TIMELINE OF COMMISSION'S AWARENESS AND ACTIONS WITH RESPECT TO THE BAD MATH PROBLEM (Last Update March 18, 2008)

In January 2007, the Commission published notice and comment of its proposed amendments. It requested general comments regarding the 100:1 crack to powder disparity, but did not propose any particular amendments related to crack cocaine policy at that time. *See* 72 Fed. Reg. 4,372, 4,398 (Jan. 30, 2007). Defenders and others reiterated that the Commission should adopt a 1:1 ratio. *See* Letter from Jon Sands to Hon. Ricardo Hinojosa Re: Comments on Proposed Amendments Relating to Drug Offenses, at 8-9 (Mar. 12, 2007); *see also* Panel Four, Public Hearing, Mar. 20, 2007, *http://www.ussc.gov/hearings/03_20_07/AGD03_20_07.HTM*. When the Commission voted on proposed amendments at its public meeting on April 18, 2007, it did not vote on any amendment to the guidelines for offenses involving crack, although Vice Chair Castillo indicated that the Commission hoped to continue working on the problem. *See* United States Sentencing Comm'n, Minutes of Public Meeting (Apr. 18, 2007), available at http://www.ussc.gov/MINUTES/4_18_07.HTM.

At a public meeting on April 27, 2007 (for which the notice requirement for public meetings was suspended pursuant to Rule 1.2(b) of the Commission's Rules of Practice and Procedure), the Commission voted to amend § 2D1.1 to lower the base offense levels for offenses involving crack cocaine. *See* United States Sentencing Comm'n, Minutes of Public Meeting (Apr. 27, 2007), available at http://www.ussc.gov/MINUTES/4_27_07.HTM. According to the minutes, the amendment adopted also addressed "how to determine the base offense level in a case involving cocaine base and other controlled substances ('a poly-drug case')." *Id.* The staff member presenting the proposed amendment for the Commission's vote indicated that "[t]his mechanism is required because the amendment changes the mathematical relationship between crack cocaine and other drugs in the Drug Quantity Table," though the minutes reflect no explanation of how the mechanism would function or its effects. *Id.* The Commission did not publish the amendment itself for comment.

On May 1, 2007, the Commission submitted to Congress the amendment to § 2D1.1 that would reduce the base offense level for offenses involving crack cocaine by two levels. *See* USSG, App. C, Amend. 706. In conjunction with this amendment, it inserted a new rule and special marijuana equivalency table in Application Note 10 for determining the combined offense level for offenses involving crack and other controlled substances. *See* 72 Fed. Reg. 28,558, 28, 572 (May 21, 2007). This new rule required courts to find the combined offense level for the other controlled substances under the regular Drug Equivalency Table in Note 10(E), as directed by Note10(B), and then to use that combined offense level for the other controlled substances to find the special marijuana equivalency rate for the quantity of crack, which was set forth in a special marijuana equivalency table in Note 10(D) and which varied depending on the offense level for the other controlled substances. *Id.* The marijuana equivalent of the other controlled substances was then added to the marijuana equivalent for the crack to find the total combined offense level.

The Commission did not explain why the special marijuana equivalency table in new Note 10(D) used varying conversion rates depending on the corresponding offense level for the other controlled substances, but it appears to have been an attempt to account for the varying ratios of crack cocaine to other drugs now found in the Drug Quantity Table. Jason Hawkins in the Defender Office in the Northern District of Texas quickly realized that the method for arriving at the appropriate offense level to which varying marijuana equivalencies were applied created the situation in which an offense involving crack and other drugs could be assigned a higher base offense level than another offense involving significantly more crack and other drugs. *See* Memo from Jason Hawkins, Supervisor, Appellate Section, N.D. Texas, *New Amendments to the Crack Cocaine Guidelines* (May 16, 2007), http://www.fd.org/odstb_CrackCocaine.htm. In his memorandum to Defenders, Mr. Hawkins stated that he called the Commission and was referred to a legal training advisor who said that the Commission was aware of the situation, described it as an "anomaly," and was unable to provide answers as to why the Commission chose this method. *Id.* at 5.

In the Commission's May 2007 Report to Congress, it stated that one of the types of cases that would not be affected by the amendment were those in which "the offense involved crack cocaine and another controlled substance or substances and the reduction in the marijuana equivalency for cocaine base for determining the base offense level in revised Application Note 10 is not of sufficient magnitude to result in a lower combined base offense level (11.2 percent of all crack cocaine cases)." U.S. Sentencing Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy*, at E-20 (May 2007). Note that this description may identify the problem in the broadest sense, but it is not at all complete. It fails to mention that the reason the reduction in the marijuana equivalency was not of sufficient magnitude in some cases was due to the varying conversion rates depending on the offense level for the other controlled substances. Also note that it does not describe the direct effect of the problem as it occurs now, after the Commission promulgated Amendment 711 in September 2007, *see* below. Now, the conversion itself of crack to marijuana raises the base offense level from the base offense level in the amended drug quantity table to the next highest base offense level.

In July 2007, the Defenders recommended that the Commission adopt as a priority that it "fix the problems created by the proposed crack amendment." *See* Letter from Jon Sands to Hon. Ricardo Hinojosa Re: Proposed Priorities for 2007-2008, at 17 (July 9, 2007), http://www.fd.org/pdf_lib/Proposed%20Priorities%2020072008.pdf.

In September 2007, the Commission published a "Notice of final action regarding technical and conforming amendments to federal sentencing guidelines effective November 1, 2007." *See* 72 Fed. Reg. 51,882 (Sept. 11, 2007); USSG App. C, Amend. 711. In it, the Commission amended the new Note 10(D) so that the varying marijuana equivalency rates apply to the offense level for the crack only (as opposed to the combined offense level for the other controlled substances), with the other equivalencies being determined under the regular table in subdivision (E). *See id.* at 51,883. This amended method is simpler to apply (and less confusing), and also seems to produce fewer anomalies. However, the mechanism still produces unfair and irrational results

only in some cases, again due to the varying marijuana equivalencies at each crack offense level, for which the Commission offered no reason. This "Notice of final action" was not published for comment.

On November 21, 2007, the Defenders wrote the Commission a letter to follow up on the hearing regarding retroactivity of the crack amendment in which they expressly noted the problem with anomalous results in multi-drug cases as one of several reasons the Commission should not declare the policy statement under § 1B1.10 to be binding. *See* Letter from Jon Sands to Hon. Ricardo Hinojosa Re: Follow up on November 13, 2007 retroactivity hearing, at 3 & n.7 (Nov. 21, 2007), http://www.fd.org/pdf_lib/Defender%20letter.pdf.

On December 11, 2007, the Commission voted to make retroactive Amendment 706 as amended by Amendment 711. On January 2, 2008, the Commission published, in a "Notice of final action," the new policy statement § 1B1.10, which 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 . . . (B) an amendment listed in subsection (c) does not have the effect of lowering the defendant's applicable guideline range." *See* 73 Fed. Reg. 217 (2008); USSG App. C, Amend. 712; USSG 1B1.10(a)(1)(B). The text of the policy statement was never published for comment.

At the Crack Summits in Charlotte and St. Louis in January 2008, the Commission presented a Power Point with a slide giving "[c]ertain cases involving multiple drug types" as an example of "when crack cocaine amendment would not result in a lowering of the guideline range," such that relief is precluded under USSG § 1B1.10(a). Upon questioning in St. Louis, the Commission suggested that a person who would be technically ineligible due to the mathematical anomaly promulgated by the Commission may be able to raise a "fairness argument." The Commission continued to present the same slide in its trainings thereafter.

On January 31, 2008, the Chair of the Sentencing Commission spoke at a Defender Conference in Seattle and was again reminded of the problem. He invited the Defenders to bring the problem to the Commission's attention, though the Commission had been aware of the problem for some time. The Commission continued to present the same slide indicating that relief is not allowed under USSG § 1B1.10(a) in its district trainings thereafter.

On February 22, 2008, the Defenders informed the Commission of two decisions, *United States v. Horta*, __ F. Supp. 2d __, 2008 WL 445893 (D. Me. Feb. 19, 2008) and *United States v. Watkins*, __ F. Supp. 2d __, 2008 WL 152901 (E.D. Tenn. Jan. 14, 2008), in which district courts identified the problems with the new drug equivalency table and declined to follow it. *See* Letter from Jon Sands to Ricardo H. Hinojosa Re: Recent decisions (Feb. 22, 2008), http://www.fd.org/odstb_CrackCocaine.htm. The Commission continued to present the same slide indicating that relief is not allowed under USSG § 1B1.10(a) in its district trainings thereafter.

On March 11, 2008, the Defenders informed the Commission of another decision, *United States v. Molina*, slip op., 2008 WL 544703 (E.D.N.Y. Feb. 28, 2008), and requested that it take immediate action to correct the problem and to instruct its training staff to cease advising judges, probation officers, clerks and lawyers that defendants who fall victim to the problem are ineligible for relief under USSG § 1B1.10. *See* Letter from Jon Sands to Ricardo H. Hinojosa Re: Recent decision (Feb. 22, 2008), http://www.fd.org/odstb_CrackCocaine.htm.

On March 13, 2008, Marianne Mariano, Acting Defender for the Western District of New York, testified before the Commission regarding proposed changes to its Rules of Practice and Procedure. Although no amendment was proposed to Rule 4.3, which exempts policy statements and commentary from notice and public comment, Ms. Mariano urged the Commission to change the rule to require policy statements (such as USSG § 1B1.1) and commentary (such as USSG 1D1.10, comment. (n.10(D)) to be published for notice and public comment (although this is not explicitly required by statute, *see* 28 U.S.C. § 994(x)). *See* *http://www.ussc.gov/AGENDAS/20080313/Mariano_FPD_testimony.pdf*. In her oral testimony, Ms. Mariano discussed the problem with the equivalency table in Note 10(D) as a notable example of commentary that would benefit from public comment. One Commissioner thanked Ms. Mariano, welcomed suggestions, and noted that it was "embarrassing." (The transcript should be posted on the Commission's website soon, at http://www.ussc.gov/HEARINGS.HTM.)

On March 17, 2008, the Defenders wrote to the Commission with a solution to fix the problem. *See* Letter from Jon Sands to Hon. Ricardo Hinojosa Re: Solution to Crack-to-Marijuana Equivalency Table (Mar. 17, 2008), soon to be posted at http://www.fd.org/odstb_CrackCocaine.htm and http://www.fd.org/pub_SentenceLetters.htm.

On March 18, 2008, Commission staff indicated at a training session in the Eastern District of Tennessee (at which Sentencing Resource Counsel was present) that the Commission *will* fix the problem. The staff also noted that it would be efficient for judges to grant relief now because the change will likely be retroactive.

A mathematical solution to the bad math problem as it affects the 2-level reduction is offered in *Molina*, which is essentially the same solution offered by the Defenders in their letter of March 17, 2008. For a more complex discussion, see Egan, *Faulty Math In New Cocaine Base Equivalency Table* (Jan. 18, 2008), available at http://www.fd.org/odstb_CrackCocaine.htm.

There is also the separate issue of varying ratios of crack to powder in all cases, which is discussed in and Egan & Roth, *Good Math to Fight the Bad Math* (Jan. 25, 2008), http://www.fd.org/odstb_CrackCocaine.htm.