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**Testimony of
Stephen R. Sady
Chief Deputy Federal Public Defender for the District of Oregon
Before the
United States Sentencing Commission
Public Hearing on Retroactivity
November 13, 2007**

My name is Steve Sady and I am the Chief Deputy Federal Public Defender for the District of Oregon. I would like to thank the United States Sentencing Commission for holding this hearing and for giving me this opportunity to testify on behalf of the Federal Public and Community Defenders regarding implementation of retroactive guidelines amendments.

Lessons From Implementing The Retroactive Marijuana Amendment

Twelve years ago, the Sentencing Commission promulgated the retroactive marijuana drug quantity amendment that changed the ratio from one kilogram per plant to 100 grams per plant. At that time, the District of Oregon, which had a large caseload involving marijuana growers, put into effect a protocol that resulted in the efficient resolution of a large number of cases with minimal burden on the courts. On the day the retroactive amendment went into effect, Oregon district judges signed about 120 orders reducing sentences pursuant to 18 U.S.C. § 3582(c).

The successful implementation of the retroactive marijuana amendment in the District of Oregon and elsewhere is strong evidence upon which to conclude that a retroactive crack amendment can be implemented without undue difficulty or expenditure of resources.

The key factors in implementing the retroactive marijuana amendment were communication, flexibility, and good faith cooperation among all concerned. As the date of

the retroactive amendment approached, the Chief Judge, the Probation Office, the United States Attorney, the Federal Defender, and the Bureau of Prisons conferred regarding the most efficient way to assure that each individual client obtained representation, consideration, and a fair disposition, either by agreement or by court resolution of disputed issues.

The first task was to identify all potential beneficiaries of the marijuana amendment. This was accomplished by comparing lists prepared by the Probation Office, the United States Attorney's Office, the Federal Defender Office, the Bureau of Prisons, and the Sentencing Commission.

Next, the Federal Defender Office contacted the individual defendants to provide general information regarding the potential for a retroactive amendment, the need to determine whether they were represented or needed representation, our general hope of reaching agreement in as many cases as possible, and the plans to hold a meeting at the BOP facility on a certain date. We then met with large groups of prisoners at both the Federal Correctional Institution and Federal Prison Camp at Sheridan, Oregon. In communicating with the inmates, we found it extremely important to assure they all were receiving the same information and that, while general questions were answered in the group, individual questions were resolved in private conversations with counsel. By providing accurate general information and conferring confidentially on the specifics of individual cases, we minimized fears and rumors and maximized our ability to resolve cases based on reason and fairness.

The District Court appointed our office as counsel to make an initial assessment in each case in which the person requested representation. We used interview sheets to obtain the necessary information and work-sheets to evaluate the case. We consulted with prior counsel and obtained conflict counsel when necessary. We easily prioritized cases based on the BOP's projected release date, which is readily available on the BOP website.

The United States Attorney's Office reviewed its files and went through each of the cases, after which I met with a U.S. Attorney Supervisor to identify which cases we could agree on and which would require further individual negotiation and potential litigation. We found that almost all of them could be resolved by agreement of the parties. The cases in which a mandatory minimum did not apply, especially where the person would be released, were easily disposed of based on agreed sentences. Some cases above a mandatory minimum were resolved with a new sentence to the mandatory minimum, with no prejudice to an individual attorney's ability to approach the government later and present any of the potential reasons for a guideline sentence, as was also done for sentences at the mandatory minimum. Cases involving career offender sentences were referred to individual attorneys for the same

reason. Although this protocol allowed for individualized litigation, relatively few cases required further litigation.

During the week before the effective date of the retroactive amendment, we sent letters to the judges with the agreed reduced sentences and information to support the parties' agreements. We also provided motions and proposed orders that changed the term of imprisonment, with all other provisions of the judgment remaining the same. We requested that the court, if it deemed the reduction appropriate, sign the order first thing on November 1, 1995.

Preparation and the cooperation of the interested parties made November 1, 1995, a very smooth day. The judges signed all of the agreed orders. Through advance coordination with the District Court Clerk's office, each order was faxed to the correct BOP facility, where the orders were expected. Because the Bureau of Prisons had previously received the proposed new sentences, they had already completed their recalculation of the projected release date and – upon receiving the faxed orders – immediately released those prisoners whose terms expired on that day or sooner. The BOP also began to take steps to transfer newly eligible inmates to community corrections or a lower security facility.

Adapting The Marijuana Protocol To Crack Retroactivity

Following the successful implementation of the retroactive marijuana guideline in our District, the protocol was distributed to Federal Public and Community Defenders for future reference. More recently, in anticipation that the crack amendment may be made retroactive, those protocols have been adapted and communicated to all Federal Public and Community Defender offices, including adaptation of the interview form and work-sheets for the crack guideline. We fully understand that there are differences among Districts as well as factors that may come into play in the crack context that are different for marijuana. However, the basic lesson is that, with the good faith of all of the parties, implementation of the Commission's instruction that a guideline should be retroactively lowered can be reasonably accomplished. The parties, with no restrictions on the scope of negotiations, can arrive at fair and reasonable sentences after the defendant bargains for certainty and the government bargains for what it considers to be fair under the circumstances.

A key to smooth implementation involved the defendants' confidence that their individual interests were being furthered by counsel. Each defendant is entitled to a representative who is attempting to achieve the best result for the individual, which may involve agreement with the government, or may involve litigation regarding controverted issues in need of a judge's resolution. Either way, representation of all persons potentially affected is an important component of implementing retroactive guidelines. The protocols

were designed to further each individual client's interest, which did not interfere with, and indeed furthered, the orderly implementation of the retroactive amendment.

Since the retroactive marijuana amendment went into effect, the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), has installed a new approach to sentencing. Just as *Booker* has not grossly affected the negotiation of trial level cases, *Booker* should not hamper the ability of parties to reach a reasonable negotiated agreement as a result of a retroactive crack amendment. The Department of Justice has indicated concern regarding the ability to raise *Booker* issues on § 3582(c) motions. Where § 3553(a) factors militate in favor of a lower sentence, the parties should be able to negotiate in good faith regarding all relevant factors. Even if agreement is not reached in a small number of cases, the expense of litigation would be minimal compared to the overall savings. The Commission has estimated that 19,500 prisoners would receive an average of 27 fewer months in custody, or an overall savings of over one billion dollars (about \$23,000 per year to house a federal prisoner, times 2.25 years per prisoner reduction, times 19,500). The Committee on Criminal Law of the Judicial Conference and the Probation and Pretrial Services Chiefs Advisory Group have recognized that the value of retroactivity outweighs the necessary allocation of resources to implement retroactivity.

The retroactivity of the crack amendment is consistent with Congress' intentions because the purpose, magnitude, and difficulty all favor retroactivity. The Commission has recognized the purpose in four different reports, all of which consistently demonstrate its sensitivity and commitment to alleviating the over-incarceration resulting from disparate treatment of crack cocaine defendants. The magnitude of the over-incarceration is also a powerful reason for making the guideline retroactive: just as Congress indicated that minor shifts in the period of imprisonment militate against retroactivity, the 27-month average reduction militates strongly in favor of remedying the over-incarceration of crack offenders which does not serve the purposes of sentencing, especially given the large number of defendants who would benefit. The final factor is the one upon which the Oregon marijuana retroactivity experience is especially relevant.

The Federal Public Defenders are in a position to attest that retroactive implementation does not need to be difficult. Even substantial disruption would be fully merited in order to accomplish the justice and societal benefits of retroactive application of the amendment. But the process can be orderly and simple with the good faith and reasonable cooperation of all affected parties. In Oregon in 1995, most of the cases were ultimately resolved by a single lawyer and a single prosecutor, heading up small teams, who reached agreements that were easily implemented through the assistance of the Clerk's Office and the Bureau of Prisons. The same can be done with the crack cocaine amendment.

The Chief Judge in the District of Oregon has approved the same type of protocol to address crack cocaine retroactivity if it goes into effect. We have been out to Sheridan to explain to prisoners the possibilities, limitations, and realities of potential retroactivity. The Oregon Probation Office is identifying potential beneficiaries and proposing revised guideline calculations, anticipating that the amendments will be retroactive. Every Federal Public Defender office has been contacted and should be taking steps to implement cooperative proceedings to achieve the best result for each individual client as efficiently as possible. Prosecutors and defense counsel, applying a rule of reason, can implement the crack cocaine amendment retroactively without undue disruption.

Twelve years ago, November 1st was one of my best days as a Federal Public Defender, but it was also one of the worst. The Sentencing Commission had also proposed a retroactive remedy for the disproportionate crack/powder ratio, which Federal Defenders have long protested as unjust and racially discriminatory. While our predominately white marijuana growers joyously embraced their families in the Sheridan parking lot, our predominately African American crack defendants remained in prison, serving sentences grossly longer than the purposes of sentencing required. The Sentencing Commission's four reports have kept this injustice in focus. Retroactivity of this partial remedy is fair, necessary, and doable.