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Honorable Ricardo Hinojosa
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Defender comments and written testimony regarding retroactivity of amendments to crack guideline and criminal history guideline.

Dear Judge Hinojosa:

With this letter, we provide our comments and written testimony on behalf of the Federal Public and Community Defenders on whether the Commission should include in subsection (c) of U.S.S.G. § 1B1.10 the proposed amendment to U.S.S.G. § 2D1.1 relating to offenses involving crack cocaine and the proposed amendments to the criminal history rules.

I. CRACK COCAINE

The Commission should include the proposed amendment to the crack guideline in § 1B1.10(c) as an amendment the district courts may apply retroactively. As the Commission recognizes, the problems associated with the 100-to-1 crack to powder ratio are "so urgent and compelling" that the Commission should take every step within its power to alleviate those problems. The Commission has already taken a modest but important step toward that goal by proposing the two-level reduction in the offense levels for crack offenses, but should not stop there.

For over twenty years, the Commission has been plagued by criticism that its cocaine sentencing policy is unfair, inconsistent, and racially discriminatory. Having now acknowledged its unintended contribution to this injustice, the Commission should demonstrate its full commitment to proportionate sentences and race-neutral policies by empowering judges to undo at least some of the damage. To choose otherwise could threaten to extinguish the good faith engendered by the Commission's decision to amend the guideline in the first place.

A. The relevant factors weigh in favor of making the amendment retroactive.

In deciding which amendments should be eligible for retroactive application under § 1.10(c), the Commission considers, among other factors, "the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under subsection (b)."[1] Each of these factors weighs in favor of making the amendment retroactive.

The purpose of the amendment is to lower the overly harsh sentencing ranges and remedy the disparate treatment of black drug offenders caused by the crack guideline.

Since 1995, the Sentencing Commission has consistently taken the position that the 100-to-1 ratio was unwarranted from its inception, has a racially disparate impact, and undermines various purposes of sentencing as set forth in the Sentencing Reform Act. In its 1995 Report to Congress, the Commission acknowledged that the unduly harsh sentences imposed upon crack offenders, the vast majority of whom are black, are not supported by sufficient policy bases and create "the perception of unfairness, inconsistency, and a lack of evenhandedness."[2]

In its 2002 Report, the Commission urged Congress to abandon the 100-to-1 ratio, stating that it "firmly and unanimously believes that the current federal cocaine sentencing policy is unjustified and fails to meet the sentencing objectives set forth by Congress."[3] As explained there, "[t]he 100-to-1 drug quantity was established based on a number of beliefs about the relative harmfulness of the two drugs and the relative prevalence of certain harmful conduct associated with their use and distribution that more recent research and data no longer support."[4] The Commission further recognized that the unjustifiably severe penalties against black drug offenders creates a perception of "improper racial disparity [that] fosters disrespect for and lack of confidence in the criminal justice system" among the poor and minority groups, "the very groups Congress intended would benefit from the heightened penalties for crack cocaine."[5]

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[1] *See* U.S.S.G. § 1B1.10(c) cmt. background.

[2] United States Sentencing Comm'n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy*, Executive Summary xii-xv & 192 (1995) (repudiating any sentencing distinction between crack and powder cocaine based on findings that the 100-to-1 ratio resulted in disproportionately severe sentences that have a disparate impact on African Americans).

[3] *See* United States Sentencing Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy*, at 91 (2002).

[4] *Id.*

[5] *Id.* at 103.

In its May 2007 Report to Congress, the Commission reaffirmed that quantity-based penalties for crack cocaine offenses overstate the relative harmfulness of crack cocaine compared to powder cocaine, sweep too broadly, apply most often to lower level offenders, overstate the seriousness of most crack offenses, and disproportionately impact minorities.[6] More particularly, the Commission acknowledged that crack cocaine penalties are not only more severe than the penalties for powder cocaine, but also more severe in general than penalties for all other drugs in the majority of federal drug cases.[7] The Commission also found through updated data that, just as in 2002, the majority of crack offenders perform low-level trafficking functions and that their offenses do not involve aggravated conduct such as weapon involvement, bodily injury, or distribution to protected persons or in protected places.[8] Finally, the Commission updated the research supporting its core findings that crack cocaine and powder cocaine cause identical pharmacologic effects, contrary to the initial assumptions underlying the enactment of the 100-to-1 ratio.[9]

In its statement of reasons for the May 11, 2007 amendment, the Commission acknowledged that it had contributed to the problems associated with the 100-to-1 ratio when it set drug quantity thresholds to produce base offense levels that produced guideline ranges above the statutory mandatory minimum penalties.[10] In order to partially alleviate those problems, the Commission lowered by two levels the drug quantity thresholds above and below the mandatory minimum threshold quantities in the Drug Quantity Table.[11] By expressly intending to remedy its contribution to empirically unjustifiable sentences for crack offenders, the Commission has provided a powerful argument for retroactivity. Indeed, the Commission has consistently made such amendments to the drug guideline retroactive in the past.

In November 1993, the Commission revised the method of calculating the weight of LSD for purposes of determining the guidelines offense level, instructing courts to calculate the amount of LSD by using a constructive weight of .4 milligrams per dose rather than weighing the carrier medium.[12] The Commission explained that the amendment would eliminate "unwarranted disparity among offenses involving the same quantity of actual LSD but different carrier weights" and reduce "sentences that are

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[6] *See* United States Sentencing Comm'n, *Report to Congress: Cocaine and Federal Sentencing Policy*, at 8 (May 2007) ("*2007 Crack Report*").

[7] *See id.* at 5, 96-97.

[8] *Id.* at 11-14.

[9] *Id.* at 69 (citing Written Statement of Harolyn Belcher, M.D., re: Cocaine Sentencing Policy, at 1 (Nov. 14, 2006)).

[10] 72 Fed. Reg. 28,558, 28,572-73 (2007).

[11] *Id.* at 9.

[12] U.S.S.G., App. C., Vol. I, Amend. 488.

disproportionate to those for other, more dangerous controlled substances, such as PCP, heroin, and cocaine."[13] The Commission thus "harmonized" offense levels for LSD with other drugs by calibrating them based on comparative assessments of dangerousness. In fiscal year 1993, nearly all (95.9 %) of offenders convicted of offenses involving LSD were white, while only one offender was black.[14] The Commission elected to designate the revised guideline as retroactive.[15]

Similarly, in November 1995, the Commission changed the weight calculation applicable to marijuana plants in cases involving more than 50 plants from 1,000 grams per plant to 100 grams per plant for purposes of determining the guidelines offense level.[16] The Commission explained that the initial assumptions underlying the base offense levels had been proven to be erroneous by studies indicated that a marijuana plant does not actually yield 1 kilogram of usable marijuana, and that not every plant will produce any usable marijuana.[17] Therefore, in an effort to "enhance fairness and consistency," the Commission adopted the lower equivalency for all cases involving marijuana plants. In that fiscal year, black defendants comprised only 5% of those convicted of offenses involving marijuana.[18] This amendment was also made retroactive.[19]

Finally, in November 2003, the Commission modified the way in which the drug oxycodone is measured for purposes of calculating the guidelines offense level.[20] Due to differences in the formulation of different medicines, Percocet tablets can contain a vastly smaller amount of actual oxycodone as compared with other medicines.[21] Recognizing "proportionality issues in the sentencing of oxycodone trafficking offenses," the Commission amended § 2D1.1 to provide for sentences based on weight of the actual oxycodone rather than the weight of the entire pill.[22] With amendment 657, the

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[13] *Id.*, Reason for Amend.

[14] *See* United States Sentencing Comm'n, *Annual Report 2003*, at 152, tbl. 62.

[15] *See* U.S.S.G. App. C, Vol. I, Amend. 502.

[16] U.S.S.G. App. C, Vol. I, Amend. 516.

[17] *Id.*

[18] *See* United States Sentencing Comm'n, *Annual Report 2005*, at 103, tbl. 38 (showing that the overwhelming majority of marijuana defendants (93.5%) were either white or Hispanic).

[19] U.S.S.G. App. C, Vol. I, Amend. 536.

[20] *See* U.S.S.G. App. C, Vol. II, Amend. 657.

[21] *See id.* Reason for Amend.

[22] *See id.*

Commission remedied the proportionality issue and made the amendment retroactive.[23] In fiscal year 2003, only 12.6% of offenders convicted of offenses involving "other" drugs, including oxycodone, were black.

The Commission's reasons for these amendments are not different from its reasons for lowering offense levels for crack offenses. Like the LSD amendment, the crack amendment functions to remedy unwarranted disparity among offenses involving the same controlled substance, and to reduce sentences that overstate the seriousness of the offense. Like the marijuana amendment, the crack amendment ensures greater fairness and consistency based on new scientific information which has undermined the assumption on which the guideline range was based. Like the oxycodone amendment, the crack amendment addresses proportionality issues that arise when there are different formulations of the same drug having identical pharmacological effects and when a lower sentence would be more proportionate to other controlled substances.

In every instance, the Commission has acted in response to scientific data and sociological assessments in order to remedy unwarranted disparity and to reduce disproportionately severe sentences as compared with other drugs. Just as the goals of proportionality, consistency, and fairness compelled the Commission to make the previous amendments retroactive, they compel the same result here.[24]

A decision not to make this amendment retroactive would stand in stark contrast to the amendments related to LSD, marijuana, and oxycodone in yet another way. Unlike offenders involved with those drugs, the vast majority of crack offenders are black. In 2006, 81.8% of all people sentenced under the crack guideline were black,[25] even though black offenders comprise only 23.8 % of all federal offenders.[26] To break

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[23] U.S.S.G. App. C, Vol. II, Amend. 662. As with the previous amendments, no substantive reason is given for making the oxycodone amendment retroactive. Minutes of the public meeting indicate that Vice Chair Castillo moved for making the amendment retroactive because its purpose "was to make the offense more proportionate to other similarly scheduled controlled substance," and due to concerns for "fairness and equity." United States Sentencing Comm'n, *Minutes of Public Meeting* (Nov. 5, 2003). Vice Chair Castillo also noted the "overcrowded conditions in prison" as a reason for making the amendment retroactive. *Id.*

[24] Our ability to fully analogize to these prior retroactive amendments is constrained by the dearth of information in the public record that would shed light on the Commission's reasons for making these amendments retroactive. *See* U.S.S.G. App. C, Vol. I, Amend. 502 (stating no substantive reason for making LSD amendment retroactive); *id.* Amend. 536 (stating no substantive reason for making the marijuana amendment retroactive); *id.*, Vol. II, Amend. 662 (stating no substantive reason for making the oxycodone amendment retroactive). To the extent that prison overcrowding is also a relevant concern, as with the oxycodone amendment, *see supra* note 23, it too weighs in favor of making the crack amendment retroactive. *See* U.S. Dept. of Justice, Bureau of Justice Statistics, *Prison and Jail Inmates at Midyear 2006*, at 7 n.2 (June 2007) (noting that at the end of 2005, the Federal prison system was operating at 34% above capacity, with the prison population steadily increasing.)

[25] *2007 Crack Report*, at 15-16 (noting that in fiscal year 1992, 91.4% of crack offenders were black, with the rate having decreased somewhat to 81.8% in 2006).

[26] United States Sentencing Comm'n, *2006 Sourcebook of Federal Sentencing Statistics*, at 16 tbl. 4.

from past practice in this instance – when consistency and reason otherwise point toward retroactivity – will unavoidably suggest to the public that the Commission's commitment to remedying disproportionality is illusory when it comes to black defendants.

The average sentence reduction is 27 months, which is neither minor nor isolated.

According to the Commission's analysis, the average sentence reduction for the 19,500 eligible defendants would be 27 months, down from an average of 152 months to 125 months.[27] A majority of eligible defendants (71.4% or 11,900) would receive a reduction of thirteen months or more, with nearly 3,000 defendants receiving a reduction of three years or more.[28] While it is true that the potential sentence reductions at stake reflect a relatively small proportion of the total sentences served, the average reduction is more than double the minimum of six months that the Commission looks for before making an amendment retroactive.[29] For those whose sentences have been corrupted by the disproportionate and unwarranted severity of the crack penalties, any reduction at all is of utmost significance.[30] And with many thousands of defendants eligible for a significant reduction, retroactivity in this instance would be in accord with Congress's expectation that the Commission will favor retroactivity when the reduction is not minor or when a significant number of defendants would be eligible for a reduced sentence.[31]

The amendment will not be difficult to apply.

As a practical matter, courts will be able to respond to this retroactive amendment with relative ease. In the vast majority of cases no additional fact-finding would be necessary because the drug quantity has already been determined and any other relevant information is already included in the presentence report. Moreover, as demonstrated through past practice, the process of dealing with a large number of § 3582(c) motions can be streamlined through cooperation and advance planning.

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[27] United States Sentencing Comm'n, Memorandum from Glenn Schmitt to Hon. Ricardo Hinojosa, Chair, *Analysis of the Impact of the Crack Cocaine Amendment If Made Retroactive*, at 23 (Oct. 3, 2007), *available at* http://www.ussc.gov/Impact_Analysis_20071003_3b.pdf.

[28] *Id.* at 24.

[29] *See* U.S.S.G. § 1B1.10, cmt. background.

[30] *Cf. Glover v. United States*, 531 U.S. 198, 203 (2001) ("[O]ur jurisprudence suggests that any amount of actual jail time has Sixth Amendment significance."); *United States v. Franks*, 230 F.3d 811, 814 (5th Cir. 2000) (even three extra months in prison constitute prejudice sufficient to support a finding of ineffective assistance of counsel).

[31] *See id.* (quoting legislative history of 28 U.S.C. § 994(u) in which Congress indicated, by negative implication, that it would ordinarily expect the Commission to make retroactive amendments that would result in downward adjustments that are not minor or occur in more than isolated instances).

For example, in the District of Oregon in 1995, the Chief Judge, the Federal Defender, the U.S. Attorney, the Probation Office, and the Bureau of Prisons set up an efficient system for handling the large number of § 3582(c)(2) motions resulting from the retroactive amendment to the marijuana guideline. As an initial matter, the Defender's office, the U.S. Attorney, and the Probation Office agreed to consult their records to provide a list of potential defendants, which was then compiled into a master list. Working from this initial list, the Defender's office contacted potential clients, conducted informational group meetings at the prisons to identify additional potential clients and minimize inaccurate rumors among the prison population, followed up with individual interviews to gather information and answer individual questions. Once the office received authorizations and verification of indigency, it submitted requests for appointment of counsel to the court.

With counsel appointed, Probation pulled the presentence reports and statement of reasons for the defendants, which were then screened by Defenders for relevant information, including base offense level, enhancements, adjustments, departures, safety-valve, mandatory minimum sentences, and criminal history. The cases were then sorted into those that could be handled on an institutional basis, such as those with no mandatory minimums, and those that would require more individualized treatment. The cases were also sorted by release date to address those who would be eligible for immediate release.

For the cases with no mandatory minimum, the parties agreed to a sentence recalculated at the lower base offense level, with all other sentencing factors remaining the same. The cases requiring individualized treatment were then sent back to either the original lawyer or appointment was sought for new counsel.

The parties and the court developed a system for filing the motions and proposed orders on the negotiated dispositions. The individual information was incorporated into template § 3582(c) motions to amend for each person, with a proposed order. Prior to filing, the clients were again contacted to approve the agreed-upon sentence.

The entire process lasted less than a month, at the end of which approximately 120 agreed orders were sent to the judges, who signed them on November 1st. The clerk's office then faxed the orders to the Bureau of Prisons, which, in anticipation of receiving the orders, had already arranged for their release and transition to supervised release.

In this instance, the Commission has identified 19,500 prisoners who appear to be eligible to seek a reduced sentence under § 3582(c) should the amendment be made retroactive.[32] The prisoners are spread throughout the judicial districts, with the largest number being only 1,404 in the Eastern District of Virginia.[33] Of the ninety-four judicial

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[32] *See* Memorandum from Glenn Schmitt to Hon. Ricardo Hinojosa, Chair, *Analysis of the Impact of the Crack Cocaine Amendment If Made Retroactive*, at 4 (Oct. 3, 2007).

[33] *See id.* at 14-15.

districts, eighty-eight have fewer than 500 persons eligible for a reduction. Of those, fifty-five (still over half of all districts) have fewer than 200.[34] And the number of those eligible for immediate release in any given district is quite low, with only 76 as the largest number in the Middle District of Florida.[35] Given the huge numbers of criminal cases district courts are ordinarily equipped to handle, these small numbers spread throughout the system are eminently manageable.

Even after *Booker*, judicial districts can adopt a coordinated and cooperative process such as the one described above to create a formulaic method of addressing each case and to effectively manage them in the manner that best ensures justice and fairness for everyone involved. Just as before, courts can engage the probation office, the Bureau of Prisons, and the U.S. Attorney's office to identify potentially affected defendants, categorize them according to appropriate limits, agreements and special issues, and negotiate agreed dispositions in the majority of cases. As post-*Booker* practice has demonstrated, the federal criminal justice system is fully capable of revisiting many thousands of sentences when justice so requires, and the prospect of early release will be a potent motivator for many defendants to participate in the most efficient process available. For the approximately 1500 defendants who have been identified by the Commission as eligible for immediate release once the amendment is made retroactive, we will work with the Bureau of Prisons and Probation to develop whatever measures are necessary to ensure a controlled transition back into society. We propose the following new application note:

Application Note 6:

> *As a general matter, district courts are encouraged to coordinate with the Bureau of Prisons, the U.S. Attorney's office, the U.S. Probation office and the defense bar to identify defendants potentially affected by amendments included in subsection (c) and to implement their retroactive application in a manner that best promotes efficiency and fairness.*

On the other hand, if the amendment is not made retroactive, the courts will be inundated with thousands of *pro se* filings using various vehicles, such as 28 U.S.C. §§ 2241 and 2255. In addition, prisoners both *pro se* and represented by counsel will no doubt argue – and some judges will agree – that in this post-*Booker*, post-*Rita* era, judges are empowered to reduce a sentence retroactively under § 3582(c) even if the Commission has not included it in § 1B1.10(c).[36] Based on reports from Defender

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[34] *Id.* at 14.

[35] *Id.* at 27-29, tbl. 8.

[36] By its own terms, § 3582(c)(2) provides that the court, the defendant or the Bureau of Prisons can move for a reduction whenever a guideline is reduced, not only when it is made retroactive:

> In the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to

Services, the federal resources needed to prosecute these types of actions and their appeals would be significantly greater than those that would be needed to administer a retroactive amendment. Disposing of the same number of motions filed under § 3582(c) would thus be a far more cost-effective and efficient manner of managing the inevitable requests for relief, creating "cleaner" and more uniform decisions.

Finally, it bears noting that including the crack amendment in § 1B1.10(c) would not *require* a district court to take any action with respect to a defendant's sentence. The court would remain free to take into account any aggravating factors in deciding whether and to what extent a defendant's sentence should be reduced under § 3582(c).[37] But given that only a small percentage of crack cases involve weapons or violence,[38] and that drug offenders generally are "overall the least likely to recidivate,"[39] any decision *not* to modify an inmate's sentence pursuant to the crack amendment is better left to the district courts at "retail" rather than handled in a wholesale manner by the Commission.[40]

B. The Commission should not otherwise amend § 1B1.10 except to encourage courts to reduce each eligible defendant's sentence to the full extent authorized by the amendment.

The Commission should do nothing to interfere with the proper exercise of district court discretion when determining how best to modify a sentence "after considering the

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28 U.S.C. § 994(o), upon motion of the defendant, the director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment after considering the factors set forth in section 3553(a) to the extent they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

Moreover, even as written, the "applicable policy statements" issued by the Commission, in the event it does not make it retroactive, is "advice" only, and under *Booker*, its "advice" is only "advisory." *See* U.S.S.G. § 1B1.10(a) ("If none of the amendments listed in subsection (c) is applicable, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) is not consistent with this policy statement and thus is not advised.").

[37] *See, e.g.*, *United States v. Legree*, 205 F.3d 724, 726 (4th Cir. 2000) (affirming district court's refusal to reduce sentence after the Commission amended § 2D1.1 to cap the Drug Quantity Table at 38 where defendant convicted of crack offenses received life sentence based on enhancements for a firearm and leadership role).

[38] *2007 Crack Report* at 34-35, 38.

[39] United States Sentencing Comm'n, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines*, at 13 & Ex. 11 (May 2004) (noting that "except in [Criminal History Category I], drug trafficking offenders have the lowest, or second lowest, rate of recidivism across the criminal history categories").

[40] *Rita v. United States*, 127 S. Ct. 2456, 2463 (2007) ("[T]he sentencing statutes envision both the sentencing judge and the Commission as carrying out the same basic § 3553(a) objectives, the one, at retail, the other at wholesale.").

factors set forth in 3553(a) to the extent that they are applicable." *See* 18 U.S.C. § 3582(c)(2). If anything, the Commission should include in the commentary to § 1B1.10 a general recommendation that courts should at least reduce each eligible defendant's offense level by two levels in accordance with the amendment and to the extent consistent with § 3582(c). We propose the following new language inserted before the last sentence in Application Note 3:

> *For those defendants whose eligibility for a reduction under 18 U.S.C. § 3582(c)(2) is triggered by Amendment ___, (amending § 2D1.1 to lower offense levels for offenses involving crack cocaine), district courts are encouraged to reduce each eligible defendant's offense level to the full extent authorized by the amendment and as consistent with 18 U.S.C. § 3553(a).*

Any other amendment to § 1B1.10 to provide specific guidance to courts in applying the amendment – or to limit its applicability in any way – would intrude upon the district court's statutory authority to exercise its discretion under § 3582(c)(2) and its inherent competence to exercise its discretion in considering the factors under § 3553(a). Courts had no trouble applying § 1B1.10 without additional guidance when the drug guideline was amended to benefit non-black defendants, and there is no reason to suspect they would have any now. To the contrary, in the wake of the Supreme Court's decision in *Rita*, the Commission should trust district courts to exercise their discretion in a manner that will serve the purposes of sentencing and, in the process, participate in the evolution of just sentencing policy.

II. CRIMINAL HISTORY

The Commission should also make retroactive the amendments to the criminal history rules that change some of the instructions for determining whether a prior sentence counts for purposes of determining Criminal History Score under § 4A1.2. These amendments can likewise be applied with little difficulty and, if so applied, will reflect the Commission's demonstrated belief that the guideline, amended, results in sentence ranges that better achieve the purposes of sentencing.

First, the Commission's reasons for the amendments indicate that they are intended to remedy inconsistency and to lower sentences that have been more severe than the defendant's risk of recidivism would suggest is appropriate. As made clear by the amendments themselves, the old rules undermined the purposes of sentencing by creating unwarranted disparity and sentences that did not fairly reflect culpability as measured by prior criminal conduct.

"Single sentences." With respect to the new method for determining whether prior sentences count as a "single sentence" under § 4A1.2(a)(2), the Commission acknowledged that the old rules were too complex, resulting in significant litigation,

circuit conflicts, and inconsistent results.[41] By simplifying the inquiry in order to "promote consistency," the Commission has evidenced its commitment to eliminating unwarranted disparities and ensuring that defendants no longer receive more punishment based entirely on the vagaries of state practice. In doing so, the Commission has also eliminated the inflationary double counting of concurrent, simultaneously imposed state sentences. This change reflects the fairer view that a defendant's criminal history should not be given more weight than suggested by the functionally single sentence imposed by the offended jurisdiction.

If the Commission is satisfied that the "single sentence" rule adequately captures a defendant's risk of recidivism based on criminal history, then it should be equally satisfied for those who have already been sentenced. Just as the Commission made retroactive the 1995 amendment that lowered sentences for offenses involving marijuana plants in order "to enhance consistency and fairness," the Commission should extend its manifest commitment to consistency and equity to those defendants who are currently serving a sentence of imprisonment that was infected by the unwarranted disparities occasioned by the old rule.

Minor offenses. We have long urged the Commission to recognize that in many instances, prior sentences for minor offenses that are routinely counted under § 4A1.2(c) reflect disparate state practices, do not reflect culpability or risk of recidivism as measured by the Commission's data, and do not advance the purposes of sentencing.[42] The Commission's proposed amendments to the rules for counting minor offenses under § 4A1.2(c) are based on the results of its study on misdemeanor and petty offenses, which included an examination of recidivism risk. As a result of this analysis, the Commission concluded that § 4A1.2(c) should be amended in the three ways: (1) to move fish and game violations and local ordinance violations that are not state law violations to the category of minor offenses that are never counted; (2) to change the probation criterion in § 4A1.2(c)(1) to a term of "more than" one year; and (3) to adopt a "common sense" approach to determine whether a non-listed offense is similar to a listed one.

With these three amendments, the Commission has demonstrated that prior sentences that were counted under the old rules – but that would not count under these new rules – did not correlate to an increased risk of recidivism and were therefore longer than necessary to advance the purposes of sentencing. In particular, by amending the

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[41] *See* 72 Fed. Reg. 28,558, 28,575-76 (2007).

[42] *See, e.g.*, Letter from Jon Sands to Hon. Ricardo Hinojosa, *Comments on Criminal History Issues*, at 1-12 (Mar. 13, 2007) (setting forth examples of state sentencing practice that results in disparity and criminal history scores that overstate the seriousness of prior criminal conduct); *see also* Letter from Jon Sands to Hon. Ricardo Hinojosa, *Proposed Priorities for 2006-2007*, at 18-19 (July 19, 2006) (urging Commission to consider its own data and the conclusions of many courts and commentators to eliminate non-moving and possibly other violations from the criminal history score because they do not clearly advance the purposes of sentencing and may adversely impact minorities); Letter from Jon Sands to Hon. Ricardo Hinojosa, *Follow-up on Commission Priorities*, at 11 (Nov. 27, 2006) (urging Commission to exclude prior convictions for minor offenses that do not advance sentencing purposes).

probation criteria in § 4A1.2(c)(1) to require a term of *more than one year* rather than *at least one year*, the Commission has remedied the pervasive problem of counting sentences that, as a matter of state practice, were merely default sentences of one year probation or conditional discharge, often without any type of supervision or other state interference with liberty.

Enacted in direct response to data, these amendments constitute more than a simple refinement causing isolated or minor differences in the guideline range. Rather, they will advance the purposes of sentencing by more accurately correlating criminal history score to the seriousness of prior criminal conduct. As such, making them retroactive would accord with the Congressional directives found at 28 U.S.C. § 994(o) & (u).[43] As a matter of equity, the significant number of defendants whose sentencing ranges were increased based on untested assumptions that have since been proven unfounded should now benefit from the Commission's analysis.

Second, although variable, the magnitude of the change in the applicable guideline range for affected defendants weighs toward retroactivity. For most defendants, recalculation of criminal history scores under the new rules would likely result in modest decreases in sentences, similar in magnitude to the reductions that would result should the crack amendment be made retroactive. For others, however, the amendments may allow for more dramatic reductions, as in the case of a defendant who was designated as a career offender based on offenses that would no longer count under the new rules. As the amendments now tell us, these defendants were sentenced as the result of inconsistent state practice and empirically unsound assumptions. The Commission should encourage district courts to correct any unwarranted disparity or unjustly harsh sentences resulting from the old guideline rules by listing the amendments in § 1B1.10(c).

Here again, listing the amendments in § 1B1.10(c) will not *require* a court to reduce a sentence under § 3582(c)(2). Indeed, courts routinely exercise their discretion to refuse to reduce a sentence after considering the factors under § 3553(a) despite the applicability of a retroactive amendment.[44] But as with the crack amendment, the

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[43] *See also* U.S.S.G. § 1B1.10 cmt. background.

[44] *See, e.g., Anderson v. United States*, 2007 U.S. App. LEXIS 17113 (11th Cir. July 18, 2007) (affirming district court's denial of § 3582 motion where "the court followed the requisite procedures, recalculating the sentencing range and considering the § 3553(a) factors"); *United States v. Whitener*, 2007 U.S. Dist. LEXIS 76624 (D.N.C. Oct. 5, 2007) (denying § 3582 motion based on information contained in the presentence report that defendant "supervised and managed a drug-dealing organization that used and carried assault rifles, pump shotguns, Uzi's [*sic*], destructive devices and other weapons to enforce discipline, collect debts, intimidate rival dealers, protect the organization's resources and establish a reputation for violence," that the defendant "took no responsibility for his actions, had several previous felony convictions, and, while in prison awaiting trial, severely beat one of the Government's witnesses," and concluding that "the public's continued interest in being protected from this Defendant, along with Defendant's demonstrated and repeated lack of respect for the law, mitigate against a sentence reduction in this case"); *Douglas v. United States*, 2004 U.S. Dist. LEXIS 28495 (D.S.C. Oct. 28, 2004) (although the defendant's "in-prison conduct and efforts at rehabilitation have been commendable," finding that "the remaining factors set forth in § 3553(a) weigh in favor of retaining [the defendant's] original sentence").

decision whether or not to modify an inmate's criminal history score pursuant to the amended Guidelines is one that is better made on an individual basis rather than across the board for all defendants.

Third, the amendments would not be difficult to apply retroactively. As with the crack amendment, the factual information needed to determine whether a prior sentence counts under § 4A1.2 is already contained in the presentence report, so no new evidence would be required for the court to determine the outcome under the amended guidelines. And although we recognize that it may be more difficult to identify defendants who will benefit from retroactive application of these amendments, we also know that the number of persons who are still serving a term of imprisonment who would benefit from these amendments is likely far lower than the number of persons potentially affected by the crack amendment. And, in any event, the method of identifying eligible defendants need not be any different from that utilized to identify those defendants eligible for a sentence reduction under the crack guideline. Defenders will take on the burden of reviewing our old case files to assess whether clients would be eligible for a sentence reduction, and will work with the courts, the U.S. Attorneys, Probation, and the Bureau of Prisons to create a streamlined process for handling affected cases.

More fundamentally, sentencing results that are inconsistent, unreasonably tied to arbitrary state procedures, or unsupported by data are unjust. By empowering courts to lower sentences under § 3582(c)(2), Congress has evidenced its understanding that the administrative burden of modifying sentences is a necessary component of justice when a change in the guidelines reflects that prior practice resulted in unjust sentences. As with the crack amendment, the Commission should not allow administrative concerns to outweigh its commitment to justice. Rather, it should encourage courts to adopt measures for streamlining the process whenever an amendment is made retroactive.

We appreciate the opportunity to provide our input on these important issues. As always, we are happy to provide additional information on any issues raised in this letter and look forward to working with the Commission in the future.

Very truly yours,

JON M. SANDS
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Chair, Federal Defender Sentencing
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cc: Hon. Ruben Castillo, Vice Chair
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