

**Transcriptions of Portions of the Crack Amendment Retroactivity Summit
Held January 24, 2008 at The Adams Mark Hotel, St. Louis, Missouri**

Part 1: Discussions Relevant to §1B1.10(b)(2)

Session 1: United States Sentencing Commission

Allan Dorhoffer, U.S. Sentencing Commission:

“I do want to talk about an issue that may raise some debate as well - going back to Judge Jackson’s question and the questions asked earlier. There are going to be some folks who have been sentenced to below guideline range sentences with the crack cocaine from their original sentence. We have a possible limitation, but at the same time a possible reduction language. If the original sentence was less than the minimum of a the guideline range - a departure or variance – most of these may be departures because most of them are initiated by the government under 5B1.1 - ‘a reduction comparably less than the guideline range is permissible.’ – and I’m going to give an example of what that looks like in a second - actually, maybe I’ll just jump to the example now -

“Let’s use this as an example – the original guideline range 70-87 months. The court, whether under 5K1.1 or 5K2.0 gave a departure down to 56 months. The math works out to about a 20% reduction below the guideline range here. The amended guideline range is 57-71 months. A reduction 20% from the amended guideline range minimum of 57 months would result in a comparable reduction here - is about 11 months difference -down to 46 months. So this may be something - this is exactly what many of the courts had suggested before *Booker* even came out. I think its going to be the same way after when we are dealing with these type reductions. Now, once again, it is completely within the court’s discretion if they want to actually give any reduction here - they may think ‘I already gave a departure, I’m not going to go any further.’ There may be some prosecutor’s arguing that ‘you already gave a departure here, you don’t need to give a further one.’

“There is one limitation though that the Commission put in place, and this will be something that might be debated at some point but I’m going to give an example - actually first I’m going to give the rule: ‘However, when the original sentence was a variance’ - that’s the term a lot of people use after the *Booker* decision for a sentence pursuant to 3553(a) not a traditional departure under the guidelines, ‘pursuant to *Booker*, a reduction from the sentence originally imposed generally would not be appropriate.’ What we mean by that for the 200 defense attorneys here getting ready to jump up and ask questions, let me say what that means:

“What we’re saying here is that sometimes what judges do – judges sentence in a wide variety of manners – if there was a guideline range of let’s say 97 to 121 months – that was what was calculated and that was in say 2006 – and with that the judge decided, ‘I’m going to sentence him to 20 months’ – and didn’t look to the guidelines at all – and yes the argument is well of course the judges have to calculate the guidelines– yes, the judges have to calculate the guidelines correctly. But in some instances, and I’ll use the term – its not the Commission’s term – but if the variance was not pegged to the guideline range – where the court may have said, ‘well I’m

going to go down three levels and sentence to here' – or it might not have in their mind used that and just said you know – and some judges do this and lets be honest - there are some judges who might not have paid as close attention to the guidelines range in sentencing, and just said, 'you know, I think in general, 20 months is appropriate.' In those situations - if you are a judge that did that – a further reduction is not going to be appropriate. Is that going to be the normal set of cases? Probably not. Probably a judge went from 97 to 121, probably said I'm going to go down three levels pursuant to 3553(a), or pursuant to *Booker*, and here's my new guideline range now 70 -87 months, and I've sentenced to 70 months. The court may, after we calculated the two level reduction from 97 to 121, which gives you a range of at that point 70 -87 months, go down another three levels. This is not a – some defense attorneys have asked questions, and I think it's a fair question to ask from the interpretation here – the Commission is not limiting in this situation, saying that if the court just varied from the guidelines without using a traditional departure, that a court then cannot give a further reduction. We're just saying that in certain circumstances, particularly if its pursuant to *Booker*, they may want to take a closer look at how they ultimately came to that sentence. And it was something that the guidelines consideration was not ultimately considered in the first place, besides the fact that you figured out what the guidelines range in the beginning, a further reduction may not be warranted in that situation."

Question from the Audience: "Thank you for that explanation, because as you know, we at the defenders have been getting lots of calls from defense attorneys and have had questions from judges about what that sentence means. And I'm wondering - people have read that second section to suggest that any variance is not subject to reduction under this policy statement - I'm wondering if there's any way that the Commission might consider clarifying in an application note that the reduction is applicable to a variance just as its applicable to a downward departure. We'd be happy to suggest language."

Alan Dorhoffer, U.S. Sentencing Commission: "I mean, I think its something we can consider and I think as you can see-- and I do agree that there's been a lot of questions raised about this. This is something maybe that, I mean particularly since we sent this forward, we're going to be looking at this and see how the courts interpret this, and I think that's a possible suggestion that the voting members of the Commission may want to consider at some point."

Honorable Ruben Castillo: I'm not going to comment on that specific suggestion, but I do want to say one thing: I've seen some of the form motions for reduction, and a lot of the motions make a great deal, or rely a great deal on the fact that the Commission unanimously voted to make this amendment retroactive but at the same time wants to downplay this policy statement that was passed. And I will tell you this: Every aspect, every line, every word of this policy statement was very carefully negotiated by all the members of the Commission, so to just suggest that we can go back and change something is not that easy because the political compromise that went into getting 7 votes and making this a 7-0 vote, I can tell you was very dependant on this policy statement being issued at the same time that all the commissioners voted for retroactivity, and all you need do is look at the statements of each commissioner that they made when they voted for retroactivity. So I think its fair to say –while I have commissioner Friedrich right next to me - that this would not have been a 7-0 vote if this policy statement was not enacted on the same day.

Commissioner Friedrich: “I certainly agree with that. I would add though - just again, not addressing your specific issue - but the Commission is always interested in being as clear as we can, and to the extent we may have done something that is causing confusion in the courts, we are always open to considering that. I don’t think the express language in the policy statement supports the argument you say is being made– that courts cannot grant a reduction in a case where a variance has been made pursuant to *Booker* – I don’t think that’s what we said, but certainly to the extent courts are struggling with this, we are always open to clarifying what we meant to do – so we’re not going to commit here to any changes, but we too would be concerned if this is causing a lot of litigation. Some of the amendments we made in the criminal history area recently are a direct result of problems courts were having dealing with the criminal history guideline amendments. So, yes, we would be receptive to issues that are raised as a result of this or any other concerns with 1B1.10 that courts are raising.”