



U.S. Department of Justice

Criminal Division

Assistant Attorney General

Washington, D.C. 20530

November 1, 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 Public Comment.

Dear Judge Hinojosa:

The Department of Justice strongly opposes the proposed retroactive application of the pending amendments pertaining to crack cocaine and the computation of criminal history.¹ According to the Commission's recently released *Analysis of the Impact of the Crack Cocaine Amendment if Made Retroactive*,² retroactive application of the crack amendment alone would require new sentences in approximately 20,000 cases, equivalent to more than 25% of all federal sentencing in 2006 and approximately the same as all of the crack sentences imposed during FY 2003, 2004, 2005 and 2006 *combined*.³ The Commission, to our knowledge, has never before made an amendment retroactive that would have the sweeping impact of these proposed amendments. Because of the uncertainty of the applicable standards to be used at such proceedings, each case would consume significant resources due to a substantial amount of litigation and years would pass before final appellate rulings can be obtained. This legal uncertainty and the possible use of different legal standards would result in unjustified disparity

¹ On July 27, 2007, the Commission submitted for publication in the Federal Register a request for comments regarding retroactive application of amendments pertaining to cocaine base (crack) and to criminal history. The notice requests comments on a number of factors including: "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 §1B1.10(b)."

² Available at http://www.ussc.gov/general/Impact_Analysis_20071003_3b.pdf. The Commission has not issued a similar analysis for the proposed amendments affecting the calculation of criminal history.

³ According to the Commission's data, from 2003 to 2006 there were 20,554 defendants sentenced where crack was the primary offense. (2006 - 5,379; 2005 - 5,071; 2004 - 4,739; 2003 - 5,355). See United States Sentencing Commission, *Federal Sentencing Statistics by State, District, and Circuit*, <http://www.ussc.gov/linktojp.htm>.

both among those eligible for a reduction and between the eligible offenders and the general offender population. Furthermore, retroactive application of the proposed amendments would result in the unexpected early return of serious drug dealers (often with lengthy criminal histories) back into the community with the possibility of little or no re-entry preparation. This would lead then to further burdens upon the courts and others due to the increased number of offenders placed on supervision and a likely attendant increase in supervised release violations and new criminal activity. Finally, making these amendments retroactive would, for a number of defendants, overrule a Congressional vote denying reductions in their sentences as proposed by the Commission in 1995 and also suggested by the Commission in 1997 and 2002.

Retroactive Application Would Impose Unjustified Burdens on the Judicial System Due to the Legal Uncertainty of Sentencing Procedures.

Retroactive application of any of the amendments inevitably would result in years of uncertainty regarding the finality of sentences in tens of thousands of cases. This uncertainty would undermine the public's faith in the judicial system, as well the Commission, introduce widespread and unjustified disparity among defendants and unjustifiably overburden the limited resources of the federal judicial system, including judges, probation officers, prosecutors and defenders. By diverting significant prosecutorial resources, re-sentencing 20,000 offenders necessarily would impact the government's ability to prosecute *current* offenses. Moreover, with respect to the crack amendment, the effect of this legal morass and resource drain would be magnified in certain judicial districts due to the larger number of crack defendants prosecuted in those districts.

Prior to the Supreme Court's ruling in *United States v. Booker*, 543 U.S. 220 (2005), hearings for a reduction of sentence pursuant to 18 U.S.C. § 3582(c) based upon a retroactive guideline change were comparatively simple procedures whereby sentencing courts merely recalculated the amended guidelines range – typically without the need for additional factfinding – and re-sentenced the defendant within that reduced mandatory guidelines range. Proponents of retroactive application have suggested that this procedure would remain the same after *Booker*. Others have posited that the Commission, through its policy statements in U.S.S.G. § 1B1.10, could limit the review so that the application of the guideline changes would be a “mechanical process” involving a simple recalculation of the crack guideline using the new table and would not even require the presence of the defendant.

The applicability of *Booker* to such hearings is unclear but the consequence of such application cannot be understated. Unfortunately, the limited case law to date provides little guidance. Compare *United States v. Hicks*, 472 F.3d 1167 (9th Cir. 2007); *United States v. Forty Estrema*, 498 F.Supp.2d 468 (D PR 2007); and *United States v. Jones*, No. 97-20005-01-JAR, 2007 WL 2703122 (D. Kan. Sept. 12, 2007) (*dicta*) with *United States v. Howard Hudson*, Nos. 07-6825, 07-6948, 07-7102, 2007 WL 2719867 (4th Cir. Sept. 19, 2007).

Hicks involved facts closely analogous to what would exist if the Commission were to make the guideline changes retroactive. In 2000, the Commission changed the guideline with regard to the Use of a Firearm . . . During or in Relation to Certain Crimes, U.S.S.G. § 2K2.4, commentary App. Note 2, *see* Amendment 599, effective November 1, 2000, and determined that this change should apply retroactively. *See* U.S.S.G. § 1B1.10(c) Amendment 599 made clear that in most cases, and in particular as to *Hicks*, a defendant should not receive both a five-year consecutive sentence pursuant to 18 U.S.C. § 924(c) and a two-level increase for use of a firearm. As a result, in 2005 *Hicks*, who had been sentenced in 1993, asked the district court both to reduce his sentence pursuant to retroactive Amendment 599 and to review his sentence pursuant to *Booker*. *Hicks*, 472 F.3d at 1168-69. Following the Commission’s policy statements, the district court reduced *Hicks*’ sentence by two levels but refused to consider any other reduction under *Booker*, concluding that it had no authority to do so. *Id.* at 1169. The Ninth Circuit Court of Appeals reversed, holding that when a defendant is eligible for resentencing pursuant to 18 U.S.C. § 3582(c)(2), the district court must apply the factors enumerated in 18 U.S.C. § 3553(a) and do so under a non-mandatory guideline system. *Id.* at 1170-73. Furthermore, with respect to the Commission’s ability to limit the scope of § 3582(c) hearings through policy statements, the Court held that “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.” *Id.* at 1171.⁴

The Fourth Circuit Court of Appeals appears to have endorsed the opposite result in *Hudson*, 2007 WL 2719867. In that case, the district court granted *Hudson*’s motion for reduction of sentence pursuant to § 3582(c)(2), but denied the Rule 35(a) motion, which asserted that the district court should have found the Sentencing Guidelines to be advisory under *Booker*. *Id.* at *1. In its June 27, 2007 Order, the district court specifically rejected the Ninth Circuit Court of Appeals’ conclusion in *Hicks*. *See United States v. Hudson*, No. 2:93cr156 (E.D. Va. June 27, 2007). In a brief *per curiam* decision, the Court of Appeals found no abuse of discretion and no reversible error and affirmed “for the reasons stated by the district,” citing to the June 27, 2007 Order. *See Hudson*, 2007 WL 2719867 at *1.

⁴ Similarly, in *Forty-Estremera*, the district court relied upon *Hicks* to conclude that “since *Booker* excised the statutes that made the Guidelines mandatory and mandatory guidelines no longer exist, this Court is free to resentence *Forty* accordingly.” 498 F. Supp. 2d at 472.

More troubling, the district court entertained the defendant’s § 3582(c) petition even though the retroactive guideline did not result in a lower sentencing range. *See* 18 U.S.C. § 3582(c)(2) (permitting a court to reduce a term of sentence only when a defendant’s term of imprisonment is “based upon a sentencing range that has been lowered by the Sentencing Commission.”) Furthermore, the Court concluded that it was no longer bound by the Commission’s policy statement which states that “[a]ll other guidelines application decisions remain unaffected.” 478 F. Supp. 2d at 472.

Thus, it appears that courts already have reached differing results and each hearing based upon retroactive application of the pending amendments would raise the same issue. At least in the Ninth Circuit Court of Appeals (where the Commission estimates there would be 584 eligible crack offenders), *Hicks* will be controlling and all sentencing hearings would require both the presence of the defendant and full argument as to the appropriate sentence under a non-mandatory guideline system. In the other courts, each judge would confront the issue anew. Regardless of the district court outcome, the losing party almost certainly would appeal, thus adding years of uncertainty to offenders' sentences. A split in the circuit courts of appeal is highly likely and may require resolution by the Supreme Court. This would then require another round of resentencings. Such turmoil and legal wrangling would undermine the public's faith both in the federal judicial system and in finality of sentences and run contrary to the Commission's directive to appropriately consider the "difficulty of applying the amendment retroactively." U.S.S.G. § 1B1.10(b).

Moreover, even if a sentencing court held that *Booker* does not apply to § 3582(c) hearings, the procedure would not be as simple as some would have the Commission believe. Courts would not be required to reduce a defendant's sentence. We would expect that in many instances, because the original guideline range and the amended guideline range will overlap, prosecutors may argue that the original sentence imposed (usually obtained after substantial plea bargaining) is still appropriate. Given that many of these offenders are serious drug dealers (as discussed below), it is not unreasonable to expect that the district court may agree. Obviously, those hearings that do not result in a change to the original sentence would be a drain on limited resources with no sentencing benefit to the defendant. Furthermore, it is likely that courts may be required to make additional factual findings in connection with the § 3582(c) hearings. For example, the proposed crack amendment established a new "trigger amount" for a level 38 offense that did not exist under the previous guideline, *i.e.*, 4,500 grams of cocaine base. In those cases where a sentencing court did not make a finding as to the exact drug quantity and instead merely determined previously that the amount involved was 1,500 grams or more (which corresponds to a base offense level 38 under the current guidelines), the inquiry would not be a simple mathematical guideline adjustment. Rather, the the court would then be required to determine the exact amount of drugs and whether that amount exceeded 4,500 grams. Such considerations most likely would require updated presentence reports, additional argument and, in most courts, the presence of the defendant.

Regardless of the ultimate outcome of the litigation arising from the standards to be applied at the hearing, courts would be required to consider § 3582(c) motions for those approximate 20,000 crack offenders whom the Commission believes to be eligible under the crack amendment (a number that the Department believes is an underestimate, for the reasons stated below) and untold number of offenders who may be eligible if the criminal history amendments are applied retroactively. Of course, thousands of ineligible defendants would deluge the courts with such motions as well. Judges' staffs, which are limited, would then be forced to sort through these petitions to separate the meritorious petitions from the frivolous.

This surge of cases would impact not only judges, but also probation officers, who in many instances would have to prepare updated presentence reports (particularly if *Booker* applies), and would also face the prospect of an unexpected increase in the number of high-risk defendants placed upon supervised release. In the event that hearings are necessary in these cases and the presence of the defendant required, the monetary cost to the Bureau of Prisons and United States Marshal's Service for transportation and housing will be substantial. Most of these offenders will no longer be housed in local jails or detention facilities, but instead will be scattered to federal prisons throughout the United States. The costs and difficulty of transporting a large number of prisoners would be substantial and it may complicate the transfer of other prisoners for court and security purposes. Furthermore, the burden upon prosecutors and defenders, both in time spent and in actual cost, necessarily would result in the diversion of resources from other cases.⁵ To our knowledge, the Commission has never before made any guideline amendment retroactive which would have the expansive impact of these proposed amendments.

While 20,000 additional cases would have a substantial impact on the district courts, this huge surge in the first year would also move on to the courts of appeals until all the issues are eventually resolved. Appeals would follow, whether or not the district court decreases the sentence based on the amendment. As explained above, the re-calculation of the new offense level is not a simple transposition, but instead may require re-calculation of the drug quantity, which may be appealed. The consideration of the § 3553(a) factors has also proven a fertile source of appeals. Indeed, even if the court reduces the sentence further based on the § 3553(a) factors, experience shows that defendants still will appeal, unless the reduction is drastic and/or is sentenced to time-served. For those defendants who are not released while their appeal is pending, the clock for filing a § 2255 petition would be restarted, allowing even defendants who

⁵ While we recognize that many of these cases would be handled by Assistant Federal Defenders, a great proportion of the cases would result in the re-appointment of panel attorneys who previously represented the defendant. A good measurement of the "costs" associated with the representation would be to take the amount paid to panel attorneys (\$92/hr for a non-capital case) and estimate that, on average, an attorney would expend a minimum of five hours per defendant. (This includes, reviewing the file, talking to the defendant and his family, preparing and filing sentencing memoranda, attending hearings, and argument.) This conservative estimate does not even account for time spent in connection with the appeal of the sentence, which would include reviewing and compiling the record, preparing the brief, travel and oral argument and likely would result in at least 20-40 hours of additional work.

If the conservative estimate of five hours per district court case is limited to the estimated 19,500 eligible defendants, it will still require an expenditure of almost \$9,000,000. This estimate does not take into account the cost to U.S. Attorneys' offices, the Marshal's Service, the probation office, the social cost of delayed or foregone current prosecutions, and the costs to other delayed civil litigation.

have exhausted their § 2255 rights to challenge their resentencings in additional collateral proceedings, further upsetting finality.

Lastly, such a litigation swell would impact some districts and courts of appeals disproportionately. For example, the 1,404 estimated eligible offenders prosecuted in the Eastern District of Virginia is equal to 80% of *all* criminal defendants prosecuted in that district court last year. See United States Sentencing Commission, *2006 Sourcebook of Federal Sentencing Statistics*, Table 1, available at <http://www.ussc.gov/ANNRPT/2006/ar06toc.htm>. For the Northern District of West Virginia, the Commission's estimate of the number of eligible offenders is 125% of the defendants sentenced in 2006; for the Western District of Virginia it is 90%; for the District of South Carolina 66%; and for the Western District of North Carolina 66%. *Id.* Furthermore, three of the eleven circuit courts of appeals – the Fourth, Eleventh and Fifth – have a more than 50% of the estimated eligible offenders.

Retroactive Application of the Crack Guideline Would Result in Serious and Often Violent Offenders, Who Are More Likely To Recidivate Than Other Offenders, Being Returned to the Community Unexpectedly Early.

Many of the prisoners eligible for immediate release if the crack guideline is made retroactive will be among the most serious and often violent offenders in the federal system.⁶ Even assuming that none of the offenders may receive more than a two-level decrease, the report notes retroactive application results in an additional 2,520 crack dealers being released in the first year of retroactive application than would be released otherwise. This number of offenders (2,520 crack dealers) is equivalent to approximately half the crack defendants convicted in federal court each year. Yet, according to the report's own numbers, these are *not* non-violent, first time offenders or possessors of small amounts of crack, as some would suggest. Instead, the average amount of crack involved for all eligible offenders was more than 50 grams – an amount far in excess of that possessed just for personal use. See *Analysis of Impact of the Crack Cocaine Amendment if Made Retroactive* at Table 5 (noting that the average base offense level was 32).⁷ More than a third of eligible offenders possessed or used a weapon (most likely a firearm), in connection with the underlying crack case. *Id.* Approximately two-thirds of these defendants have a significant criminal record with a Criminal History of III or greater. *Id.* This is

⁶ The Commission was unable to determine the number and characteristics of those offenders affected by possible retroactive application of the proposed criminal history amendments. Based upon our knowledge of large numbers of real cases, we know that many serious and violent offenders, including career offenders, would be eligible to be released early by retroactive application of these amendments as well.

⁷ Indeed, less than 1% of all crack defendants were convicted of simple possession with the remaining 99% convicted of distribution related offenses. See United States Sentencing Guidelines, *Use of Guidelines and Specific Offense Characteristics: FY 2006*, pgs 22-27, available at http://www.ussc.gov/gl_freq/06_glinexgline.pdf.

particularly significant because the Commission's own studies have established that higher criminal history scores correlate to the increased likelihood that a defendant will reoffend. See *Measuring Recidivism: The Criminal History Computation Of the Federal Sentencing Guidelines*, available at http://www.ussc.gov/publicat/Recidivism_General.pdf. That report found:

... guideline offenders in higher CHCs are more likely to re-offend within two years of release from prison or upon entering probation status. Under the primary recidivism measure, offenders in CHC I have a substantially lower risk of recidivating within two years (13.8%) than do offenders in CHC VI (55.2%).

Id. at page 6. The Commission estimates that 22.7% of the crack offenders eligible for a reduction in their sentence have a CHC III. According to the Commission's recidivism study, these offenders have a 34.2% risk of recidivism. See *Measuring Recidivism* at Exhibit 2. For the 16.6% of eligible offenders in CHC IV, the rate jumps to 44.6% risk of recidivism; for the 10.2% of offenders at CHC V, the rate is 51.6%; and for the 15.7% of offenders at CHC VI, the rate is a startling 55.2%. *Id.*

The crack offenders who have the highest offense levels, and therefore have been incarcerated the longest, are the offenders who would reap the greatest benefit from retroactive application. For example, a two-level reduction at the highest end of the guidelines table (BOL 37 reduced to 35, with a CHC VI) could result in a minimum reduction of 68 months – more than five years. According to the staff study, these offenders, *i.e.*, *who remain in jail years after their convictions and who will receive the greatest reduction in sentence*, are far different from those who originally received relatively short original sentences. For those who were sentenced from 1993-1995, 60% either had a “weapon specific offense characteristic” or a firearm mandatory minimum. This compares with approximately 30% for those sentenced in the last three years. Additionally, between 16.3% and 24.2% of those sentenced from 1992 to 1995 received an enhancement for obstructing justice, while only approximately 3% of those sentenced between 2005-2007 received the enhancement. Similarly those sentenced in the early 1990's were approximately seven times more likely to receive an upward adjustment for an aggravating role as compared to those sentenced in the past three years (35% versus 5%). Thus, those that would receive the greatest reduction in their sentence, even if limited to a two-level reduction, are the worst of this group and could see their sentences reduced by five years or more. See *generally Analysis of Impact* at Tables 5A and 5B.

Returning serious and often violent offenders who are most likely to offend again to communities earlier than anticipated obviously poses a danger to public safety. Crack trafficking crimes *are not victimless crimes*. The entire neighborhood suffers because of the way in which crack is distributed in open markets. These crack markets take over a community and hold it hostage to the drug dealers. Crack houses commonly have walk-up or drive-through traffic at all hours of the day. Law-abiding citizens are afraid to leave their homes or allow their children to play outside, particularly in light of the frequent use of guns to protect the crack trade.

Retroactive application of the crack amendment would return these serious offenders to those same neighborhoods with a high likelihood that the offenders would re-offend.

The risk to public safety is magnified by two additional factors. First, because of the sudden nature of the reduction, in some instances a defendant may be released five years earlier than expected, causing the Bureau of Prisons and probation offices to have insufficient time to place the inmate in typical reentry programs. Second, many of our communities have seen a substantial increase in their violent crime rates and are expending additional resources to respond. The recently released statistics from the FBI show that for the third consecutive year, the violent crime rate has increased. See http://www.fbi.gov/ucr/cius2006/data/table_01.html. Communities are stretching their limited resources to battle this increase and the problem will be exacerbated by releasing these prisoners at a time when communities will be unable to provide the intensive support necessary to assist them in avoiding reoffense. Of course, these dangers will be even greater and the number of potential offenders even higher if the Commission's assumptions on the limits of the reduction are wrong.

Lastly, as explained above, retroactive application of any of the proposed amendments, particularly the crack cocaine amendment, necessarily would divert valuable resources from prosecuting current offenses. In essence, any decision by the Commission to apply the amendments retroactively has the consequence of increasing social harm by limiting prosecutors' and the courts' ability to combat ongoing crime.

Retroactive Application Actually Would Result in Greater Unwarranted Sentencing Disparity.

If courts determine that *Booker* applies to § 3582(c) hearings, retroactive application introduces enormous and unjustified disparity because eligible offenders will receive the benefit of having the court consider once-prohibited factors, while all other offenders cannot receive such consideration. All courts of appeals unanimously have agreed that *Booker* does not apply retroactively to previously-sentenced offenders. See *In re Fashina*, 486 F.3d 1300, 1303-1306 & n. * (D.C. Cir. 2007) (citing cases from eleven other circuit courts of appeal). Yet retroactive application of either the crack amendment or the criminal history amendments would create an exception to this universal rule by giving these narrow classes of offenders the benefit of *Booker*. Notably, the disparity is not even applied uniformly to all crack offenders; instead, only *eligible* crack offenders (*i.e.*, those who were not sentenced at the mandatory minimum, were not career offenders, etc.) will receive this lop-sided benefit.

The legal uncertainty of the application of *Booker* raises yet another potential disparity. Eligible offenders in the Ninth Circuit could argue for a sentence below the reduced guidelines range based upon *Hicks* and the factors enumerated in § 3553(a). Yet it appears that eligible offenders in the Fourth Circuit could not argue for such a further reduction. Thus, offenders in the Fourth Circuit or any other court that determines *Booker* should not apply would receive only

a two-level reduction while offenders in the Ninth Circuit could receive a reduction to time served.

In addition to being disparately applied among offenders, *Booker* would be applied (to the extent that it is applicable at all) in an unequal reduction-only manner. *Booker* application could only benefit offenders due to the reduction-oriented nature of § 3582(c) hearings (*i.e.* sentencing courts could only consider whether to vary downward from the guidelines, not upward, because § 3582(c) only permits a court to adjust a sentence by “reduc[ing] the term of imprisonment.”) This unjustified differential treatment and unequal application would result in the type of sentencing disparity that is condemned by 18 U.S.C. § 3553(a)(6) and that was the primary evil which Congress sought to avoid by the Sentencing Reform Act and the Guidelines.

The Commission’s Crack Retroactivity Data Likely Underestimates the Number of Offenders Affected, the Magnitude of Reduction in Sentence and the Impact Upon the Federal Judiciary.

Though the breadth and detail of the analysis contained in the staff’s report *Analysis of the Impact of the Crack Cocaine Amendment if Made Retroactive* is commendable, the report, nevertheless, unintentionally may be misleading to those who are unfamiliar with the nuances of federal sentencing practices and the current ambiguities pertaining to the law controlling the sentencing guidelines.

The underlying assumption contained in the report is that the trial courts would be restricted to reducing the base offense level in crack cases by two levels and that no other factors may be considered at a resentencing. Yet, even on the day that the report was issued, the assumption was not applicable in the Ninth Circuit Court of Appeals and at least one other district court. Thus, the Commission’s estimates as to the magnitude of reduction and possible release dates may be too low and many offenders could see reductions upwards of 50% or to time served. Furthermore, the rationale of *Forty-Estremera* suggests that offenders whose offense level is *unchanged* by retroactivity are eligible for reductions in sentence, including consideration of *Booker* factors, thus potentially greatly expanding the number of offenders who could be eligible for reduction beyond the estimated 19,500.⁸

Second, the number of eligible offenders may be erroneously low due to the inability of the Commission (through no fault of its own) to capture data for offenders whose sentences were reduced pursuant to Federal Rule of Criminal Procedure 35. At page 11 of the report, Figure A, 9,034 offenders, or nearly an additional 50% of the eventual group determined to be eligible,

⁸ Thus, those offenders who were excluded because their range was controlled by the Career Offender and/or Armed Career Criminal status (4,914), or because the Commission assumed that there would be no change in the sentencing range (1,969) may also be eligible for resentencing. Inclusion of these offenders raises the Commission’s estimate by more than one-third.

were removed from the analysis because they were sentenced at the statutory mandatory minimums. The analysis assumed that sentences for those offenders could not be reduced. But as noted in footnote 20 of the report,

The Commission's data do not reflect any reduction in sentence that may have occurred for crack cocaine offenders after the date of the original sentence, for example, pursuant to Federal Rule of Criminal Procedure 35(b) based on an offender's substantial assistance to the government. Under this rule, the court may sentence an offender below any otherwise applicable mandatory minimum term of imprisonment. Therefore, an offender who received a sentence reduction pursuant to Rule 35(b) would be eligible to seek a reduced sentence under the crack cocaine amendment if it were to be made retroactive (assuming all other criteria above are met). Commission data do not include the information necessary to determine which offenders originally sentenced at a mandatory minimum term of imprisonment receive a reduced sentence pursuant to Rule 35(b) after the original sentence was imposed. Therefore, ORD's estimate of the number of offenders who appear to be eligible to seek a reduced sentence if the crack cocaine amendment were to be made retroactive may underestimate the actual number of such offenders.

While the propriety of granting a further § 3582(c) reduction after a Rule 35 reduction remains to be seen, the impact of this data inadequacy could be considerable – especially considering that the Eastern District of Virginia, where the greatest number of estimated eligible offenders were prosecuted (7.2% of the 19,500 eligible cases), primarily uses Rule 35(b) for reductions in sentence due to a defendant's substantial assistance.

Retroactive Application Appears To Be Contrary to Congressional Will.

Retroactive application of the crack amendment would, for the approximately 1500 defendants who were sentenced between 1987 and 1995, overrule a Congressional vote denying reductions in their sentences as proposed by the Commission in 1995. The same might be said of those crack defendants who were sentenced between 1995 and 2002 when the Commission again suggested that Congress reduce the penalties for crack. For these two groups (approximately 6,500 or one-third of the estimated eligible defendants) Congress either specifically rejected a reduction in crack penalties or declined to intervene.

A decision by the Commission to make the amendment retroactive at this late date would be unreviewable by Congress absent extraordinary legislative action. This appears to run counter to the current prevailing sentiment evidenced by the three bills pending before the Senate that

would reduce the penalties for crack. They either specifically reject⁹ or do not include¹⁰ authorization for retroactive application of their mandated change in the statutes. Thus, a decision to apply the amendments retroactively would be in discord with the past and current sentiments of Congress.

Conclusion

The sheer number of defendants eligible for reduction combined with the legal uncertainty of whether *Booker* would apply to reduction hearings would impose enormous and unjustified costs upon the federal judicial system, including judges' staffs, probation officers, U.S. Attorneys' offices, public defenders, panel attorneys and the United States Marshal's Service. This surge of litigation, much of which may be frivolous, would detract from our ability to investigate and prosecute current crime and will impede the courts' ability to deal with pending cases, both criminal and civil. Furthermore, the unexpected release of 20,000 prisoners or more, who have comparatively high recidivism rates, would jeopardize community safety and threatens to unravel the success we have achieved in removing violent crack offenders from high-crime neighborhoods. These serious and often violent offenders would be returned to the streets at a time when loosely affiliated violent crack dealing street gangs are proliferating and violent crime statistics are increasing. Instead of achieving fairness and uniformity, retroactive application actually would inject more disparity into the sentencing process by potentially unfairly conferring certain benefits upon crack offenders. Lastly, by decoupling the retroactivity decision from the proposed amendment and delaying this decision until after the amendment takes effect, the Commission has denied Congress the ability to review the retroactivity decision through the normal statutory review process. Therefore, we strongly encourage the Commission to give great consideration to these multiple adverse consequences and to determine that the amendments should not be applied retroactively.

⁹ S. 1711, 110th Cong. § 11 (2007); S. 1383, 100th Cong. § 204(b)(1) (2007).

¹⁰ S. 1685, 100th Cong.(2007).

We appreciate the opportunity to provide our views on federal sentencing policy and we look forward to continuing our work together to improve federal sentencing policy and practice to help reduce crime and serve the American people.

Sincerely,

A handwritten signature in black ink, appearing to read 'Alice Fisher', with a long horizontal line extending to the right.

Alice Fisher
Assistant Attorney General

cc: The Commissioners
Judy Sheon, Staff Director