Before the

UNITED STATES SENTENCING COMMISSION

Public Meeting

Thursday, June 30, 2011

Leonidas Ralph Mecham Conference Center
Thurgood Marshall Federal Judiciary Building
One Columbus Circle
Washington, D.C. 20002-8002

The meeting was convened, pursuant to notice, at
1:01 p.m., before:

JUDGE PATTI B. SARIS, Chair
MR. WILLIAM B. CARR, JR., Vice Chair
MS. KETANJI BROWN JACKSON, Vice Chair
CHIEF JUDGE RICARDO H. HINOJOSA, Commissioner
JUDGE BERYL A. HOWELL, Commissioner
MS. DABNEY FRIEDRICH, Commissioner
MR. JONATHAN J. WROBLEWSKI, Ex-Officio Member of the
Commission
PROCEEDINGS

(1:01 p.m.)

CHAIR SARIS: The meeting is called to order. The first order of business is a vote to adopt the [April 6, 2011], public meeting minutes.

Is there a motion to do so?

VICE CHAIR CARR: So moved.

VICE CHAIR JACKSON: Also move.

CHAIR SARIS: Is there a second?

COMMISSIONER HINOJOSA: Second.

CHAIR SARIS: Any discussion?

(No response.)

CHAIR SARIS: Now we need a vote on the motion. All in favor, say aye.

(Chorus of ayes.)

CHAIR SARIS: Any opposed?

(No response.)

CHAIR SARIS: The motion carries.

Now we move on to the matter before the Commission today.

So good afternoon to everyone, and thank you all for coming to this important meeting.
regarding crack retroactivity. Today's public meeting has been called to vote on whether to apply retroactively the Commission's proposed permanent amendment implementing the Fair Sentencing Act of 2010.

Let me begin with the statute. By statute the Commission is required to review and revise the operation of the sentencing guidelines and ensure their conformance with federal statutes. By statute, the Commission also is required to consider applying retroactively changes to the guidelines that lower penalties. Because of the importance of finality of judgments and the burdens placed on the judicial system when a change to the guidelines is applied retroactively, the Commission takes this duty very seriously and does not come to a decision on retroactivity lightly.

You will hear more extensively from me and from my colleagues about the deliberative process that the Commission followed leading to today's vote. But before the motion regarding retroactivity is raised, I want to make some comments on today's
proceedings and the process that will follow.

First, I want to make it clear that we are voting today on the retroactivity of the guidelines only. The Commission cannot make the Fair Sentencing Act itself retroactive. Therefore, if there is an affirmative vote, not every federal crack defendant in custody would see a benefit from retroactivity because the old statutory mandatory minimums will still apply.

Second, if the Commission decides to give retroactive effect to the Fair Sentencing amendment today, it does not become effective immediately, but becomes effective on the date set by the Commission provided that the amendment itself is not disapproved by Congress. That effective date is November 1st, 2011. Consideration by the courts of retroactivity motions would not be proper before such time.

And third, if there were an affirmative vote on retroactivity, that does not mean that defendants are free to leave prison immediately. Nor does an affirmative vote on retroactivity, if there is one, mean the end of the process. Every defendant
who believes he is eligible for retroactivity must have his case considered by a federal judge who will ultimately decide to what extent, if any, a modification of sentence is warranted. That decision will be directed by the statutory limitations on sentence modification proceedings, the policy statement covering retroactivity, and the court's analysis of the statutory factors.

And let me emphasize that federal judges would be required to consider the defendant's risk to public safety as part of their overall consideration of a defendant's motion for a reduced sentence.

Today is a very important historic day for the Commission in national sentencing policy as a whole. The Commission has long worked on this issue. I had everybody gather all the reports, the four reports that we have written on the subject: 1995, 1997, 2002, and 2007.

We commissioners have spent the last month since the hearing reading letters — I think over 43,500 — and the testimony and reviewing the new issues raised by the Supreme Court, appellate, and
district case law.

Our excellent staff has literally been working around the clock, and the Commission is grateful to everyone — probably all of you sitting in this room — who sent in letters or testified, regardless of what your position was on the issue, because we want to hear from everyone when we make these important decisions. Your views help us make better decisions.

There is much more to do, and we look forward to working with all of you on the many issues before us. As I said, my colleagues and I will have more remarks.

So now I would like to get the meeting started with our general counsel and the first order of business. Mr. Cohen?

MR. COHEN: Thank you, Judge.

Before you is a proposed amendment that amends 1B1.10, which is the policy statement governing retroactivity, in four ways:

First, the proposed amendment would expand the listing in 1B1.10(c) to include Parts A and C of
Amendment 750 as an amendment that may be considered for retroactive application. In response to the Fair Sentencing Act of 2010, Part A of Amendment 750 amended the Drug Quantity Table in 2D1.1 for crack cocaine and made related revisions to Application Note [10 to] 2D1.1. Part C deleted the cross reference in 2D2.1(b) under which an offender who possessed more than five grams of crack cocaine was sentenced under 2D1.1.

Second, the proposed amendment amends 1B1.10 to change the limitations that apply in cases in which the term of imprisonment was less than the minimum of the applicable guideline range at the time of sentencing. Under the proposed amendment, the general limitation in subsection (b)(2)(A) continues to be that the court shall not reduce the defendant's term of imprisonment to a term that is less than the minimum of the amended guideline range. The proposed amendment restricts the exception in subsection (b)(2)(B) to cases involving a government motion to reflect the defendant's substantial assistance to authorities. For those cases, a reduction comparably
less than the amended guideline range may be appropriate.

Third, the proposed amendment amends the commentary to 1B1 to address an application issue. Circuits have conflicting interpretations about when, if at all, the court applies the departure provision before determining the "applicable guideline range" for purposes of 1B1.10. Consistent with the three-step approach adopted by Amendment 741, and reflected in 1B1.1, the proposed amendment clarifies that the applicable guideline range referred to in 1B1.10 is the guideline range determined pursuant to 1B1.1(a), which is determined before consideration of any departure provision in the Guidelines Manual or any variance.

Fourth, the proposed amendment adds an Application Note to 1B1.10 to specify that, consistent with subsection (a) of 1B1.11, the court shall use the version of 1B1.10 that is in effect on the date on which the court reduces the defendant's term of imprisonment as provided by 18 U.S.C. 3582(c)(2).
And finally, the proposed amendment adds commentary to 1B1.10 to refer to the Supreme Court case, Dillon v. U.S.

A motion to promulgate the proposed amendment would be in order with an effective date of November 1, 2011, which is the same effective date as the underlying amendment itself, Amendment 750, and granting staff technical and conforming amendment authority.

CHAIR SARIS: Thank you, Mr. Cohen. Is there a motion?

VICE CHAIR CARR: I so move.

CHAIR SARIS: Is there a second?

VICE CHAIR JACKSON: I second.

CHAIR SARIS: Is there discussion on the motion?

(No response.)

CHAIR SARIS: I will ask at this point Ms. Sheon, the staff director, to call the roll.

MS. SHEON: Thank you, Chair Saris. On the motion as described by General Counsel Cohen, Vice Chair Carr.
VICE CHAIR CARR: Aye.

MS. SHEON: Vice Chair Jackson.

VICE CHAIR JACKSON: Yes.

MS. SHEON: Commissioner Hinojosa.

COMMISSIONER HINOJOSA: Aye.

MS. SHEON: Commissioner Howell.

COMMISSIONER HOWELL: Yes.

MS. SHEON: Commissioner Friedrich.

COMMISSIONER FRIEDRICH: Aye.

MS. SHEON: Chair Saris.

CHAIR SARIS: Aye.

MS. SHEON: The motion passes unanimously.

CHAIR SARIS: Thank you. Now at this point, does any commissioner want to make a statement? Ms. Jackson — Commissioner Jackson.

VICE CHAIR JACKSON: In the Sentencing Reform Act of 1984, Congress not only created the United States Sentencing Commission, it also required the Commission to consider retroactive application of guideline penalty reductions.

Title 28, 994(u) of the United States Code is not ambiguous. It states:
"If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced."

There is a similar degree of definitiveness in the Fair Sentencing Act of 2010. In that statute, Congress reduced the statutory mandatory minimum penalty thresholds applicable to federal crack cocaine offenses, among other things. And, rather than permit the Commission to consider whether or not to make corresponding guideline penalty reductions in the ordinary course of its amendment cycle, Congress ordered the Commission to make conforming penalty reductions in the guidelines that pertain to crack cocaine, quote, "as soon as practicable."

We are here today because the Commission did just that. It has fulfilled its statutory duty under the Fair Sentencing Act to reduce the term of imprisonment recommended in the guidelines applicable...
to crack cocaine offenses, and it now must consider
whether those guideline changes should be eligible
for retroactive application under the Sentencing
Reform Act.

Congressional silence about retroactivity
in the text of the Fair Sentencing Act tells us
nothing about whether the Commission is relieved of
its statutory obligation to consider the
retroactivity of the corresponding guideline penalty
changes.

Congress certainly could have addressed
that issue, but it did not. So now the Commission
must do what the Sentencing Reform Act requires.

I share the conclusion of my colleagues,
and of many of you here today, that Parts A and C of
the guideline Amendment 750 should be subject to
retroactive application. This conclusion rests on
many bases. Among them: the testimony that we heard
at our public hearing; the thousands of letters and
pieces of written public comment that we have
received on this issue; an analysis of the relevant
data; and a thorough evaluation of the guideline
amendment in light of the established criteria by which the Commission makes retroactivity determinations.

In my view, each of these criteria is fully satisfied. The crack cocaine guideline penalty reduction is not some minor adjustment designed to facilitate efficient guideline operation, but it reflects a statutory change that is unquestionably rooted in fundamental fairness.

The Commission first identified the myriad problems with a mandatory minimum statute that penalizes crack cocaine offenders 100 times more severely than offenders who traffic in powder cocaine in a report to Congress in 1995. And today there is no federal sentencing provision that is more closely identified with unwarranted disparity and perceived systemic unfairness than the 100:1 crack/powder penalty distinction.

Congress's clear purpose in enacting the Fair Sentencing Act and in requiring the Commission to make immediate conforming reductions in the guidelines was to address this fair sentencing issue.
The Commission also estimates that a substantial number of affected crack cocaine offenders could see a significant change in their sentences. And to a person — the federal officials who testified at our hearing about their experience with having administered the applications for retroactive penalty reductions before, after the crack cocaine guideline was reduced in 2007, said that these guideline changes, if made retroactive, would not be particularly burdensome.

It also bears repeating that there is nothing automatic about a guideline change that has been made eligible for retroactive application under 1B1.10. In each eligible case, a federal judge must determine the appropriateness of a sentence reduction for that particular defendant, adjusting the sentence only if warranted and if the risk to public safety is minimal.

And judges have proven that they are up to this task. Indeed, more than 35 percent of the motions for retroactive application of the 2007 crack amendment were denied.
Sure, many offenders will ask. But we know from experience that not all will receive reduced penalties when the circumstances of their cases are reviewed and the retroactivity analysis is applied.

This, in my view, is precisely why the Justice Department's position on retroactivity need not be sustained. In this context, there is simply no need to employ imperfect proxies for dangerousness when an actual judge with an actual case can make that call.

And so, as you can see, my vote today does not resemble any caricature of a policymaker intent on freeing violent felons without authorization and against congressional will. Rather, it is well supported and fully consistent with the Sentencing Reform Act, the Fair Sentencing Act, prior experience, and common sense.

The Commission has the statutory authority to permit retroactive guideline penalty reductions, and presumably Congress provided that authority to be used if ever the day should come when the
retroactive application of a guideline penalty
reduction furthers our societal interests in
equitable sentencing and the avoidance of unwarranted
disparity.

This is that day.

Parts A and C of the guideline amendment
that the Commission promulgated under the Fair
Sentencing Act addresses a sentencing inequity that
the Commission has known about and cared about for
years. Indeed, even before any of the currently
incarcerated crack offenders who would be eligible
for a retroactive benefit received their sentences.

For the past 25 years, the 100:1

crack/powder disparity has cast a long and persistent
shadow. It has spawned clouds of controversy and an
aura of unfairness that has shrouded nearly every

federal crack cocaine sentence that was handed down

pursuant to that law.

In my view, now that Congress has taken
steps to clear the air by making significant downward
adjustments to the mandatory statutory penalties for

crack cocaine offenses, there is no excuse for
insisting that those who are serving excessive
sentences under the long-disputed and now discredited
prior guideline must carry on as though none of this
has happened.

I believe that the Commission has no
choice but to make this right. Our failure to do so
would harm not only those serving sentences pursuant
to the prior guideline penalty, but all who believe
in equal application of the laws and the fundamental
fairness of our criminal justice system.

The decision we make today, which comes
more than 16 years after the Commission's first
report to Congress on crack cocaine, reminds me in
many respects of an oft-quoted statement from the
late Dr. Martin Luther King, Jr. He said:

"The arc of the moral universe is long,
but it bends toward justice."

Today the Commission completes the arc
that began with its first recognition of the inherent
unfairness of the 100:1 crack/powder disparity all
those years ago. I say justice demands this result.

CHAIR SARIS: Thank you. Judge Howell.
COMMISSIONER HOWELL: Yes. It is always a challenge to follow Commissioner Jackson.

(Laughter.)

COMMISSIONER HOWELL: And her poetry, but I do want to explain my strong support for retroactive application of Parts A and C of the permanent amendment that we sent to Congress on May 1st to implement the Fair Sentencing Act.

But before I get to those two parts of the amendment that reduce guideline sentences for crack offenses in accord with the reduced penalties in the Fair Sentencing Act, I did want to spend just a moment talking about Part B of the amendment which incorporates into the guidelines for all drug offenders, not just crack offenders, certain aggravating and mitigating factors that is not a part of the amendment that the Commission is applying retroactive effect for. And I did want to spend just a moment addressing why that is.

The aggravating and mitigating factors in Part B of the amendment would, to my mind — and I think shared by my colleagues on the Commission —
would involve time-consuming and administratively
difficult-to-apply factors for courts to look at on a
retroactive basis. These are new factors, both
aggravating and mitigating, that were not formerly
considered by judges as part of the original
guideline calculations, and consideration now, if we
were to consider making that Part B of the amendment
retroactive, would likely require courts to engage in
new fact-finding with the concomitant need for
hearings, and possibly litigation over whether
application of the aggravating factors in particular
would be warranted. And this process to my mind
would just be administratively burdensome to the
point of impracticality.

Certainly we got no testimony from anybody
suggesting otherwise. That is by far in contrast to
Parts A and C of the amendment which we are, by our
vote today, voting for retroactivity in their
application because we do not believe that,
administratively, that those would be unmanageable
for the courts. And to the contrary, we think that
courts will be able to perfectly manage retroactive
application of those two parts of the amendment.

I don't want to repeat the history that Commissioner Jackson referred to, but I do want to say that the Sentencing Commission has for many years said that crack sentences were too severe and unfair. Under the leadership of our former chairman, and our colleague, Commissioner Ricardo Hinojosa, we did something about it in 2007 by reducing guideline penalties for crack by two levels, and then making that guideline change retroactive in 2008.

Judge Hinojosa deserves a lot of credit for that.

When Congress subsequently passed the Fair Sentencing Act making much more significant reductions in crack penalties than we were ever able to, this Commission acted promptly in 2010 under the leadership of our former chairman, Judge Bill Sessions, to enact temporary guideline amendments to implement the new law and reduce guideline sentencing ranges for crack offenses.

Our new chairman, Judge Patti Saris, has ably led us through this debate on the permanent
amendment, and the consideration that we have given today to making that amendment retroactive. And I thank her, too, for her able leadership.

I note these past actions by the Commission to recognize that the work of many commissioners, both past and present, including the reports that both Judge Saris and Commissioner Jackson mentioned, has led us to the vote that we take today. It is the culmination of many years of Commission research, data collection, analysis, and reports that persuaded us that the steps we took in 2007, 2008, 2010, and today are the right ones.

What is noteworthy in this history is that, no matter the makeup of this bipartisan Commission, we have been able to come to a unified position on this issue — just as we do today.

The Commission's work helped persuade Congress that reducing crack penalties was the right policy and the right thing to do. In making this decision, we have heeded the input we have received both for and against retroactive application of the amendment, and taken careful stock of our statutory
authority to make retroactive guideline amendments that reduce sentencing ranges.

We have specifically considered carefully the letters received from Members of Congress, some of whom have urged retroactive application of the guideline amendment, and others who have not. Those members who have cautioned against retroactive application have eloquently stated that silence by Congress on the issue of retroactivity in the Fair Sentencing Act should be a signal enough that we exceed our authority and violate congressional intent by making the amendment retroactive under any circumstances. And I want to take a moment to address this issue.

The Commission has over its history used its authority under 28 U.S.C. 994(u) infrequently to [make] retroactive guideline amendments that reduce sentencing ranges. This is because the finality of judgments is an important principle in our judicial system and we require good reasons to disturb final judgments.

Indeed, while the vast majority of the 750
amendments to the guidelines over the last 25 years
and over my tenure on the Commission have been to
increase guideline penalties, approximately 100 have
reduced penalties. Yet only 28 of the guideline-
reducing amendments have been made retroactive over
the history of the Commission.

The Commission's authority to make
guideline-reducing amendments retroactive is
consistent with the purposes and duties laid out
for us by Congress in our organic statute. Congress
have [given] us both lofty goals and practical goals.

Among the lofty goals, Congress directed us
to update and issue amendments to the guidelines that
reflect, to the extent practicable, advancements in
knowledge of human behavior as it relates to the
criminal justice process.

Practical goals included directions to the
Commission to examine the capacity of prison
facilities when we promulgate guideline amendments,
and in fact Congress directed us to formulate the
guidelines to minimize the likelihood that the
federal prison population will exceed the capacity of
the federal prisons. And we are now at over 35 percent over-capacity in our federal prisons.

While Congress was silent in the Fair Sentencing Act about retroactive application of the statutory changes made in the new law, the Congress has given the Commission very clear direction both that we must consider retroactive application of the guideline-reducing amendments, as Commissioner Jackson pointed out, and that as part of that consideration we must take into account the purposes of sentencing set out in the Sentencing Reform Act, and our other statutory responsibilities both lofty and practical.

Among the purposes of sentencing that we must try to achieve are fairness, proportionality, and avoiding unwarranted sentencing disparities. And to my mind, retroactive application of Parts A and [C] of our guidelines – FSA guideline amendment helps to achieve those purposes of the Sentencing Reform Act.

I share the view of the Congressional Black Caucus that retroactive application of the Fair
Sentencing Act guideline changes would help address racial disparities and excessive sentences for crack offenders and undo a long history of injustice in federal sentencing.

To those who have concerns about our agenda on this Commission, let me assure you that this Commission has no agenda other than to fulfill our statutory duties to the best of our ability, and we do so with our amazing staff.

I appreciate the concern that reducing the sentences of crack offenders may send the wrong signal about being tough on crime, but this just has no basis in fact. Even with reduced sentences, most crack offenders will still serve on average over ten years. Over a decade in prison is a tough sentence no matter how you measure it, and crack offenders will still serve tougher sentences than offenders convicted of dealing the same amount of powder cocaine, about 18 times tougher.

In the end, I am very proud of the work of this Commission and I am very proud to support retroactive application of Parts A and [C] of our
VICE CHAIR CARR: A and C?

COMMISSIONER HOWELL: A and C, sorry.

CHAIR SARIS: The record stands corrected.

Commissioner Friedrich. Thank you, Judge Howell.

COMMISSIONER FRIEDRICHC: My vote today in favor of giving retroactive effect to Amendment 750 is based on the Fair Sentencing Act of 2010, the legal standards governing retroactivity, the Commission's precedents and data, as well as the public comment that the Commission has received to date, including the Criminal Law Committee's testimony in support of retroactivity.

Some in Congress have argued that the Commission does not have the authority to give retroactive effect to Amendment 750 because the Fair Sentencing Act is silent with regard to retroactivity. I agree that the savings statute precludes retroactive application of a statute unless Congress states a clear intent otherwise, and Congress has expressed no such intent here. However,
the Fair Sentencing Act must be read in conjunction with the Commission's organic statute, and in particular 28 U.S.C. 994(u), which requires the Commission to consider retroactivity with respect to any guideline amendment that reduces the term of imprisonment, even where, as here, that amendment is based on legislation that is silent with regard to retroactivity.

Consistent with 1B1.10 of the guidelines and 28 U.S.C. 994(u), the Commission traditionally has considered three factors in determining whether to give retroactive effect to a guideline that reduces the term of imprisonment. These factors, while not exclusive, include the purpose of the amendment, the magnitude of the change as a result of the amendment, and the administrative burdens associated with retroactivity. A weighing of these factors leads me to conclude, on balance, that Amendment 750 should be given retroactive effect.

The purpose of Amendment 750 is to implement the Fair Sentencing Act. Among other things, the Act amended the drug quantity thresholds
that apply to the five and ten-year mandatory minimum penalties such that the ratio of powder to crack cocaine for offenses committed on or after August 3rd of 2010 is now 18:1, reduced from 100:1 for offenses committed prior to August 3rd of 2010. This change in ratio is consistent with the Commission's recent recommendations to Congress.

When promulgating a guideline amendment pursuant to legislation, the role of the Commission is to implement Congress's statutory directives faithfully. In the Fair Sentencing Act, Congress directed the Commission to "promulgate the guidelines, policy statements, or amendments provided for in this Act . . ." and to "make conforming amendments to the guidelines as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law." The purpose, as reflected in the title itself, is to restore fairness in cocaine sentencing.

The Commission implemented these congressional directives through Amendment 750.
In summary, the amendment incorporates the 18:1 drug quantity ratio at every offense level on the Drug Quantity Table in 2D1.1 of the guidelines; it adds a number of new aggravating and mitigating factors to 2D1.1; and it deletes the guidelines cross-reference which required courts to sentence defendants who possess more than five grams of crack cocaine to at least five years in prison.

The fact that Congress did not express a clear intent to give retroactive effect to the new statutory mandatory minimum penalties and other provisions of the Act is a factor that weighs heavily, in my view, against retroactivity. However, this factor is not dispositive with respect to the issue of whether the Commission's guideline amendment should be given retroactive effect. Amendment 750 substantially lowers guideline penalties; therefore, pursuant to 28 U.S.C. 994(u), the Commission now must decide whether to give retroactive effect to any portion of Amendment 750.

Despite the fact that the Fair Sentencing Act is silent with respect to guideline
retroactivity, I favor giving retroactive effect to the amendment because doing so will conform the guideline penalties that apply to crack offenses to those that apply to other controlled substance offenses; it will ensure that crack offenders are treated consistently under the guidelines; and it will restore a greater degree of fairness in cocaine sentencing. For more than 15 years the Commission, as well as Members of Congress and other stakeholders, have argued that crack penalties based on the 100:1 drug quantity ratio are unfair and undermine key objectives of the Sentencing Reform Act. Giving retroactive effect to Amendment 750 will help remedy this injustice. I also support retroactivity because I believe that the other two factors that the Commission must consider – the magnitude of the change, and the administrative burdens associated with retroactivity – weigh in favor of giving retroactive effect to Amendment 750.

To be clear, the Commission's decision today in no way alters the statutory mandatory minimum penalties in the Fair Sentencing Act. The
mandatory minimum penalties that apply to crack
offenders who committed crimes before August 3rd,
2010, remain in effect.

With respect to the magnitude of the
change, the Commission estimates that approximately
12,000 offenders will be eligible for possible
sentencing reductions of approximately 23 percent on
average. These estimates are substantial and
comparable to those associated with the Commission's
2007 amendment. The estimated savings to the Bureau
of Prisons are considerable.

With respect to the administrative burdens
on the federal courts, concerns expressed in 2007
have diminished significantly as a result of the
Supreme Court's decision last term in Dillon v. United States. In that case, the Court affirmed the
Commission's view as expressed in 1B1.10, that
3582(c)(2) proceedings are not full-scale
resentencings.
As Judge Reggie Walton made clear in his testimony on behalf of the Criminal Law Committee of the Judicial Conference, judges, probation officers, and litigants ably implemented the 2007 amendment, notwithstanding the considerable resources expended. The Commission estimates that the number of crack offenders who will be eligible for a potential reduction in sentence will be substantially less than the number of offenders who were eligible in 2007.

And as in 2007, the Commission anticipates that the vast majority of the anticipated 3582(c) motions can be handled on the papers, without the need for hearings or the presence of defendants.

However, to minimize the need for judicial factfinding, the Commission votes today to limit retroactive application of Amendment 750 to Parts A and C. In addition, the Commission amends 1B1.10 to preclude sentencing reductions below the amended guideline range except in those cases in which the offender has received a substantial assistance reduction, based on a government motion filed pursuant to 5K1.1 of the guidelines, 18 U.S.C. 3553(e), or

These bright-line rules will set clear limits that will minimize and simplify any future litigation.

The Department of Justice supports retroactive application of Amendment 750, but has urged the Commission to bar certain classes of offenders, namely those who fall within criminal history categories IV, V, and VI, and those who have received firearm enhancements. While I share the concerns voiced by the department, as well as Members of Congress, regarding public safety, relevant sentencing data counsels against categorically excluding those offenders who fall within these categories.

In 2007, the Commission did not impose any such limits on retroactivity, and instead amended 1B1.10 to mandate that judges consider public safety in deciding whether to exercise their discretionary authority. Data related to the implementation of the 2007 crack amendment reveals that judges exercised their discretion pursuant to 1B1.10 to deny 3582(c)
motions on the merits on public safety grounds.

Recently the Commission completed a three-year recidivism study in which it compared the recidivism rates of crack offenders who were released early as a result of the Commission's 2007 crack amendment, to those of similarly situated crack offenders who served their entire sentences. The study found no statistically significant difference between the recidivism rates of these two groups.

Crack offenders who fall within criminal history categories IV, V, or VI, and those who receive firearm enhancements are subject to significantly higher penalties at their initial sentencings. Any reduction in sentence that these offenders may receive as a result of Amendment 750 will in no way negate the extra prison time they are required to serve as a result of such aggravating factors.

Regardless of Amendment 750, offenders in these categories will continue to serve longer prison terms than other crack offenders.

To be sure, certain offenders in the categories that the Department of Justice has
identified pose a significant threat to public safety and should not be released prematurely. As 1B1.10 makes clear, reductions in sentence pursuant to 3582(c) are not automatic. Federal judges are expected to exercise their discretionary authority to deny reductions to those offenders who pose a risk to public safety. Indeed, 1B1.10 requires judges to consider the risks to the public in each and every case.

It is important to note that the Commission's decision today to give retroactive effect to Amendment 750 will not take effect until November 1st of this year. This four-month delay will give Congress ample time to review Amendment 750, and potentially disapprove of the Commission's retroactivity decision. It will also give the courts, the Department of Justice, and the federal defenders time to implement procedures that will lead to sound and efficient 3582(c) proceedings.

CHAIR SARIS: Thank you very much. Lest
you think we seated ourselves women and men, that
just plays out that way seniority-wise. But on the
theory of ladies before gentlemen, we now turn to the
gentlemen.

Commissioner Carr.

VICE CHAIR CARR: In light of the
Commission's historical position with respect to
 crack sentencing, and considering Congress's purpose
and effect in changing decades of unfair crack
mandatory sentencing policy, I think it would be
incongruous, if not unconscionable, if we failed to
make this amendment retroactive. And I don't want to
repeat the things that have been said, most of which
I agree with, but I do want to re-emphasize a few
things.

Our estimation is that the average
sentence served by those crack defendants that will
benefit from a reduction in sentence will still be in
excess of ten years. Bureau of Prisons is currently
at 37 percent over-capacity. That 37 percent over-
capacity doesn't only create undesirable conditions
for prisoners, but also for corrections staff. And
the Bureau of Prisons predicts that as things are
going, even with new prisons coming on line, that the
net effect year after year for the next several years
is going to be an increase of several thousand
prisoners a year.

We have to take into account prison impact
when we do our work. And the Bureau of Prisons also
estimates that over the next five years, as a result
of us making this amendment retroactive, the Bureau
of Prisons could save in excess of $200 million while
we are helping to alleviate somewhat prison
overcrowding.

I also want to emphasize that, while we
have to consider what the Bureau of Prisons' impact
is going to be, our decision today is based on
fundamental fairness.

CHAIR SARIS: Thank you. Judge Hinojosa?

COMMISSIONER HINOJOSA: Thank you. First
of all I would like to say, although not as eloquent
as everyone else has been, my vote counts as much as
everyone else's in favor of this amendment. And I
would also be remiss if I didn't mention the three
chairs who have not been mentioned who have worked on this matter: Judge Conaboy and Judge Murphy all continued their work, and certainly worked extremely hard with regards to the crack cocaine issue. And Judge Wilkins recently wrote us a letter in favor of retroactivity. So that means every single chair of this Commission who is presently the chair or who has been the chair has been in favor of this particular retroactivity.

As has already been stated, Title 28 U.S. Code 994(u) requires the Commission to determine when there has been a reduction in a guideline as to whether to make it retroactive, and to what extent, and under what circumstances judges should be able to do that.

As has already been stated more than once, 1B1.10 presently indicates that there are, among other factors, three that the Commission will always consider: the purpose of the amendment; the magnitude of the change; and the difficulty in applying the amendment retroactively.

As has already been stated also, in 2007
we changed the guidelines and made those retroactive.

It has been clear to me, as I am sure to the other Commissioners, that we have continued to hear comments from judges, practitioners, and others who are interested in the criminal justice system that actually retroactivity worked well, and it was a much more simple process than individuals might have thought it would have been.

One of the important things we decided at the time we voted with regards to the 2007 amendments becoming retroactive, was that we would conduct a study as to the recidivism rates of individuals who were freed and received lesser sentences as a result of the retroactivity.

The results that we have received as a result of those studies show that there really is no difference between the recidivism rates of the individuals who had a reduced sentence as opposed to those who had served the entire lengthier sentences.

It is also important, when we look at those percentages of recidivism, to realize that when recidivism rates are relied upon and the percentages,
many times those include arrests which have not
turned into convictions yet, as well as some
technical violations that would not necessarily be to
the level of a conviction coming as a result of them.

The Fair Sentencing Act: a bipartisan
act. It is important for us to realize that it gave
the Commission emergency amendment authority, which
doesn't come with regards to every act that is passed
by Congress. Obviously they felt it was important
for the Commission to act, and to act quickly. The
present amendment that we have sent to Congress,
which comes into effect on November 1st unless
Congress acts to the contrary, requires the
Commission's determination as to retroactivity.

It is important for us to also realize
that the Commission in all of its decisions — whether
it is new guidelines, amendments to guidelines, or
retroactivity issues — always receives comments from
all segments of individuals and organizations that
are interested in the criminal justice system. And
we certainly received it with regards to this
particular issue.
We have heard from Members of Congress who have different views as to what we should do with regards to this particular issue. We have heard from the Justice Department, which is the Executive Branch. We have heard from the judiciary. And we have heard from the general public, as well as from the public defenders, as well as individuals who practice as defense attorneys in the criminal justice system.

It then becomes the role of the Sentencing Commission to make the determination, after having carefully reviewed all of those comments, in many ways as judges do every single time they sentence an individual, as to what the right thing to do is.

Based on the decision of the Commission, it does not mean that any comment has been ignored or has not been taken seriously. Quite to the contrary. Just as judges do when they receive comments in the courtroom and have received evidence with regards to a particular matter, every single piece of comment and every single letter of comment, as well as testimony, has been considered, and the Commission
has come unanimously to this decision.

It is also important for us to bear in mind that all the Commission does is make certain defendants eligible for a reduction in sentence.

(A cell phone ring is heard.)

COMMISSIONER HINOJOSA: I think we are hearing from some of them right now.

(Laughter.)

COMMISSIONER HINOJOSA: And they seem to be very happy about it. However, it is also important to realize that the decision will continue to be in the hands of the judges. They will continue to make these decisions on an individual basis. They are directed with regards to the guidelines themselves to determine whether reduction is appropriate, and to what extent it is appropriate within the limits that are set in 1B1.10.

With regards to those who say, well, criminal history categories, use of a firearm in possession, or relevant conduct purposes, that there should be distinctions. It is also very important for us to bear in mind that the guidelines have taken
that into consideration. Individuals with higher
criminal history category scores have been sentenced
to higher sentences. Individuals where a firearm may
have been involved have been sentenced to higher
sentences. All of these aggravating factors have
already been considered with regards to the sentences
that have been handed down.

In closing, I would like to say that the
Sentencing Reform Act of 1984, for those of us who
were on the bench before the Sentencing Reform Act of
1984 went into effect in 1987, was a bipartisan piece
of legislation that attempted to create a more fair
system, that avoided unwarranted disparity, that
provided more transparency, and that set one system
at the national level.

Senators Kennedy, Hatch, and Thurmond
were some of those individuals who worked awfully
hard for a more fair system. I am naming them, but
there were many others who performed that task. One
of the things provided in the Sentencing Reform Act
of 1984 was the creation of the United States
Sentencing Commission, a bipartisan Commission that
was set up to take the sentencing policy decisions
out of the political process, out of the hands of
just the prosecutor and out of the hands of just the
defense attorney.

The purpose of the Act was to set the
policy, the sentencing policies of the United States
with regards to the determination of guidelines and
guidance to be given to individual judges, with
regards to individual cases, at a national level by
an independent agency within the judiciary, which was
supposed to act outside of the political process and
outside of the influence of just one side or the
other in the courtroom.

The Commission since its creation has done
that. Today the Commission has done that with
regards to its statutory duty with regards to the
decision as to how to proceed with regards to
retroactivity on a particular statute. And I think
it is fair to say that the Commission, in making its
decision, has acted outside of the political process
and outside of just the request of the defense
attorneys, and outside of the request of just the
prosecution side of any case, but rather has acted in its belief that the independent judges will make their individual decisions with regards to a particular case and whether it is the right thing to do in that particular situation. And also, the decision has been made by each one of the members of this Commission based on the consideration of all of the principles that need to be considered with regards to retroactive application, and has been made certainly on my part — and I certainly believe with regards to on the part of every other commissioner — based on the fact that this is the just, the fair, and the right thing to do.

CHAIR SARIS: Thank you, Judge Hinojosa.

Commissioner Wroblewski?

COMMISSIONER WROBLEWSKI: Thank you very much, Judge Saris, for yielding, and thank you very much for your leadership. I think it is fair to say that it has been a very busy six months since you first became chair.

We have addressed together as a Commission a variety of very, very important issues ranging from
health care fraud, to firearms violence, and many,
many others as well. You have guided the Commission
adeptly, and you have brought us to this day and this
very important issue of federal cocaine sentencing
policy.

Many of my colleagues have mentioned
different people who have participated in the
consideration of federal cocaine sentencing policy.
I think it is important to recognize all of the
people who have been involved in this issue over the
last 17 years.

There is no way that I could possibly — and
I won't — try to name all of them, but suffice it to
say that Members of Congress current and past, former
members of this Commission, the Judicial Conference,
the Commission staff, advocacy groups, and many, many
others have all participated in the consideration of
this issue.

I did hear from Judge Conaboy just the
other day and remember well his chairmanship in the
1990s when the Commission issued its first report on
federal cocaine sentencing policy, a report that
remains the seminal report on this issue.

I also want to mention the thousands of assistant United States attorneys, assistant federal public defenders, probation officers, and judges who work every day in federal courts across the country, and who will be called upon to implement what the Commission has voted to do today.

All of these men and women take their responsibilities very seriously, and I know that they will faithfully execute the law and their duty to the best of their abilities.

In particular I do want to mention my colleagues in the U.S. attorneys' offices from coast to coast who go to work every day with two things front and center in their mind: to keep our communities safe and to do justice.

We owe great thanks to the entire federal court community, and we all have the great good fortune of working with remarkable professionals across the court family.

As many others have said already today, the Fair Sentencing Act is an historic piece of
legislation. It addressed what we think is the single most important issue affecting trust and confidence in the federal criminal justice system. It was passed on a bipartisan basis after many years of debate, and was very long overdue.

About one month ago, the Attorney General testified in person before this Commission in support of retroactive application of the guideline amendment implementing the Fair Sentencing Act. He spoke about his personal experience, about the importance of this issue to him and to the cause of justice — and I won't go over all the reasons why the department supports retroactive application of this amendment. We are grateful to the Commission for considering the views of the Department of Justice. And as the Attorney General stated a month ago, we think retroactivity is an important step forward for the cause of justice.

After today's vote will come many months of implementation, and we think it is very, very important — it is imperative — that the Commission help facilitate the implementation of retroactivity. And we appreciate the discussions that the Commission has
already had and the planning that the Commission and
the staff have already done.

We pledge to you our support in seeing
that retroactivity is done in an efficient way and
that ensures that courts get the information they
need to make informed decisions on the thousands of
sentence modification requests that are certain to be
filed.

We are committed to implementing this
decision to achieve the twin goals of public safety
and justice. In his testimony, the Attorney General
indicated some of our public safety concerns around
retroactivity, and we need to do all we can to ensure
that the thousands of case-by-case retroactivity
determinations are indeed robust, and that thoughtful
decisions are made in every single case.

As we have noted often, violent crime
rates across the country are at generational lows.
Part of the reason for that is tough sentencing
policy. We continue to believe in the necessity of
strong sentencing policy, and we look forward to
examining important systemic issues facing federal
sentencing and corrections policy with the Commission
over the coming months. But tough sentencing policy
can also be fair sentencing policy, and we think that
the Fair Sentencing Act and the Commission's actions
implementing the Act are consistent with both tough
and fair sentencing.

    Thank you again, Judge Saris, for
considering our views and for your leadership.

CHAIR SARIS: Thank you, very much.

    So it is with enormous pride that I
preside today as chair at this historic moment. The
United States Sentencing Commission, as you have
heard, is a bipartisan body. We were nominated by
the President and confirmed by the Senate, and we
consist of judges, and former prosecutors, and former
defense attorneys, and we have worked very hard over
the last months to come to today's decision, and vote
unanimously to make the amendment to the United
States sentencing guidelines that reduced penalties
for selling and possessing crack cocaine retroactive.

    As you have heard, this amendment reduces
the average sentence for crack distribution by about
37 months. The average sentence will drop from about
164 to 127 months. The purpose of the amendment is
to fix a fundamental unfairness in our criminal
justice system.

It its report to Congress in 1997, as you
have heard there were many reports, after extensive
research, the Commission recognized that sentences
for crack cocaine were unfairly high and unjust.
Why? Because they reached below the level of mid-
level and serious traffickers and instead they
applied to low-level street dealers. An overwhelming
majority of crack cocaine offenders are African
American, and because of the unwarranted disparity in
sentencing and because it has affected prisoners for
over 14 years, we believe retroactivity is fair and
consistent with the purpose of the Fair Sentencing
Act of 2010.

As passed, this vote on retroactivity will
permit an estimated 12,040 prisoners over more than a
30-year period – not at once – over a 30-year period,
to petition a court for early release.
As many as 2,000 prisoners might be
eligible to file a petition in court in the first year. Remember, though, before any prisoner is released, the court has an obligation to consider whether release will create a risk to public safety.

Certainly there were disagreements at our hearings and during testimony about the precise form that retroactivity should take. However, retroactivity in some form has been supported by, as you've just heard: the Attorney General of the United States; the Criminal Law Committee of the Judicial Conference, which represents the federal judges; Senators Leahy, Durbin, Franken, [and] Coons; Congressman Bobby Scott; many members of the Congressional Black Caucus; the American Bar Association; Families Against Mandatory Minimums, FAMM; and many, many other advocacy groups.

For over 15 years the Commission has advocated that Congress should reduce the crack penalties to rectify the fundamental unfairness of punishing crack cocaine 100 times more seriously than powder. A broad bipartisan coalition in Congress led
by Senator Dick Durbin of Illinois and Senator Jeff Sessions of Alabama worked to pass the new law in the Senate, and Representatives Scott and Conyers took the lead to get the new law passed under suspension of the rules in the House.

Of course not all prisoners will be entitled to this reduction. Why?

First, prisoners who at their initial sentencing received a departure or variance below the equivalent of the guideline range established by the statute will not be entitled to any further reductions unless they received departures for substantial assistance. Based on its data, the Commission estimates that over 750 prisoners already received reductions below the proposed new guideline range as a result of these departures and variances.

Second, career offenders — by which I mean people who already have a very serious criminal record — will not generally get the reduction.

Third, as earlier stated, many prisoners will be bound by statutory minimums set under the previous statute.
At the hearing, the proposed retroactive application of the amendment reducing crack penalties did prompt some criticism. It prompted understandable criticism by, I think they described themselves as, the boots-on-the-ground law enforcement community, and by some caring Members of Congress like Congressman Lamar Smith and Senators Grassley and Sessions.

Their concern is that the early release of crack offenders will create a threat to public safety. The Commission has weighed these thoughtful criticisms with care, but we ultimately decided that these policy concerns did not prevail based upon the data and our own past experience. And let me explain.

In 2007 the Commission reduced the guideline penalties for crack cocaine offenses by two levels, under Chairman Hinojosa, to signal the Commission's concern that crack penalties were too high. It voted to give retroactivity to that amendment beginning March 3rd, 2008. And during that process involving a much larger number of petitioners
than today — 25,000 back then — judges rejected as many
as 604 petitions from those prisoners who had those
high public safety risks. They were rejected.

Indeed, half of the denials were in the
highest criminal history category. So judges were
careful. A three-year study of the recidivism rates
demonstrates that the rates of prisoners released
eyearly were indeed a little lower than those released
under their initially imposed sentence.

And of course while any recidivism is
unacceptable, the risk is mitigated because judges
have the right to reject any prisoners who pose too
high a public safety risk. For example, those
prisoners who have disciplinary problems in prison.

The Commission does recognize the need for
finality and certainty in punishment, and those are
important goals. And we know that retroactivity
should be rare. We heard concerns from the United
States attorneys' offices, deep-felt concerns, and
from some senators and congressmen about the
resources needed to implement retroactivity.

We appreciate and acknowledge those
concerns raised about the use of resources, particularly in this tough economy. However, the Commission heard testimony that retroactive application of the 2007 amendment which involved, as I just mentioned, a much larger pool of potentially eligible offenders, did not overly burden or tax the criminal justice resources. In fact, I was the head of my liaison team in Boston and I can say that from personal experience.

The testimony received by the Commission and my own experience suggests that the process went extremely smoothly, partly because of the dedicated – or largely because of the dedicated work of the assistant U.S. attorneys and assistant public defenders and panel attorneys, and the Commission, as well as the hard work of the judges and probation officers, and the Commission is confident that retroactivity of the Fair Sentencing Act amendment will proceed similarly.

We believe that the clarity of our policy statement, the Commission training, and our past experience will ensure minimal disruption this time,
as well. We have received the commitment from all
the actors in the criminal justice system to work
collaboratively on making sure that the amendment
applies to only the appropriate prisoners.

Finally, at the hearings on [the proposed
amendment and] retroactivity, the Bureau of Prisons
reported that a year of incarceration costs about
$27,000 per prisoner, and that the prisons are
over-crowded, as Commissioner Carr said, by about 37
percent.

Over five years the BOP estimates that it
will save $240 million. While cost savings alone
should not be the reason for retroactivity, they
should be taken into account in the decision.

This was a difficult decision, but we on
the Commission have been in the forefront of this
effort to address the fundamental unfairness in
society created by the crack/powder disparity.

As Chair Wilkins — former Chair Wilkins
said, he sent us a letter — he was the first chair of
the United States Sentencing Commission — I think I
looked upstairs under his picture 18 – 1985 —

(Laughter.)
CHAIR SARIS: — not that long ago — to 1994 he said: "If the law was unfair going forward, it was unfair for those already sentenced under it."

Today's vote ensures that the purpose of the Fair Sentencing Act is met, justice is served, and the goals of sentencing furthered. I look forward now to working with everyone, with the criminal justice community — and you all represent all corners of that — to address other critical sentencing issues facing the nation.

Thank you.

COMMISSIONER HINOJOSA: On behalf of all of us, I think it is appropriate for us to thank you, Chair Saris, for the work that you have done with regards to getting us prepared to take this vote, as well as working with our staff director, Judy Sheon, and everybody on the staff to make sure that we had all the information that we needed to make this decision. And we very much appreciate your leadership with regards to this whole process.

CHAIR SARIS: Thank you, very much. So thank you to everyone. Are there any other comments?
(No response.)

CHAIR SARIS: And with that, is there a motion to adjourn?

COMMISSIONER HINOJOSA: I move that we adjourn.

VICE CHAIR CARR: I second.

CHAIR SARIS: All right, all in favor?

(Chorus of ayes.)

CHAIR SARIS: Opposed?

(No response.)

CHAIR SARIS: Thank you.

(Applause.)

(Whereupon, at 2:06 p.m., Thursday, June 30, 2011, the meeting was adjourned.)