# FEDERAL PUBLIC DEFENDER

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**Testimony of**
**Lisa B. Freeland**
**Federal Public Defender for the Western District of Pennsylvania**
**Before the**
**United States Sentencing Commission**
**Public Hearing on Retroactivity**
**November 13, 2007**

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My name is Lisa Freeland and I am the Federal Public Defender for the Western District of Pennsylvania. I would like to begin by thanking the United States Sentencing Commission for convening this public hearing and for inviting me to testify on behalf of the Federal Public and Community Defenders regarding this most important issue.

As the Commission noted in its reasons for the amendment, the changes to the crack cocaine guideline are intended to partially remedy the urgent and compelling problems associated with the 100-to-1 crack-to-powder ratio which, for decades, resulted in excessively severe sentences for tens of thousands of offenders. Recognizing that basic principles of fairness and equity demanded that the base offense levels for crack offenses be reduced, the Commission acted. Those same principles require that the Commission act again and afford retroactive application of the amendment. Only then will the Commission's efforts at promoting justice in sentencing be effective.

If the Commission decides instead to turn a blind eye to those already sentenced, its inaction will stand in stark contrast to its handling of prior amendments to the drug guideline. Amendments involving marijuana, LSD, and oxycodone all were made retroactive despite the fact that they affected far fewer and much less severe sentences. Moreover, none of these prior amendments were prompted by Commission findings – based on decades of data collection, research and evaluation – that the existing guidelines undermined the objectives of the Sentencing Reform Act and the purposes of punishment.

Simply put, treating crack cocaine differently by refusing to make the amendment retroactive is inconsistent with past practice and unfair. It will also expose the Commission to blame for allowing the racial effect of the crack guideline to continue unabated in our nation's prisons. Those who benefitted from the prior drug amendments generally were white, while the vast majority of those sentenced under the crack guideline are African-American. The Commission already has recognized the "urgent and compelling" nature of the guideline's

disparate impact on African-American men. It has also acknowledged that the perception of improper racial disparity fosters disrespect for and lack of confidence in the criminal justice system.

Congress charged the Commission with the duty to promote respect for the law. A refusal to make the recent amendment to the crack guideline retroactive will signal to all those involved in the criminal justice system, as well as the public at large, that the Commission's commitment to fairness and justice in sentencing does not extend to African-Americans.

Others have suggested that the federal courts will be crippled by retroactive application of the amendment. That view is fantastic and must be rejected. The courts exist to dispense justice. Where, as here, justice and fairness require a particular action, the administrative costs associated with that action cannot be considered an undue burden. Our judicial system inherently tolerates the costs of achieving just results. It would be improper to base a decision about whether to act on a fear that it will be burdensome for the courts.

Even if considering the impact on the court system were proper, the anticipation surrounding the crack amendment and the severity of the sentences imposed under the prior guideline guarantee that, irrespective of the Commission's decision about retroactivity, petitions seeking a reduction in sentence will be filed under Title 18, Section 3582(c)(2) and under Title 28, Sections 2241 and 2255. I am confident that many courts also will see Petitions for Writs of Mandamus and of Coram Nobis, among others. The question of whether a reduction in sentence based on the crack amendment is available absent retroactive designation by the Commission will be litigated in every courtroom in the United States. Some defendants will receive reduced sentences, others will not, and in each case, appeals will ensue.

The Commission can either facilitate this litigation by making the amendment retroactive or it can stand by and watch as the courts, defendants and prosecutors spend years grappling with the issue of how to rectify years of unjustifiable sentences. If the Commission truly seeks to protect the system, it will act to provide guidance to the courts.

Finally, the Commission must reject any insinuation that retroactive application will result in the premature release of dangerous offenders to the streets of our cities and towns. The amendment reflects the Commission's findings that the sentences imposed under the 100-to-1 ratio are unjustifiably severe and that sentences imposed under the amended guidelines will better serve the purposes of punishment.

It logically follows, then, that retroactive application of the amendment will simply result in every crack offender – those already sentenced and those yet to be sentenced –receiving a sentence range that the Commission believes better serves the ends of justice and the purposes of punishment. In other words, any release based on the retroactive application of the amendment may be earlier than previously expected, but no such release will be premature.

Of course, even if the amendment is made retroactive, a sentencing court is not required to reduce a defendant's sentence. And, in the event a sentence is reduced to time served, no one will be "let loose," so to speak, because a sentence of supervised release will begin immediately. As noted in the November 2, 2007, comments submitted by the Chair of the Committee on Criminal Law of the Judicial Conference of the United States, the Probation and Pretrial Services Chiefs Advisory Group (CAG) believe probation offices around the country can handle the anticipated influx of supervisees without jeopardizing agency resources or public safety.

In sum, the crack amendment reflects the Commission's sound judgment that the 100-to1 ratio cannot coexist with fairness and equity in sentencing. There is no reason – not one – for the Commission to refuse retroactive application of it. Such a failure of leadership at this time would open the courts to an onslaught of unnecessary litigation, and leave tens of thousands in prison serving sentences that the Commission knows are unjust and unjustifiable. And, it will serve as a signal that the Commission will only remedy past injustices when those who stand to benefit are predominantly white. Such a legacy will vastly overshadow the significant and positive step the Commission took toward redressing the urgent and compelling problems associated with the 100-to-1 ratio by proposing and promoting the amendment.

On behalf of the Defenders, I hope the Commission does not allow its substantial efforts in this area to be diminished.