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ASSET FORFEITURE

PRESENTED TO THE
UNITED STATES SENTENCING COMMISSION

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INTRODUCTION

Chairman Hinojosa, distinguished members of the Commission, thank you for allowing me the opportunity to testify. It is an honor to appear before you today to discuss an issue with which I have dealt for much of my professional life, that is crack cocaine and its impact on our communities. In particular, I want to bring to you the perspective of how, in the Western District of North Carolina, retroactive application of the crack cocaine and criminal history amendments would pose a public safety risk by adding to the growing violent crime problem that we address every day, create disparity based upon a retroactive application of *Booker* and impose unjustified burdens on the criminal justice system.

I am the U.S. Attorney for the Western District of North Carolina. We have a headquarters office in Charlotte and a fully staffed branch office in Asheville. Before being confirmed in 2004 as United States Attorney, I served as an Assistant District Attorney for Mecklenburg County (the Charlotte area), and then as an Assistant U.S. Attorney in the Western District for 14 years. For years, I was

assigned to the Western District's Organized Crime Drug Enforcement Task Force and prosecuted numerous drug trafficking organizations and the violent crime associated with them, including drug violations and firearms violations. Many of those cases involved crack. I have a deep personal familiarity with the blight of crack cocaine because I was an Assistant Public Defender in Charlotte in 1988 when the crack epidemic hit. Almost overnight, the issues of addiction and drug-related violence erupted in our city. In fact, as U. S. Attorney, I continue to prosecute crack cases myself. So when I talk about the impact of your decision on the communities, on law enforcement, and on the courts, I do so based on personal experience.

Impact on Community Safety

The Western District includes 32 counties and a population of more than 2.9 million people. There are 24 Assistant United States Attorneys assigned to criminal cases and those AUSAs practice in four different courthouses. There are only four district court judges, one senior district court judge, and three magistrates in my district. Last year, 118 defendants were sentenced in our courts for crack convictions. (Just so you are aware, slightly more, 123, were sentenced for methamphetamine.) Drug cases constitute 46.2% of our case load. Within my office, AUSAs are spending many hours of overtime working on their cases and responding to an increasingly violent atmosphere that has been generated by crack and meth dealers.

After years of slowly but steadily bringing our murder rate down in Charlotte, we face a sudden upward surge. In 2005, murders increased 44% and they have stayed at that level for the past three years. Retroactive application of the crack cocaine amendment could release unexpectedly early approximately 536

crack dealers into this violence. In many instances, these crack dealers originally were prosecuted as part of our successful efforts to reduce the high murder rate of the early 90's. Even with our recent rise in murders, we still have not returned to those 1990's levels but I am afraid we may do so if these people are prematurely released.

I have seen firsthand the effects of crack cocaine distribution, the benefits of effective law enforcement and the consequences of serious federal penalties. For example, one of the earliest violent crack gangs in Charlotte, the Cecil Jackson Gang, used semi-automatic weapons, knee cap shootings, and a kidnaping to enforce their "turf" during crack-related gang warfare in Charlotte. An aggressive federal prosecution effectively dismantled the Cecil Jackson Gang. Those men are still in federal prison.

Likewise, in the Grier Heights neighborhood of Charlotte, I worked with federal, state, and local law enforcement to eradicate a large network of crack dealers who had set up shop in a low-income neighborhood populated with many elderly people and parents with small children. Neighbors complained that they felt unsafe leaving their homes and were worried about stray gunfire. Using the federal drug conspiracy statutes, we were able to convict more than 70 crack dealers. The average prison sentence more than 200 months. When I interviewed witnesses in Grier Heights, neighbors came out of their homes to shake my hand. They were grateful to have their neighborhood back. During the jury trials in federal court, representatives from the neighborhood sat in the courtroom to watch and to provide moral support. Today, that neighborhood is a far different place. Children play and neighbors walk the streets.

My experience is not unusual. Almost every U. S. Attorney in every district could tell the same story. For example, in Selma, Alabama, a local street gang

known as the St. Phillips Boys ran an open-air crack market that dominated the neighborhood. Residents described the neighborhood as a "war zone" and were afraid to leave their homes due to the guns and violence that accompanied the steady stream of crack buyers who came through the neighborhood by car and on foot at all hours of the day and night. Like the residents in my district, those residents lived in fear of stray bullets and slept on the floor instead of their beds for safety. Local law enforcement was unable to stem the violence or drug trade and asked for federal law enforcement assistance.

In the ensuing 15-month investigation, the ATF, along with Selma police, arrested and convicted more than 12 gang members; searched five crack houses; and seized nine guns, along with drugs and money. At the time of the arrests and searches, the residents of Selma came out of their houses, lined the streets and cheered and applauded the law enforcement officers. Later that day, the residents called into local radio talk shows to thank law enforcement for giving them back their neighborhood. Shortly thereafter, residents participated in a neighborhood beautification project. Residents and homeowners like Ocie Acoff, who will speak to you today, can now walk down the street again, sleep in their beds, sit on their porches and allow children to play in the yard because they are no longer living in an open crack market. Retroactive application of the crack amendment jeopardizes this precious and hard-won success by re-inserting those crack dealers into these same impoverished neighborhoods unexpectedly early.

Quite simply, crack dealing is not a victimless crime; it holds entire communities hostage. Crack generally is sold in small quantities in open air drug markets. Dealers establish their territory on the streets or in crack houses, where walk-up and drive-by drug trade occurs 24 hours-a-day. Dealers defend their territory with guns or other weapons. Young people are recruited into the drug

trade and drug gangs. Drive-by shootings are commonplace. In many areas, including Statesville, Shelby, Charlotte and Asheville in my district and in Selma, Alabama, we have made great strides in ridding these neighborhoods of the drug trade and violent crime. Retroactive application of the crack amendment will result in serious and often violent drug dealers being returned unexpectedly early to these reviving communities. In essence, retroactivity would release drug dealers from prison at the cost of imprisoning entire communities.

I know that some have argued that "these offenders are going to get out anyway, so what is the big deal if they get out a little early? We are correcting a wrong." I am not here to debate whether the Commission's decision to lower the guidelines prospectively was right or wrong. I must, however, correct some misperceptions. These offenders are not addicts convicted of possessing small amounts of crack cocaine. Nor have they been convicted of merely using crack cocaine. My experience and the Commission's data show that these are crack dealers who are responsible for the distribution of large amounts of crack. The average case involved more than 50 grams of crack. In more than a third of the cases, the defendant received an enhanced sentence because of a weapon. 11.7% received a higher sentence because of their aggravating role. Just as significantly, almost none of them were new to the criminal justice system – 65.2% had a criminal history category of III or higher.

The fact that these offenders have higher criminal history categories is significant. The Commission's own data shows that these offenders likely will reoffend and will do so within a short time of getting out of jail. Thus, 12,700 of the estimated 19,500 eligible offenders have between a 22.7% and 55.2% risk of recidivating within the first two years of their early release. The impact of retroactive application would be immediate, as the Commission estimates that an

additional 2,520 offenders would be released in the first year.

The risk posed by these offenders is amplified by the fact that retroactive application of the crack amendment would result in many prisoners being unable to participate in the typical re-entry programs sponsored by the Bureau of Prisons. The BOP generally spends years developing a re-entry program for each prisoner, which intensifies as the inmate gets closer to his release date. As part of this process, the BOP works with the inmate to provide him the documents that he will need, such as a drivers license and social security card; to identify possible employment; and to locate a place to live upon release. In some circumstances, the BOP must notify certain law enforcement agencies of the prisoner's pending release and determine whether he might qualify as a sex offender, which would trigger other requirements. Finally, and perhaps most importantly, they would attempt to prepare many of these offenders for release through training programs and community confinement centers. The reductions in sentence contemplated by the retroactive application of the guideline would truncate or entirely eliminate this process. The proposed reduction in sentence means that in some instances, the BOP would not have sufficient time to place the offender in training programs or halfway houses. Indeed, in some cases, offenders could be released from the courthouse without ever returning to the prison. This lack of preparation only increases an offender's chance of re-offending.

The risks and burdens of retroactive application of the amendments combined with the substantial danger that an offender will be unprepared for re-entry into society would then be passed along to probation officers. Due to the geographic disparity in the distribution of these cases, some probation offices would be swamped with these high-risk offenders who suddenly would be under their supervision. Probation officers who already are spread thinly would be taxed

even more. And when these crack dealers "slip," it will be the community that pays the price.

These high-risk offenders would be released into a system that is ill-equipped to give them the support and supervision they clearly need. As a result, the community would suffer the greatest consequences: defendants' families, who want them home, may not have the adequate resources to assist in offender transition and neighborhoods can only watch as they return to selling drugs. Our job is to protect these communities and to ensure that these residents, who do not have the option of moving to another safer neighborhood, are safe in their own homes.

I am especially concerned about the impact of retroactivity on our Weed and Seed neighborhoods. We have five Weed and Seed programs in my district. The Weed and Seed program aims to prevent, control and reduce violent crime, drug abuse and gang activity in designated high-crime neighborhoods across the country. It is important to remember that the Weed and Seed Program was initiated in direct response to the crack epidemic in our cities. The program involves a two-pronged approach: law enforcement agencies and prosecutors cooperate in "weeding out" violent criminals and drug abusers; and public agencies and community-based private organizations collaborate to "seed" much-needed human services, including prevention, intervention, treatment, and neighborhood restoration programs. We have adopted a multilevel strategic plan that includes four basic components: law enforcement; community policing; prevention, intervention, and treatment; and neighborhood restoration. This program is time limited, usually to five years. Four of the five Weed and Seed programs in my district have experienced a dramatic drop in crime. I am greatly concerned that premature re-introduction of convicted serious crack dealers into

these same neighborhoods will undermine all the progress we have achieved in these blighted communities. By definition, Weed and Seed communities are transition neighborhoods where law enforcement and the community have joined hands to fight crime and improve the quality of life. The clock is ticking on these five year programs, and I worry that we would lose precious time and momentum if our Weed and Seed neighborhoods are forced to absorb a large group of convicted crack dealers in a relatively short period of time.

Let me tell you about Robert. Robert lives in public housing in our Weed and Seed neighborhood in Asheville. Robert lived on the streets for years as a homeless person, although he is highly intelligent. Robert is now married and raising three children. Among many other things, Robert tends and maintains our Weed and Seed community garden on the very same plot that used to be an open-air drug market. When I was in Asheville two weeks ago, Robert showed me the garden, the compost heap, and the site where the neighborhood is planning to build a greenhouse. Women in the community hold meetings there. Children play there, and Robert is teaching the children about plant life and about organic gardening. One small boy expressed surprise that tomatoes do not grow in cans when Robert showed him his tomato plants.

Equally significant is the fact that Robert now keeps his tools propped up against the fence. In a neighborhood previously known as a haven for crack and guns, no one has stolen his tools. Robert told me that even some of the crack dealers have come by to shake his hand. Robert, Weed and Seed, and community involvement have transformed the neighborhood. I do not want to see that progress interrupted.

These vitally important transformations are taking place in many other locations where we have intensified law enforcement efforts, including the small

southern town of Shelby. Crack cocaine and gang related violence transformed much of that town, leaving it with the second highest per capita rate of violent crime in North Carolina. The Weed and Seed program, together with aggressive federal prosecutions, arrived on the scene. Some of the biggest neighborhood meetings we have ever sponsored occurred in Shelby. The community has embraced the idea of confronting the crack cocaine problem head-on. Violent crime has dropped off dramatically. Community-based policing is a reality. Traditional racial barriers have ended. And yes, Shelby also has a thriving community garden, tended by local residents in our Weed and Seed neighborhood.

Finally, there is Statesville, another small southern community, best known for good barbeque and local sports rivalries. Statesville, though, suffers from a severe crack problem and its accompanying violence. In recent years, Statesville has had to contend with drug-related shoot-outs in the downtown area, open-air drug markets, and gangs. Our Weed and Seed initiative in that community is vital to changing the atmosphere created by the drug dealers. We have started a Citizen's Police Academy to forge better relationships between the residents of our Weed and Seed community and local law enforcement. We have a Police Athletic League. Our Hoops for Hope program includes tutoring and mentoring for disadvantaged youth. Aggressive code enforcement is forcing slum landlords to improve their property, and the faith-based community has established twelve-step programs to address the needs of drug addicts. The Statesville Weed and Seed Program is thriving, but it is fragile and vulnerable. A large influx of convicted felons who formerly operated in the crack cocaine trade could seriously undermine our success.

Furthermore, any decision to make the amendment retroactive would impact the community in another less direct way. The courts, the probation officers,

prosecutors, and law enforcement would have their scant resources diverted from current cases to rehashing old ones. Every hour that AUSAs and law enforcement officers spend re-investigating and re-litigating long-closed cases is an hour that they cannot spend combating ongoing crime. In sum, a decision to apply these amendments retroactively would have the perverse and unintended consequence of jeopardizing burgeoning communities and making it *more likely* that these offenders will return to the criminal justice system.

Effect Upon the Criminal Justice System

In addition to endangering our communities, retroactive application of the amendments would impose enormous and unjustified burdens upon our criminal justice system. Retroactive application of the crack amendment would require new sentences in approximately 20,000 cases, which is equivalent to more than 25% of all federal sentencings in 2006 and approximately the same as all of the crack sentences imposed during FY 2003, 2004, 2005 and 2006 combined. Put another way, the 20,000 estimated eligible crack offenders comprise approximately 10% of the entire federal prison population. In my district alone, the 536 estimated eligible offenders in my district is the equivalent of 66% of all criminal cases handled by the district in 2006. While I have 24 criminal AUSAs in my district, only five of them routinely handle drug cases. Thus, these five AUSAs would bear the brunt of these 536 possible re-sentencings, diverting them from the investigation and prosecution of current and serious drug cases.

While these numbers are startling, this example from my district is not unique. This swell of litigation would occur in other districts to varying degrees. Where it would have the most impact is in those districts that often can afford it the least – that is, where crack and its associated violence was a serious problem

and poses a serious threat to return. In the Eastern District of Virginia there would be at least 1,400 defendants eligible for a reduction - that is almost 400% of the crack defendants sentenced in that district in all of 2006. In the Middle District of Florida, it is 394%. Put another way, the 1,400 estimated eligible offenders prosecuted in the Eastern District of Virginia is equal to 80% of *all* criminal defendants prosecuted in that district court last year. For the Northern District of West Virginia, the Commission's estimate of the number of eligible offenders is 125% of the defendants sentenced in 2006; for the Western District of Virginia it is 90%; for the District of South Carolina 66%.

Booker Application and Unjustified Disparity

As troubling as they are, these numbers fail to capture one of the greatest problems posed by retroactivity – the uncertainty surrounding the possible application of *Booker* to § 3582(c) hearings. The Department previously has argued and continues to believe that *Booker* should not apply to such hearings. The Fourth Circuit Court of Appeals decision in *United States v. Hudson*, though an unpublished decision with little legal analysis, provides support for this position. Nevertheless, the Ninth Circuit Court of Appeals reached a different conclusion in *United States v. Hicks*, as did the district court in Puerto Rico in *United States v. Forty-Estremera.*

While we believe that *Hicks* and *Forty-Estremera* were wrongly decided, the Commission must recognize that every hearing conducted pursuant to §3582(c) would raise these same issues. The uncertainty of the legal standard to be applied, in and of itself, substantially raises the costs and stakes in each potential § 3582(c) hearing. Each potential motion likely would generate voluminous briefing on the *Booker* issue, requiring significant resources from AUSAs, defense counsel and

the courts. Regardless of how the district court may decide the *Booker* question, the losing party likely would appeal, thus adding years of uncertainty to offenders' sentences and undermining the public's confidence in the finality of sentences.

In addition to posing legal uncertainty, the possible application of *Booker* to § 3582(c) hearings introduces troubling and unwarranted disparity into the sentencing system. All courts of appeals have uniformly held that *Booker* does not apply retroactively to previously-sentenced offenders. Yet if the Commission applies these amendments retroactively and courts determine that *Booker* applies to § 3582(c) hearings, these offenders would be an unjustified narrow exception to this rule. Stated in a more concrete manner, crack offenders would receive the benefit of *Booker* but every other defendant who was sentenced prior to *Booker* would not. These potential and unjustified disparate results and unequal applications are the precise harms that Congress sought to eliminate in enacting the Sentencing Reform Act and in creating the Sentencing Commission.

Burdens Upon the Criminal Justice System

The actual application of *Booker* would impose even greater burdens upon the judicial system, U.S. Attorneys' offices and the courts in the most affected districts. If sentencing courts followed *Hicks*, each hearing would require the presence of the defendant, an updated pre-sentence report and full argument as to the appropriate sentence, including whether the court should reduce the sentence by more than two levels. Probation officers may be required to re-interview defendants, possibly re-investigate some aspects of the pre-sentence investigation and prepare updated reports.

Regardless of whether *Booker* applies, these would not be simple mechanical decisions premised upon a limited two-level reduction. The proposed

reduction is not an automatic mathematical exercise. Instead, courts have the discretion to whether to apply a retroactive amendment in order to reduce an offender's sentence. Furthermore, because the original guideline range and the amended reduced guideline range would overlap and because many of these defendants are serious drug dealers, prosecutors in many cases may argue that the original sentence imposed is still appropriate. AUSAs likely would need to retrieve and review their case files in almost every case to determine whether a reduction is appropriate. Where there was no appeal and no transcript of the previous proceedings, a transcript may need to be prepared. In many instances, the original prosecutor may have left the office and most likely the law enforcement investigator would no longer be available. Usually there are hundreds of pages of reports, notes, and grand jury transcripts that would need to be reviewed. Additionally, AUSAs likely would want to obtain records from the BOP indicating how the prisoner has behaved while serving his sentence. The potential for 20,000 resentencing hearings, with more than 500 in my district alone, will divert prosecutorial and judicial resources from handling current crime.

As I stated earlier, the burden upon U.S. Attorneys' offices and courts would not be uniform throughout the country. Instead, according to the Commission's data, the top 15 of the 92 affected districts would bear a disproportionate 42.8% of the estimated eligible offenders. Similarly, three of the twelve circuit courts of appeals – the Fourth, Fifth and Eleventh Circuits – have more than 50% of the estimated eligible offenders. This disproportionate impact only amplifies all the concerns I previously have mentioned.

Some have suggested that applying the crack amendment retroactively could result in a cost savings to the United States. This focus upon dollars, particularly upon prisoner bed-space savings, ignores the very real social and financial costs to

the community. The early release of thousands of serious and often violent offenders poses a substantial risk of undermining current law enforcement efforts and community reform programs, such as Weed and Seed, which are just now beginning to make progress in turning around drug devastated communities. This damage cannot be quantified in dollars and cents. What price do you put upon living in a safe neighborhood? As I mentioned previously, the Commission's own studies demonstrate that a high-percentage of these offenders would re-offend within the first two years of release. This increased crime would come at a great social cost to recovering communities, not to mention the actual dollars that will be consumed with the re-prosecution of these offenders. Furthermore, any cost analysis focused solely upon saving prison bed space does not take into account many other factors that would increase costs for the Department of Justice, the courts and state and local law enforcement.

Conclusion

Some have suggested that it would be unfair to have those sentenced after November 1, 2007 receive a lower sentence than those who were sentenced for the same offense before that date. That is true any time the Commission has amended a guideline and yet on many occasions the Commission has decided not to make the amendment retroactive, such as the safety valve amendment.

Furthermore, all legal changes result in some degree of disparity among defendants. For example, courts have held that other major sentencing decisions, such as *Booker* and *Apprendi,* do not apply retroactively. Retroactive application of the crack amendment actually creates greater disparity by applying *Booker* retroactively to crack offenders and to no others.

In order to avoid the greater disparity, the amendment should not be applied

retroactively. This way, everyone who was sentenced under the previous guideline continues to be so. What would be difficult to explain to inmates is that due to the variances in the way the amendment will be implemented there will be wide discrepancies in the way prisoners are treated. For example, Mr. Forty Estrema saw his life sentence reduced to 20 years, while another judge in another district might rule in an identical situation that the defendant was not even entitled to a hearing. Rather than correcting a perceived wrong, retroactive application is likely to result in greater disparity.

Chairman Hinojosa and Commissioners, let me say on behalf of myself and my colleagues, how much we appreciate the opportunity to raise our concerns with the Commission. We have the deepest respect for you and for the important work that you do to ensure fairness and integrity in the implementation of our laws.

My concern is about the future and about the unforeseen consequences of releasing large numbers of convicted drug offenders into vulnerable communities in a relatively short period of time. In my own district, I have seen the tragic personal consequences of crack cocaine. I have also seen just how difficult it is to reclaim a neighborhood, once crack dealing has taken hold. On behalf of the many good people who are trying to continue the process of restoring their neighborhoods, I urge you reject arguments for retroactivity and to allow those who have violated the law, to complete the criminal sentences that were imposed upon them.

That concludes my prepared remarks. The Department has submitted a letter responding in greater detail to some of these issues. I will be glad to answer any questions.