Chair Sessions made a motion to adopt the proposed amendment, with Vice Chair Castillo seconding. The Chair opened the floor for discussion on the motion. Vice Chair Castillo recalled his 30-year involvement in the criminal justice system, primarily in the city of Chicago. He stated that twenty years ago, law enforcement was seizing millions of dollars of cocaine and making progress in what could be labeled the “cocaine wars.” Vice Chair Castillo expressed his personal concern that the same progress was not being made today and called for refocus in the war on drugs. Vice Chair Castillo urged Congress to pass a comprehensive solution on the issue of federal cocaine sentencing policy. Vice Chair Castillo expressed his concern that current sentencing policy concerning crack cocaine disproportionately impacted minorities and stated that it is critical that the American criminal justice system ensure that race plays no role in the operation of the justice system.

Commissioner Howell recalled Judge Reggie Walton’s statement that the unfairness of the drug laws has a coercive impact on the respect many of our citizens have about the general fairness of our nation's criminal justice system. She agreed with Judge Walton’s assessment that the perceived unfairness of the criminal justice system has an adverse effect on the ability of law enforcement at all levels to combat crime when the system is perceived as unfair, as witnesses are reluctant to come forward and assist the police. Commissioner Howell observed that witnesses at the Commission’s public hearings believe the 100 to 1 ratio for powder cocaine to crack cocaine is unwarranted. The proposed amendment is an important step to bolster respect for the fairness of our criminal justice system.

Vice Chair Sessions stated that applying a modest two-level sentencing reduction to persons sentenced in the past is ultimately fair and just. Vice Chair Sessions emphasized the Commission’s concern regarding public safety in its deliberations and reminded the audience that federal judges will decide based on individualized facts who will benefit from the retroactive application of the crack cocaine sentencing reduction.

Vice Chair Steer noted that the Sentencing Reform Act of 1984 requires the Commission to carefully balance the equitable considerations in individual cases with societal concerns, particularly public safety, when the Commission considers the retroactive application of a guideline amendment. Vice Chair Steer stated that the equitable considerations argue strongly for retroactivity and that the equally compelling safety concerns were addressed by placing the decision concerning who will benefit from retroactive application in the hands of federal judges.

Commissioner Horowitz stated that the 100 to 1 ratio of cocaine powder to crack cocaine lacked scientific support and that applying the two-level decrease to individuals sentenced before the

amendment will help to correct the unfairness produced by this unwarranted ratio. Commissioner Horowitz noted that by amending §1B1.10 to include guidance to the courts, the Commission makes explicit that not everybody is automatically entitled to the reduction.

Commissioner Friedrich explained that her decision to support retroactive application of Amendment 706 was based in large part on the recommendation of the federal courts and the Commission's own precedents.

Commissioner Friedrich supported retroactivity despite her concerns about the impact it could have on the safety of communities because reductions in sentences would not be automatic but would be left to the discretion of federal judges in individual cases. Commissioner Friedrich stated that by amending §1B1.10, the Commission had directed federal judges to consider in each case “the nature and circumstances of the danger to any person or the community that may be posed by a reduction in the defendant's term of imprisonment.”

Commissioner Friedrich recognized that retroactive application of the amendment would pose substantial administrative burdens for the federal courts. For this reason, Commissioner Friedrich explained, the Commission had followed the recommendation of the federal courts and had implemented procedures to minimize these burdens. In particular, the Commission had amended §1B1.10 to make clear that motions for reductions under 18 U.S.C. § 3582(c) do not constitute full-scale resentencings. As such, they do not require the presence of defendants.

Commissioner Friedrich supported a delay in the effective date of Amendment 706 to give the affected parties, including the courts, probation officers, the Bureau of Prisons, defense attorneys, and prosecutors, adequate time to prepare for the surge in motions and early releases that would likely occur as a result of the Commission's decision. Commissioner Friedrich noted that a delay in the effective date also would ensure that Congress has adequate time to consider the Commission's decision to give retroactive effect to Amendment 706.

Ex Officio Commissioner Ferry restated the Department of Justice’s opposition to the retroactive application of the crack cocaine amendment. Commissioner Ferry reminded the Commission of the public safety concerns of the communities where individuals may be released and of the significant administrative burden that the review of previously sentenced offenders will place on the federal court system.

Ex Officio Commissioner Reilly recalled how the Commission has sought to answer the question of cocaine sentencing policy during the previous 12 years, noting the four reports the Commission published recommending that Congress reduce the crack cocaine sentencing disparity. Commissioner Reilly advised the Commission that when the U.S. Parole Commission has amended its guidelines, the Parole Commission has always provided retroactive application.

Chair Hinojosa asked Vice Chair Steer to temporarily preside so that Chair Hinojosa could comment on the proposed amendment. Chair Hinojosa noted that the Commission was created

by the Sentencing Reform Act of 1984 as an independent and bipartisan agency so that it may set sentencing policy free of political pressure. Chair Hinojosa reported that the Commission solicited and received more than 33,000 pieces of public comment concerning the issue of retroactivity. Chair Hinojosa thanked the Criminal Law Committee of the Judicial Conference of the United States and the many advocacy groups who offered their advice. The Chair expressed the Commission's confidence that the nation's federal judges will, as they have always done, consider the issue of public safety when they consider on an individual basis whether someone should receive retroactive application of the crack cocaine amendment. Chair Hinojosa thanked the Commissioners and staff for their work on this issue. At the end of his remarks, Chair Hinojosa resumed presiding over the meeting.

The Chair called on Ms. Sheon for a roll call vote on the motion. Ms. Sheon called for a vote from Chair Hinojosa, Vice Chairs Castillo, Sessions, and Steer, and Commissioners Friedrich, Horowitz, and Howell. The motion was adopted unanimously upon the roll call vote.

The Chair asked if there was any further business before the Commission and hearing none, called for a motion to adjourn the meeting. Vice Chair Castillo made a motion to adjourn, with Commissioner Howell seconding. The Chair called for a vote on the motion, and the motion was adopted by voice vote. The meeting was adjourned at 4:39 p.m.

EXHIBIT A

Proposed Amendment: Modification of §1B1.10

Chapter One, Part B is amended by striking §1B1.10 and its accompanying commentary and inserting the following:

**"§1B1.10. Reduction in Term of Imprisonment as a Result of Amended Guideline Range
(Policy Statement)**

(a) Authority.—

- (1) In General.—In a case in which 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, the court may reduce the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2). As required by 18 U.S.C. § 3582(c)(2), any such reduction in the defendant's term of imprisonment shall be consistent with this policy statement.
- (2) Exclusions.—A reduction in the defendant's term of imprisonment is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2) if—
 - (A) none of the amendments listed in subsection (c) is applicable to the defendant; or
 - (B) an amendment listed in subsection (c) does not have the effect of lowering the defendant's applicable guideline range.
- (3) Limitation.—Consistent with subsection (b), proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant.

(b) Determination of Reduction in Term of Imprisonment.—

- (1) In General.—In determining whether, and to what extent, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement is warranted, the court shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines listed in subsection (c) had been in effect at the time the defendant was sentenced. In making such determination, the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected.

(2) Limitations and Prohibition on Extent of Reduction.—

- (A) In General.—Except as provided in subdivision (B), the court shall not reduce the defendant’s term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range determined under subdivision (1) of this subsection.
- (B) Exception.—If the original term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing, a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection may be appropriate. However, if the original term of imprisonment constituted a non-guideline sentence determined pursuant to 18 U.S.C. § 3553(a) and *United States v. Booker*, 543 U.S. 220 (2005), a further reduction generally would not be appropriate.
- (C) Prohibition.—In no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.

- (c) Amendments covered by this policy statement are listed in Appendix C as follows: 126, 130, 156, 176, 269, 329, 341, 371, 379, 380, 433, 454, 461, 484, 488, 490, 499, 505, 506, 516, 591, 599, 606, 657, and 702.

Commentary

Application Notes:

1. Application of Subsection (a).—

- (A) Eligibility.—*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. Accordingly, a reduction in the defendant’s term of imprisonment is not authorized under 18 U.S.C. § 3582(c) and is not consistent with this policy statement if: (A) none of the amendments listed in subsection (c) is applicable to the defendant; or (B) an amendment listed in subsection (c) is applicable to the defendant but the amendment does not have the effect of lowering the defendant’s applicable guideline range because of the operation of another guideline or statutory provision (e.g., a statutory mandatory minimum term of imprisonment).*
- (B) Factors for Consideration.—
- (i) In General.—*Consistent with 18 U.S.C. § 3582(c)(2), the court shall consider the factors set forth in 18 U.S.C. § 3553(a) in determining: (I) whether a reduction in the defendant’s term of imprisonment is warranted; and (II) the extent of such*

reduction, but only within the limits described in subsection (b).

- (ii) Public Safety Consideration.—*The court shall consider the nature and seriousness of the danger to any person or the community that may be posed by a reduction in the defendant’s term of imprisonment in determining: (I) whether such a reduction is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).*
- (iii) Post-Sentencing Conduct.—*The court may consider post-sentencing conduct of the defendant that occurred after imposition of the original term of imprisonment in determining: (I) whether a reduction in the defendant’s term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).*

2. Application of Subsection (b)(1).—*In determining the amended guideline range under subsection (b)(1), 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.*

3. Application of Subsection (b)(2).—*Under subsection (b)(2), the amended guideline range determined under subsection (b)(1) and the term of imprisonment already served by the defendant limit the extent to which the court may reduce the defendant’s term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement. Specifically, if the original term of imprisonment imposed was within the guideline range applicable to the defendant at the time of sentencing, the court shall not reduce the defendant’s term of imprisonment to a term that is less than the minimum term of imprisonment provided by the amended guideline range determined under subsection (b)(1). For example, in a case in which: (1) the guideline range applicable to the defendant at the time of sentencing was 41 to 51 months; (2) the original term of imprisonment imposed was 41 months; and (3) the amended guideline range determined under subsection (b)(1) is 30 to 37 months, the court shall not reduce the defendant’s term of imprisonment to a term less than 30 months.*

If the original term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing, a reduction comparably less than the amended guideline range determined under subsection (b)(1) may be appropriate. For example, in a case in which: (1) the guideline range applicable to the defendant at the time of sentencing was 70 to 87 months; (2) the defendant’s original term of imprisonment imposed was 56 months (representing a downward departure of 20 percent below the minimum term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing); and (3) the amended guideline range determined under subsection (b)(1) is 57 to 71 months, a reduction to a term of imprisonment of 46 months (representing a reduction of approximately 20 percent below the minimum term of imprisonment provided by the amended guideline range determined under subsection (b)(1)) would amount to a comparable reduction and may be appropriate.

In no case, however, shall the term of imprisonment be reduced below time served. Subject to these limitations, the sentencing court has the discretion to determine whether, and to what extent, to reduce a term of imprisonment under this section.

4. Supervised Release.—

- (A) Exclusion Relating to Revocation.—Only a term of imprisonment imposed as part of the original sentence is authorized to be reduced under this section. This section does not authorize a reduction in the term of imprisonment imposed upon revocation of supervised release.
- (B) Modification Relating to Early Termination.—If the prohibition in subsection (b)(2)(C) relating to time already served precludes a reduction in the term of imprisonment to the extent the court determines otherwise would have been appropriate as a result of the amended guideline range determined under subsection (b)(1), the court may consider any such reduction that it was unable to grant in connection with any motion for early termination of a term of supervised release under 18 U.S.C. § 3583(e)(1). However, the fact that a defendant may have served a longer term of imprisonment than the court determines would have been appropriate in view of the amended guideline range determined under subsection (b)(1) shall not, without more, provide a basis for early termination of supervised release. Rather, the court should take into account the totality of circumstances relevant to a decision to terminate supervised release, including the term of supervised release that would have been appropriate in connection with a sentence under the amended guideline range determined under subsection (b)(1).

Background: Section 3582(c)(2) of Title 18, United States Code, provides: "[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."

This policy statement provides guidance and limitations for a court when considering a motion under 18 U.S.C. § 3582(c)(2) and implements 28 U.S.C. § 994(u), which provides: "If 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."

Among the factors considered by the Commission in selecting the amendments included in subsection (c) were 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)(1).

The listing of an amendment in subsection (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. The 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.

The Commission has not included in this policy statement amendments that generally reduce the maximum of the guideline range by less than six months. This criterion is in accord with the legislative history of 28 U.S.C. § 994(u) (formerly § 994(t)), which states: "It should be noted that the 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 old guidelines or 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." S. Rep. 225, 98th Cong., 1st Sess. 180 (1983).*

*So in original. Probably should be "to fall above the amended guidelines".

EXHIBIT B

Cocaine Base (“Crack Cocaine”)

Synopsis of Proposed Amendment: *This proposed amendment adds Amendment 706 as amended by Amendment 711 to §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range) as amendments that the court may consider for retroactive application.*

Proposed Amendment:

**§1B1.10. Reduction in Term of Imprisonment as a Result of Amended Guideline Range
(Policy Statement)**

* * *

- (c) Covered Amendments.—Amendments covered by this policy statement are listed in Appendix C as follows: 126, 130, 156, 176, 269, 329, 341, 371, 379, 380, 433, 454, 461, 484, 488, 490, 499, 505, 506, 516, 591, 599, 606, 657, ~~and~~ 702, and 706 as amended by 711.