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February 14, 2008

Honorable Robert C. Scott
Chairman
Subcommittee on Crime, Terrorism and Homeland Security
Committee on the Judiciary
U.S. House of Representatives
1201 Longworth House Office Building
Washington, DC 20515

Re: Reform of Crack Cocaine Sentencing Laws

Dear Mr. Scott:

I was asked to submit written testimony on behalf of the Federal Public and Community Defenders to the Subcommittee on Crime and Drugs of the Senate Judiciary Committee in connection with its hearing on February 12, 2008, entitled "Federal Cocaine Sentencing Laws: Reforming the 100-to-1 Crack/Powder Disparity." I forwarded my initial statement to Mr. Vassar on February 11, 2008.

I now enclose my supplemental statement, which responds to some of the inaccuracies in the testimony presented by the Department of Justice at the hearing on February 12, 2008. Please feel free to provide my initial statement and this supplemental statement to any of your colleagues in the House who may be interested.

Thank you for your leadership on these important issues.

Very truly yours,

A. J. Kramer



A. J. Kramer
Federal Public Defender
District of Columbia

SUPPLEMENTAL STATEMENT OF A. J. KRAMER
Federal Defender for the District of Columbia
On Behalf of the Federal Public and Community Defenders

BEFORE THE SUBCOMMITTEE ON CRIME AND DRUGS
OF THE JUDICIARY COMMITTEE OF THE UNITED STATES SENATE

February 12, 2008 Hearing
Federal Cocaine Sentencing Laws: Reforming the 100-to-1 Crack/Powder Disparity

Mr. Chairman and Members of the Subcommittee:

This supplemental statement corrects some of the inaccuracies in the testimony presented by the Department of Justice.

- 1. The prosecution described by the Department witness exemplifies the abuse of the cocaine sentencing laws to reward serious violent offenders with short sentences in exchange for their cooperation in putting low-level non-violent offenders behind bars for decades, and does not support the Department's arguments.**

Gretchen C. F. Shappert testified on behalf of the Department of Justice on February 12, 2008, urging Congress to take measures to repeal the Sentencing Commission's decision to make the amendment to the crack cocaine guidelines retroactive effective March 3, 2008, and suggesting that current crack cocaine penalties are warranted. Ms. Shappert based her arguments in very large part on a description of a case she recently prosecuted. As Ms. Shappert described it, the jury heard of an episode in which a crack cocaine trafficker engaged in kidnapping and pistol whipping, and the prosecution was based on the cooperation and testimony of citizens of the community who had been victimized by crack-related violence. The facts of the case are as follows.

In this trial, Thomas Joseph Isbell and Jonathan Patterson, two low-level dealers who engaged in no violence, were convicted on the basis of informant testimony in exchange for money, immunity, or substantial reductions in sentence below the applicable mandatory minimum or guideline range. Mr. Isbell, who was completely rehabilitated by the time of trial, is facing a mandatory minimum sentence of ten years and a potentially higher guideline sentence. Mr. Patterson, who has been incarcerated since his arrest, is facing a mandatory minimum sentence of twenty years and a potentially higher guideline sentence.

The prosecution's star cooperating witness, Wallace Horton, directed the kidnapping and carried out the pistol whipping described by the Department witness. Horton sent two underlings to Atlanta to purchase 2 kilograms of cocaine. Once there, they were robbed of \$23,000, half the price of the arranged drug purchase. At Horton's direction, they returned to Atlanta and kidnapped the person they believed had arranged the robbery, and took him to Horton's house in Lenoir, North Carolina. Horton began

hitting the kidnap victim with a high powered rifle, but found it awkward because he has only one arm, so retrieved a .357 magnum from an upstairs room and pistol whipped the victim. Horton then threatened the victim's mother, who called the sheriff. The sheriff advised Horton to release the victim safely, which he did. At the sheriff's direction, the victim then telephoned Horton, telling him he now had the drugs. Horton sent his underlings to meet the victim, at which point they were arrested, and Horton was arrested soon thereafter. Horton was never prosecuted for his violent kidnapping, despite the fact that government investigators had pictures of the savage beatings, multiple witnesses, and reports that Horton previously used violence to collect on drug debts. Neither Mr. Isbell nor Mr. Patterson had anything to do with the kidnapping/pistol whipping incident described by Ms. Shappert.

Horton was released from prison on May 15, 2007, and placed on supervised release.¹ Before Horton testified against Mr. Isbell and Mr. Patterson, defense counsel informed the prosecution that they had information that he was again using crack. In response to defense counsel's inquiry, around January 1, 2008, Horton was tested and the test confirmed his drug use. Prior to his testimony in federal court, the government took no action to revoke his supervised release. Thus, he walked in the front door of the courthouse, a free man with the appearance of having cleaned up his act, to testify as the prosecution's star witness against Mr. Isbell and Mr. Patterson.

The only innocent citizens of the community who testified in this trial testified on behalf of Mr. Isbell or Mr. Patterson. A retired Lenoir police detective and lead investigator for the Caldwell County District Attorney's Office testified that Mr. Isbell was a changed person after completing a drug treatment program as a condition of his pretrial release, that he was a good influence on young people in the community, and that he was a great father. A retired intensive probation surveillance officer testified that he saw Mr. Isbell 90 times in 90 days after he completed drug treatment, and each time the house was clean and Mr. Isbell was caring for his baby, acting as a model father. This retired officer saw Mr. Isbell in the community over the two intervening years before his trial, and at all times saw him caring for his son, sober, and working. Mr. Isbell's family members, deacons of the church, couples married for decades, the salt of the earth, all testified to his rehabilitation. The prosecution called Mr. Isbell's landlord to establish that he rented a house, and the landlord testified that Mr. Isbell was a good tenant and that he himself was a customer of Mr. Isbell's car detail shop -- direct evidence of legitimate employment that the prosecution sought to discredit during the course of the trial. Mr. Patterson's family members and other citizens of the Lenoir community, including his pastor, testified that he was a loving father who attended church on a regular basis with his family.

¹ Horton was originally facing 135-168 months on count one for drug trafficking, and 60 consecutive months on count two for using a firearm. At his first sentencing, on May 6, 2002, upon motion of the government, his sentence was reduced to 67 months, with 30 months to run consecutively. On May 9, 2007, he then received an additional reduction based on a Rule 35 motion by the government, reducing the second count from 30 months to six months, which essentially gave him a sentence of time served.

All of the prosecution witnesses other than law enforcement were addict informants or cooperating co-conspirators. The prosecution called 15-20 cooperating informants or co-conspirators. Some were facing mandatory life, others 10 or 20-year mandatory minimums. Some were high level dealers, others were crack addicts. The government has filed on behalf of all of them Rule 35 or substantial assistance motions which will substantially reduce their sentences. One addict received cash. Mr. Patterson's lawyer called five witnesses, all of whom had been incarcerated with one or more of the government's witnesses. Patterson's witnesses testified that they had heard the government's witnesses sharing information and discovery and telling the others what to say.

The only witnesses against the defendants who were not even threatened with prosecution by Ms. Shappert's office were white. This included a white middle-aged couple from Lenoir who testified that they had purchased \$500 worth of crack from one of the co-conspirators once a week for ten years. The week before trial was scheduled to begin in July 2007, Ms. Shappert personally went to their home, told them they were not targets, and asked them to testify. If prosecuted, they would have been subject to a mandatory minimum sentence of 20 years and a guideline sentence of nearly 30 years. Another witness who was not under threat of prosecution was a white middle-aged woman who testified that, while acting as a paid confidential informant for the Caldwell County Sheriff's Department, she was addicted to crack. Another white woman, given immunity from prosecution, testified to a long standing crack addiction and to purchasing crack in Lenoir. Of all of the witnesses, only these four witnesses were never even threatened with prosecution.

If you would like further information about this trial, you may contact Henderson Hill at 704 375-8461, or Lisa Costner at 336 748-1885. They represented Mr. Isbell and Mr. Patterson, respectively.

Claire Rauscher, the Federal Defender in the Western District of North Carolina, reports that the Isbell/Patterson prosecution is characteristic of the drug cases prosecuted in that district. The low-level dealers go to prison for a long time while the high-level leaders who testify against them spend relatively little time in prison. This is borne out by Commission statistics showing that the national average for substantial assistance motions is 26%, while it is 40.7% in the Western District of North Carolina.²

2. Repealing or limiting the Commission's well-considered and unanimous decision to make the crack cocaine amendment retroactive would reinforce the perception of racial bias.

Amendments lowering guideline sentences for LSD, marijuana, psilocybin, fentanyl, PCE and percocet, all of which benefited primarily white offenders, were made fully retroactive. See USSG App. C, amends. 126, 130, 488, 499, 516, 657.

² See Statistical Information Packet, Western District of North Carolina, FY 2006 at p. 19, <http://www.ussc.gov/JUDPACK/2006/ncw06.pdf>.

Amendments to the guidelines for fraud, obstruction, escape and money laundering, which likewise benefited primarily white offenders, were made fully retroactive. *See* USSG App. C, amends. 156, 176, 341, 379, 490. The maximum base offense level for drug offenders with the highest sentences allowable was retroactively lowered from 42 to 38, thus lowering the range in Criminal History I from 360 months-life to 235-293 months. *See* USSG App. C, amend. 505. Likewise, the elimination of the two-level weapon enhancement for those convicted and sentenced under 18 USC § 924(c) for using, carrying or possessing a firearm was also made retroactive. *See* USSG App. C, amend. 599. There is surely no reasonable basis to assume that crack offenders are by definition more dangerous than drug trafficking offenders whose base offense levels were the highest allowable or who were convicted of using a firearm.

3. The Department's claims of violence and recidivism are false and misleading, and do not justify a legislative repeal or limitation of the retroactive crack cocaine amendment.

As Judge Walton indicated, any legislation that would prohibit retroactive application of the amendment with respect to anyone who was not a first offender or had no weapon involvement, as the Department suggests, is unworkable and unfair, and makes no sense.

The Department's claims that "nearly 80 percent of the offenders who will be eligible for early release have a criminal history of II or higher," and that "many of them will also have an enhanced sentence because of a weapon or received a higher sentence because of their aggravating role" answers itself: Increases for criminal history, weapon enhancement, or aggravating role adjustment are already included in the sentence and will not be lessened by any new sentence. The Commission's policy statement for judges considering a retroactive sentence reduction provides and has always provided that the judge must leave all guideline application decisions other than the amended guideline unaffected. USSG § 1B1.10(b)(1).

The Commission found that in crack cases in 2005, death occurred in 2.2% of cases, any injury occurred in 3.3% of cases, and a threat was made in 4.9% of cases.³ Thus, 94.5% of cases involved no actual violence, and 89.6% involved no violence or threat of violence. Only 2.9% of crack offenders in 2005 used a weapon.⁴ The Commission also found that although "weapon involvement, by the broadest of definitions," *i.e.*, ranging from weapon use by the defendant to mere access to a weapon by an un-indicted co-participant, "has increased since 2002 in both powder cocaine and crack cocaine offenses, the rate of actual *violence* involved in the offense, *already relatively low*, has declined further during this period."⁵ Further, any tendency to violence decreases with age.⁶

³ *Id.* at 38.

⁴ *Id.* at 33.

⁵ *Id.* at 87 (emphasis in original and added).

The Department claims that defendants in Criminal History III have a 34.2% rate of recidivism and that those in criminal history category VI have a 55.2% rate of recidivism. This is false as to crack offenders. These are the average rates for *all* types of offenders. For Criminal History Categories II and higher, drug offenders have the *lowest* rate of recidivism of all offenders.⁷ Further, across all criminal history categories and for all offenders, the largest proportion of “recidivating events” that count toward rates of recidivism are supervised release revocations, which are based on anything from failing to file a monthly report to failing to report a change of address.⁸ Drug trafficking accounts for only a small fraction – as little as 4.1% – of recidivating events for all offenders.⁹

While it is true that crack offenders generally have higher criminal history categories than powder cocaine offenders,¹⁰ as the Commission has explained, “African-Americans have a higher risk of conviction for a drug trafficking crime than do similar White drug traffickers” because of “the relative ease of detecting and prosecuting offenses that take place in open-air drug markets, which are most often found in impoverished neighborhoods.”¹¹ Indeed, though African Americans comprise only 15% of drug users, they comprise 37% of those arrested for drug offenses, 59% of those convicted, and 74% of those sentenced to prison for a drug offense.¹²

Because African Americans have a higher risk of conviction than similar White offenders, they already have higher criminal history scores and thus higher guideline ranges, which they will continue to have with a revised sentence. And they are sentenced more often under the career offender guideline, are subjected to higher mandatory minimums for prior drug trafficking felonies under 21 U.S.C. § 841, and are more often disqualified from safety valve relief, each of which, except in narrow circumstances, will disqualify them from relief altogether. Categorically denying retroactivity to offenders simply because they are in Criminal History II or higher would fail to recognize that the

⁶ *Id.*

⁷ USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* at 13 & Ex. 11 (May 2004).

⁸ *Id.* at 4, 5 & Exs. 2, 3, 13.

⁹ *Id.* at Ex. 13.

¹⁰ USSC, *Cocaine and Federal Sentencing Policy* 44 (May 2007).

¹¹ USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 134 (2004).

¹² See Interfaith Drug Policy Initiative, *Mandatory Minimum Sentencing Fact Sheet*, http://idpi.us/dpr/factsheets/mm_factsheet.htm.

criminal history score is already built into the original guideline sentence and would be built into any new sentence, and would compound the race-related influences on the criminal history score.

4. The solution to any public safety concerns is for the government to do its job, and to allow judges to do their job.

Revised USSG § 1B1.10, p.s. provides that, in determining whether a reduction is warranted, and the extent of such reduction, the court “shall consider the factors set forth in 18 U.S.C. § 3553(a)” and “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,” and “may consider post-sentencing conduct of the defendant that occurred after imposition of the original term of imprisonment.”

Each prisoner released will be under supervision. If the government wishes to request some additional form of help for a particular prisoner to re-enter society, it should be doing so now, instead of urging Congress to repeal the Commission’s well-considered decision to make the sentence reduction retroactive.

5. The Department’s predictions of administrative and litigation burdens have already been disproved, and if credited by Congress to repeal the retroactive amendment, would only require much more substantial, prolonged and complex litigation.

The Department’s dire predictions bear no resemblance to what is actually already happening on the ground. District Court Judges, Probation Officers, Defenders, the Bureau of Prisons and U.S. Attorneys’ Offices have been working in a spirit of cooperation for the past two months to ensure an efficient and fair process. U.S. Probation has held two summits attended by hundreds of judges, probation officers, defenders, prosecutors and prison officials. Information and ideas were shared, and consensus on issues of consequence was reached. DOJ representatives announced that they would cooperate in the process.

Implementation is already underway and is running smoothly. For example, in the Western District of North Carolina, where Ms. Shappert is the U.S. Attorney, the Federal Defender, Claire Rauscher, recently met with the District Court Judges, the U.S. Probation Office, and representatives from the United States Attorneys Office (Ms. Shappert was not present) regarding plans for implementing the retroactive amendment. The upshot was that the vast majority of cases will be resolved by agreement, and a few will be litigated by either the government or the defense.

In the Eastern District of Virginia, which has the largest number of prisoners estimated to be eligible for release, the Defender, Michael Nachmanoff, has worked closely for nearly two months with the Probation Office, the U.S. Attorney’s Office, and the District Court to develop fair and efficient procedures to handle these cases. In his view, everyone involved is dedicated to effectively implementing the Commission’s

unanimous decision. He anticipates that the vast majority of cases will be resolved without any substantial disagreement or litigation. Thus far, the focus has been on assisting those who may be eligible for immediate release on March 3, which appears to include a grand total of 15 people. Like many other Defenders, Mr. Nachmanoff has found that the Commission's list is a helpful starting point, but it includes dozens of prisoners who have been released or who are ineligible for one reason or another, and also misses some prisoners who do qualify. This suggests that the total number of cases and the time it will take to process them will not be unduly burdensome. It will be handled in an orderly and manageable way over a long period of time.

The Department's claim that "federal defenders already have issued guidance telling defense counsel to argue that . . . every court should consider not only the two-level reductions authorized by the Commission but conduct a full resentencing" is false. A legal memorandum given to Defenders attempted to explore all possibilities that could be posed by certain irregularities in the guidelines, individual cases, arguments by the government, and circuit precedent. No uniform policy for every case could or would ever be promulgated by any representative of the Defenders. Defenders represent individual clients, and they adapt to conditions in their various districts. Nonetheless, at the two summits held by U.S. Probation, representatives of the Federal Defenders were able to report, based on a survey of all Defenders, that they expect over 90% of cases to be resolved by agreement. They also announced that Defenders cannot and have not adopted any blanket policy on whether the restrictions on judicial discretion contained in USSG § 1B1.10 should be challenged in any case.

Notably, the Department witness did not claim that any defendant in her district has filed a motion seeking more than a two-level reduction, or to know of any such motion being filed. The claim of litigation overload is thus without basis. The witness claimed concern over the Ninth Circuit's decision in *United States v. Hicks*, 472 F.3d 1167 (9th Cir. 2007), which held that the policy statement must be advisory in light of the Supreme Court's decision in *Booker v. United States*, 543 U.S. 220 (2005). Commission representatives have stated that they addressed *Hicks* by revising the policy statement and that they believe the Ninth Circuit will not apply *Hicks* to the policy statement as revised. Whatever the outcome, only 584 prisoners (2.9%) are estimated to be eligible for release in the entire Ninth Circuit over the course of decades.

Congress should not repeal retroactivity for the purpose of relieving prosecutors of litigating a small number of cases, using briefs that have already been prepared and distributed. Indeed, this would create much more litigation. A statute that retrospectively denied eligibility for a sentence reduction for an easily identifiable group of largely African American prisoners would violate the Article I prohibitions on Bills of Attainder and *Ex Post Facto* laws and the guarantee of Equal Protection of the Laws.

Thank you again for giving me the opportunity to submit a written statement on behalf of the Defenders. Please do not hesitate to contact me should you have any questions or need further information.