Department of Justice

STATEMENT OF

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UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

CONCERNING

"HEARING ON CRACKED JUSTICE – ADDRESSING THE UNFAIRNESS IN COCAINE SENTENCING"

PRESENTED

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Mr. Chairman, members of the Subcommittee –

Thank you for inviting the Department of Justice to appear before you today to discuss federal cocaine sentencing policy. My name is Gretchen Shappert, and I am the United States Attorney for the Western District of North Carolina. I have been in public service most of my professional life, both as a prosecutor and as an assistant public defender. Earlier this month, I completed 4 ½ consecutive weeks of trial, including two trials in my district involving crack cocaine distribution. Indeed, much of my professional career has been defined by the ravages of crack cocaine, both as a defense attorney and as a prosecutor.

The Department of Justice recognizes that the penalty structure and quantity differentials for powder and crack cocaine created by Congress as part of the Anti-Drug Abuse Act of 1986 are seen by many as empirically unsupportable and unfair because of their disparate impact. As this subcommittee knows, since the mid-1990s, there has been a great deal of discussion and debate on this issue. There have been many proposals but little consensus on exactly how these statutes should be changed.

We remain committed to that effort today and are here in a spirit of cooperation to continue working toward a viable solution. We continue to insist upon working together on this issue that we get it right not just for offenders, but also for the law-abiding people whom we are sworn to serve and protect.

It has been said, and certainly it has been my experience, that whereas cocaine powder destroys an individual, crack cocaine destroys a community. The emergence of crack cocaine as the major drug of choice in Charlotte during the late 1980's dramatically transformed the landscape. We saw an epidemic of violence, open-air drug markets, and urban terrorism unlike anything we had experienced previously. The sound of gunfire after dark was not uncommon in some communities. Families were afraid to leave their homes after dark and frightened individuals literally slept in their bathtubs to avoid stray bullets.

I have also seen the dramatic results when federal prosecutors, allied with local law enforcement and community leaders, make a commitment to take back neighborhoods from the gun-toting drug dealers who have laid claim to their communities. The successes of our Project Safe Neighborhoods (PSN) initiatives, combined with Weed & Seed, have literally transformed neighborhoods. In Shelby, North Carolina, for example, federal prosecutions of violent crack-dealing street gangs have slashed the crime rate and have enabled neighborhood groups to begin a community garden, truancy initiatives, and sports programs for young people. Traditional barriers are breaking down, and Shelby is thriving as an open and diverse small southern city. This transformation would not have been possible without an aggressive and collaborative approach to the systemic crack cocaine problem in that community.

In the jury trial I completed February 6th, the jury convicted the remaining two defendants in a seventy-person drug investigation that originated in the furniture manufacturing community of Lenoir, North Carolina. Several years ago, street drug dealers literally halted

traffic to solicit crack cocaine customers in several Lenoir communities. At trial, the jury heard of an episode where drug dealers kidnapped and held for ransom one of their coconspirators, demanding repayment of a drug debt. After pistol-whipping their hostage, they finally released him. This is the kind of violent activity we have come to expect from crack cocaine traffickers, even in relatively tranquil small communities.

I am pleased to be able to tell you that we used the tools that Congress gave us to stop these dealers. We built strong cases against them. Local law enforcement officers, in conjunction with federal agents, have seized substantial quantities of crack and firearms from these dealers and dismantled their operations. It is a testament to the courage of people who live in these communities that they have been willing to cooperate with law enforcement and testify. Our most powerful witnesses are the citizens who have been victimized by crack-related violence. Cooperation from citizens in these communities is based upon their trust in our ability to prosecute these violent offenders successfully and send them away for lengthy federal prison sentences.

I know from my conversations with state and federal prosecutors from around the country that our experience in North Carolina is not unique or uncommon. When considering reforms to cocaine sentencing, we must never forget that honest, law-abiding citizens are also affected by what these dealers do. Unlike the men and women who chose to commit the crimes that terrorized our neighborhoods, the only choice many of the residents of these neighborhoods have is to rely on the criminal justice system to look out for them and their families. Let us make sure

the rules we make at the federal level allow us to continue to do so.

Toward that end, we believe that any reform to cocaine sentencing must satisfy two important conditions. First, any reforms should come from the Congress and not the United States Sentencing Commission. Second, any reforms, except in very limited circumstances, should apply only prospectively. I will discuss the reasons necessitating each condition in turn.

First, bringing the expertise of the Congress to this issue will give the American people the best chance for a well-considered and fair result that takes into account not just the differential between crack and powder on offenders, but the implications of crack and powder cocaine trafficking on the communities and citizens whom we serve. Congress struck the present balance in 1986. Since then, although there have been many policy objections raised in debate, these statutes have been repeatedly upheld as constitutional. As a federal prosecutor, I have done my best to enforce these laws for the benefit of our communities.

Cleared of hyperbole, what we are talking about is whether the current balance between the competing interests in drug sentencing is appropriate. We are trying to ascertain what change will ensure that prosecutors have the tools to effectively combat drug dealers like those who terrorized western North Carolina while addressing the concerns about the present structure's disparate impact on African-American offenders. That is a decision for which Congress and this Subcommittee are made. At some level, the United States Sentencing Commission itself recognized that when it delayed retroactive implementation of the reduced

crack cocaine guideline until March 3, 2008, thereby giving Congress a short window to review and consider the broader implications of their policy choice.

In considering options, we continue to believe that a variety of factors fully justify higher penalties for crack offenses. In the cases I have prosecuted, I have seen the greater violence at the local level associated with the distribution of crack as compared to powder. United States Sentencing Commission data and reports confirm what I have seen, as they show that in federally prosecuted cases, crack offenders are more frequently associated with weapons use than powder cocaine offenders. According to the United States Sentencing Commission 2007 report on Crack Cocaine, powder cocaine offenders had access to, possession of, or used a weapon in 15.7 percent of cases in 2005. In contrast, crack cocaine offenders had access to, possession of, or used a weapon in 32.4 percent of cases in 2005.

That said, we understand that questions have been raised about the quantity differential between crack and powder cocaine, particularly because African-Americans constitute the vast majority of federal crack offenders. The Department of Justice is open to discussing possible reforms of the differential that are developed with victims and public safety as the foremost concerns, and that would both ensure no retreat from the success we have had fighting drug trafficking and simultaneously increase trust and confidence in the criminal justice system.

Second, reforms in this area, except in very limited circumstances, should apply prospectively. Notwithstanding the wide differences in the bills addressing the crack-powder

differential, there is one great commonality. Across the board, they are all drafted to apply only prospectively.

Without finality, the criminal law is deprived of much of its deterrent effect. Even where the Supreme Court has found constitutional infirmities affecting fundamental rights of criminal defendants, it rarely has applied those rules retroactively. For example, the United States Supreme Court has not made its constitutional decision in *United States v. Booker*, the most fundamental change in sentencing law in decades, retroactive.

The shortcomings of retroactive application of new rules are illustrated starkly in the Sentencing Commission's recent decision to extend eligibility for its reduced crack penalty structure retroactively to more than 20,000 crack dealers already in prison.

Proponents of retroactivity argue that we should not be worried about the most serious and violent offenders being released too early because a federal judge will still have to decide whether to let such offenders out. But that misses an important point. The litigation and effort to make such decisions in so many cases forces prosecutors, probation officers, and judges to marshal their limited resources to keep in prison defendants whose judgments were already made final under the rules as all the parties understood them and reasonably relied on them to be.

The swell of litigation triggered by the Commission's decision will affect different districts differently. Where it will have the most impact, however, will be in those districts that

have successfully prosecuted the bulk of crack cases over the past two decades. Fifteen districts will bear a disproportionate 42.8 percent of the estimated eligible offenders. Similarly, more than 50 percent of the cases will have to be handled by the Fourth, Fifth, and Eleventh Circuits. The 536 estimated offenders in my district who are eligible for resentencing is the equivalent of 66 percent of all criminal cases handled in my district in 2006.

The litigation, furthermore, is likely to be greater than that envisioned by the Commission. Notwithstanding strict guidance to the contrary, the federal defenders already have issued guidance telling defense counsel to argue that the Supreme Court's decision in *United States v. Booker* applies and that, therefore, every court should consider not only the two-level reductions authorized by the Commission but conduct a full resentencing at which any and all mitigating evidence may be considered. If courts accept this argument, the administrative and litigation burden will far exceed the estimates the Commission relied upon in making their new rule retroactive and will create the anomalous result that only crack defendants – many of whom are among the most violent of all federal defendants - will get the benefit of the retroactive effect of *Booker*.

With retroactivity, many of these offenders, probably at least 1600 at a minimum, will be eligible for immediate release. Others will have their sentences cut in such a fashion that they may not have the full benefit of the Bureau of Prison's pre-release programs to prepare them to come back to their communities. I am deeply concerned that the success we are experiencing in some of our most fragile, formerly crack-ravaged communities will be seriously interrupted if

these communities are forced to absorb a disproportionate number of convicted felons, who are statistically among the most likely persons to re-offend.

Because Congress only has until March 3, 2008 to have a say in that decision, Attorney General Mukasey asked Congress to quickly enact legislation to prevent the retroactive application of the United States Sentencing Commission amendments. Specifically, he asked Congress to ensure that serious and violent offenders remain incarcerated for the full terms of their sentences. In calling for action, he emphasized that "we are not asking this Committee to prolong the sentences of those offenders who pose the least threat to their communities, such a first-time, non-violent offenders. Instead, [he said,] our objective is to address the Sentencing Commission's decision in a way that protects public safety and addresses the adverse judicial and administrative consequences that will result."

The Federal Sentencing Guidelines assign to each offender one of six criminal history categories. The categorization is based upon the extent of an offender's past misconduct and the recency of the crimes. Criminal History Category I is assigned to the least serious criminal record and includes many first-time offenders. Criminal History Category VI is the most serious category and includes offenders with the lengthiest criminal records. The Sentencing Commission's data shows that nearly 80 percent of the offenders who will be eligible for early release have a criminal history category of II or higher. Many of them will also have received an enhanced sentence because of a weapon or received a higher sentence because of their aggravating role in the offense.

Almost none of these offenders were new to the criminal justice system. The data shows that 65.2 percent of potentially eligible offenders had a criminal history category of III or higher. That fact alone tells us that these offenders will pose a much higher risk of recidivism upon their release.

The Sentencing Commission's 2004 recidivism study shows that offenders with a criminal history category of III have a 34.2 percent chance of recidivating within the first two years of their release. Those with criminal history category of VI have a 55.2 percent chance of recidivating within the first two years of their release.

Our concern about the early release of these offenders is amplified by the fact that retroactive application of the crack amendment would result in many prisoners being unable to participate in specific pre-release programs provided by the Bureau of Prisons (BOP). Preparation to reenter society intensifies as the inmate gets closer to release. As part of this process, BOP provides a specific release preparation program and works with inmates to prepare a variety of documents that are needed upon release, such as a resume, training certificates, education transcripts, a driver's license, and a social security card. BOP also helps the inmate identify a job and a place to live. Finally, many inmates receive specific pre-release services afforded through placement in residential re-entry centers at the end of their sentences.

With no adjustments to BOP's prisoner re-entry processes, any reductions in sentence such as those contemplated by the retroactive application of the guideline may reduce or eliminate inmates' participation in the Bureau's re-entry programs. Without that, the offender's chance of re-offending will likely increase.

Mr. Chairman, the Department of Justice is open to addressing the differential between crack and powder penalties as part of an effort to resolve the retroactivity issue. It is our hope that as we work together we can make sure that there is no retreat in the fight against drug trafficking and no loss in the public's trust and confidence in our criminal justice system.

I would ask that the written portion of my statement be made a part of the record. I would be happy to answer any questions you may have. Thank you.