A SIMPLE SOLUTION TO THE MATH PROBLEM PRODUCED BY THE NEW CRACK-TO-MARIJUANA TABLE IN CASES INVOLVING RETROACTIVE APPLICATION OF THE CRACK AMENDMENT

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I. Overview

In four reports to Congress, the Sentencing Commission demonstrated that the severity of crack cocaine penalties based on drug type is unjustified by the purposes of sentencing, is unfair, and has a disproportionate impact on African Americans.[1] The Commission took a first step to "somewhat alleviate" these "urgent and compelling problems,"[2] by promulgating a two-level reduction in the base offense levels for crack, which became law on November 1, 2007. On December 11, 2007, the Commission voted that the amendment should apply retroactively to persons sentenced before November 1, 2007 because "the statutory purposes of sentencing are best served by retroactive application of the amendment,"[3] as with prior amendments benefiting offenders of other races and more serious offenders.[4] According to the Commission, the amendment is "only a partial remedy to some of the problems associated with the 100-to-1 drug quantity ratio."[5]

Title 18 U.S.C. § 3582(c)(2) provides that persons who were "sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered" by the Commission may receive a sentence reduction if consistent with the factors set forth in 18 U.S.C. § 3553(a)(2) and the Commission's applicable policy statements. The

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[1] USSC, Cocaine and Federal Sentencing Policy (February 1995); USSC, Cocaine and Federal Sentencing Policy (April 1997); USSC, Cocaine and Federal Sentencing Policy (May 2002); USSC, Cocaine and Federal Sentencing Policy (May 2007).

[2] USSC, Cocaine and Federal Sentencing Policy 9 (May 2007).

[3] *See* U.S.S.C. Press Release, *U.S. Sentencing Commission Votes Unanimously to Apply Amendment Retroactively for Crack Cocaine Offenses* (Dec. 11, 2007), available at http://www.ussc.gov/PRESS/rel121107.htm.

[4] Amendments lowering guideline sentences for LSD, marijuana, psylicibin, fentanyl, PCE and percocet, all of which benefited primarily White offenders, were made fully retroactive. *See* USSG App. C, amends. 126, 130, 488, 499, 516, 657. Amendments to the guidelines for fraud, obstruction, escape and money laundering, which likewise benefited primarily white offenders, were made fully retroactive. *See* USSG App. C, amends. 156, 176, 341, 379, 490. The maximum base offense level for drug offenders with the highest sentences allowable was retroactively lowered from 42 to 38, thus lowering the range in Criminal History I from 360 months-life to 235-293 months. *See* USSG App. C, amend. 505. The elimination of the two-level weapon enhancement for those convicted and sentenced under 18 U.S.C. § 924(c) for using, carrying or possessing a firearm was also made retroactive. *See* USSG App. C, amend. 599.

[5] USSC, Cocaine and Federal Sentencing Policy 9-10 (May 2007).

Commission's policy statement, USSG § 1B1.10, as revised March 3, 2008, states that a "reduction in the defendant's term of imprisonment is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2) if . . . an amendment listed in subsection (c) does not have the effect of lowering the defendant's applicable guideline range." USSG § 1B1.10(a)(1)(B).

In addition to reducing the base offense levels in USSG § 2D1.1(c), the Commission created a new separate table in the commentary, at Note 10(D), for converting crack to an "equivalent" quantity of marijuana in cases involving crack and at least one other drug. But the table produces false equivalencies. For certain quantities within certain base offense levels, simply converting crack to marijuana under this table raises the reduced base offense level back to the old base offense level, thus eliminating the reduction.

Courts attempting to deduce a rationale for this result by trying out various combinations have found it to be simply irrational. *See United States v. Molina*, slip op., 2008 WL 544703 (E.D.N.Y. Feb. 28, 2008); *United States v. Horta*, __ F. Supp. 2d __, 2008 WL 445893 (D. Me. Feb. 19, 2008); *United States v. Watkins*, 531 F. Supp. 2d 943 (E.D. Tenn. 2008).

The problem is easily solved in cases sentenced on or after November 1, 2007, as there is no question that the courts are free to reject any guideline, commentary, or policy statement that is not empirically based or otherwise reflects unsound judgment. *Rita v. United States*, 127 S. Ct. 2456, 2465, 2468 (2007); *Kimbrough v. United States*, 128 S. Ct. 558, 575 (2007); *Gall v. United States*, 128 S. Ct. 586, 594 n.2 (2007).

As to defendants sentenced before November 1, 2007, however, the Commission has been advising probation officers, judges, clerks and lawyers in its training sessions that "certain cases involving multiple drug types" are ineligible for relief under USSG § 1B1.10(a)(1)(B). *See* Bad Math Timeline, available at http://www.fd.org/odstb_CrackCocaine.htm. The (and the government in most cases) take the position that USSG § 1B1.10, alone among all guidelines and policy statements, is mandatory. Under this logic, a defendant who falls victim to one of the false equivalencies could be denied retroactive relief.

The controversy over whether USSG § 1B1.10 may or may not be treated as mandatory in light of *United States v. Booker*, 543 U.S. 220 (2005) and its progeny has not been definitively resolved in all circuits. *See* Part III(B), *infra*. But one thing should be clear. The policy statement, insofar as it would bar retroactive relief in those instances where the mere conversion of crack to marijuana eliminates the reduction in base offense level by operation of one of the false equivalencies in the table, violates the applicable enabling statutes and is inconsistent with the guideline itself, and is therefore invalid in those instances. *See* Part III(A), *infra*.

It seems clear that the Commission simply made a mistake due to the difficulty and time it took to reach a decision on this particular amendment. However, the

Commission is free to amend commentary at any time without first sending it to Congress and waiting for approval by silence.[6] To its credit, the Commission appears to be looking into fixing the problem. *See* Bad Math Timeline, available at http://www.fd.org/odstb_CrackCocaine.htm. Meanwhile, the issue will have to be negotiated or litigated. What follows is a description of the mathematical problem, the responsive legal argument, and a simple mathematical solution.

II. The Mathematical Problem[7]

Prior to Amendments 706 and 711, effective November 1, 2007, the conversion ratio for crack to marijuana was 1 to 20,000 (1 gram of crack cocaine = 20 kg of marijuana). *See* USSG § 2D1.1, comment. (n.10) (Nov. 1, 2006). This ratio was based on the quantities within the base offense levels in the Drug Quantity Table, U.S.S.G §2D1.1(c).[8] This kept the equivalency neat and uniform throughout the discrete base offense levels and throughout the entire Drug Quantity Table. No matter what quantity of crack was attributed to the defendant, the marijuana equivalency would always result in the same relative position within the marijuana range. In other words, simply converting the amount of crack to marijuana never altered the defendant's base offense level. Of course, quantities of other drugs involved in the offense may have resulted in a higher base offense level, but simply converting the crack to marijuana always maintained the same base offense level.

With the November 1, 2007 amendments, the Drug Quantity Table, USSG §2D1.1(c), was altered by reducing the base offense level by two at each quantity range. As a consequence of lowering the base offense levels for crack and keeping the marijuana quantities the same at each base offense level, the ratio of crack to marijuana within each range is no longer 1 to 20,000. Instead, the ratios both between and within most base offense levels vary. The equivalency table in Note 10(D) fails to account for the spectrum of ratios *within* most base offense levels. Instead, it specifies a single ratio for converting crack to marijuana at each base offense level. As a result, converting crack to marijuana will, at times, move the defendant to the next highest base offense level, even before considering any other drug.

The following example illustrates the point:

The offense involved 75 grams of crack and 10 grams of powder. The first step is to determine the base offense level for the quantity of crack involved in the offense by

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[6] 28 U.S.C. § 994(p) (send and wait provision applies to "amendments to the guidelines" only).

[7] Thanks to James Egan, Research and Writing Specialist, Northern District of New York, for identifying the precise mathematical problem and deriving the mathematical solution.

[8] The ratio at the base offense levels was based on the ratio between the quantities triggering the mandatory minimum penalties in 21 U.S.C. § 841(b).

consulting the Drug Quantity Table. *See* USSG § 2D1.1, comment. (n. 10(D)(i)(I)). The base offense level for 75 grams of crack is 30. *See* USSG § 2D1.1(c).

The second step is to multiply each gram of crack involved in the offense by the number of kilograms of marijuana specified in the table for the base offense level identified at the first step. *See* USSG § 2D1.1, comment. (n. 10(D)(i)(II)). For a base offense level of 30, each gram of crack is multiplied by 14 kilograms of marijuana. This converts the 75 grams of crack to 1,050 kilograms of marijuana.

The conversion itself of crack to marijuana in the second step raises the base offense level from 30 to 32, even before considering the 10 grams of powder. The current quantity ranges for crack and marijuana at base offense levels 30 and 32 are:

Base Offense Level	Range of Crack	Range of Marijuana
30	50-150 grams	700-1,000 kilograms
32	150-500 grams	1,000-3,000 kilograms

This makes no sense. If the offense involved crack alone, an additional 75 grams of crack would be necessary to move to level 32. A defendant whose offense involved 149.99 grams of crack alone receives a base offense level of 30, while a defendant whose offense involved 75 grams of crack and only 1 gram of powder receives a base offense level of 32 simply by converting the crack to marijuana.

The problem at base offense level 30 is also present at base offense levels 24, 32 and 36. Defendants who possess 6.25 grams or more at level 24, 71.43 grams or more at level 30, 447.76 grams or more at level 32, and 4.48 kilograms or more at level 36 are propelled to the next highest base offense level prior to accounting for the remaining drugs. *See Watkins*, 2008 WL 152901 at *1 n.1.

III. The Legal Argument

A. The policy statement and the equivalency table, insofar as they would bar retroactive relief when one of the false equivalencies eliminates the reduction in the base offense level, are invalid because they violate their enabling statutes and are inconsistent with the amended guideline.

As noted above, at least three courts have identified the problems produced by the new table and declined to follow it. *See United States v. Watkins*, 531 F. Supp. 2d 943 (E.D. Tenn. 2008); *United States v. Horta*, __ F. Supp. 2d __, 2008 WL 445893 (D. Me. Feb. 19, 2008); *United States v. Molina*, slip. op., 2008 WL 544703 (E.D.N.Y. Feb. 28, 2008). The defendants in these cases were being sentenced for the first time after the amendment became effective. In *Molina*, however, Judge Gleeson commented on the effect on retroactive application: "Worse, a defendant's guideline range being reduced is

an *absolute* condition on that defendant's receipt of a sentence modification under the proposed revised § 1B1.10." *Id*. at *4 (emphasis in original). Note that Judge Gleeson does not say that a reduced range is an absolute condition for receipt of a sentence reduction under 18 U.S.C. § 3582(c)(2), but instead that it is an absolute condition "under the proposed revised § 1B1.10."

The difference is important. When a policy statement (such as § 1B1.10), or commentary to a guideline (such as the table set forth in § 2D1.1, comment. (n. 10(D)(i)(II))) is inconsistent with a statute, the statute trumps. *See United States v. LaBonte,* 520 U.S. 751, 757-58 (1997); *Neal v. United States*, 516 U.S. 284, 292-95 (1996); *Stinson v. United States*, 508 U.S. 36, 38, 44, 45 (1993).

Title 28 U.S.C. § 994(a)(2)(C) requires that any policy statement implementing 18 U.S.C. § 3582(c)(2) be consistent with 18 U.S.C. § 3553(a)(2) and all other pertinent federal statutes. Title 28 U.S.C. § 991(b)(1) requires that all policy statements assure that the purposes set forth in § 3553(a)(2) purposes are met, avoid unwarranted disparities, provide certainty and fairness, and reflect advancement in knowledge of human behavior.

The policy statement, USSG § 1B1.10(a)(1)(B), insofar as it would deny relief based on the elimination of the sentence reduction through the false equivalencies in the table in USSG § 2D1.1, comment. (n.10(D)(i)(II)), is inconsistent with these statutes. The table, as it applies in some but not all multi-drug cases, with no rhyme or reason, and contrary to empirical evidence, undermines the § 3553(a)(2) purposes, creates unwarranted disparities, uncertainty and unfairness, and fails to reflect advancement in knowledge of human behavior, all as set forth in the Commission's four reports to Congress. As Justice Breyer would say, the table (and the policy statement's purported enforcement of it) is not even a "rough approximation" of compliance with § 3553(a)(2) because it is not based on an "empirical approach," was not based on consultation with the criminal justice community, and has not been revised in the face of evidence that it is irrational. *See Rita*, 127 S. Ct. at 2464-65.

Moreover, commentary is not authoritative if it "is inconsistent with, or a plainly erroneous reading of, that guideline." *Stinson*, 508 U.S. at 38. "If . . . commentary and the guideline it interprets are inconsistent in that following one will result in violating the dictates of the other, the Sentencing Reform Act itself commands compliance with the guideline." *Id*. at 43. By dictating a higher base offense level than the guideline itself, the commentary is clearly inconsistent with the guideline.

B. In the alternative, the policy statement is merely advisory, and should not be followed because the table is not empirically based and reflects an unsound judgment.

The court can decide the question based on statutory construction alone. However, you can argue in the alternative that since all of the guidelines and policy statements are now advisory, *United States v. Booker*, 543 U.S. 220 (2005), the court should find that the false equivalencies in the table in USSG § 2D1.1, comment.

(n.10(D)) and the limitation in USSG § 1B1.10(a)(2)(B) "fail[] properly to reflect the §3553(a) considerations," and thus "reflect an unsound judgment." *Rita v. United States*, 127 S. Ct. 2456, 2465, 2468 (2007). Because the table is not the product of "empirical data and national experience," the court is free to reject the policy statement's advice to deny relief when the false equivalencies raise the guideline range. *Kimbrough v. United States*, 128 S. Ct. 558, 575 (2007); *Gall v. United States*, 128 S. Ct. 586, 594 n.2 (2007).

Courts have held or indicated in the following cases that USSG § 1B1.10 is advisory, just like any other provision of the guidelines. *United States v. Hicks*, 472 F.3d 1167, 1172-73 (9th Cir. 2007); *United States v. Jones*, 2007 WL 2703122 (D. Kan. Sept. 17, 2007); *United States v. Forty Estremera*, 498 F.Supp.2d 468, 471-72 (D.P.R. 2007); *United States v. Polanco*, 2008 WL 144825, *2 (S.D. N.Y. Jan. 15, 2008). However, there is other authority upon which the government may rely to argue that USSG § 1B1.10 has special mandatory status. The unpersuasiveness of this authority is addressed elsewhere. *See* Sentence Reductions Under the Retroactive Crack Amendment (Jan. 2, 2008); Crack Retroactivity: Questions, Answers, Caselaw, Argument Outlines (Feb. 22, 2008).[9] In any event, even when all of the guidelines, policy statements, and commentary were mandatory, they were invalid if they conflicted with an applicable statute. *See* Part III(A), *supra*.

C. The court has jurisdiction.

Section 3582(c)(2) is one exception to the statutory rule that the court may not modify a term of imprisonment once it has been imposed. *See* 18 U.S.C. § 3582(c). One requirement for *granting* a sentence reduction is that it be "consistent with applicable policy statements" issued by the Commission. According to the Commission's policy statement, an amendment that "does not have the effect of lowering the defendant's applicable guideline range is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2)." *See* USSG § 1B1.10(a)(1)(B).

The limitation in USSG § 1B1.10(a)(1)(B) is not a jurisdictional bar. Rather, it is an instruction for the court in determining the merits of whether to grant a sentence reduction. For the reasons set forth in Part III(A), *supra*, that instruction may not be followed when one of the false equivalencies in the table has the effect of eliminating the reduction in the base offense level. For the reasons set forth in Part III(B), *supra*, the instruction need not be followed in those cases. However, the government has argued in other contexts (*e.g.*, career offender) that the policy statement is a jurisdictional bar, and may try that argument here.

If so, the argument is clearly wrong. "[I]t is familiar law that a federal court always has jurisdiction to determine its own jurisdiction." *United States v. Ruiz*, 536 U.S. 622, 628 (2002). *See also United States v. Mineworkers*, 330 U.S. 258, 291 (1947) (the courts alone decide whether they have jurisdiction). Moreover, only the courts (and

[9] Both available at http://www.fd.org/odstb_CrackCocaine.htm.

surely not the Commission) have the power under our constitutional structure to interpret statutes upon which jurisdiction depends:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

Marbury v. Madison, 1 Cranch 137, 177 (1803).

To determine whether it has jurisdiction, the court must decide whether the Commission's policy statement (USSG § 1B1.10(a)(1)(B)), claimed to bar jurisdiction based on the operation of the table (USSG § 2D1.1, comment. (n.10(D)(i)(II))), conflicts with the enabling statutes (28 U.S.C. §§ 994(a)(2)(C), 991(b)(1)), and if so, must decide on the operation of each. If the policy statement violates the enabling statutes, it is inoperative. In the words of 18 U.S.C. § 3582(c)(2), it is not an "*applicable* policy statement." (emphasis supplied). Alternatively, the court may determine whether it has jurisdiction by deciding whether the policy statement and the commentary are merely advisory in light of the Supreme Court's interpretation of 18 U.S.C. § 3553(a) and (b) in *Booker* and its progeny. If so, a sentence reduction, in the words of 18 U.S.C. § 3582(c)(2), is "*consistent* with" the Commission's merely advisory policy statement.[10] (emphasis supplied).

IV. Mathematical Solution

[10] While you need go no further to refute the "no jurisdiction" argument, it is wrong on its own terms. When the defendant was originally sentenced, the crack-to-marijuana equivalency table provided a uniform ratio of 20,000 grams of marijuana to 1 gram of crack. *See* USSG § 2D1.1, comment. (n.10) (Nov. 1, 2006). This was directly based on the ratio of the quantity of crack to the quantity of marijuana at each base offense level in the Drug Quantity Table in the guideline itself. *See* USSG §2D1.1(c) (Nov. 1, 2006). The base offense levels in the Drug Quantity Table in the guideline have now been lowered. *See* USSG §2D1.1(c) (Nov. 1, 2007). Thus, the defendant was sentenced to a term of imprisonment "based on" an equivalency table that in turn was based on the quantities set forth in sentencing ranges that have subsequently been lowered. Further, even though the new table bumps certain defendants into the next highest base offense level (because the new ratios fail to account for the spectrum of ratios within most base offense levels), every ratio in the new table has itself been lowered; the highest ratio is 16,000 grams of marijuana to 1 gram of crack. *See* USSG § 2D1.1, comment. (n.10(D)(i)(II)) (Nov. 1, 2007). Moreover, the only relevant "sentencing range" is one that has "subsequently been lowered by the Sentencing Commission *pursuant to 28 U.S.C. § 994(o)*." 18 U.S.C. § 3582(c)(2) (emphasis supplied). Title 28 U.S.C. § 994(o) provides that the Commission "shall review and revise, in consideration of comments and data coming to its attention, the *guidelines* promulgated pursuant to the provisions of this section," and "shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system." (emphasis supplied). While "guidelines" are subject to these procedures, "commentary" is not. *See Stinson v. United States*, 508 U.S. 36, 45-46 (1993). Thus, the only relevant question is whether the "sentencing range" set forth in the "guideline" has subsequently been lowered, regardless of the fact that the "commentary" eliminates the reduction.

The simplest solution is for the court to grant a two-level reduction in any case in which the conversion table wipes out the reduction. Another solution, proposed by James Egan of the Defenders and by Judge Gleeson in his *Molina* decision, is to use a mathematical formula from the table below. The table shows the formulas that would keep the conversion of crack to marijuana consistent within each level. In the formula at each base offense level, x equals the amount of crack in grams involved in the offense.

Base Offense Level	**Conversion Formula**
38	$x(6.7)$
36	$20{,}000/3(x-1{,}500) + 10{,}000$
34	$7(x-500) + 3{,}000$
32	$40/7(x-150) + 1{,}000$
30	$3(x-50) + 700$
28	$20(x-35) + 400$
26	$20(x-20) + 100$
24	$4/3(x-5) + 80$
22	$20(x-4) + 60$
20	$20(x-3) + 40$
18	$20(x-2) + 20$
16	$x(10)$
14	$x(10)$

These formulas were derived by accounting for the spectrum of ratios of crack to marijuana within each base offense level as follows. First, determine the base offense level for the quantity of crack cocaine. Second, identify the ranges of quantities of crack and marijuana for that base offense level. At level 30, the range of crack is 50 to 150 grams, and the range of marijuana is 700 to 1,000 kilograms. Third, subtract the lowest quantity of marijuana from the highest quantity of marijuana for that base offense level: 1,000-700 = 300. Fourth, do the same subtraction for the low and high quantities of crack: 150-50 = 100. Fifth, divide the difference in the high and low quantities of marijuana by the difference in the high and low quantities of crack: 300/100 = 3. Sixth, subtract the low quantity of crack for the base offense level from the quantity of crack involved in the offense: x-50. Seventh, multiply this difference by the quotient derived in step five: 3(x-50). Finally, add this product to the low quantity of marijuana for the base offense level: 3(x-50) + 700. Applying this method keeps the crack and its marijuana equivalency at the same relative position within each respective range at level 30.

Although written a little differently, this is the same solution proposed by Judge Gleeson. *See Molina*, 2008 WL 544703 at *3.

Here is how the proposed table would apply in the example above involving 75 grams of crack and 10 grams of powder. Since the base offense level for 75 grams of crack is 30, apply the formula for base offense level 30 to find the marijuana equivalency of 75 grams of crack:

1. $3(x\text{-}50) + 700 =$ kilograms of marijuana
2. $3(75\text{-}50) + 700 =$
3. $3(25) + 700 =$
4. $75 + 700 =$
5. 775 kilograms of marijuana

Once the marijuana equivalency for the crack has been calculated, the marijuana equivalency for the remaining drugs is determined under Notes 10(D)(i)(III) & 10(E). In the above example, 10 grams of powder cocaine equals 2 kilograms of marijuana. Then, as directed by Note10(D)(i)(IV), the marijuana equivalency for the crack is added to the marijuana equivalency for the remaining drugs, in this case 775 kilograms for the crack and 2 kilograms for the powder. This yields a total marijuana equivalency of 777 kilograms for all drugs, with a base offense level of 30.

This solution ensures that every crack quantity will convert to a quantity of marijuana that will maintain the same relative position within each range. No defendant will be propelled to the next highest base offense level simply by converting the crack to marijuana. A smaller amount of crack will have a lower marijuana equivalency than a larger amount of crack. It eliminates the anomalies and gives each defendant the intended benefit of the amendment.