Written Testimony of the
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represent 10 times the number of low-level white crack defendants, I don't think we can simply close our eyes.[2]

oxycodone amendments in 1993, 1995, and 2003, respectively, this Commission has rendered amendments retroactive when they serve to correct Congressional and Commission errors related to harms of drugs or the inflated penalties that result from a poorly reasoned sentencing mechanism such as the inclusion of all carrier weight.

The exact same concerns that prompted retroactive application of the 2007 Amendment apply with equal force regarding retroactivity of Amendment 2. In a series of reports beginning in the mid-1990s, the Commission determined that the 100:1 crack-powder disparity was flawed in several respects.[14] First, it rested on unsupportable assumptions about the harmfulness of crack and the seriousness of most crack cocaine offenses.[15] Second, it led to the "anomalous" result that "retail crack dealers get longer sentences than the wholesale drug distributors who supply them the powder cocaine from which their crack is produced."[16] Finally, it "foster[ed] disrespect for and lack of confidence in the criminal justice system" because of the "widely-held perception" that it "promote[ed] unwarranted disparity based on race."[17] These concerns were the motivating force behind both the 2007 Amendments and Amendment 2. The effect in ameliorating racial disparity is dramatically illustrated by the fact that 85% of the offenders who would be eligible for relief if Amendment 2 were retroactive are African-American.[18]

For all of these reasons, Ģ eq d."

Although it is not an explicit factor in the analysis, the Commission should take additional comfort from the fact that the recidivism rate for beneficiaries of the 2007 Amendments did not materially differ from the recidivism rate for offenders who did not benefit from those Amendments.[28]

For these reasons, the three factors of U.S.S.G. § 1B1.10 and simple fairness all support retroactive application of Parts A and C of Amendment 2 as well as the mitigating role cap.

No Further Limitations on Retroactivity Are Necessary or Appropriate.

Assuming retroactive application, the Commission has asked for comment regarding the advisability of retroactivity limitations for specific categories of defendants. In our view, none of the potential limitations on retroactive application are warranted. The starting point for all crack-cocaine defendants — regardless of whether they were sentenced within the Guideline range, received departures or variances, had criminal history points or aggravating factors, or were sentenced before or after *United States v. Booker*,[29] *Kimbrough v. United States*,[30] or *Spears v. United States*[31] — was a Guideline range driven by an unfair ratio. The FSA's overarching and unqualified emphasis on fairness cannot be reconciled with a compartmentalized approach that would offer some offenders the benefit of fairer sentencing outcomes while denying it to others despite the fact that all offenders were sentenced under the old, unjust regime. The Fair Sentencing Act was a clear indication of Congress's intent to end *all* sentences calculated according to the discriminatory 100-to-1 ratio. By the same logic, the Commission should endorse universal retroactive application of the new, fairer base offense levels set forth in Part A and available by application of Part C.

Notably, the Commission has never created exceptions to retroactivity based on any of the distinctions suggested in its May 3 solicitation for comment.[32] Where the underlying legislation was aimed at rectifying past racial injustice and (as the Commission has urged) ameliorating public concern about racial bias in the justice system, piecemeal retroactivity would open precisely the same wounds that the FSA was designed to address.

In addition, the Commission has historically labored to establish a carefully calibrated system that amalgamates a variety of factors in calculating a sentence. The intent of Chapter 1's direction on sentencing process is to ensure that each basis for reduction or enhancement is separately calculated.[33] Denying retroactive relief to categories of defendants would undermine this system. For example, if a defendant were denied retroactive relief because she falls in a high criminal history category, that would undermine the careful calibration of the horizontal axis of the table by effectively double-counting criminal history — i.e., using criminal history both as a basis to enhance penalties at the outset and then subsequently as a basis to deny retroactive relief.

[28] This fact is drawn from forthcoming Commission data, discussed by Commission staff and panelists at the 2011 Annual National Seminar on the Federal Sentencing Guidelines held in San Diego, California, May 18-20, 2011.
[29] 543 U.S. 220 (2005).
[30] 552 U.S. 85 (2007).
[31] 555 U.S. 261 (2009).
[32] *See* 76 FR 24960, 24973-74 (May 3, 2011), *available at* http://www.ussc.gov/Legal/Federal_Register_Notices/20110503_RF_FedReg_RFC_Retroactivity.pdf.
[33] *See generally* U.S.S.G. § 1B1.1.

Nor should the fact that certain defendants have received one type of deserved benefit — for example, reductions under chapter 5, part K — bar those individuals from receiving a different kind of benefit (i.e., a lower offense level) that Congress thinks is necessary to enhance fairness.

Limiting retroactivity based on whether the court granted or could have considered a variance would be likewise inappropriate. Any limitation based on whether the Guidelines were advisory (*Booker*), whether a policy disagreement could have applied (*Kimbrough*), or whether an alternate ratio could have been imposed (*Spears*), would be premised on the false assumption that *every* defendant sentenced after these cases received, for policy reasons alone, a benefit equivalent to what would be provided under Amendment 2. This is clearly not the case. Circuit courts have specifically instructed that no court is required to vary on policy grounds from a Guideline,[34] and the courts have been slow to recognize their authority to do so. Moreover, many variances that courts do grant are based on individualized circumstances under 18 U.S.C. § 3553(a), rather than the unfairness Congress sought to rectify. Even after *Booker*, *Kimbrough*, and *Spears*, while some defendants have received variances, many others have not. If individual courts that imposed variances at initial sentencing believe that denying or limiting retroactive relief at re-sentencing is appropriate to avoid a sentencing windfall to a defendant who already received a variance, the courts can accordingly limit relief in a § 3582 proceeding. But for the

3553(a) and *United States v. Booker*.[35] That is the appropriate amount of guidance for district judges: it r5t