

**Statement of Michael S. Nachmanoff
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On Behalf of the Federal Public and Community Defenders
Before the Judiciary Committee of the House of Representatives
Subcommittee on Crime, Terrorism and Homeland Security**

**February 26, 2008 Hearing
Hearing on Cracked Justice – Addressing the Unfairness in Cocaine Sentencing**

Mr. Chairman and Members of the Subcommittee:

Thank you for holding this hearing and for the opportunity to speak to you on behalf of the Federal Public and Community Defenders regarding the urgent need for reform of the federal cocaine sentencing laws. The Defenders have offices in 90 of 94 federal judicial districts. We represent thousands of people charged with federal crack cocaine offenses, 82% of whom are African American.¹ In the Eastern District of Virginia, where I am the Federal Defender, there were 253 crack cocaine prosecutions in 2006, the highest number in the nation. Of those, 37.5% involved less than 25 grams.²

As well-documented by the Commission in its four reports to Congress beginning in 1995, the severity of crack cocaine penalties based on drug type is unjustified and unfair, has a disproportionate impact on African Americans, and creates the widely held perception that the penalty structure promotes unwarranted disparity based on race.³

The Sentencing Commission has taken a first step to “somewhat alleviate” these “urgent and compelling problems.”⁴ With the overwhelming support of the Judiciary, U.S. Probation, the Federal Defenders, the private defense bar, and community groups, the Commission promulgated a two-level reduction, which became law on November 1, 2007 with congressional approval. On December 11, 2007, after receiving over 33,000 letters from the public in support of making the amendment retroactive, the Commission voted unanimously to do so, as with prior amendments benefiting offenders of other races and more serious offenders.

The amended guideline range now includes, but no longer exceeds, the mandatory minimum penalty at the two statutory quantity levels for an offender in Criminal History Category I, and guideline ranges above, between and below the two statutory quantity

¹ USSC, Cocaine and Federal Sentencing Policy 16 (May 2007).

² *Id.* at 112-14, Table 5-3.

³ USSC, Cocaine and Federal Sentencing Policy (February 1995); USSC, Cocaine and Federal Sentencing Policy (April 1997); USSC, Cocaine and Federal Sentencing Policy (May 2002); USSC, Cocaine and Federal Sentencing Policy (May 2007).

⁴ USSC, Cocaine and Federal Sentencing Policy 9 (May 2007).

levels continue to be keyed to the mandatory minimum penalties.⁵ Before the amendment, guideline sentences for crack were three to over six times longer than for powder cocaine;⁶ now they are two to five times longer.⁷ In the Commission's view, the amendment is "only a partial remedy to some of the problems associated with the 100-to-1 drug quantity ratio," and requires a "comprehensive solution" from Congress, at which time the guidelines can be further amended.⁸

On December 10, 2007, the Supreme Court recognized that the sentencing guidelines for crack undermine the purposes of sentencing and create unwarranted disparity, even as amended, based on the Sentencing Commission's findings. Thus, a sentencing court does not abuse its discretion when it imposes a below-guideline sentence for those reasons.⁹ Again, however, this is only a partial remedy. A judge cannot sentence below a mandatory minimum, and many courts remain hesitant to sentence outside the guidelines.

Thus, until Congress acts, the cocaine penalty structure continues to undermine the purposes of sentencing and to create unjustified disparity.

The Defenders support the following reforms:

1. Penalties for offenses involving the same quantity of crack and powder cocaine should be equalized at a level no greater than the current level for powder cocaine.
2. Differences among offenses and offenders should be taken into account by the sentencing judge in the individual case. Aggravating circumstances should not be built into every sentence for crack cocaine, but should affect the sentence only if they exist in the individual case, as with all other drug types.
3. The mandatory minimum for simple possession of crack cocaine should be repealed.
4. Mandatory minimums for all drug offenses should be repealed.
5. A pilot program for federal substance abuse courts should be established.

⁵ USSC, Cocaine and Federal Sentencing Policy 9-10 (May 2007).

⁶ *Id.* at 3.

⁷ USSG § 2D1.1 (Nov. 1, 2007).

⁸ USSC, Cocaine and Federal Sentencing Policy 9-10 (May 2007).

⁹ *Kimbrough v. United States*, 128 S. Ct. 558 (2007).

6. Alternatives to incarceration, including probation, should be made available for all drug offenses.
7. If Congress authorizes the appropriation of funds for additional salaries and expenses for the prosecution of a substantial number of additional drug trafficking cases, it should authorize the appropriation of additional funds for the defense of such cases.
8. Finally, Congress should reject the Department's efforts to reverse the progress made by the Commission and to divert Congress from enacting a comprehensive and long overdue solution to the unfairness in cocaine sentencing.

I. Penalties for Offenses Involving the Same Quantity of Crack and Powder Cocaine Should Be Equalized at a Level No Greater Than the Current Level for Powder Cocaine.

There is no basis for punishing crack cocaine offenders any more severely than powder cocaine offenders based on drug type. They are the same drug and have the same effects. Indeed, all crack cocaine was once powder. Yet, the current penalty structure often punishes low level crack cocaine offenders more severely than high level powder cocaine offenders. Further, the majority of crack cocaine prosecutions are of low level street dealers. This diverts law enforcement and prosecution resources from high level offenders and contributes to the overcrowding of federal prisons with people who do not need to be there. At the same time, it does not prevent or deter drug crime. Instead, it destroys individuals, families and communities, contributes to recidivism, and undermines confidence in the justice system.

A. The Current Cocaine Penalty Structure Often Results in Punishment That is More Severe for Low Level Offenders Than for High Level Offenders, Serving No Legitimate Law Enforcement Goal and Wasting Resources.

A “major goal” of the Anti-Drug Abuse Act of 1986 was “to give greater direction to the DEA and the U.S. Attorneys on how to focus scarce law enforcement resources” on “major” and “serious” drug traffickers.¹⁰ In practice, the largest number of prosecutions involving cocaine of any type is against low level offenders, *i.e.*, street level dealers of crack cocaine and couriers of powder cocaine.¹¹ This misplaced focus is particularly serious in crack cocaine prosecutions, as 55.4% of all crack cocaine offenders are street level dealers, while 33.1% of powder cocaine offenders are couriers.¹²

¹⁰ H.R. Rep. No. 99-845, 99th Cong., 2d Sess. 1986, 1986 WL 295596 (Background).

¹¹ USSC, Cocaine and Federal Sentencing Policy 85 (May 2007).

¹² *Id.* at 20-21, Figures 2-5 & 2-6.

The median quantity of crack cocaine associated with the function of a street-level dealer is 52 grams.¹³ In 2006, over 35% of all crack cocaine cases involved less than 25 grams,¹⁴ and nearly 50% involved less than 50 grams.¹⁵ This is because “sellers at the retail level are the most exposed and easiest targets for law enforcement, provide an almost unlimited number of cases for prosecution, and are easily replaced.”¹⁶

John P. Walters, Director of the Office of National Drug Control Policy, told Congress in early 2005 that the current policy of focusing on small-time dealers and users was ineffective in reducing crime, while breaking generation after generation of poor minority young men.¹⁷ As the Sentencing Commission has found, “retail-level drug traffickers are readily replaced by new drug sellers so long as the demand for a drug remains high. Incapacitating a low level drug seller prevents little, if any, drug selling; the crime is simply committed by someone else.”¹⁸

This focus on low level crack offenders is particularly irrational since “virtually all cocaine is imported in powder form.”¹⁹ Powder cocaine is a necessary ingredient of crack cocaine without which crack cocaine cannot be made. Yet, high level powder dealers are punished less severely than low level crack dealers.

A person with no criminal history who possesses 5 grams of crack (10-50 doses), whether for personal use or sale, is subject to a guideline sentence of 51-63 months (after the 2007 amendment) and a mandatory minimum of five years. Five grams of powder converts to about 4 ½ grams of crack cocaine by simply adding baking soda, water and heat. But a person possessing 5 grams of powder (25-50 doses) with intent to distribute receives a guideline sentence of only 10-16 months, or if for personal use, no more than 12 months. To receive a five-year mandatory minimum sentence, a powder cocaine offender must distribute 500 grams, or 2,500-5,000 doses.²⁰

¹³ USSC, *Cocaine and Federal Sentencing Policy* at 45, Figure 10 (May 2002) (median drug weight for street level crack dealers was 52 grams in 2000).

¹⁴ *See* USSC, *Cocaine and Federal Sentencing Policy* at 112, Table 5.3 (May 2007).

¹⁵ *Id.* at 25, Figure 2.10.

¹⁶ *Id.* at 85.

¹⁷ Kris Axtman, *Signs of Drug-War Shift*, *Christian Science Monitor*, May 27, 2005.

¹⁸ 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). *See also* USSC, *Cocaine and Federal Sentencing Policy* 68 (Feb. 1995) (DEA and FBI reported that dealers were immediately replaced).

¹⁹ *Id.* at 85.

The five-year sentence for possessing or distributing 5 grams or 10-50 doses of crack (less than the average for a street level dealer, *see* footnote 24) is the same as the guideline sentence for dumping toxic waste knowing that it creates an imminent danger of death, the same as that for theft of \$7 million, and double that for aggravated assault resulting in bodily injury.²¹ The ten-year sentence for distributing 50 grams or 20-100 doses of crack (still less than the average for a street level dealer, *see* footnote 24), is far greater than any of those, slightly more than that for voluntary manslaughter, the same as that for theft of \$50 million, and triple that for racketeering.²²

Here is a comparison of the profitability of crack cocaine trafficking at the two mandatory minimum levels with that for other offenses punished at the same level:²³

Level 24: 51-63 months, Criminal History Category I	
Crack: 5 grams @ \$150/gram	\$750
Powder: 400 grams @ \$110/gram	\$44,000
Marijuana: 80 kg. @ 2.47/gram	\$197,600
Fraud	\$2,500,000-\$7,000,000
Level 30: 97-121 months, Criminal History Category I	
Crack: 50 grams @ \$150/gram	\$7500
Powder: 3.5 kg. @ \$110/gram	\$385,000
Marijuana: 700 kg. @ 2.47/gram	\$1,729,000
Fraud	\$50,000,000-\$100,000,000

Any proposal that would continue to punish crack offenders more harshly than powder cocaine offenders may perpetuate the problems that currently exist. For example, a 20:1 ratio, in which 25 grams would be subject to a five-year sentence and 250 grams would be subject to a ten-year sentence, would not focus law enforcement resources on kingpins or major traffickers. A quantity of 25 grams of crack is half that associated with

²⁰ USSC, Cocaine and Federal Sentencing Policy 63 (May 2007).

²¹ *See* USSG §§ 2A2.2, 2B1.1 2Q1.1.

²² *See* USSG §§ 2A1.3, 2B1.1, 2E1.1.

²³ Prices for crack and powder cocaine were taken from Figures 4.4 and 4.5 of the Commission's 2007 Cocaine Report. The price for marijuana was taken from Table 9 of the Office of National Drug Policy Control's Report, *The Price and Purity of Illicit Drugs, 1981 Through the Second Quarter of 2003* (November 2004), available at http://www.whitehousedrugpolicy.gov/publications/price_purity/results.pdf. The fraud amount is taken from USSG § 1B1.1 (Nov. 1, 2007). The quantity levels for the drugs are taken from USSG § 1D1.1 (Nov. 1, 2007).

a mere street-level dealer.²⁴ A quantity of 250 grams is orders of magnitude less than that associated with a high-level supplier or organizer/leader,²⁵ is in the neighborhood of that associated with such lowly roles as manager and cook, and is far less than that associated with a mere courier.²⁶

As these figures suggest, quantity is a poor and imprecise measure of culpability, and both quantity and type are subject to happenstance and manipulation. A typical street level dealer who supervises no one and makes little profit continues to sell small quantities of crack to an informant until he is arrested. That he is arrested after selling 250 grams of crack to an informant over the course of weeks or months does not make him a major drug trafficker.

Any disparity between crack and powder cocaine based on drug type invites manipulation of type and quantity, resulting in longer sentences for low level offenders and shorter sentences for serious offenders. The Commission has found that drug quantity manipulation and untrustworthy information provided by informants are continuing problems in federal drug cases.²⁷ These problems are particularly pronounced in cocaine cases because the simple process of cooking powder into crack results in a drastic sentence increase, and because a very small increase in the quantity of crack results in a very large increase in the sentence. The result is that agents and eager-to-please informants insist that powder be cooked into crack, arrange to buy the threshold amount in a single sale, or make additional buys, all for the purpose of arriving at the higher crack sentence.²⁸ Rather than encouraging law enforcement to focus on existing “major” and “serious” drug traffickers, the unfortunate fact is that the crack/powder disparity lends itself to abuse, creating long sentences for low level offenders who have no information to offer while more culpable offenders receive shorter sentences in return

²⁴ USSC, *Cocaine and Federal Sentencing Policy* at 45, Figure 10 (May 2002) (median drug weight for street level crack dealers was 52 grams in 2000).

²⁵ *Id.* (median weight for high level supplier of crack was 2962 grams in 2000).

²⁶ *Id.* (median weight of crack in 2000 for managers was 253 grams, for cooks was 180 grams, and for couriers was 338 grams).

²⁷ USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 50, 82 (2004).

²⁸ See, e.g., *United States v. Fontes*, 415 F.3d 174 (1st Cir. 2005) (at agent’s direction, informant rejected two ounces of powder defendant delivered and insisted on two ounces of crack); *United States v. Williams*, 372 F.Supp.2d 1335 (M.D. Fla. 2005) (“[I]t was the government that decided to arrange a sting purchase of crack cocaine [producing an offense level of 28]. Had the government decided to purchase powder cocaine (consistent with Williams’ prior drug sales), the base criminal offense level would have been only 14.”); *United States v. Nellum*, 2005 WL 300073 (N.D. Ind. Feb. 3, 2005) (defendant could have been arrested after the first undercover sale, but agent purchased the same amount on three subsequent occasions, doubling the guideline sentence from 87-108 months to 168-210 months).

for their cooperation. This is the very definition of unwarranted disparity, wastes taxpayer dollars, and should be eliminated from the federal cocaine sentencing laws.

B. All of the Evidence Supports Equal Punishment for Equal Quantities of Crack and Powder Cocaine at a Level No Greater Than the Current Level for Powder Cocaine.

Addiction and other medical effects on the user are the same for crack and powder cocaine and less serious in many respects than those of heroin, nicotine and alcohol. Crack and powder cocaine cause identical physiological and psychotropic effects regardless of the method of ingestion.²⁹ In any form, cocaine is potentially addictive.³⁰ While snorting powder cocaine is less addictive than smoking crack or injecting powder, “powder cocaine that is injected is more harmful and more addictive than crack cocaine.”³¹ The risk and severity of addiction to any drug are significantly affected by the way they are ingested,³² but no drug other than crack is punished more severely based on the most common method of ingestion.

One reason cocaine is smoked more often than it is injected is that smoking is safer given the risk of infection from sharing needles.³³ The danger to public health associated with needles, including the spread of AIDS and hepatitis, is more severe than the threat to public health posed by smoking crack. “People who inject cocaine can experience severe allergic reactions and, as with all injecting drug users, are at increased risk for contracting HIV and other blood-borne diseases.”³⁴

By 2004, opioid painkiller deaths outnumbered the total of deaths from heroin or cocaine.³⁵ Emergency room admissions are highest, and approximately equal, for alcohol and any kind of cocaine.³⁶

²⁹ USSC, Cocaine and Federal Sentencing Policy at 62-64 (May 2007).

³⁰ *Id.* at 65.

³¹ USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 132 (2004).

³² USSC, Cocaine and Federal Sentencing Policy at 65 (May 2007).

³³ USSC, Cocaine and Federal Sentencing Policy at 66 (May 2007).

³⁴ National Institute on Drug Abuse, *NIDA InfoFacts: Crack and Cocaine*, available at <http://www.nida.nih.gov/Infofacts/cocaine.html>.

³⁵ Testimony of Dr. Leonard J. Paulozzi, Medical Epidemiologist, Centers for Disease Control and Prevention, before Committee on Energy & Commerce, U.S. House of Representatives (Oct. 24, 2007) (emphasis added), available at <http://www.cdc.gov/washington/testimony/2007/t20071024.htm>.

³⁶ USSC, Cocaine and Federal Sentencing Policy at 77-78 (May 2007).

The highest rate of treatment admissions is for alcohol abuse, followed by marijuana, heroin, crack cocaine, methamphetamine, and powder cocaine.³⁷ Cocaine addiction appears to be more treatable than heroin or alcohol addiction. *See, e.g.*, Drug and Alcohol Services Information Report, *Admissions with 5 or More Prior Episodes: 2005* (of people seeking treatment in 2005 who had 5 or more prior treatment episodes, 37% were addicted to opiates, 36% to alcohol, and only 16% to cocaine). According to one study, it is more difficult to quit using nicotine or heroin than to quit using cocaine, withdrawal symptoms are more severe for alcohol and heroin than for cocaine, and the level of intoxication is greater for alcohol and heroin than for cocaine.³⁸

Negative effects of prenatal exposure are mild and identical for crack and powder cocaine and less severe than for other substances including alcohol. The negative effects of prenatal crack cocaine exposure are identical to the negative effects of prenatal powder cocaine exposure, which are significantly less severe than previously believed, are similar to prenatal tobacco exposure, less severe than heroin or methamphetamine exposure, and far less severe than prenatal alcohol exposure. The 2005 National Survey of Drug Use and Health estimated that of infants exposed to illicit drugs in utero, 7% were exposed to powder cocaine, 2% were exposed to crack cocaine, 73% were exposed to marijuana, and 34% were exposed to unauthorized prescription drugs.³⁹ A recent study found no differences in growth, IQ, language or behavior between three-year-olds who were exposed to cocaine in the womb and those who were not. *See* Kilbride, Castor, Cheri, *School-Age Outcome of Children With Prenatal Cocaine Exposure Following Early Case Management*, *Journal of Developmental & Behavioral Pediatrics*, 27(3):181-187, June 2006.

The incidence of violence is low, steadily decreased after the 1980s, and is addressed, if it occurred, through available enhancements in individual cases. In crack cases in 2005, death occurred in only 2.2% of cases, any injury occurred in only 3.3% of cases, and a threat was made in 4.9% of cases.⁴⁰ 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.⁴¹

³⁷ *Id.* at 79.

³⁸ Phillip J. Hilts, *Relative Addictiveness of Drugs*, *New York Times*, Aug. 2, 1994 (study by Dr. Jack E. Henningfield of the National Institute on Drug Abuse and Dr. Neal L. Benowitz of the University of California at San Francisco ranked six substances based on five problem areas), <http://www.tfy.drugsense.org/tfy/addictvn.htm>.

³⁹ USSC, *Cocaine and Federal Sentencing Policy* at 68-71 (May 2007).

⁴⁰ *Id.* at 38.

⁴¹ *Id.* at 33.

There has been a reduction in violence associated with crack since 1992. According to the Commission, this is consistent with the aging of the crack cocaine user and trafficker populations.⁴² “By the early 1990s . . . the relationship between crack and unwelcome social outcomes had largely disappeared. . . . After property rights were established and crack prices fell sharply reducing the profitability of the business, competition-related violence among drug dealers declined.”⁴³

Violence or weapon involvement, if it occurred, should be taken into account through enhancements in individual cases. Building it into the punishment for any given quantity of crack cocaine on the assumption that it occurs in every case punishes offenders for conduct that did not occur or double counts it when it did occur.

Recidivism is relatively low and is addressed if it exists through the criminal history score and other enhancements in the individual case. For Criminal History Categories II and higher, drug offenders have the *lowest* rate of recidivism of all offenders⁴⁴ 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.⁴⁵ Drug trafficking accounts for only a small fraction – as little as 4.1% – of recidivating events for all offenders.⁴⁶

While it is true that crack cocaine offenders generally have higher criminal history categories than powder cocaine offenders,⁴⁷ 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.”⁴⁸ 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.⁴⁹

⁴² *Id.* at 83, 87.

⁴³ Roland G. Fryer, Jr., Paul S. Heaton, Steven D. Levitt, Kevin M. Murphy, National Bureau of Economic Research, *Measuring the Impact of Crack Cocaine* (May 2005), <http://pricetheory.uchicago.edu/levitt/Papers/FryerHeatonLevittMurphy2005.pdf>.

⁴⁴ USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* at 13 & Ex. 11 (May 2004).

⁴⁵ *Id.* at 4, 5 & Exs. 2, 3, 13.

⁴⁶ *Id.* at Ex. 13.

⁴⁷ USSC, *Cocaine and Federal Sentencing Policy* 44 (May 2007).

⁴⁸ 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).

Because African Americans have a higher risk of conviction than similar White offenders, they already (1) have higher criminal history scores and thus higher guideline ranges, (2) are sentenced more often under the career offender guideline, (3) are subjected to higher mandatory minimums for prior drug trafficking felonies under 21 U.S.C. § 841, and (4) are more often disqualified from safety valve relief. In short, criminal history is already accounted for in a host of ways in individual cases. Building it into every crack cocaine sentence effectively double counts criminal history and exacerbates racial disparity.

No evidence supports raising powder cocaine penalties. Congress should “reject addressing the 100-1 drug quantity ratio by decreasing the . . . threshold quantities for powder cocaine offenses, as” the Commission has found that “there is no evidence to justify an increase in quantity-based penalties for powder cocaine offenses.”⁵⁰

C. The Harsh Federal Penalties for Crack Cocaine Offenses Destroy Individuals, Families and Communities, Undermine Public Confidence in the Justice System, and Create a Greater Risk of Recidivism.

Though some maintain that higher penalties for crack offenses protect and benefit African American communities, this claim is unsupportable. Over 32% of Black males born in 2001 are expected to go to prison during their lifetimes if current incarceration rates continue. In 2001, the percentage of Black males in prison was twice that of Hispanic males and six times that of White males.⁵¹ One of every fourteen African American children has a parent in prison, and thirteen percent of all African American males are not permitted to vote because of felony convictions.⁵² The harsh treatment of federal crack offenders has contributed to this deplorable situation.

The persistent removal of persons from the community for lengthy periods of incarceration weakens family ties and employment prospects, and thereby contributes to

⁴⁹ See Interfaith Drug Policy Initiative, *Mandatory Minimum Sentencing Fact Sheet*, http://idpi.us/dpr/factsheets/mm_factsheet.htm.

⁵⁰ See USSC, *Cocaine and Federal Sentencing Policy* 8 (May 2007).

⁵¹ U.S. Department of Justice, Bureau of Justice Statistics, *Special Report: Prevalence of Imprisonment in the U.S. Population, 1974-2001* (August 2003).

⁵² See American Civil Liberties Union, *Cracks in the System: Twenty Years of the Unjust Federal Crack Cocaine Law* 3-4, October 2006; Justice Policy Institute, *Cellblocks or Classrooms?: The Funding of Higher Education and Corrections and its Impact on African American Men* 10 (2002); Human Rights Watch & the Sentencing Project, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States* 8 (1998).

increased recidivism.⁵³ Reputable studies show that if a small portion of the budget currently dedicated to incarceration were used for drug treatment, intervention in at-risk families, and school completion programs, it would reduce drug consumption by many tons and save billions of taxpayer dollars.⁵⁴

Defenders see the pointless destruction of our clients' lives and families on a frequent basis. Under the statute and guidelines, even a first offender must spend a substantial period of time in prison, cutting off education and meaningful work, and greatly diminishing prospects for the future. The Defender in the District of Columbia recently represented a 22-year-old young man who was working toward his GED and taking a weekly class in the plumbing trade when he was sentenced to prison for selling 7 grams of crack to a cooperating informant. He had no prior convictions or even any prior arrests, no history of drug or alcohol abuse, was in a stable relationship, and had two small children to whom he was devoted. He was a random casualty of an investigation of a serious drug trafficking conspiracy in which he was not involved. A cooperator in that investigation, who happened to live in the same housing project, approached the young man to get him some crack, and he unwisely agreed in order to get cash to support his family. The government prosecuted the client in federal court, not because he was involved in the conspiracy under investigation, but to make a record for its cooperator. If the client had been prosecuted in superior court, he would have received a sentence of probation. If he had been prosecuted in federal court for selling 7 grams of powder cocaine, he would have received a sentence of probation. He is now serving a prison sentence, while the cooperator, who had a very substantial record, was sentenced to time served.

In a case handled by the Defender in Los Angeles, the client was just finishing up a sentence for being a felon in possession of a firearm. He had completed the 500-hour drug treatment program, had served as a suicide watch companion in prison for over a year, had been released to a halfway house, was working full time, and was about to regain custody of his son. On the eve of his return home and just before the statute of limitations would have expired, the government indicted him for a sale of four ounces of crack to a confidential informant, which had occurred seven months *before* the felon in possession offense. In that case, the informant, at the direction of law enforcement officers, rejected the four ounces of powder cocaine the client brought him and insisted on four ounces of crack instead. If the government had indicted the client for both offenses at once, he would have received a concurrent sentence. If the informant had not

⁵³ The Sentencing Project, *Incarceration and Crime: A Complex Relationship* 7-8 (2005) (hereinafter "*Incarceration and Crime*"), available at <http://www.sentencingproject.org/pdfs/incarceration-crime.pdf>.

⁵⁴ Caulkins, Rydell, Schwabe & Chiesa, *Mandatory Minimum Sentences: Throwing Away the Key or the Taxpayers' Money?* at xvii-xviii (RAND 1997); Rydell & Everingham, *Controlling Cocaine: Supply Versus Demand Programs* (RAND 1994); Aos, Phipps, Barnoski & Lieb, *The Comparative Costs and Benefits of Programs to Reduce Crime* (Washington State Institute for Public Policy 2001), <http://www.nicic.org/Library/020074>.

insisted on crack, the entire sentence would be wrapped up, the client would be working, and his son would have a parent to care for him. Instead, he is now serving a ten-year mandatory minimum sentence.

In a case handled by the Defender in the Southern District of Alabama, a forty year old mother of three and grandmother of two with no criminal history was convicted of conspiring to distribute crack. The only evidence against her was the uncorroborated testimony of serious drug dealers, one a former boyfriend, who had gun charges dismissed and received lower sentences in return. Her lawyer moved for a mistrial when he learned that the cooperators were placed in the same holding cell and were coordinating their testimony. The witnesses assured the judge that they did not discuss their testimony and the motion was denied. The woman was sentenced to twenty years in prison. Her 20-year-old daughter was forced to leave college to support and care for the family.

II. Aggravating Circumstances, Rather Than Being Built Into Every Sentence for Crack Cocaine Offenses, Should Affect the Sentence Only If Present In The Individual Case, as With Any Other Drug Type.

The aggravating circumstances once thought to be particularly prevalent in or unique to crack cocaine offenses are already available in existing guidelines and statutes applicable to all drug cases.⁵⁵ Thus, under the current penalty structure, for crack cocaine offenders, this means that they are being punished once based on an assumption that aggravating circumstances exist in every case even if they do not exist in the individual case, and twice if the aggravating circumstance is actually present in the case.

As with all other drug types, any additional harm in a crack cocaine offense should not be addressed through the blunt instrument of a higher penalty built into the punishment at every quantity level, but by enhancements that may or may not exist in individual cases. Many aggravating circumstances are already available under current law. *See* footnote 55, *supra*. Thus, any directive to the Commission regarding aggravating circumstances should be permissive, giving the Commission wide leeway to independently determine whether any aggravating circumstances should be added and if so, what their effect should be.

III. The Mandatory Minimum for Simple Possession of Crack Cocaine Should Be Repealed.

⁵⁵ *See* USSG § 2D1.1(b)(1) (actual possession of a weapon by the defendant or access to a weapon by an unindicted participant); 18 U.S.C. § 924(c) (consecutive mandatory minimum if weapon was possessed, used or brandished); USSG § 4B1.3 (offense was part of a pattern of criminal livelihood); USSG Chapter Four (criminal history score); USSG § 3B1.4 (use of a minor); USSG § 3B1.1 (aggravating role); USSG § 2D1.2 (sales to pregnant women, minors, or in protected locations); USSG § 2D1.1(a) (death or serious bodily injury); USSG § 5K2.1 (death); USSG § 2K2.2 (bodily injury); USSG § 3C1.1 (obstruction of justice).

Congress should repeal the mandatory minimum for simple possession of crack, so that the penalty for simple possession of crack is the same as that for simple possession of powder cocaine, as the Commission has unanimously and repeatedly recommended.

IV. Mandatory Minimums for All Drug Offenses Should Be Repealed.

Seventeen years ago, the Sentencing Commission found that mandatory minimums create unwarranted disparity and unwarranted uniformity, and transfer sentencing power from impartial judges to interested prosecutors.⁵⁶ Mandatory minimum statutes result in sentences that are unfair, disproportionate to the seriousness of the offense and the risk of re-offense, and racially discriminatory. The Commission, in its Fifteen Year Report, detailed many of these problems with support from many sources, including evidence from the Department of Justice “that mandatory minimum statutes [are] resulting in lengthy imprisonment for many low-level, non-violent, first-time drug offenders.”⁵⁷ The Commission concluded: “Today’s sentencing policies, crystallized into sentencing guidelines and mandatory minimum statutes, have a greater adverse impact on Black offenders than did the factors taken into account by judges in the discretionary system in place immediately prior to guidelines implementation.”⁵⁸

The Commission recently reported that in 2006, Black offenders were the only racial group comprising a greater percentage of offenders convicted under a mandatory minimum statute (32.9%) than their percentage in the overall offender population (23.8%). In drug cases, only Hispanics and Blacks comprised a greater percentage of offenders convicted under a mandatory minimum statute (42.4% and 32% respectively) than their percentage in all drug cases (41.7% and 29.2% respectively).⁵⁹

Today, there is a solid consensus in opposition to mandatory minimums among an ideologically diverse range of judges, governmental bodies and organizations dedicated to policy reform, including the Judicial Conference of the United States, the U.S. Conference of Mayors, the American Bar Association’s Justice Kennedy Commission, and Justice Kennedy himself.⁶⁰ According to the Constitution Project’s Sentencing

⁵⁶ See USSC, Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (1991).

⁵⁷ See USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 51 (2004), citing U.S. Department of Justice, *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories*, Executive Summary (February 4, 1994).

⁵⁸ *Id.* at 135.

⁵⁹ See Statement of Ricardo H. Hinojosa, Chair, United States Sentencing Commission, Before the Subcommittee on Crime, Terrorism and Homeland Security of the House Judiciary Committee 3, 12 (June 26, 2007).

Initiative, chaired by former Attorney General Edwin Meese III, “Experience has shown that mandatory minimum penalties are at odds with a sentencing guideline structure.”⁶¹

V. **A Pilot Program For Federal Substance Abuse Courts As a Sentencing or Pretrial Diversion Option Should be Established.**

We urge Congress to establish a pilot program for federal substance abuse courts that would be available as a sentencing or pretrial diversion option. Substance abuse or addiction is a contributing cause not only of simple possession, which comprises only 2.9% of federal drug offenses,⁶² but of drug trafficking and many other federal crimes.

The Benefits and Cost Savings of Substance Abuse Treatment and Substance Abuse Courts Are Well Established. Experts are in agreement that substance abuse treatment is far more cost effective than incarceration. Incarceration diminishes the ability to get a job, to be a parent and to be a productive member of the community, which in turn increases the risk of recidivism and the costs to the criminal justice system and society as a whole.⁶³ According to the National Institute on Drug Abuse, every dollar spent on effective treatment yields a \$4 to \$7 return in reduced drug-related crime, theft and criminal justice system costs, and the return is even greater when health care savings are taken into account.⁶⁴ According to a report prepared for the Office of National Drug Control Policy, each dollar spent on cocaine treatment yields \$7.48 in societal benefits.⁶⁵

⁶⁰ See Statement of Hon. Paul J. Cassell Before the Subcommittee on Crime, Terrorism and Homeland Security of the House Judiciary Committee on Behalf of the Judicial Conference of the United States (June 26, 2007); U.S. Conference of Mayors, Resolution Opposing Mandatory Minimum Sentences 47-48 (June 2006); American Bar Association, Report of the ABA Justice Kennedy Commission (June 23, 2004); Associate Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting at 4 (Aug. 9, 2003); Leadership Conference on Civil Rights, Justice on Trial (2000); Federal Judicial Center, The Consequences of Mandatory Prison Terms (1994).

⁶¹ Constitution Project, Sentencing Initiative, Principles for the Design and Reform of Sentencing Systems: A Background Report 12 (June 7, 2005).

⁶² USSC, 2006 Sourcebook of Federal Sentencing Statistics, Table 3.

⁶³ Doug McVay, Vincent Schiraldi, & Jason Ziedenberg, *Treatment or Incarceration: National and State Findings on the Efficacy of Cost Savings of Drug Treatment Versus Imprisonment* (March 2004), Justice Policy Institute Policy Report; National Institute on Drug Abuse, *Principles of Drug Abuse Treatment for Criminal Justice Populations*, National Institutes of Health (2006); *National Treatment Improvement Evaluation Study 1997 Highlights* (March, 1997) Washington, D.C.: U.S. Department of Health and Human Services, Center for Substance Abuse Treatment, Substance Abuse and Mental Health Services Administration.

⁶⁴ Rutledge, Josh, *Drug treatment urged in criminal justice, Report cites lower society costs*, The Washington Times, 25 July 2006.

⁶⁵ Rydell, C.P. & S.S. Everingham, *Controlling Cocaine* (1994).

Many states have adopted substance abuse court programs as a sentencing or pretrial diversion option. There are two typical approaches: (1) deferred prosecution (diversion) programs in which the participant does not plead guilty or judgment is withheld pending successful completion of (or failure in) the program; and (2) programs in which the participant pleads guilty, but the sentence is deferred or suspended pending successful completion of (or failure in) the program.⁶⁶ In February 2005, the GAO submitted a comprehensive report on adult drug courts. The GAO based its conclusions on twenty-seven evaluation studies. It found that the majority of studies revealed that drug courts resulted in reduced recidivism rates for all felony and drug offense participants.⁶⁷ Re-arrest and re-conviction rates for participants were below those of the control group.⁶⁸ Other studies show that drug court programs reduce recidivism, keep offenders employed and with their families and in their communities, and save taxpayer dollars that would otherwise be wasted on ineffective incarceration.⁶⁹

Federal Substance Abuse Courts Have Been Highly Successful But Are Available Only After A Sentence of Imprisonment Has Been Served. The Sentencing Commission, based on findings that lower recidivism rates correlate with abstinence, employment and education, has advised that rehabilitation programs that include substance abuse treatment, job training, and/or the pursuit of a degree would have a high cost-benefit value. USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* at 12-13, 15-16 & Ex. 10 (May 2004).

However, such programs are available in the federal system only after the offender has already completed what is usually a lengthy prison sentence. These programs (of which there are currently only five) have been highly successful.⁷⁰ Participation is voluntary and results in a reduced term of supervised release upon successful completion of a total of fifty-two weeks. Participants meet regularly as a group with the federal magistrate and/or district court judge in charge of the program. The judge assigns each person goals to achieve between meetings, and each person must stand up and account for what they have accomplished or not accomplished to the judge

⁶⁶ GAO Report to Congressional Committees, *Adult Drug Courts, Evidence Indicates Recidivism Reductions and Mixed Results for Other Outcomes* at 36, Feb. 2005 (“GAO Report”).

⁶⁷ *Id.* at 44.

⁶⁸ *Id.* at 45, 49.

⁶⁹ Ryan S. King, *Changing Direction? State Sentencing Reforms 2004-2006* (March 2007), <http://www.sentencingproject.org/Admin/Documents/publications/sentencingreformforweb.pdf>.

⁷⁰ Substance abuse courts are currently in operation in three districts, and “re-entry courts” are in operation in two other districts. No legislation was needed for these programs. They were implemented by Probation Offices, District Courts, and Defenders, with the assent of U.S. Attorneys. Legislation is needed, however, to create such programs at the front end.

and the entire group. They must, among other things, remain sober and be employed. When issues arise, treatment may be changed (*e.g.*, the person may be required to live in a sober house because her home environment does not support recovery), and/or graduated sanctions imposed (from writing an essay to community service to curfew to docking weeks from the 52-week calculation to a weekend or up to 7 days in jail).

A study conducted by the Federal Drug Court Team in the District of Oregon compared a control group with drug court participants, and found that (1) drug court graduates completed treatment at a rate 83% higher than the control group, (2) drug court graduates were 11% less likely to submit a positive urinalysis and 52% more likely to disclose drug use prior to testing, and (3) all drug court graduates paid restitution, while none of the control group did. In Oregon and other districts, judges, defenders and probation officers report that these programs work because of individual attention from the judge, the award of incentives, the imposition of sanctions, and peer pressure and support from others who are succeeding in the face of the same problems. Six other district courts are opening similar programs within the next few months, and proposals are pending in four other districts.

The success of these programs demonstrates that prison first, drug courts only later, is insufficient. Participants are still addicted when released because most prisoners receive no treatment in federal prison. Spending years in prison makes recidivism more likely by breaking up families and making offenders less employable. If offenders were given the tools and incentives on the front end, recidivism would be reduced at less cost.

These programs also demonstrate that there is much to gain by making participation available to a wide range of offenders. In the first class of ten who recently graduated successfully in the District of Massachusetts, one was convicted of delay of the mail, one of possession of a firearm with an obliterated serial number, two of bank robbery, and six of drug trafficking (two crack cocaine, one powder cocaine, two heroin, one marijuana). Three graduates had 0-1 criminal history points, three had 2-3 criminal history points, and four had 13 or more criminal history points.

The Establishment of Federal Substance Abuse Courts is Necessary to Avoid Unwarranted State/Federal Disparity, to Rehabilitate Federal Offenders, and to Save Federal Resources. The existence of drug courts in the state system but not the federal system in the same district creates unwarranted disparity. Federal authorities can and do take cases from state court, where sentences are generally lower and drug courts are available. As often as not, this has nothing to do with the seriousness of the offense. Funding more state drug courts without creating federal substance abuse courts would perpetuate this unwarranted federal/state disparity. The establishment of federal substance abuse courts would remove this source of unwarranted disparity, rehabilitate federal offenders, and save federal dollars.

Pretrial Diversion is Available in the Federal System But Only for Simple Possession and Substance Abuse Treatment is Not Required. “Pre-judgment probation” is available under 18 U.S.C. § 3607 for a person found guilty of simple

possession under 21 U.S.C. § 844 who has no prior controlled substance conviction. The judge may place the person on probation for not more than one year, and must dismiss the proceedings without entering judgment if the person does not violate a condition of probation. In addition, the United States Attorneys' Manual provides that a prosecutor may decline to charge, or dismiss charges, upon completion of a period of supervision. This "pretrial diversion" procedure is not available to anyone who is an "addict," or who has two or more prior felony convictions. USAM § 9-22.100.

The Department's Objections to Federal Drug Courts Are Unsupported. The Department of Justice claims that federal drug courts are inappropriate because the federal system "deals overwhelmingly with drug trafficking defendants who have committed more serious drug trafficking offenses, are often violent, and are not eligible for, or amenable to, drug-court-type programs." DOJ Report to Congress on the Feasibility of Federal Drug Courts 1 (June 2006). While serious and violent drug trafficking may be what Congress had in mind for the federal system, the reality is that most federal drug defendants are low level, non-violent street dealers, couriers, and users.⁷¹ These offenders are amenable to substance abuse treatment, as are other types of federal offenders who suffer from addiction and whose crimes are often inextricably linked to addiction.

The Department also claims that "federal programs during pretrial release, incarceration, and supervised release, are already available as an alternative to a new federal drug court program." *Id.* This is inaccurate. While some defendants *can* receive treatment during pretrial release, *if* they are released, they are not required or allowed to participate for 52 weeks, the time it takes for a successful result. Thus, there is no effective federal drug court program available on the front end where it could do the most good and save the most resources.

The Department's claim that treatment is available during incarceration is largely inaccurate. After Congress created the residential drug and alcohol program, *see* 18 U.S.C. § 3621(e)(2)(B), the BOP, by unilateral regulation, placed many restrictions on the ability to obtain the one-year sentence reduction, thus removing the incentive to participate that Congress intended. Those convicted of being a felon-in-possession, no matter how non-violent, are ineligible. Those who received the two-level weapon

⁷¹ Over 51% of federal drug offenders have 0-1 criminal history points and over 83% had no "weapon involvement," broadly defined as anything from use by the defendant to mere access to a weapon by an un-indicted co-participant. *See* U.S. Sentencing Commission, 2006 Sourcebook, Tables 37, 39. The largest proportion of powder cocaine offenders are mules and the largest proportion of crack cocaine offenders are street level dealers. *See* USSC, Cocaine and Federal Sentencing Policy 19 (May 2007). A study by the Department in 1994 found that a substantial number of federal drug offenders played minor functional roles, had engaged in no violence, and had minimal or no prior contacts with the criminal justice system, and that this was a waste of taxpayer dollars. U.S. Department of Justice, *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories*, Executive Summary (February 4, 1994), available at http://fd.org/pdf_lib/1994%20DoJ%20study%20part%201.pdf.

enhancement under the drug guidelines are ineligible, thus excluding many who were convicted of a drug offense in which a gun was merely possessed or accessible to someone other than the defendant. Anyone with certain crimes of violence in his criminal history, no matter how old, e.g., a 30-year-old bar fight, is ineligible for the reduction. These restrictions were not required by Congress.⁷²

Similarly, in January 2005, BOP unilaterally terminated the boot camp program enacted by Congress in 1990. The only study of the federal boot camp program showed it to be effective and efficient. Nonetheless, BOP terminated it, without congressional consultation or approval, depriving judges of a mitigating sentencing option that benefited first time non-violent offenders,⁷³ the very ones DOJ concluded in its own study were receiving unnecessary time and wasting taxpayer dollars.⁷⁴

VI. Alternatives to Incarceration, Including Probation, Should Be Made Available For All Drug Offenses.

Since the Anti-Drug Abuse Act of 1986 and the Sentencing Guidelines, use of punishments options short of incarceration, such as probation, home detention, intermittent confinement and community service, has been greatly reduced. In 1984, over 30% of federal defendants were sentenced to probation without any term of imprisonment.⁷⁵ By 2006, only 7.5% of federal defendants were sentenced to straight probation.⁷⁶ In 1995, 78.7% of federal defendants received a sentence including a term of imprisonment, and of those, 94% were sentenced to straight prison.⁷⁷ By 2006, 88.6% received a sentence including a term of imprisonment, and of those, 96% were sentenced to straight prison.⁷⁸

⁷² The exclusion from early release for those convicted of possessing, carrying or using a firearm was recently struck down because BOP articulated no rationale for categorically excluding such prisoners. *Arrington v. Daniels*, __ F.3d __, 2008 WL 441835 (9th Cir. Feb. 20, 2008).

⁷³ Update on BOP Issues Affecting Clients Before And After Sentencing at 5-6, <http://or.fd.org/BOPNotesOnIssuesJan07.pdf>.

⁷⁴ U.S. Department of Justice, *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories*, Executive Summary (February 4, 1994), available at http://fd.org/pdf_lib/1994%20DoJ%20study%20part%201.pdf.

⁷⁵ USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 43-45 & Fig. 2.2 (2004).

⁷⁶ USSC, 2006 Sourcebook of Federal Sentencing Statistics, Fig. D & Table 12.

⁷⁷ USSC, Annual Sourcebook of Federal Sentencing Statistics, Table 18.

⁷⁸ USSC, 2006 Sourcebook of Federal Sentencing Statistics, Table 12.

We do not believe that it is necessary or advisable that fully 88.6% of all federal offenders serve a prison sentence, or that drug trafficking offenders be excluded from the possibility of a probationary sentence altogether. Incarceration means loss of employment and family support, the two factors most likely to promote rehabilitation and prevent recidivism, and certainly makes future employment more difficult to obtain.

H.R. 5035, by making probation and parole available to cocaine offenders, is a step in the right direction.

VII. Parity in Resources Between Prosecution and Defense is Necessary.

Section 10 of H.R. 4545 would authorize the appropriation of \$56,000,000 for salaries and expenses for the prosecution of high level drug offenders. This would result in many additional cases for Defenders and CJA counsel. Defenders handle 75% of federal criminal cases at the trial level. Of the other 25%, the majority are multi-defendant cases, typically drug cases, in which the Defender represents one of the defendants and CJA counsel is appointed for the others.

Prosecutors have vast investigative support outside of their agency and outside of their budget, and have the ability to bring witnesses to their offices. Defense counsel must perform all or much of the investigation themselves. We frequently meet with clients and witnesses in far flung jails and correctional institutions. We may spend an entire day for a brief meeting with one client or one witness. For these and other reasons, it takes more lawyer time to defend a case than to prosecute it. Because of budgetary constraints and hiring freezes, there has been no appreciable increase in Defender hires over the past few years, though our caseload increases annually.

The Sixth Amendment guarantees every indigent defendant the right to appointed counsel and every defendant the right to effective assistance of counsel. *See Gideon v. Wainwright*, 372 U.S. 335 (1963); *Strickland v. Washington*, 466 U.S. 668 (1984). Defender Offices, already strained, cannot provide effective representation if their caseloads are substantially increased. Thus, if the prosecution's budget for drug cases is increased, a corresponding increase for the defense is necessary.

VIII. Congress Should Reject the Department's Efforts to Reverse the Progress Made by the Commission and to Divert Congress from Enacting a Comprehensive Solution.

A. Recent Claims About the Number of Prisoners Who Will Be Released And When Due to the Retroactive Amendment Are Inaccurate.

Representations were made at the Senate hearing that there was going to be a "mass release" of 10% or 25% of the federal prison population as a result of the retroactive amendment. This is not so. The federal prison population is approximately

200,000 today.⁷⁹ The Commission estimates that due to the retroactive amendment, approximately 19,500 people are going to be released *over the course of thirty years*.⁸⁰

These defendants, of course, were going to be released in any event, and in most cases not much later. According to the Commission, two thirds will receive a sentence reduction of two years or less. *See* USSC, Analysis of the Impact of the Crack Cocaine Amendment if Made Retroactive, Table 6 (28.6% with 0-12 months reduction, 34.9% with 13-24 months reduction, 18.7% with 25-36 months reduction, 9.9% with 37-48 months reduction, and 7.9% with 49+ months reduction).

The Commission estimates that, across 94 judicial districts, 1508 prisoners will be due for immediate release on March 3, a number that is probably overstated, as many of these prisoners have been released after serving their full original sentences. Nearly 70,000 people are released from federal prison annually.⁸¹ A few more, who have already served sentences that are greater than necessary to serve legitimate sentencing goals, is hardly a “mass release.”

B. The Department’s Representations About the Dangerousness of this Population Are Unsupported.

The Attorney General’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,

⁷⁹ *See* <http://www.bop.gov/news/quick.jsp#1>. Due in large part to the draconian federal drug sentencing laws, it has increased from 44,408 in 1986, and 48,300 in 1987. *See* Katherine M. Jamieson and Timothy Flanagan, eds., *Sourcebook of Criminal Justice Statistics – 1988* Table 6.34, Department of Justice, Bureau of Justice Statistics, Washington, DC: USGPO, 1989.

⁸⁰ *See* USSC, Analysis of the Impact of the Crack Cocaine Amendment if Made Retroactive, Table 7; <http://www.ussc.gov/PRESS/rel121107.htm>.

⁸¹ The breakdown by offense type is as follows:

Violent offenses 4,343
Property offenses 9,175
Drug offenses 24,971
Public-order offenses 4,627
Weapon offenses 7,089
Immigration offenses 17,526
Missing/Unknown 1,826
Total 69,557

BJS Federal Justice Statistics Program website (<http://fjsrc.urban.org>)
Data Source: Bureau of Prisons - Extract from BOP's online Sentry System, FY 2006 (as standardized by the FJSRC).

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 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).

As noted above, 94.5% of crack cases in 2005 involved no actual violence, and 89.6% involved no violence or threat of violence. Any violence or weapon involvement is already built into the original guideline sentence and would be built into any new sentence.

The Department's witness has claimed 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 and drug offenders generally. 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 offenders⁸² As noted above, 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.

C. The Solution to Any Legitimate Public Safety Concerns is for the Government to Do its Job, and to Allow Judges to Do Theirs.

If the government believes that any particular prisoner poses a public safety risk, it is invited to bring this to the judge's attention, and judges are required to consider this factor whether or not the government raises it. *See* USSG 1B1.10, comment. (n.1(B)).

There should be few such concerns, however, because the Attorney General's claim that the retroactive application of the amended guideline "will pose significant public safety risks" is contrary to the evidence showing that this population is overwhelmingly non-violent.⁸³

Each prisoner released will be under supervision of a U.S. Probation Officer. It is the Probation Officer, not the Bureau of Prisons, who assists the releasee in setting up treatment, and finding a job and housing. If the government wishes to request some additional form of help for a particular prisoner to re-enter society, it may do so.

⁸² USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* at 13 & Ex. 11 (May 2004).

⁸³ *See* Darryl Fears, Crack Set for Release Mostly Non-Violent, Study Says, Washington Post, Feb. 22, 2008.

D. 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. 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.

E. The Department’s Claims of Administrative and Litigation Burdens Are Not Consistent With the Facts on the Ground.

The Department witness’s claims of undue burden 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. It would be a massive waste of resources and goodwill to derail the process now, as the Department urges.

Implementation is already underway and is running smoothly. In the Eastern District of Virginia, which has the largest number of prisoners estimated to be eligible for release (1208⁸⁴), I have worked closely for 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. Everyone involved is dedicated to effectively implementing the Commission’s unanimous decision. I anticipate that the vast majority of cases will be resolved without any substantial disagreement or litigation. The same apparently can be said for most other districts. 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 without litigation. Thus far, the focus in my district has been on assisting those who may be eligible for immediate release on March

⁸⁴ *See* USSC, Analysis of the Impact of the Crack Cocaine Amendment if Made Retroactive, Table 8.

3, which appears to include a grand total of 16 people. I have 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. 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 Western District of North Carolina, where Ms. Shappert is the U.S. Attorney, has only 436 prisoners estimated to be eligible for early release over the next thirty years.⁸⁵ The Federal Defender there, Claire Rauscher, also has 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. Ms. Rauscher expects that the vast majority of cases will be resolved without litigation by either the defense or the government.

Ms. Shappert's claim in her Senate statement that federal defenders 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 simply not correct. A legal memorandum was made available to Defenders which addressed litigation issues that may be posed by anomalies in the amended guidelines, individual cases, arguments by the government, and circuit precedent. No uniform policy for every case would ever be promulgated by any representative of the Defenders. This is because Defenders represent individual clients and they adapt to conditions in their various districts.

Notably, Ms. Shappert does 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. She claims 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). This decision was issued before the policy statement was amended. Whether it will be applied to the revised policy statement remains to be seen. In any event, only 584 prisoners (2.9%) are estimated to be eligible for release in the entire Ninth Circuit over the course of three decades.

Congress should not repeal retroactivity for the purpose of relieving prosecutors of litigating a small number of cases. 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.

⁸⁵ See USSC, Analysis of the Impact of the Crack Cocaine Amendment if Made Retroactive, Table 8.

In conclusion, I again thank you for your attention to the urgent and compelling need for reform of the federal cocaine sentencing laws.