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RESTORING FAIRNESS TO FEDERAL SENTENCING: ADDRESSING THE CRACK-POWDER DISPARITY

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BEFORE THE

SUBCOMMITTEE ON CRIME AND DRUGS

OF THE

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UNITED STATES SENATE

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RESTORING FAIRNESS TO FEDERAL SENTENCING: ADDRESSING THE CRACK-POWDER DISPARITY

WEDNESDAY, APRIL 29, 2009

U.S. SENATE,
SUBCOMMITTEE ON CRIME AND DRUGS,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Subcommittee met, pursuant to notice, at 10 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Richard J. Durbin, Chairman of the Subcommittee, presiding.

Present: Senators Durbin, Feinstein, Klobuchar, Kaufman, Graham, and Hatch.

OPENING STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Chairman DURBIN. This hearing will come to order. The subject of today's hearing is "Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity."

This is the second hearing of the Crime and Drugs Subcommittee in the 111th Congress, and first, a word about our initial hearing, which focused on the greatest organized crime threat to our country—the Mexican drug cartels. Based on what we learned at the hearing, Senator Graham and I are working on bipartisan legislation to crack down on drug cartels, which we will introduce very soon.

There is a direct connection between Mexican drug cartels and the subject of today's hearing—our drug sentencing policy in America We learned at our first hearing that Mexican drug cartels supply 90 percent of the cocaine in the United States and that our drug policy, which focuses largely on criminal sanctions instead of prevention and treatment, has failed to stem America's insatiable demand for illegal narcotics.

Cocaine, whether powder or crack, has a devastating impact on families and on our society, but we cannot address this problem through law enforcement alone. We need a comprehensive approach that cracks down on drug-trafficking organizations while emphasizing prevention and treatment for addicts.

Our drug sentencing policy also is the single greatest cause of the record levels of incarceration in America. Today in the United States, more than 2.3 million people are imprisoned. We have the most prisoners of any country in the world, as well as the highest per capita rate of prisoners in the world. One in 31 Americans are

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in prison, on parole, or on probation, including one in every 11 African-Americans. And over 50 percent of Federal inmates are imprisoned for drug crimes.

The United States has made great strides in the last half century in ensuring equal treatment under the law for all. When it comes to the Federal criminal justice system, however, inequalities are growing rather than shrinking. African-Americans are incarcerated at nearly 6 times the rate of white Americans, while Hispanics are incarcerated almost twice as much.

Today we turn our attention to one especially troubling aspect of our failed drug policy: The so-called crack-powder disparity. It takes 100 times more powder cocaine than crack cocaine to trigger the same harsh mandatory minimum sentences. This chart here will indicate that disparity by chart. Under current law, mere possession of 5 grams of crack—the weight of five packets of sweetener—carries the same sentence as distribution of half a kilogram of powder—or 500 packets of sweetener. That is the difference.

The crack-powder disparity is one of the most significant causes of the disparity in incarceration rates in America, particularly the disparity between African-Americans and Caucasians. The dramatically higher penalties for crack have disproportionately affected the African-American community: 81 percent of those convicted for crack offenses in 2007 were African-American, although only about 25 percent of crack cocaine users are African-American. The low crack threshold also diverts scarce law enforcement resources away from efforts to combat major traffickers and drug cartels.

These racial disparities undermine trust in our criminal justice system and have a corrosive effect on the relationship between law enforcement and minority communities. As the U.S. Sentencing Commission has said, and I quote, even "perceived improper racial disparity fosters disrespect for and lack of confidence in the criminal justice system."

This sentencing framework, created in 1986, was fueled by fears about the newest drug epidemic and based on assumptions that we now know were exaggerated or just plain false. And let me tell you, I was one of those who voted for this disparity. And if you look at the debate, when I was a Member of the House of Representatives, you will find leading African-Americans in the House of Representatives who were arguing for this disparity. Crack was a new phenomenon. It was viewed as a scourge. It appeared to be something out of control that needed to be dealt with harshly and quickly, and that was the reason that many of us supported that sentencing disparity. Today, on reflection, we realize that decision was wrong.

We have learned a great deal since that vote. Vice President Biden, the previous Chair of the Committee, was one of the authors of the disparity himself. When he chaired a hearing of this Subcommittee on this issue last year, he said, "each of the myths upon which we based the disparity has since been dispelled or altered."

Some argue that the sentencing disparity is justified because crack cocaine is associated with more violence than its powder counterpart. But the truth is that crack-related violence has decreased significantly since the 1980's, and today 94 percent of crack cocaine cases do not involve violence at all. And cases that do in-

volve violence are subject to increased sentences, anyway, including a mandatory minimum for use of a weapon in connection with drug-trafficking offense.

Sadly, both the crack trade and, as we are witnessing along our Southern border, the trade in cocaine powder are frequently associated with violence. But the evidence just does not justify a sentencing disparity between the two forms of the same drug.

In the 110th Congress, I was the Chair of the Human Rights Subcommittee, and we focused on issues like genocide in Darfur, Internet censorship in China, and rape as a weapon of war in the Democratic Republic of Congo. But Americans must also be prepared to look ourselves in the mirror and recognize that we are not above reproach. Our record-high incarceration rates and the racial disparities in our criminal justice system are human rights issues that we must face honestly.

The first important step we should take is to completely eliminate the crack-powder disparity and to adopt a one-to-one sentencing ratio for crack and powder cocaine. As the Sentencing Commission has said, "Revising the crack cocaine thresholds would better reduce the [sentencing] gap than any other single policy change, and it would dramatically improve the fairness of the Federal sentencing system." Given what we have learned during the last 23 years, the sentencing disparity between crack and powder cocaine is both unjustified and unjust.

During the course of these hearings this morning, we are going to hear of one family that has been impacted, a family from my State, by this sentencing disparity. It is shocking to hear what has happened to this family because of a decision which we made many years ago to create this disparity.

In closing, it is important to note that there is a bipartisan consensus that we must address the crack-powder disparity. In particular, I want to acknowledge and commend the leadership of members of this Committee, Senators Hatch and Sessions who have looked at this issue carefully themselves. I look forward to working with them as well as my Ranking Republican, Senator Graham, and other members of the Committee, and the Obama administration to address this important issue on a bipartisan basis.

Other members of the Committee will be joining us as we proceed this morning, Senator Graham included, and he will have an opening statement, which will be made part of the record at this point in the record for this hearing.

Unless Senator Feinstein has an opening statement, I will turn to our first panel of witnesses.

Senator FEINSTEIN. If I could just say one thing. I have been a cosponsor with Senator Hatch on changing the formula to 20:1. My interest in coming here this morning is to try and see what the appropriate change should be. There are pros and cons, if you go to 10:1, if you go to 0:0, whatever you go to. But what I am most interested in, Senator—there is no question in my mind that it needs a change—is to exactly what.

Chairman DURBIN. Thank you, Senator Feinstein.

Now we will turn to our first panel. Each witness will have 5 minutes to make an opening statement before questions, and their complete written statements will be included in the record.

As is the custom of the Judiciary Committee, I ask the witnesses to please stand and raise your right hand to be sworn. Do you solemnly swear that the testimony you will give is the truth, the whole truth, and nothing but the truth, so help you God?

Mr. BREUER. I do.

Judge WALTON. I do.

Judge HINOJOSA. I do.

Chairman DURBIN. Let the record reflect that the witnesses answered in the affirmative.

Our first witness, Lanny Breuer, was just sworn in last week—7 days on the job now—as Assistant Attorney General for the Criminal Division at the Department of Justice, following unanimous confirmation by the Senate last week. I am appreciative that your first congressional testimony as head of the Criminal Division is before this Subcommittee on this issue. Your presence speaks volumes about the administration's commitment to restoring fairness to Federal sentencing. It is also a significant day because I understand Mr. Breuer is going to make an important announcement, and we look forward to hearing it.

Mr. Breuer began his career as an Assistant District Attorney in Manhattan where he prosecuted both violent and white-collar criminal cases. He later joined the law firm of Covington & Burling, where he has worked with the exception of a 2-year period, since 1989. From 1997 to 1999, Mr. Breuer served as Special Counsel to President Clinton. He received his B.A. and J.D. from Columbia University.

Thank you for being here today, Mr. Breuer, and please proceed with your testimony.

STATEMENT OF LANNY BREUER, ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. BREUER. Mr. Chairman, thank you so much, Senator Feinstein, thank you for giving the Department of Justice the opportunity to appear before you today to share our views on the important issue of the existing disparities in Federal cocaine sentencing policy.

The Obama administration firmly believes that our criminal and sentencing laws must be tough, predictable, fair, and not result in unwarranted racial and ethnic disparities. Criminal and sentencing laws must provide practical, effective tools for Federal, State, and local law enforcement, prosecutors, and judges to hold criminals accountable and to deter crime. Indeed, the certainty of our sentencing structure is critical to disrupting and dismantling the threat posed by drug-trafficking organizations and gangs that plague our Nation's streets. It is vital in the fight against violent crime, child exploitation, and sex trafficking, and it is essential to effectively punishing financial fraud.

Ensuring fairness in the criminal justice system is also especially important. Public trust and confidence are essential elements of an effective criminal justice system. Our laws and their enforcement must not only be fair, but they must also be perceived as fair. The perception of unfairness undermines governmental authority in the criminal justice process. It leads victims and witnesses of crime to

think twice before cooperating with law enforcement, tempts jurors to ignore the law and facts when judging a criminal case, and draws the public into questioning the motives of governmental officials.

Changing these perceptions will strengthen law enforcement, and there is no better opportunity to address these perceptions than through a thorough examination of Federal cocaine sentencing policy.

Cocaine and other illegal drugs pose a serious risk to the health and safety of Americans. Drug-trafficking organizations and gangs that manufacture and traffic drugs have long posed an extremely serious public health and safety threat to the United States. The administration is committed to rooting out these dangerous organizations.

In the 1980s, crack cocaine was the newest form of cocaine to hit American streets. In 1986, in the midst of the exploding epidemic, Congress passed the Anti-Drug Abuse Act, which set the current Federal penalty structure for crack and powder cocaine trafficking, punishing the crack form of cocaine far more severely than the powder cocaine.

Since that time, in four separate reports back to 1995, the Sentencing Commission has documented in great detail all of the science of crack and powder cocaine, as well as the legislative and law enforcement response to cocaine trafficking.

I will not review all of the information here other than to note the mounting evidence documented by the Commission that the current cocaine sentencing disparity is difficult to justify based on the facts and science, including the evidence that crack is not an inherently more addictive substance than powder cocaine. Moreover, the Sentencing Commission has shown that the quantity-based cocaine sentencing scheme often punishes the low-level crack offenders far more harshly than similarly situated powder cocaine offenders.

Additionally, Commission data confirms that in 2006, 80 percent of individuals convicted of Federal crack cocaine offenses were African-American while just 10 percent were white. The impact of these laws has fueled the belief across the country that Federal cocaine laws are unjust. We believe that the Commission's work forms the foundation for any thorough review of Federal cocaine sentencing policy, and we commend the Commission for all that it has done in this area.

Based in significant part on the work of the Commission, a consensus has now developed that Federal cocaine sentencing laws should be reassessed. Indeed, as set forth more fully in my written testimony, may have questioned whether the policy goals that Congress set out to accomplish have been achieved.

In the administration's view, based on all that we know now, as well as the need to ensure fundamental fairness in our sentencing laws, a change in policy is needed. We think this change should be addressed in this Congress, and that Congress' objective should be to completely eliminate the sentencing disparity between crack cocaine and powder cocaine.

The administration is, of course, aware that there are some who will disagree. The supporters of the current cocaine penalty struc-

ture believe that the disparity is justified because it accounts for a greater degree of violence and weapons involvement associated with some crack offenses. This administration shares these concerns about violence and guns used to commit drug offenses and other crimes associated with such offenses. Violence associated with any offense is a serious crime and must be punished. And we think that the best way to address drug-related violence is to ensure that the most severe penalties and sentences are meted out to those who commit violent offenses.

However, increased penalties for this conduct should generally be imposed on a case-by-case basis, not on a class of offenders, the majority of whom do not use any violence or possess a weapon. We support sentencing enhancements for those, for example, who use weapons in drug-trafficking crimes.

But we cannot ignore the mounting evidence documented by the Commission that the current cocaine sentencing disparity is difficult to justify. At bottom, the administration believes that the current Federal cocaine sentencing structure fails to appropriately reflect the differences and similarities between crack and powder cocaine, the offenses involving each form of the drug, and the goal of sentencing serious and major traffickers to significant prison sentences. We also believe that the structure is especially problematic because a growing number of citizens view it as fundamentally unfair.

Accordingly, as I mentioned a moment ago, the administration believes that Congress' goal should be to completely eliminate the disparity.

Earlier this month, the Attorney General asked the Deputy Attorney General to form and chair a working group to examine Federal sentencing and corrections policy. I have the privilege of being the Vice Chair of that effort.

In addition to studying issues related to prisoner re-entry, Department policies on charging and sentencing, and other sentencing-related topics, the group will focus on formulating a new Federal cocaine sentencing policy, one that aims to completely eliminate the sentencing disparity between crack and powder cocaine, but also to fully account for violence, chronic offenders, weapons possession, and other aggravating factors associated in individual cases with both crack and powder cocaine trafficking.

We look forward to working closely with Congress, Mr. Chairman, and the Sentencing Commission on this important policy issue and finding a workable solution.

As I stated at the outset, this administration believes that our criminal laws should be tough, smart, fair, and perceived as such by the American public, but at the same time promote public trust and confidence in the fairness of our criminal justice system. Ultimately, we all share the goals of ensuring that the public is kept safe, reducing crime, and minimizing the wide-reaching negative effects of illegal drugs.

Thank you for the opportunity to share the administration's views, and I welcome any questions you may have.

[The prepared statement of Mr. Breuer appears as a submission for the record.]

Chairman DURBIN. Thanks, Mr. Breuer.

The next witness is Judge Reggie Walton, here to represent the Judicial Conference of the United States. After being nominated by President George W. Bush, Judge Walton has served on the U.S. District Court for the District of Columbia since 2001. He previously was an Associate Judge of the Superior Court of the District of Columbia from 1981 to 1989, and from 1991 to 2001, having been appointed by Presidents Reagan and George H.W. Bush. Between 1989 and 1991, Judge Walton was Associate Director of the Office of National Drug Control Policy and Senior White House Adviser for Crime. From 1976 to 1981, he also served as a Federal prosecutor. He received his B.A. from West Virginia State College and his J.D. from American University. Judge Walton has been outspoken about the need to address the crack-powder disparity as well as other racial disparities in our criminal justice system.

Thank you for your leadership on this and so many issues and for joining us today. The floor is yours.

STATEMENT OF HON. REGGIE B. WALTON, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF COLUMBIA, ON BEHALF OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, WASHINGTON, D.C.

Judge WALTON. Thank you very much. Good morning, Chairman Durbin and Senator Feinstein. I would ask that my written testimony be made a part of the record, which I would like to summarize.

Chairman DURBIN. Without objection.

Judge WALTON. It is an honor to have the opportunity to be here on behalf of the Judicial Conference of the United States to address what I believe is one of the most important issues confronting our criminal justice system today. No one can appreciate, I think, the agony of having to enforce a law that one believes is fundamentally unfair and disproportionately impacts individuals who look like me who appear before me all too often and we have to impose sentences that we know are unjust. And I hope that we finally have reached the point in our history that we are prepared to address this significant issue.

I, too, when I was a part of the Drug Office, advocated in support of disparity between crack and powder because I, too, thought, based upon the information available to us at that time, that disparity at least on some level was appropriate. However, we now know, as you indicated and as Mr. Breuer indicated, that we were mistaken in many respects in reference to crack cocaine. And I can tell you in reference to the issue of violence that I see no greater level of violence in reference to the cases that come before me involving crack cocaine as compared to any other drug. And I think that alone is sufficient justification to address this issue.

One of the other things I do in addition to my judicial responsibilities is I chair the National Prison Rape Elimination Commission, and in that capacity, I have traveled all over the country into prisons and jails and held hearings on that issue. And the one thing that I always find very disturbing is when I go into prisons, even in parts of the country where you think there are not a lot of African-Americans, our jails are loaded with people who look like me. And I believe that we have to do something and we have to

do something now to address this phenomenon that is affecting our country and having a devastating impact on the African-American community.

The problem not only affects what happens in the Federal system, but it also has a significant impact on the entire system. As a District of Columbia local judge, I experienced circumstances, even though the sentencing law did not apply to cases brought in the District of Columbia court system, when jurors were unwilling to serve, who knew about the disparity and said that they could just not do it because they thought the process was unfair. I know of jurors who would tell me after the fact, when they refused to convict, that even though they thought the evidence was overwhelming, they were not prepared to put another young black man in prison knowing the disparity that existed between crack and powder in those types of cases. And I think it is very unfortunate in America that we have a sizable portion of our population who feel that the system is unfair and feel that race underlies what is being done in reference to how we prosecute and how we sentence certain offenders.

So I hope that the Congress, with the support of the administration and the understanding that the judiciary also supports the effort, will finally address this problem. This is not an issue that relates to the question of whether we are being lenient on crime by addressing this problem. If that is what it was about, people who know me know I would not be here testifying because I believe that when people engage in aberrant behavior, punishment is appropriate. But punishment has to be fair, and it has to be perceived to be fair. And we have to ensure that our citizenry is supportive of our laws, because when you think about it, it is amazing that our court system has the authority that it does within our society because we do not have armies to enforce what we do. People go along with what we do because they believe, by and large, that the process is fair. But as I say, there are many of our fellow Americans who do not believe that is true, and therefore, I think it is time that we address this problem because fundamental fairness requires that it be done.

Thank you.

[The prepared statement of Judge Walton appears as a submission for the record.]

Chairman DURBIN. Thank you, Judge Walton.

Judge Ricardo Hinojosa is Acting Chair of the U.S. Sentencing Commission. After being nominated by President Reagan, he served on the U.S. District Court for the Southern District of Texas since 1983. He is also an adjunct professor at the University of Texas Law School, and prior to being appointed to the Federal bench, Judge Hinojosa was a partner at the law firm of Ewers and Toothaker. Judge Hinojosa is a graduate of the University of Texas and Harvard Law School. I want to thank the Sentencing Commission for its efforts over the last 14 years to call attention to the unintended effects of the crack cocaine sentencing disparity. Since 1995, the Commission has issued several reports exhaustively documenting these effects and has consistently urged Congress to address the disparity. I hope 2009 will be the year that Congress responds to the Sentencing Commission's recommendations.

Judge Hinojosa, thank you very much for being here today, and you may proceed with your testimony.

STATEMENT OF HON. RICARDO H. HINOJOSA, ACTING CHAIR, UNITED STATES SENTENCING COMMISSION, WASHINGTON, D.C.

Judge HINOJOSA. Chairman Durbin, Senator Feinstein, I appreciate the opportunity on behalf of the United States Sentencing Commission to discuss this morning Federal cocaine sentencing policy.

As you have stated, Chairman Durbin, the Commission has considered cocaine sentencing issues for many years and has worked closely with Congress to address the disparity that exists between the penalties for crack cocaine and powder cocaine offenses.

As everyone knows, in the year 2007 the Commission promulgated a crack cocaine guideline amendment to address some of the disparities, but was and continues to be of the view that any comprehensive solution to the problem of Federal cocaine sentencing policy requires revision of the current statutory penalties and, therefore, must be legislated by Congress. The Commission once again urges Congress to take legislative action on this important issue.

In the interest of time, I will briefly cover some of the information submitted in my written statement.

Of the information that was sent to the Commission for fiscal year 2008, approximately half of the cases that are drug-trafficking offenses were either crack cocaine cases or powder cocaine cases. Approximately 5,913 defendants were sentenced for crack cocaine, about 24 percent of the drug-trafficking cases, and 5,769 powder cocaine defendants were sentenced in fiscal year 2008, which represents about 23 percent of the drug-trafficking cases.

African-Americans continue to comprise the substantial majority of Federal crack cocaine offenders, approximately 80.6 percent of the defendants sentenced in fiscal year 2008, while Hispanics comprised the majority of the powder cocaine offenders. Approximately 52.5 percent of powder cocaine offenders are Hispanic.

Federal crack cocaine offenders consistently have received longer average sentences than powder cocaine offenders. In fiscal year 2008, the average sentence for crack cocaine offenders was 115 months compared to 91 months for powder cocaine offenders, a difference of approximately 24 months, or about 26.4 percent. Most of the difference is due to the statutory mandatory minimum penalties. In fiscal year 2008, crack cocaine and powder cocaine offenders were convicted under mandatory minimum penalties at virtually equal rates—about 80 percent of the offenders—even though the median drug weight for powder cocaine offenses was 7,000 grams of powder compared to 52 grams for crack cocaine offenders.

In fiscal year 2008, only 14.3 percent of crack cocaine offenders compared to 42.4 percent of powder cocaine offenders received relief from the statutory mandatory minimum penalties pursuant to statutory and guideline "safety valve" provisions. This is partly attributable to differences in criminal history and weapon involvement.

In fiscal year 2008, 28.1 percent of crack cocaine offenders compared to 16.9 percent of powder cocaine offenders either received

the guideline weapon enhancement or were convicted pursuant to Title 18 U.S. Code Section 924(c). Crack cocaine offenders generally have more extensive criminal history, and 77.8 percent of crack cocaine offenders were ineligible for the safety valve because they were in criminal history categories higher than Criminal History Category I, compared to 40.0 percent of powder cocaine offenders.

Another factor is the applicability of mitigating role adjustment as provided by the courts in fiscal year 2008. Approximately 5.1 percent of the crack cocaine offenders received the mitigating role adjustment as opposed to 20 percent of the powder cocaine offenders who received the mitigating role adjustment.

The sentencing disparity has been the subject of recent Supreme Court case law. In *Kimbrough* v. *United States*, the Court relied on the Commission's conclusion that the disparity between the treatment of crack cocaine and powder cocaine offenses fails to meet the sentencing objectives set forth by Congress in both the Sentencing Reform Act and the 1986 Act. The Court held that a sentencing court may consider the disparity when determining an appropriate sentence in a crack cocaine case.

In the *Spears* case, the Court held that under *Kimbrough*, a sentencing court may vary from the crack cocaine guidelines based on policy disagreements and may substitute with regards to crack and powder its own drug quantity ratio with regards to the crack cocaine guidelines.

With regards to the operation of the Commission's decision to retroactively apply the 2007 guideline amendments, I would like to give some information.

In the 1 year since the guideline amendment of 2007 was made retroactive, the Commission has received approximately 19,239 sentence reduction motions that have been acted on by the courts. Of those, approximately 70 percent—13,408—have been granted, and the average reduction was 24 months from approximately 140 months to 116 months. Approximately 30 percent have been denied, 5,831. Some of those have been denied because the defendant had not been sentenced with regards to crack cocaine. Others have been denied because the defendant was not eligible either because of statutory mandatory minimums or a career offender or armed career offender status and/or were denied on other reasons on the merits.

The Commission's belief continues to be that there is no justification for the current statutory penalty scheme for powder cocaine and crack cocaine offenses and is of the view that any comprehensive solution requires revision of the current statutory penalties by Congress.

The Commission remains committed to its 2002 recommendation that such statutory drug quantity ratio should be no greater than 20:1 and recommends further that Congress increase the 5-year and 10-year statutory mandatory minimum threshold quantities for crack cocaine offenses, repeal the mandatory minimum penalty provision for simple possession of crack cocaine, and reject addressing the 100:1 drug quantity ratio by decreasing the 5-year and 10-year statutory mandatory minimum threshold quantities for powder cocaine offenses.

The Commission believes that the Federal Sentencing Guidelines continue to provide the best mechanism for achieving all of the principles of the Sentencing Reform Act of 1984 and recommends that congressional concerns about the harms associated with crack cocaine are best captured through the sentencing guideline system.

The bipartisan United States Sentencing Commission continues to offer its help, support, and services to the Congress, to the Executive, and to the Judiciary branch, as well as to all others interested in the subject who are interested and continue to be interested in this important issue and requests that any congressional action include emergency amendment authority with regard to guideline amendments so that they would go into effect as soon as Congress acts.

Again, on behalf of the United States Sentencing Commission, we thank you very much for holding this hearing, and we appreciate the continued interest in this very important subject.

[The prepared statement of Judge Hinojosa appears as a submission for the record.]

Chairman DURBIN. Thank you very much, Judge. And before we ask questions of the panel, I would like to invite my Ranking Member, Senator Graham, to make an opening statement.

STATEMENT OF HON. LINDSEY GRAHAM, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator GRAHAM. Thank you, Mr. Chairman. I will be very brief. I think this is a topic long overdue for discussion. When you look at your panel, you have got a very unusual group of people, political divergent who have the same message. I am looking forward to listening.

Chairman DURBIN. Thank you very much.

I would like to ask the first question of Mr. Breuer so that there is clarity on the record. I listened carefully to your testimony. You testified the administration believes Congress should completely eliminate the sentencing disparity between crack cocaine and powder cocaine. To be perfectly clear, does the administration believe that Congress should set the sentencing ratio for crack and powder at 1:1?

Mr. BREUER. Mr. Chairman, the administration does believe that. We believe that should be part of a comprehensive approach, but that is the position of the administration.

Chairman DURBIN. There may be some disagreement among those who are on the panel here, but I would like to go to the next question that crosses my mind. What are we to do with all the people who were sentenced over the last 23 years with this disparity of 100:1? What is the appropriate thing, the just and fair thing to do, for those who are currently in prison?

Mr. BREUER. Mr. Chairman, that is, of course, a very difficult question, and, of course, within the Department of Justice at the Attorney General's request, we are having right now a Sentencing Working Group that is going to go and reach out to members of the Commission, the judiciary, and all the stakeholders. Whether at the end of the day the issue of retroactivity is one that should be adopted, I am sure that will be a topic that will be discussed.

Senator, it is a very hard issue. I do not think there is an easy fix to it. I think the process is just going to have to take forth so we can figure out the best resolution there.

Chairman DURBIN. If I could ask the two other witnesses that question, and add a little context to it. In December 2007, the Sentencing Commission unanimously decided to apply its reduction in crack sentences retroactively. The Commission estimated that it would affect the sentences of approximately 19,500 inmates over the course of several years. At the time, opponents of retroactivity argued that the courts would be flooded; the judiciary would be hard pressed to handle all these cases.

So what is the verdict? I ask of the two other witnesses. Have the courts been flooded, or has the process gone smoothly? Has ever defendant seeking a sentence reduction received one? And if not, why not? And are judges still able to consider the individualized factors such as the use of a weapon or crimes of violence and an offender's criminal history while incarcerated and similar aspects? I would like to ask Judge Walton and Judge Hinojosa to respond.

Judge WALTON. As you know, there was tremendous concern when the Commission was considering the issue of retroactivity as to whether it would overload the court process. And I had some of those concerns, but the Criminal Law Committee did recommend to the Judicial Conference that we support retroactivity, and we did so.

My feeling is that the process, as far as the District of Columbia is concerned, has gone smoothly, and based upon what I know from my colleagues throughout the country, it has gone smoothly also. Has it placed a burden on the courts? Yes, it has. But I do not think we can let that burden impair us from doing what fundamentally has to be done to make our process fair.

So if it means my probation department and as individual judges we have to work a little harder in order to address the problem, we are prepared to roll up our sleeves and do it.

Chairman DURBIN. Judge Hinojosa.

Judge HINOJOSA. Chairman Durbin, with regards to that issue, the Commission, when it acted in 2007 amending the guidelines, seriously looked at the issue of retroactivity. As you know, the statute gives the Commission the opportunity when it changes guidelines to decrease sentences, to apply them retroactively and allow the courts to apply them retroactively if they so desire.

We held hearings. We heard from individuals from the judiciary as well as other interested groups, as well as the executive branch of the Government, and then decided unanimously to apply it retroactively. We did put it off for a period of about 3 months. This was going to be the largest number of defendants that had ever been eligible for a sentence reduction. This gave the courts, as well as the executive and defenders' organizations, an opportunity to be prepared with regards to the motions that would be filed.

We also amended Section 1B1.10 of the guidelines with regards to the matters that could be considered by a court in determining whether to reduce the sentence.

I will indicate that it appears to have run smoothly across the country so far. We have received information as of March of 2009

of approximately 19,239 motions, as I indicated. About 70 percent of those have been granted; 30 percent have been denied, as I stated a little while ago. About 11 percent of them have been denied because defendants filed them who did not have crack cocaine convictions. The others have been denied either because the mandatory minimums apply and/or career offender status or armed career offender status applies as well as for other reasons on the merits.

It is totally discretionary with regards to a sentencing judge as to whether to grant the motion to reduce the sentence, and the Commission provided some guidance with regards to that.

I will indicate that any action on the part of the Commission with regards to retroactivity would be guided, as it always has, by deliberative effort, certainly consultation with the other branches of Government, as well as individuals who are interested on this issue; and we would certainly proceed to act in that way to make a decision with regards to any guideline amendment that would come as a result of any reduction that might apply.

Chairman DURBIN. Thank you.

In addition to considering the impact or burden of retroactivity, I want to share with the panel some statistics from our Nation's capital. In Washington, DC, 52 percent of Federal cases involve crack cocaine—52 percent. That is 2½ times the national average. Then 92.8 percent of the city's incarcerated population is African-American and over 50 percent of young black men in the city are either incarcerated or under court supervision. Over 50 percent.

Judge Walton, you sat on the Federal bench here for 8 years and presided over hundreds of cases involving crack cocaine. In your experience, what effect does this sentencing disparity between crack and powder have on the criminal justice system? I gave as an illustration earlier that this much crack would be viewed the same as this much in powder cocaine. To put that in dollar terms, 5 grams of crack now selling at $69 would market for $342, would merit the same criminal penalty at 500 grams of powder cocaine now selling at $73 on the street, $37,000—$342, $37,000, same sentencing aspect.

So can you tell me, have you—you have seen this up close, and we are going to hear some further testimony on this. Can you tell me the burden on the current system and the impact this has on the sentencing aspects?

Judge WALTON. Yes, Senator. As I indicated in my opening remarks, I know from personal experience jurors during the voir dire process who would come up and say that they were not willing to serve as a juror because they know about the disparity, and I think that is unfortunate when our citizenry is not prepared to participate in our judicial process because they believe it is fundamental unfair.

As I also indicated, we have had jurors who have said after the fact, who would not convict and there was a hung jury, that the reason they would not convict is because they know of the disparity and they were not prepared to contribute another young black male—who it usually is—to the system knowing the unfairness of the process.

I know, because I spend a lot of time talking to people in the community, that there are people who are unwilling to come for-

ward and cooperate with law enforcement because, again, they believe the system is unfair.

So I think it does have a perverted impact on the attitude that many people in our country have about the fairness of the process. And whenever that happens, I think it builds disrespect for our judicial process, which obviously has an overall impact. And as I said, it is just not within the Federal system, because when I served on the superior court, even though the Federal sentencing laws did not impact what was taking place in that court, we had the same attitude being expressed by jurors and other citizens about the fairness of the process. So it had an impact on the process in that system also.

Chairman DURBIN. Thank you very much.

Senator Graham.

Senator GRAHAM. Thank you. A very good discussion.

Generally speaking, do you believe that crack cocaine has been a detriment to minority communities in terms of their health and their future, Judge?

Judge WALTON. Absolutely. There is no question that crack cocaine has had a devastating impact on African-American communities. I know that there are people who are afraid to even come outside of their homes because of the violence that exists. But I have seen violence in reference to other drugs in addition to crack. And as I indicated earlier, I cannot say, based upon the cases I see coming before me, that at this time the level of violence is any greater as it relates to crack and other drugs.

We know a lot of our children who are having difficulty educationally, academically, are children who were born to women who used during their pregnancy. So, yes, it has had a tremendous impact. But it also has had a tremendous impact because the breakdown of the African-American family has had a devastating impact on the African-American community, and to a large degree, when you go into many of these communities, there are no men because so many of our young black men are locked up. And I think that is a major problem that this country has to confront.

Senator GRAHAM. The only reason I mention that, you know, when you go back and look at a law, there is a reason that laws exist, and history sometimes will say that was a dumb reason. We have had laws to do some things that, in hindsight, were just really racially motivated or just, you know, Neanderthal.

But when it comes to this drug, I think I understand why people back in the 1980s and the early 1990s really wanted to declare war on crack cocaine and making it very difficult to be involved with its use or sale. So I think Senator Durbin probably during that period of time had that motivation, anybody that supported this original statute.

The one thing we can say for us is that all this enforcement and punishment you said—has it gone up or down throughout the communities? Has it had any impact in terms of deterrence?

Judge WALTON. I do not have any statistics or empirical data I can provide to you to support the position I am going to take. But I have come to believe, in the context of this type of crime, that certainty of punishment is more important than severity of punish-

ment. Obviously, for repeat offenders and for offenders involved in large trafficking organizations or those involved——

Senator GRAHAM. With that in mind, Judge, a mandatory minimum, does it have a place here for simple possession, do you think?

Judge WALTON. Not for simple possession. The Judicial Conference has opposed mandatory minimums.

Senator GRAHAM. OK. From the administration's point of view, do you have any—could you give me an answer to that question; has the use of crack cocaine gone up or down after we passed these very tough statutes?

Mr. BREUER. Senator, it is my understanding that use of drugs throughout has somewhat gone down, so not just for crack cocaine. Whether that is the result of this sentencing regime, I think one would be hard pressed to say it is the result. But I think overall what we say about crack cocaine would be true for other drugs and powder cocaine as well.

Senator GRAHAM. I think the most revealing testimony is the fact you talk about jurors who openly understand that—you know, they understand the consequences of one type drug versus the other and are very reluctant to find people guilty. So I think the Committee is doing a good job here to try to figure out how to create justice. But the goal is to protect people from the scourge of this drugs. Let us do not lose sight of that. And from the Sentencing Commission point of view, if you have applied—if you did away with the simple possession standard and you went back in case files and you reviewed cases of people who are in jail based on simple possession of crack cocaine with a mandatory sentence, how many people are we talking about letting out of jail?

Judge HINOJOSA. Last fiscal year of 2008, I believe it was about 105 cases of simple possession, and about half of those cases were subject to mandatory minimums.

Senator GRAHAM. So not that many people.

Judge HINOJOSA. It was a small number, but, nevertheless, it is the only drug that carries a mandatory minimum for simple possession.

Senator GRAHAM. So if you did away with the mandatory minimum, you are not—it is only 105 cases that it was used in, right?

Judge HINOJOSA. It was 105 cases, and about half of those, I believe, actually were subject to the mandatory minimum. Nevertheless, it is about 50-some defendants who were affected by mandatory minimum with regards to that particular drug who were not affected with regards to any other—possession of any other drug.

Senator GRAHAM. Well, here is my statement to you and the Committee as a whole, and really to the country, I guess. If we change the law to do away with what appears to be an injustice, that you get so much more punishment for one type of cocaine versus the other, and it has such a disparate effect in terms of our demographics, what do we do if we change the law to do away with that harshness and make the law still punishment, what do we do to prevent the problem? I mean, isn't that the goal? The goal is to prevent the problem. And if I thought passing a 1,000:1 ratio would do it, I would vote for the law. Obviously, it is not and it is creating a counter-effect, and it is creating a backlash that is not what we

want. We do not want the community to stop convicting people because they think it is unfair. We want people convicted that deal in this stuff and abuse it. But we also want to help them get off of it. So if you could just in a minute or so, tell me what do we do if we change the law to make it less punitive. How do we fix the problem?

Mr. BREUER. Well, Senator, from the administration's point of view, what we would do is we would have a regime that would be more case specific. So we would have very severe punishments for those who are deserving of severe punishments. If you are a serious or major trafficker, you are someone involved in violence, you use children, you sell to children, you sell near schools or whatever, in that case you should get—and there should be certainty to it. And with that, in the comprehensive approach we would want rehabilitation so that if you are someone who has simple possession or you are someone who has had just a small amount of cocaine or such a substance, but you do not have violence, that once you are out of jail, if you go to jail, that we have some way of dealing with you so that we do not have you re-entering the Bureau of Prisons system.

Senator GRAHAM. One last question. If we change the law or we change the sentencing to be more balanced and, quite frankly, fair given powder cocaine, do you worry that we send the wrong message?

Mr. BREUER. Senator, from the administration's point of view, we think today we are sending the right message. We are sending———

Senator GRAHAM. Do you agree with that, Judge?

Judge WALTON. I do. I agree with everything that Mr. Breuer has indicated about how we should address this problem. And I do not think we send the wrong message. I believe that enforcement is very important to addressing this problem. But I also believe that prevention works, and I also believe that treatment works. But we have not made the investments in those arenas that I believe are necessary.

Senator GRAHAM. Thank you.

Chairman DURBIN. Without objection, a statement by Senator Leahy will be entered into the record.

Senator Feinstein.

Senator FEINSTEIN. Thank you very much, Mr. Chairman.

Mr. Breuer, obviously this is a very major recommendation, and it carries with it a lot of concomitant issues, and not the least of which is retroactivity. And it seems to me you cannot eliminate the disparity without having a program to release people from prison who are under these laws, thereby unfairly sentenced. And I think we need to know exactly what we are talking about.

Mr. Hinojosa, I was reading your written statement, and the question you just answered, and I read something different from what you have just responded to. On page 3, powder cocaine and crack cocaine offenses together historically have accounted for nearly half of the federally sentenced drug-trafficking offenders; 24,600 total drug-trafficking cases in 2008; there were 5,900 crack cases. That is 24 percent of all drug-trafficking cases, and 5,760

powder cocaine cases. That is 23 percent of all drug-trafficking cases. So there are a lot of people in prison with this disparity.

Do you want to say something on that?

Judge HINOJOSA. The number I gave was those that were eligible with regards to the 2007 guideline amendment. Some of them had already served their sentences, some of them had been obviously released, and some were not eligible for other reasons. And so the number that I gave is not everyone who had been sentenced under the crack-powder ratio, but those who might be eligible with regards to the 2007 guideline amendment. We have done no study with regards to eligibility with regards to any others, nor have we looked into that.

Senator FEINSTEIN. Well, what would be the eligibility of people in prison for immediate parole, assuming there was retroactivity and the 1:1 standard was in place?

Judge HINOJOSA. That would depend on what the ratio was and what Congress actually decided the ratio should be.

Senator FEINSTEIN. Well, I am just saying the administration has suggested a ratio. Supposing that were, in effect, the law. How many Federal offenders would then be subject to release? Because you would have a clamor if we changed the disparity and kept people in prison.

Judge HINOJOSA. If that were the case and that was the legislation, of course, we would do all the numbers with regards to whatever that might be.

Senator FEINSTEIN. But right now we do not know how many people would be———

Judge HINOJOSA. No, but we would be glad to get that for you, and we have prepared some information with regards to the reduction possibilities, but not with regards to the numbers presently in custody that might be eligible for retroactivity, if that was the way it was proceeded with.

I will say that one of the things the Commission is also attempting to do and has started doing—and this does take some time—is to look at the recidivism rates with regards to those who have had retroactivity applied with regards to the 2007 guideline amendments.

Senator FEINSTEIN. Well, let me ask you, I would appreciate getting those numbers, because I think we have to look at this. Philosophically, I agree with what the administration has said. Practically, before we proceed, I sure want to know the impact. And so I think we need that. Now———

Judge HINOJOSA. And I hope I did not leave you with the impression, Senator, that the number I had used involved if there was a change to 1:1. It was simply the number with regards to the 2007 guideline.

Senator FEINSTEIN. I understand. Thank you. That is helpful.

Now, there are 14 States that do have crack cocaine disparities, mine being one of them. Our disparity in California is based on the actual minimum sentence, with crack defendants sentenced to a 3-, 4-, 5-year term, and powder cocaine to 2-, 3-, 4-year terms. So that is not, I think, as difficult to change. But, again, I would want to know what is the practical impact of this.

Let me ask you, Mr. Breuer, I am sure that when you make this suggestion, you have analyzed the practical impact of this both on the Federal system and the fact that States are apt to follow and what the impact would be with those States that do have disparities.

Mr. BREUER. Well, Senator, what I would say with respect to that is that, of course, this is the very beginning of the process, and we have a working group where we want all the stakeholders to get involved. The issue of retroactivity I think will be an issue———

Senator FEINSTEIN. Is the answer that you have not looked at that?

Mr. BREUER. Well, the answer is not that we have not looked at it, but the answer is that in speaking—for instance, I personally in the first week on the job, when I have spoken to those like Judge Walton and Judge Hinojosa and other judges, they have said in the past when, for instance, the Sentencing Commission decided to have a two-level reduction, that those people thought in the beginning that it would be overwhelming, that, in fact, judges, as Judge Walton said, were able to do it and roll up their sleeves.

Whether or not if we were to do this now it would create an overwhelming burden I do not think has yet been quantified. But I think it is an issue and, on the one hand, will be the practicality of doing it and, as the Senators have indicated, is the fundamental justice in doing that. Somewhere in that will be where that discussion comes out.

Senator FEINSTEIN. I am sure you have talked with law enforcement.

Mr. BREUER. Yes.

Senator FEINSTEIN. What is the law enforcement view of this?

Mr. BREUER. Well, Senator, I think like everything, there is not unanimity. I have had the privilege—yesterday, I spoke, for instance, with Chief Bratton, the police chief in Los Angeles, who said to me, "Lanny, you should quote me as saying I fully support 1:1, and I fully support the administration's position."

I see Chief Timoney there, and I had the pleasure of having breakfast with him about a week ago, and I think there is a lot of support for it.

I do not want to suggest there is unanimity, but I think a lot of law enforcement believes that the current status is unsatisfactory. There is probably going to be some debate whether it should be 1:1 or something else, but I think there are a lot of informed sources who are now very much in agreement with this position.

Senator FEINSTEIN. What would be the administration recommendation on retroactivity?

Mr. BREUER. I do not think yet, Senator, we have one, and the reason we do not have one is that in beginning this process, I think the administration believes it is essential that in a more comprehensive way, we are able to reach out to law enforcement, to the Congress, and to other stakeholders. Intuitively, there is a lot about retroactivity that seems right. But I think if we were to take a firm position now, we, in fact, would disenfranchise those who we very much want to bring into the process as we all discuss in an informed way this issue.

Senator FEINSTEIN. For whatever it is worth, it is my position that any change has to have retroactive consideration, because we have to know what we are doing when we do it and what the practical application of what we are doing is, not just the theoretical application, because you are going to have 14 States very concerned as well.

So I would very much appreciate it, Mr. Chairman, if it is agreeable with you, that the Attorney General's Office really look into this and give us some recommendations of what they think this should be as part of any bill.

Mr. BREUER. Senator, just to reassure you, our goal, in fact, for the working group is that the working group within a period of a few months, not very long, will, in fact, have coalesced all of these issues, and we would be delighted to do exactly that.

Senator FEINSTEIN. That would be very helpful.

Thanks very much, Mr. Chairman.

Chairman DURBIN. Thank you, Senator Feinstein. I agree with you on that point. Senator Klobuchar.

Senator KLOBUCHAR. Thank you very much, Mr. Chairman. Thank you to all of you.

As you know, I am a former prosecutor, and when I was listening to Senator Graham talk about going back to how this happened, these disparities in the first place, I think part of this was—which I still see today—the scourge of crack cocaine and what it does and the very violent offenses that get committed with it. So I think it is very clear to say that we are not talking about decriminalizing this—right, Mr. Breuer?

Mr. BREUER. That is exactly right.

Senator KLOBUCHAR. All right. Very good. And that we understand it is a very serious problem.

On the other side, I think of a judge in Minnesota named Pam Alexander, who was a district court judge, who was one of the first to strike down the crack cocaine disparity in Minnesota. It went up to the Supreme Court, and in 1991, in the case of *State* v. *Russell*, the Minnesota Supreme Court struck down our disparity in our State.

Pam Alexander was nominated or her name was seriously considered for Federal district court judge, and I hope she is watching this hearing today, because she was not able to advance because of this decision that she had made.

So I am well aware of this issue, and I think the first thing I wanted to say and ask you about was that there were reasons given back then for this disparity—and I am sure some of them were real, but some of them were—that crack could be worse, the effect it had on babies and things like that. And is that still true, the crack cocaine? Any comments on that?

Mr. BREUER. Senator, based on my understanding of the Commission's excellent work and its work with respect to science, there is no basis for that conclusion.

Senator KLOBUCHAR. All right. And then, second, the fact that sometimes crack, for maybe reasons outside of the drug itself, it is involving more gun offenses, more violence; it may be those that are using this illegal drug compared to those that are using co-

caine; it may have nothing to do with the drug, but there was some more propensity of cases involving gun and violence with crack.

Mr. BREUER. I think though the numbers have gone down, there is still some more prevalence of those who are on the streets trading in crack possessing guns or using guns. It is why the administration feels we should have a much more targeted approach.

Senator KLOBUCHAR. So your answer to that, for my law enforcement people out there who are listening to this very carefully, would be that it is not like we are going to disregard the fact that guns are used with these crack crimes, that you are going to use enhanced sentences. Or how are you going to get at that fact? Because, clearly, when you have guns with drug cases, it means something more.

Mr. BREUER. That is exactly right, Senator. What we would propose is through the working group and making recommendations ultimately is either through enhancements or through further legislation that we ensure that those who are trafficking in crack cocaine, for instance, who are using guns, that they get extremely severe sentences. And so we are not in any way proposing that we are going to ignore it. Through a comprehensive regime of legislation and enhancements, we very much want to address that issue.

Senator KLOBUCHAR. OK. I think that is very important for people to know, and I do think it gets at Senator Feinstein's retroactivity question to some degree, which I think is going to be very difficult, and that is that perhaps—I am just guessing this, judges, but because of the sentences for crack, that sometimes those sentences were used, weapons charges may have been dropped even though a weapon was present. And so the retroactivity argument becomes more difficult in those cases. You may have a severely violent case or a gun case, but because the crack sentence was so long, perhaps those charges were dropped. Do you want to address that at all? It just complicates saying, well, because someone was put in for a crack charge for this long, they should be let out, when, in fact, maybe there were other factors there.

Mr. BREUER. Senator, I think that is exactly right. I defer to the judges on the implementation, but, of course, any issue of retroactivity will have to be case by case for the very reasons you have identified.

Senator KLOBUCHAR. Judge.

Judge HINOJOSA. Senator, I do want to make it clear that the guidelines themselves do provide some enhancements already with regards to a weapon involvement if you are not convicted under the statute. They also provide enhancements for use of minors, enhancements for roles in the offense, as well as some of the other matters that would be of concern to individuals. They are provided within the Sentencing Guideline system with regard to some of these enhancements that have been talked about with regards to certain specific characteristics of the way a defendant may be involved in a particular case.

And so some of these individuals may have already gotten the weapon enhancement under the Sentencing Guidelines even though they were not convicted under the statute itself.

Senator KLOBUCHAR. I understand. My focus here is that you may have some violent offenders that were simply convicted under

this crack law, and so it just makes it much more complicated to look at the retroactivity issue.

The other thing that was raised and Senator Graham addressed was just other reasons to look at changing this disparity, and one of them is that the judges have been downgrading the sentences out of a realization of what they perceive is this unfairness, as well as the fact, which he referred to, that juries are aware of this in many parts of the country and have reactions to this, or people. And I am very interested in mostly effectively using our laws and making sure they are targeted, as Mr. Breuer pointed out, at where we need them. But could you comment a little bit about that? I think it was you, Judge Hinojosa, that brought up the issue of the judges' departing downward.

Judge HINOJOSA. There has been some since *Kimbrough* and *Spears*. Post *Spears*, the departure or variance rate that is not Government sponsored is about 18 percent in crack cocaine cases, which is higher than it had been. It was probably 3 percent lower than that prior to that, and so there has been an increase. That is only with 900-some cases that have come in since *Spears* that we have been able to code. We will continue to put out that information. It is different than it has been.

We have seen about five cases where judges actually decided to use their own ratio. Some have used 20:1. Some have used 1:1. And so this may lead to disparity with regards to how individual judges look at what they feel might be the ratio. And so we are coding that information and would certainly make it available.

Senator KLOBUCHAR. Thank you.

Judge Walton, do you want to comment at all on this?

Judge WALTON. Which particular——

Senator KLOBUCHAR. Well, just on the judges' departing downward, maybe your own feelings or changes in your feelings about this disparity in these laws over time.

Judge WALTON. Under our current system, I do have concerns, because I know within my own courthouse there is a difference of view of what that disparity should be. So you do have some judges going 1:1, 10:1, 20:1, and I think that is problematic because I think disparity is a problem within our system. So, to the extent that there can be greater uniformity, I think that is important.

On the issue of retroactivity, I agree, that is a significant issue. There are a lot of factors that have to be weighed in assessing whether it would be appropriate to do that, and one of the things I do not think I would be saying off the reservation on behalf of the court system to say this is that if retroactivity is a reality, then I would hope that the needs of the court financially would be considered, because if we need additional resources in order to carry it out, I would hope that they would be made available to us.

Senator KLOBUCHAR. OK. I could tell you that I totally understand that from seeing court cases, but, again, the public safety issues with making sure that any retroactive changes that are made are going to also be, I think, foremost in people's minds. But thank you.

Judge WALTON. But I think one thing that is important, if you look at the statistics that Judge Hinojosa indicated with the experience of what has happened now in reference to what the Commis-

sion did, there has not been a significant number of people who have been released who have come back into the system. According to the statistics, it is only about 0.6 percent of the individuals released pursuant to the action of the Commission who have committed new offenses and come back into the process because of that.

Senator KLOBUCHAR. Right, and I am a big supporter of treatment. I come from the land of, well, 10,000 treatment centers—that is what we say—in Minnesota, and we believe in it. My own father is a recovered alcoholic, so I completely believe we need to look at that and drug courts as part of our laws, and that there are much better ways we can handle this. But at the same time, I want to make very clear to the public—and Mr. Breuer did that—that we are not talking about decriminalizing that, that we are going to move very carefully as we look at any talk of retroactivity, and that we do understand that crack cocaine is, as Senator Graham said, a scourge on our community and that we want to do everything to get people off of it and to make sure the laws are enforced and to focus very much on these violent offenses and gun offenses, while understanding that this disparity has not been fair and it has not seemed to have been effective in how we enforce our drug laws.

So thank you very much, all of you.

Chairman DURBIN. Senator Kaufman.

Senator KAUFMAN. Mr. Chairman, I want to thank you for holding this hearing. I think this will go a long way to deal with popular misperceptions about the disparity between the crack cocaine and powder cocaine differences, and I think it is a real service.

Mr. Breuer, I want to follow up on Senator Klobuchar's question. I know about the children, but what are the things that we have learned since 1986 that make us now, the Department, to feel that it is important to remove this disparity?

Mr. BREUER. Well, Senator, where we were right, of course, and what we have known throughout is that crack cocaine, drugs in general, such as crack cocaine and powder cocaine, are, in fact, a scourge and they are very bad for the community and they can be associated with violence. What we have learned is that if we punish based on a class as opposed to case specific or one form versus another, then, in fact, what we begin to do is deteriorate the public's confidence in our justice system, as Judge Walton so eloquently described, and that cannot be the case.

We need to protect our citizens. They need to know there is certainty of punishment. And they need to know that we are putting in jail those who should be in jail as opposed to, as Judge Walton said, young African-American men who have no business being in jail perhaps for as long as they are based on the crime. That is a terrible injustice. I think that is the lesson we have learned.

Senator KAUFMAN. To follow up on that, one of the findings in the Sentencing Commission's most recent report to the Congress said that more than one-third of all crack cocaine cases in 2006 involved fewer than 25 grams while powder cocaine cases typically involved far larger quantities.

Can you kind of talk about how that happens?

Mr. BREUER. Well, Senator, I think what has happened under the current regime is that, in essence, there is sort of a de facto

process, and because the quantities are lower in some cases, people are targeted because there is a sense that perhaps they are more involved in other kinds of criminal activity.

The result, however, is somewhat artificial. If we had a 1:1 level, then, in fact, I think what we would find is sentences throughout would be proportional based on what they should be. Now I think what is happening is people are using their own independent judgments to try to take the system that most people think is not working and try to make it work a little better. But that is a very imperfect system.

Senator KAUFMAN. Thank you. Now, we know, talking about doing away with the disparity—and I think there seems to be good agreement on that. I mean, do you have any thoughts about whether we are going to raise the current powder levels or lower certain crack levels in order to get to what we should be doing? Just your thoughts on that.

Mr. BREUER. Well, Senator, based on the Commission's work and the work that we have heard about, I am not aware of any compelling arguments—at this point, none—to say that we should raise the powder cocaine penalties or raise the powder cocaine. But I must say that the working group will do what we have said it will do. It will remain open to all issues, and so if there are those arguments, we want to hear them, and we want to assess them. But at this point, I have not heard any compelling arguments there, and I do not think the Commission in its work has found any.

Senator KAUFMAN. Thank you for that.

Judge Hinojosa, on the subject of violence, does your data suggest that the violence associated with crack distribution has changed at all over the years?

Judge HINOJOSA. The last coding project that we did with regards to violence was that there was a slight difference between crack and powder cases. It was not present in about 89-point-some percent of the crack cases and not present in about 93 percent of the powder cases. And so that was a coding project with regards to 2005 cases.

The other thing that we judge it by is the weapon enhancement, which is applied in about 28.1 percent of the crack cases and 16.9 percent of the powder cases. And so, therefore, that is the information that we do have.

Senator KAUFMAN. All right. Thank you.

Judge Walton, obviously, in addition to your long service as a trial judge, you served with the Office of National Drug Control Policy. How has that experience affected your positions and your views on this issue?

Judge WALTON. Well, as I indicated earlier, I did advocate a disparity when I worked in the Drug Office because of the information we had available to us at that time. As has been indicated, a lot of that information we know was incorrect, and so it has altered my view about the disparity, coupled with the fact of my experience that I have had with people who would come into the process, like jurors, who did not want to be a part of the process because of the disparity.

So I think, as I have indicated before, that public confidence is critical if our laws are going to be respected and followed, and I think this adversely impacts the ability to have that occur.

Senator KAUFMAN. Great. Thank you all for your comments.

Again, Mr. Chairman, thank you for holding this hearing.

Chairman DURBIN. Thank you, Senator Kaufman, and I would like to thank this panel for their testimony. I believe this has been long overdue, and your statements are going to help us understand this issue and I hope motivate us to move forward. Some of the little huddles that you have seen taking place here are among Senators who are thinking about what is the next step, so we are consciously thinking of an active response to your suggestions today, and I thank you for motivating and for joining us.

Judge WALTON. There is one statement I would correct. I said that it was 0.6 percent who have been rearrested who had been released. It actually is 0.6 who were revoked based upon a rearrest.

Chairman DURBIN. I see. Thank you very much, Judge Walton. Thank you all.

Chairman DURBIN. We now invite the next panel of three distinguished witnesses to join us, and before swearing them in, while they are taking their seats, I will give you a little background on each one of them.

John Timoney is going to testify first. He is the Chief of Police of the Miami Police Department. He has been in that position since January of 2003. His law enforcement career began in 1967 when he joined the New York City Police Department. After serving in a variety of leadership positions during three decades with NYPD, Chief Timoney was for 4 years the police commissioner of Philadelphia, where he commanded a force of approximately 7,000 officers. He is President of the Police Executive Research Forum, serves on the Board of Penn Institute for Urban Research in Philadelphia University, Co-Chairman of the FBI's South Florida Joint Terrorism Task Force. His 40 years of local law enforcement experience give him a unique perspective on these issues. I thank him for being here.

Asa Hutchinson is a familiar face here on Capitol Hill, currently practicing law at the Hutchinson Law Group which he and his son founded. He began his legal career as a city attorney in the famed Bentonville, Arkansas, before he was appointed by President Reagan as U.S. Attorney for the Western District of Arkansas. He served in the U.S. House of Representatives from 1997 to 2001, appointed by President Bush as Administrator of the Drug Enforcement Administration in 2001; 2 years later, he became the first Under Secretary for Border and Transportation Security at the newly created Department of Homeland Security. He has an undergraduate degree from Bob Jones University and a law degree from the University of Arkansas. Mr. Hutchinson, welcome.

Cedric Parker, one of seven children, born in Tampa, Florida, grew up in Alton, Illinois, home of the Red Wings. Upon graduating from Southern Illinois University, he joined the U.S. Army and served his country for over 7 years. Mr. Parker, after leaving the military, returned to Alton, Illinois, where he managed a residential diagnostic and treatment facility for troubled and abused adolescents. He met his wife, Christie, there, who is a psychotherapist

in private practice. Their four children—one son and three daughters—range in age from 24 years to 11 months.

That is a wide spread there, sir. Mr. Parker, thank you for the sacrifices you made to be with us today.

He is here to testify about his sister, Eugenia Jennings, and before I—I will wait and show that a little later. We have a picture here of the family which we would like to show when the time comes for your testimony.

If I could ask the three witnesses to stand to be sworn in, I would appreciate it. Do you solemnly swear that the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

Chief TIMONEY. I do.

Mr. HUTCHINSON. I do.

Mr. PARKER. I do.

Chairman DURBIN. Thank you. Let the record indicate that all the witnesses responded in the affirmative.

Chief, I am going to let you open up. The floor is yours.

STATEMENT OF JOHN F. TIMONEY, CHIEF OF POLICE, MIAMI POLICE DEPARTMENT, MIAMI, FLORIDA

Chief TIMONEY. Thank you very much, Mr. Chairman, and good morning to the distinguished members of the Committee. I want to thank you for affording me the opportunity to testify regarding reforming the Federal cocaine sentencing laws, commonly referred to as the "crack-versus-powder cocaine controversy." As you mentioned in your introduction, I have spent the last 40 years in local law enforcement—the last 6½ years as the Chief of Miami, 4 years before that as the police commissioner of Philadelphia, and then 29½ years in the NYPD, beginning as a young cop in the South Bronx and working my way up through the ranks to become the youngest four-star chief in that department's history. So I come at this as a police professional.

Others this morning have testified regarding the 100:1 disparity, and you had very good graphics there, Senator. They testified to the efforts of many, including the United States Sentencing Commission, to try to rectify or mitigate the disparity. To date, none of these efforts have been effective, having, for whatever reason, fallen on deaf ears. I am here today to lend my voice to the chorus pleading with Congress to right a wrong.

I have no idea if the original reasons for establishing this dichotomy that somehow crack cocaine was more powerful and, therefore, deserved a stiffer sentence—I did not know if they were right or wrong. I have heard the arguments on both sides. But what I can tell you from a practitioner's perspective is that the results or the unintended consequences—and I do not think the consequences were ever intended in this situation. But the results have been one unmitigated disaster.

Making an artificial distinction about a particular form of the same drug is a distinction without a difference, and that is bad enough. But when the distinction results in a dramatic disparity in sentencing along racial lines, then that distinction is simply un-American and intolerable. Furthermore, it defies logic from a law enforcement perspective, and here is what I mean.

If I arrest a guy carrying 5 grams of crack cocaine—that is less than a fifth of an ounce—I figure this guy is a low-level street corner dealer, or maybe he just has a good amount of crack for personal consumption. But if I arrest a guy with 500 grams of powder cocaine—and that is about half a kilo—I assume that this individual is a serious trafficker in narcotics. The notion that both of these guys are equal and deserve the same sentence is just ludicrous on its face.

Now let me take my two guys and show you how the monetary value of their illegal contraband plays out in the street. In Miami today, you can purchase 5 grams of crack for around $150. In New York and in Philadelphia, my prior two cities, it will cost you around $200—a little more expensive. In Miami today, my undercover officers for powder cocaine spend between $700 and $1,000 per ounce, or around $14,000 for half a kilo, which is 500 grams. In New York and in Philadelphia, probably $2,000 more. The bottom line is the difference—it is a hell of a difference. It is $150 versus $14,000.

Now, if you were to present those numbers to the average eighth grader, they could figure out who is the narcotics trafficker and who is not. It is quite simple. And the answer is quite simple.

Finally, when unfair laws are passed, police officers see the impact at the local level. Citizens do notice the things you do up here in Washington, and they do play out in the street. And in this case, the people become cynical.

I remember back in 1974 when I was a young cop in the South Bronx, and President Ford issued the pardon to former President Nixon. I was amazed at how many times that issue was thrown up in our face as we made arrests on the street. We would get the accusation: "Oh, Nixon gets pardoned, but the poor people get arrested."

Now, I know a lot of that was just street-level nonsense and jargon, but the point was well taken. And police departments across America face a much more difficult challenge gaining the trust of their communities if there are glaring inequities in the justice system that are allowed to persist. These inequities breed cynicism, mistrust, and should be eliminated.

Thank you, Senator, for your indulgence today.

[The prepared statement of Chief Timoney appears as a submission for the record.]

Chairman DURBIN. Thank you for your testimony.

Mr. Hutchinson, you have an opportunity now, 5 minutes, and we, of course, will enter into the record any written statement you would like to submit. Please proceed.

STATEMENT OF ASA HUTCHINSON, ASA HUTCHINSON LAW GROUP, ROGERS, ARKANSAS, AND FORMER ADMINISTRATOR, UNITED STATES DRUG ENFORCEMENT AGENCY

Mr. HUTCHINSON. Thank you, Senator. I am delighted to appear before your Committee. I am grateful for the invitation. I am here today, of course, reflecting my background as a Federal prosecutor in the 1980s, when we really commenced the strong effort against illegal drugs. I am reflecting my background as a Member of Congress when I had oversight responsibilities on the House side for

some of our law enforcement agencies; and then, most significantly, as a former Administrator of the U.S. Drug Enforcement Administration. In all of those recent positions, Congress and the DEA, I have been a long-time advocate for reducing the sentencing disparity between crack and powder cocaine. I have advocated this position for a couple of very simple reasons:

One, the justice system should be about fairness, and I do not believe that this sentencing disparity reflects the fairness that is required.

Secondly, it obviously has a disparate racial impact on our communities and undermines what we are trying to accomplish in the justice system.

Today I express my support for legislation for Congress addressing this disparity, and I believe that this is the time that this can be done. The reasons that I am strongly advocating congressional action in this regard are that I see the impact of the disparity as undermining the confidence, credibility, and cooperation that are important in our criminal justice system; and also—and I think this has not been talked about enough—the present disparity skews law enforcement priorities. It encourages law enforcement to pursue lengthy sentences when the offenders are not high-level dealers. In Arkansas, where I hail from, I want to cite this particular statistic: 41 percent of the drug-related Federal offenses in Arkansas are crack related—41 percent—and that is compared to a national average of 20 percent. Powder-related Federal offenses in Arkansas are 12 percent of all Federal offenses, or drug-related offenses. That compares with 22 percent nationwide.

In Arkansas the African-American population is approximately 16 percent, but we have a higher percentage of crack-related offenses compared to the national average. I believe that congressional sentencing priorities impact law enforcement patterns and practice to our detriment in effectively fighting the war on drugs.

Now, perhaps the easier part of this debate is to convince policymakers that we have got to do something. The more difficult aspect is to address how to do it, and what is the right way to do it. Let me just offer a couple of views in that regard.

First, the issue of retroactivity has been discussed today, and I applaud Congress that in implementing the changes of the Sentencing Commission last fall you did not reverse the retroactive application. As Judge Reggie Walton, who previously testified, has said, "I do not see how it is fair that someone sentenced on October 30th gets a certain sentence when someone sentenced on November 1 gets another sentence." And so whatever changes you make, I do believe have to be applied retroactively.

The most strenuous objection comes from the Department of Justice, who says it takes extraordinary U.S. Attorney resources and court resources to process these. The courts do not object, and since they have gone through the resentencing on many, you have not seen any mass resignations of U.S. Attorneys or Assistant U.S. Attorneys saying they are overworked. So the process has worked, and, most importantly, when you are dealing with an issue of fundamental fairness, adjust the resources, apply the resources, make changes where necessary to make sure that the individualized approach can be handled and they can be reviewed.

Second, I would suggest that in terms of adjusting the disparity, mandatory minimum sentences required of cocaine traffickers should be more clearly directed toward those who are engaged in the business of trafficking, and it should not all be quantity based. Right now you have got the sentencing disparity because it is all based upon quantity. Well, a mule who is transporting a large load of cocaine across the border is not the high-level trafficker we actually want to get. We have got to adjust our sentencing priorities to include different criteria rather than simply the quantity aspect.

Under the current formula, a dealer charged with trafficking 400 grams of powder worth approximately $40,000 could receive a shorter sentence than a user he supplied with crack valued at $500. Obviously, there has to be more than quantity. We have to adjust that criteria. Quantity should be one factor, but it has been an unreliable ally in determining sentencing priorities and in determining law enforcement priorities.

And, finally, whatever Congress does in terms of changing the sentencing structure, give it time to work, and then listen to the Sentencing Commission as they review what has been accomplished. And, obviously, anything we do has to be subject to adjustments down the road. Make the change and then let us evaluate the change after we give it an opportunity to work.

Thank you, Mr. Chairman, Senator Hatch, for the opportunity to appear before the Committee.

[The prepared statement of Mr. Hutchinson appears as a submission for the record.]

Chairman DURBIN. Thank you, and we will have a few questions for you.

Mr. Parker, I want to give you a chance to testify. As I mentioned at the opening, Mr. Parker is here testifying on behalf of his sister, Eugenia Jennings, and before you begin, I wanted to show a picture of your sister's children. I would ask you to tell us their names and ages, if you will, please.

Mr. PARKER. OK. To the left is Radley. That is her son, he is 14. In the center, Radisha Berry. And to the right is Cardez. He is the one that lives with me. And that is my son, front and center.

Chairman DURBIN. Thank you very much. Please proceed with your testimony.

STATEMENT OF CEDRIC PARKER, ALTON, ILLINOIS

Mr. PARKER. First I want to thank you, Chairman Durbin and Senator Hatch, for giving me the opportunity to testify before you today. Of course, you know my name is Cedric Parker. I am from Alton, Illinois, and I am here to tell you the things my sister, Eugenia, would say if she was here today. The severity of the mandatory minimums and especially the sharp disparity between those for crack and powder cocaine have touched my family directly. Eugenia cannot be here because she is in Federal prison for selling crack cocaine.

I spoke with my sister when I learned you wanted to hear from me, and these are the things she would like you to know. I want to say first that Eugenia does not excuse her conduct or hide behind her problems. She took immediate responsibility for her ac-

tions, and I know a day does not go by that she is not sorry for what she has done.

Eugenia is the youngest of seven and our mother's only daughter. She was born and growing up as I was leaving Alton for college and then eventually to the military. As I began to hear about all the things that were happening to my little sister, I tried repeatedly to intervene from overseas and find a safe harbor for her, but I could not.

Our mother was terribly challenged by illness, poverty, and other problems that made it difficult to provide us a stable family and a safe environment or to get help. When Eugenia was very young, our mother would leave her with the Smith's, their family friends that were in our projects, until she stopped bringing Eugenia home hardly at all.

Eugenia had an unspeakable childhood. Her surrogate mother, Annie, beat her and emotionally brutalized her from the time she arrived. Annie's children all abused drugs and alcohol, and when Eugenia was only 7 years old, she was left for days with a prostitute who sexually assaulted her, and also a teenage neighbor of the Smiths. A year later, one of the her half-brothers sexually assaulted her, and when she became a teenager, her stepfather tried to rape her.

Eugenia escaped the Smith, household when she was only 13. She dropped out of school and went to live with her boyfriend in a house where drugs and alcohol were the norm. She began abusing drugs and became addicted to crack by the time she was 15. She stopped using when she learned she was pregnant, but after giving birth at the age of 16, desperate for money to support her and her daughter, she began selling and using drugs. Of course, she was eventually caught.

Eugenia was convicted in Illinois in 1996 for two drug sales totaling less than 2½ grams of crack cocaine. While in prison, she sought treatment for her drug addiction and resolved to remain drug free. She studied for and completed her GED. She gave birth to her youngest son Cardez while she was incarcerated.

Eugenia tried to live up to her commitment. But following her release from prison in 1999, she relapsed again and began using drugs and alcohol.

In June of 2000, Eugenia was arrested for trading crack cocaine on two different occasions for designer clothes. One sale involved 1.3 grams, and the second, a few days later, involved 12.6 grams.

Eugenia was charged in Federal court with two counts of distributing crack cocaine. She accepted responsibility and pleased guilty. The Federal prosecutor decided to charge her as a so-called career offender. A career offender is someone who has two or more prior felony drug offenses. Her two small Illinois State prior convictions were enough to treat her as a major drug kingpin, driving her sentence from the mandatory minimum of 5 years to a sentence of almost 22 years. My sister was barely 23 years old and the mother of three young children when she was sentenced in January of 2001 to over two decades behind bars.

Had Eugenia been sentenced for powder cocaine instead of crack cocaine, even as a career offender, her sentence would have been less than half of the one she received for crack cocaine. Today she

would be getting ready to come home, probably already in a halfway house. She will not be released from prison until 2019.

Eugenia has worked very hard while in prison to better herself and maintain ties with her children. They correspond regularly, and what little money she has managed to earn, she has sent home to them for birthdays and holidays. My sister has never been in trouble in prison and is very well regarded by staff and other prisoners. She is an avid student and a model employee. She is involved with supporting battered women and is a member of the Youth Awareness Program, speaking with young people about the dangers of drugs. After a lifetime of substance addiction, Eugenia is proudly sober.

It strikes me that whatever the Government had hoped to achieve by locking Eugenia up has been accomplished, and yet she still has 10 more years than someone convicted of powder cocaine. My sister's children, 11, 14, and 15, have only seen their mother once since she has been in prison.

My sister is a remarkable woman of courage and principles, and I would give anything not to be here today to tell you this sad story, but I hope that my words will convince you to change this terrible law.

I want to leave you not with Eugenia's words or mine, but with the words of the Honorable G. Patrick Murphy, who sentenced my sister. Here is what he told her:

"Mrs. Jennings, I'm not mad at you....The fact of the matter is, nobody has ever been there for you when you needed it. Never. You never had anyone who stood up for you. All the Government has ever done is just kick your behind. When you were a child and you were being abused, the Government wasn't there. When your stepfather abused you, the Government wasn't there. When your stepbrother abused you, the Government wasn't there. But when you had a little bit of crack, the Government's there."

"And it is an awful thing, an awful thing, to separate a mother from her children. And the only person who had the opportunity to avoid that was you....At every turn in the road we failed you. And we didn't come to you until it was time to kick your butt. That's what the Government has done for Eugenia Jennings."

I am here to bring you Eugenia's message to end the sentencing gap between crack and powder cocaine. It causes racial disparities in sentencings, and Eugenia has witnessed this every day. It also results in unduly harsh sentences for people whose only crime is selling the same drug but only in a different form. The fact that the 13 grams of drugs that my sister sold were the crack form and not the powder form of cocaine surely cannot be enough to justify adding a decade to an already lengthy sentence.

Thank you for hearing me.

[The prepared statement of Mr. Parker appears as a submission for the record.]

Chairman DURBIN. Mr. Parker, thank you, and, Mr. Hutchinson and Mr. Timoney, thank you as well. That was powerful testimony. Powerful.

Tell me about her kids. How are they viewing this? And how are they doing without her for 10 years?

Mr. PARKER. It was very difficult for them in the beginning—actually for several years. They had a lot of problems in school. The boys, you know, I guess they feel abandoned, so they started having troubles with pretty much dealing with women. They felt abandoned by her. And, you know, I stay in contact with them. I see them every day, help them with homework.

The youngest, he lives with me, so I have been raising him. He went from D's and F's to honor roll now, and he is enjoying life. They all are doing a little better now. But, you know, they really miss their Mom. I cannot replace their Mom, or their father. Their father is not around. So it has been very difficult for them.

Chairman DURBIN. Chief Timoney, I am sure you are well aware of stories just like this.

Chief TIMONEY. Yes, sir.

Chairman DURBIN. In the course of your professional career as chief in Philadelphia and now in Miami. And I want to thank you for your testimony because it really means a lot when a law enforcement professional will step up and use the words you did, you know, to call this "one unmitigated disaster," which you said, "un-American," "intolerable," "defies logic."

So when you hear from the Justice Department about eliminating this disparity and bringing it down to a 1:1 ratio, I would like to know your response or reaction.

Chief TIMONEY. I actually do not think there is any other option. Any other option is a false distinction. So if you go 10:1, 20:1, it is the same drug, just manufactured differently. And I think whether it is 100:1 or 10:1, you are going to have that cynicism. In fairness, it needs to be 1:1, and as Mr. Hutchinson pointed out, we want to get the right people, the people who are profiting, the profiteers, the traffickers, not some poor person that did not—you know, that bought too much or had too much on them to meet some really crazy guideline of 5 grams, which really is not a lot.

You know, I was a young cop in the South Bronx. Just to make you all feel better regarding your votes in 1986, in the early 1970s in the Rockefeller law, the same thing happened in New York. And guess what? The same results happened. Mules or some grandmother or housewife that was asked to hold something, and if it met the proper weight, there was no judicial discretion. You had to go away. And, finally, last week, Governor Paterson has signed a bill revoking the Rockefeller laws. I think this Congress should do the same.

Chairman DURBIN. So you heard Senator Graham earlier, and he expressed a sentiment we all feel. We want fairness and we want justice, but we want to do something smart to reduce the use of narcotics.

Chief TIMONEY. Right.

Chairman DURBIN. You have been on one end of this conversation, risking your life in New York and Philadelphia and Miami, and watching your men and women in uniform doing the same every day because of the scourge of drugs in America.

What is the smart thing to do, assuming we get this one right and get this disparity fixed? But what is the smart thing for us to do so we can say to the American people we are not going soft on drugs here, we are going to go at this a different way, a smarter

way that could be more effective? You are on the firing line. Your men and woman are. What do you recommend?

Chief TIMONEY. Two things. I think, one, those that are profiting, making money, deserve to go to jail. I think as far as sentencing, there are lots of aggravating factors you could put into the law, such as possession of a gun, violence, by a school, things of that nature.

But when it comes to what my mother would say, the "poor unfortunates," those that are addicted, that use it, they are sick, then I think the right option is treatment. But use the criminal justice system as a lever to force them into treatment.

I did something like that in Philadelphia. It was successful. I do not think it was continued after I left. But what we did, when we would do these—I do not want to call them "round-ups," but you would do an operation to get sellers, but we would also get some users. We had a drug treatment center, and with the concurrence of the D.A., we told them, "Here is your choice. You can come with us now to jail, or you can go over here and register with this drug clinic." And most of the time they went over to register with the drug clinic.

Now, the problem was there was not enough money available. There was not enough treatment. But I think you have to do both. You need to be tough on the enforcement end, but on the treatment end, I think you need to have a heart.

Chairman DURBIN. What do you think about the fact that so many people are in prison today for drug-related crimes, many of whom were addicts themselves, and most of whom receive little or not treatment or counseling once incarcerated?

Chief TIMONEY. You know, whether it is treatment for drugs or education, you really have a captive audience—I hate to play that pun—and why wouldn't you use that year or 2 years or 3 years to create some good in there? So if it is drug treatment, by all means, give them that, but also the education. What we see in Miami and other cities are young men going in, late teens, early 20s, do not know much, do not have a high school education. But the one thing they learn in there is how to be better criminals when they come out. And I am not a softie, but that is the reality that we face. And, you know, it is no surprise that they come out and reoffend within 3 to 6 months, because there has been no effort—you know, the non-sexy part of the criminal justice system is the corrections part. Everybody wants to—and I like getting the resources to the cops. We are the sexy part. But the hard part is the back part, the corrections, and not enough money goes there.

Chairman DURBIN. That is your point, Mr. Hutchinson. You talked about resource allocation here and putting a lot of resources and going after the crack cocaine offender instead of going after what you think—and I happen to agree—are the real sources of the problem. And I thought you made an interesting challenge to us, and I am going to challenge you right back. If you do not go after it by quantity—you have been around this as a prosecutor and at the Federal policy level—what do you think is a more effective way to go after this scourge of narcotics? How would you write the law now that you have seen this from so many different aspects?

Mr. HUTCHINSON. Well, the Sentencing Guidelines have built in different criteria that they give credit if you are in a managerial role or you have a sentence enhancement, you know, if you are profiting, if you are financing, if you have got financial assets that you have invested as a result of the drug trade. All of these indicate that you are—whether you are kingpin or whether you are a mid-level dealer, it shows that you have a high level of culpability and responsibility.

Those are the types of factors that I think Congress should build into targeting our resources, and obviously, you build the sentencing structure, but the law enforcement officials are going to take that and say this is the priority. And so that is where we ought to be investing our resources.

As I indicated, in Arkansas—and I think this is reflected nationwide—whenever you can put somebody away for 5 to 10 years on a mandatory minimum for crack cocaine, well, that is rewarding law enforcement with long penalties. We want to encourage them to go beyond that to the higher-level dealers, and I think it starts with, if you are going to have mandatory minimums, let us not just have it quantity based but have it based upon the real role they play in the trafficking enterprise.

Chairman DURBIN. You heard Mr. Parker's story about his sister. She does not sound to me like a big trafficker in drugs. The story sounds to me like a very vulnerable woman who faced addicting and a lot of bad choices and now is sentenced to 22 years in prison as a result of it. So let me ask you to respond to his story from his family's side.

Mr. HUTCHINSON. Well, his point is well taken that if it had been powder cocaine, then it would have been probably half the sentence. But the fact is that if it had been powder cocaine, a Federal prosecutor probably would have looked at that and said let us defer this to State prosecution; it is not a serious enough offense even to pursue.

We do not know all the factors, but I think that very well could have been the judgment. And if it, in fact, had been in State court then, I would hope they would look at this and say this is a lady with an addiction problem. Primarily she has an addiction problem. And let us make sure that she has the treatment necessary to get over that addiction. And that is not to minimize the conduct. There is a second offender element here. There is a selling offense that is here. But, clearly, his heart-wrenching story really cries out to Congress for the need to remedy this disparity.

Chairman DURBIN. Thank you.

Senator Hatch?

Senator HATCH. Well, I want to thank all three of you for being here. I am in the middle of a big Finance Committee markup—not markup but session on health care. But I have appreciated all the testimony I have heard.

Chief Timoney, I think you have added a lot here today, and nobody is going to think you are a pushover, so do not worry.

[Laughter.]

Senator HATCH. And, Asa, you have been one of the more erudite people around here for years, and, frankly, I am very pleased to listen to your testimony.

Mr. Parker, I empathize with you and your sister. I think we have far too many people who are drug addicted in jail. We have got to find a better system than what we have now because, generally, prison does not necessarily help them get over their addictions. It can in some areas where you have enlightened leadership and so forth, but there are a lot of areas where we do not have enlightened leadership and where it does not work.

So I have been a proponent of trying to narrow this difference between crack and powder cocaine for years, and hopefully we can do something, Mr. Chairman, and get that changed this year. But, also, we need to go beyond that. We need to come up with a better way of handling these kids that otherwise have not had much of a chance, who get addicted and find some way, short of prison. In cases like Asa said, Mr. Hutchinson said, your sister, there are some other factors there that made them probably want to put her in jail for longer, but, still, I think we need a better system where we can hopefully do some things for these folks short of prison.

That may be hoping for too much sometimes, but I have been thinking about this for a long time, and we are not winning this war on drugs at all, in my opinion, and we need a better system. Hopefully we can in this Judiciary Committee work during this coming year or so to try and come up with a better system that makes sense and yet would be properly supervised and managed.

But thank you, Mr. Chairman, I appreciate it. And I am going to keep helping here and see what I can do to work with the Chairman and others to resolve this very, very difficult set of situations.

Chairman DURBIN. Thank you, Senator Hatch. I know you have important responsibilities in the Finance Committee. If you had been here earlier, you would have heard me say something nice about you on the record.

[Laughter.]

Senator HATCH. Somebody tell me what he said.

No, he is a good friend—tough as nails, but I am not exactly considered a pushover myself.

Chairman DURBIN. Thanks a lot.

Senator HATCH. I appreciate it.

Chairman DURBIN. Chief Timoney, I am not going to just single you out, but if we could have the help of law enforcement professionals like yourself in thinking about how to respond to this and perhaps doing the right thing here and figuring out what else by way of sentencing or policy—Mr. Hutchinson as well—that we can change that might really help us do something effective to reduce drug usage, your voice and the voice of your fellow professionals could really make a difference in this conversation, and I hope you will accept that invitation if we get back to you.

Chief TIMONEY. I will, and, Senator, thank you for the opportunity. I am also the President of PERF, and over here is our Executive Director, Chuck Wexler, who does an awful lot of work with the Federal Government. But as you move forward, if you need—I hope I am not speaking out of class, Chuck. If you need the assistance of PERF, because we represent most of the major chiefs across America, across the world really, that input of PERF by all means, call on us.

Chairman DURBIN. We need you and I thank you.

Mr. Parker, thanks. Tell your sister we are thinking about her, and I hope you will share some of the things that were said today. And I hope it gives her some hope to carry on. Maybe at the end of the day there will be justice, and I would love to see her back with those kids as soon as possible. I think that would really be justice and fairness at this point.

Mr. Hutchinson, thank you as well.

There are a lot of statements that will be made part of the record here, without objection—and there is no one here to object.

[Laughter.]

Chairman DURBIN. Since there are no further comments from our panel, I would like to thank you all for being here. The record will remain open for a week for additional materials, and written questions for the witnesses may be sent your way, which I would appreciate timely response to.

As we close this hearing, I urge everyone to remember Eugenia Jennings' children—Radley, Radisha, Cardez—and also Judge Murphy's plea to Congress when he sentenced Ms. Jennings to almost 22 years in prison, and I quote, "It is an awful thing, an awful thing to separate a mother from her children."

This hearing is adjourned.

[Whereupon, at 11:50 a.m., the Subcommittee was adjourned.]

[Questions and answers and submission for the record.]

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June 9, 2010

Julia Gagne
Hearing Clerk
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510-6275

Ms. Gagne:

Attached please find the United States Sentencing Commission's responses to questions for the record submitted after the Judiciary Committee's hearing on April 29, 2010, entitled "Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity," which were transmitted to the Commission on January 4, 2010, and received by the Commission on January 15, 2010.

The responses also have been provided to the individual senators who originally submitted the questions. If you have any questions regarding this submission, please do not hesitate to contact me at 202.502.4519 or by email at lrich@ussc.gov.

Sincerely,

Lisa A. Rich
Director
Office of Legislative and Public Affairs

Attach.

Questions for the Record from Senator Tom Coburn

1. **It is my understanding that there is not currently a federal drug court system or any other alternatives to incarceration available to first time, low-level drug offenders.**

   a. **In your opinion, what is the feasibility of implementing a federal drug court system for these types of federal drug offenders?**

ANSWER: The Commission does not have sufficient information on the feasibility of implementing drug courts in the federal system for first-time, low-level drug offenders and recommends that your question be posed to the federal judiciary as it is in the best position to address your question. For example, the Judicial Conference of the United States has tasked the Federal Judicial Center with conducting a study to assess the various reentry court programs that currently exist in 30 federal district courts.[1] These programs, based on "problem solving courts" or "drug courts," "address offender behavior and rehabilitation by providing treatment and sanction alternatives, combined with regular judicial oversight for offenders under federal supervision."[2]

The Commission believes that the federal criminal justice system must provide more alternatives to incarceration. In September 2009, the Commission indicated that one of its priorities for the coming year would be the continued study of alternatives to incarceration.[3] Throughout 2009 and early 2010, the Commission held a series of regional hearings across the country, during which it heard testimony from prosecutors, defense attorneys, district and circuit court judges, law enforcement, academics, and community advocates.[4] The Commission often heard at these hearings that more alternatives to incarceration, particularly for low-level non-violentdrug offenders, were necessary for the system to reflect advancement in the knowledge of human behavior as it relates to the criminal justice process.[5]

Based on that information, as well as the overwhelming interest in alternatives to incarceration being expressed by all branches of government, the Commission has promulgated an amendment that expands the availability of alternatives to incarceration to certain low-level offenders.[6] The two-part amendment was submitted to Congress on April 30, 2010, and will become effective November 1, 2010, if Congress does not take action to disapprove or modify the amendment.

The first part of the amendment amends the Sentencing Table. The Sentencing Table consists of four "zones" that guide judges as to the types of sentences available to offenders who

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[1] *The Third Branch*, "Study Requested on Reentry Court Programs," (December 2009), available at http://www.uscourts.gov/ttb/2009-12/article02.cfm# (last visited March 9, 2010).
[2] *Id.*
[3] In July 2008, the Commission held a two-day symposium on alternatives to incarceration that drew over 200 leading experts on alternatives to incarceration. The compilation of those proceedings is available on the Commission's website at www.ussc.gov.
[4] The Commission held hearings in Atlanta, Georgia; Stanford, California; New York, New York; Chicago, Illinois; Denver, Colorado; Austin, Texas; and Phoenix, Arizona.
[5] *See* 28 U.S.C. § 991(b)(1)(C).
[6] A copy of the "reader-friendly" amendment is attached.

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fall within those zones. In Zone A, for example, a term of imprisonment a non-incarcerative sentence is permitted. In Zone B, a probationary term may be appropriate but it must include some form of imprisonment or alternative to imprisonment, such as community or home confinement. In Zone C, a "split" sentence may be appropriate but at least 50 percent of the sentence must be incarcerative. In Zone D, a term of imprisonment must be imposed and alternatives are not available.

The amendment shifts the Sentencing Table so that those offenders whose sentences currently range from 8-14 or 9-15 months and fall into Zone C would be included in Zone B. Those offenders whose sentences currently range from 10-16 months or 12-18 months and fall into Zone D would be included in Zone C. By modifying the Sentencing Table in this way, alternatives to incarceration would be more available to certain low-level offenders.

The Commission estimates that of the 71,054 offenders sentenced in fiscal year 2009 for which complete sentencing guideline application information is available, 1,565 offenders in Zone C, or 2.2 percent, would have been in Zone B of the Sentencing Table under the amendment, and 2,734 offenders in Zone D, or 3.8 percent, would have been in Zone C. Not all of these offenders would have been eligible for an alternative to incarceration, however, because many were non-citizens who may have been subject to an immigration detainer and some were statutorily prohibited from being sentenced to a term of probation, see, e.g., 18 U.S.C. § 3561(a)(1) (prohibiting a defendant convicted of a Class A or Class B felony from being sentenced to a term of probation).

As a further reason for the zone expansion, Commission data indicate that courts often sentence offenders in Zone D with an applicable guideline range of 12-18 months to a term of imprisonment of 12 months and one day for the specific purpose of making such offenders eligible for credit for satisfactory behavior while in prison. See 18 U.S.C. § 3624(b). For such an offender, assuming the maximum "good time credit" is earned, the sentence effectively becomes approximately ten and one-half months. Given that prior to the amendment the highest guideline range in Zone C was 10-16 months, the Commission determined that offenders in Zone D with an applicable guideline range of 12-18 months, many of whom effectively serve a sentence at the lower end of the highest Zone C sentencing range, should be included in Zone C.

Second, the amendment clarifies and illustrates certain cases in which a departure may be appropriate to accomplish a specific treatment purpose. Specifically, it amends an existing departure provision at §5C1.1 (Imposition of a Term of Imprisonment), Application Note 6. As amended, the application note states that a departure from the sentencing options authorized for Zone C of the Sentencing Table to accomplish a specific treatment purpose should be considered only in cases where the court finds that (A) the defendant is an abuser of narcotics, other controlled substances, or alcohol, or suffers from a significant mental illness, and (B) the defendant's criminality is related to the treatment problem to be addressed. Under the application note as amended, the court may depart from the sentencing options authorized for Zone C (under which at least half the minimum term must be satisfied by imprisonment) to the sentencing options authorized for Zone B (under which all or most of the minimum term may be satisfied by intermittent confinement, community confinement, or home detention instead of imprisonment) to accomplish a specific treatment purpose. The application note also provides that, in

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determining whether such a departure is appropriate, the court should consider, among other things, two factors relating to public safety: (1) the likelihood that completion of the treatment program will successfully address the treatment problem, thereby reducing the risk to the public from further crimes of the defendant, and (2) whether imposition of less imprisonment than required by Zone C will increase the risk to the public from further crimes of the defendant. Some public comment, testimony, and research suggested that successful completion of treatment programs may reduce recidivism rates and that, for some defendants, confinement at home or in the community instead of imprisonment may better address both the defendant's need for treatment and the need to protect the public. Accordingly, the Commission amended the application note to clarify the criteria and to provide examples of such cases.

The amendment also makes two other changes to the Commentary to USSG §5C1.1 regarding the factors to be considered in determining whether to impose an alternative to incarceration. The amendment adds an application note providing that, in a case in which community confinement in a residential treatment program is imposed to accomplish a specific treatment purpose, the court should consider the effectiveness of the treatment program.

b. Under the current sentencing regime, approximately how many drug offenders would be likely to qualify for federal drug courts aimed at first-time, low-level drug offenders? Please breakdown the number into the various types of drugs for which the offender was convicted?

i. Would that number change if the alternative to incarceration for these offenders was probation, community service or home confinement?

ii. Would that number change for cocaine offenders if the current sentencing disparity were completely eliminated?

ANSWER: The Commission is not in a position to this question as there are a number of unknown factors incorporated into the definition of "first-time, low-level" drug offender that the Commission cannot capture. As s noted in the answer to Question 1(a) above, however, the Commission has provided access to more alternatives to incarceration for offenders that may fall into a category of "low-level" drug offenders, among other low-level offenders.

c. Would alternatives to incarceration such as probation, community service, or home confinement be feasible for first-time, low-level drug offenders?

ANSWER: As noted in its answers, *supra*, the Commission does believe that alternatives to incarceration may be appropriate in certain circumstances for certain low-level offenders, including drug offenders. Currently, for example, USSG §5C1.1 (Imposition of a Term of Imprisonment), provides for alternatives to imprisonment for offenders whose applicable guideline range falls within Zone B of the Sentencing Table under certain circumstances. Moreover, as discussed above, the Commission has clarified the applicability of a departure from the otherwise applicable guideline range to allow imposition of a longer term of community

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confinement than otherwise authorized for an equivalent number of months imprisonment in order to accomplish a specific treatment purpose, such as drug treatment.[7]

d. How much would a drug court or other alternative to incarceration specifically help crack offenders who are convicted of simple possession? Would your answer change of the mandatory minimum for simple possession be eliminated or reduced?

ANSWER: The Commission notes that S. 1789, the Fair Sentencing Act of 2010, passed by the Senate on March 19, 2010, repeals the statutory mandatory minimum penalty for simple possession of crack cocaine. The Commission has recommended the repeal of this provision in each of its reports to Congress on federal cocaine sentencing policy. The Commission believes that this is the best way to address this particular category of offenders.

2. What types of drug treatment programs currently are available in the prison system for drug offenders or other inmates with addiction problems? What is the participation rate for eligible inmates?

ANSWER: The Commission does not collect this type of information routinely and recommends that your questions be directed to the Bureau of Prisons. As part of its amendment to the departure language in USSG §5C1.1, App. n. 6, the Commission encourages courts to look at the effectiveness of a requested treatment program and, in future amendment cycles, expects to provide more information on the types of treatment programs available. The Commission also heard testimony from drug treatment personnel during its March 2010 hearing on the proposed amendments. That public comment and testimony is available on the Commission's website at www.ussc.gov. The Commission also recommends that your questions be directed to the Administrative Office of the United States Courts Office of Probation and Pretrial Services as that office maintains a great deal of information on the types and availability of different drug treatment programs.

[7] Courts are advised that the departure should be considered in cases where the defendant's criminality is related to the treatment problem to be addressed and there is a "reasonable likelihood that successful completion of the treatment program will eliminate that problem." USSG §5C1.1, comment. (n.6).

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Amendments to the Sentencing Guidelines

May 3, 2010

This compilation contains unofficial text of amendments to the sentencing guidelines, policy statements, and commentary, and is provided only for the convenience of the user. Official text of the amendments can be found on the Commission's website at www.ussc.gov and will appear in a forthcoming edition of the Federal Register.

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1. ALTERNATIVES TO INCARCERATION

Reason for Amendment: *This amendment is a two-part amendment expanding the availability of alternatives to incarceration. The amendment provides a greater range of sentencing options to courts with respect to certain offenders by expanding Zones B and C of the Sentencing Table by one level each and addresses cases in which a departure from imprisonment to an alternative to incarceration (such as intermittent confinement, community confinement, or home confinement) may be appropriate to accomplish a specific treatment purpose.*

The amendment is a result of the Commission's continued multi-year study of alternatives to incarceration. The Commission initiated this study in recognition of increased interest in alternatives to incarceration by all three branches of government and renewed public debate about the size of the federal prison population and the need for greater availability of alternatives to incarceration for certain nonviolent first offenders. See generally 28 U.S.C. §§ 994(g), (j).

As part of the study, the Commission held a two-day national symposium at which the Commission heard from experts on alternatives to incarceration, including federal and state judges, congressional staff, professors of law and the social sciences, corrections and alternative sentencing practitioners and specialists, federal and state prosecutors and defense attorneys, prison officials, and others involved in criminal justice. See United States Sentencing Commission, Symposium on Alternatives to Incarceration (July 2008). In considering the amendment, the Commission also reviewed federal sentencing data, public comment and testimony, recent scholarly literature, current federal and state practices, and feedback in various forms from federal judges.

First, the amendment expands Zones B and C of the Sentencing Table in Chapter Five. Specifically, it expands Zone B by one level for each Criminal History Category (taking this area from Zone C), and expands Zone C by one level for each Criminal History Category (taking this area from Zone D). Accordingly, under the amendment, defendants in Zone C with an applicable guideline range of 8-14 months or 9-15 months are moved to Zone B, and defendants in Zone D with an applicable guideline range of 12-18 months are moved to Zone C. Conforming changes also are made to §§5B1.1 (Imposition of a Term of Probation) and 5C1.1. In considering this one-level expansion, the Commission observed that approximately 42 percent of the Zone C offenders covered by the amendment and approximately 52 percent of the Zone D offenders covered by the amendment already receive sentences below the applicable guideline range.

The Commission estimates that of the 71,054 offenders sentenced in fiscal year 2009 for which complete sentencing guideline application information is available, 1,565 offenders in Zone C, or 2.2 percent, would have been in Zone B of the Sentencing Table under the amendment, and 2,734 offenders in Zone D, or 3.8 percent, would have been in Zone C. Not all of these offenders would have been eligible for an alternative to incarceration, however, because many were non-citizens who may have been subject to an immigration detainer and some were statutorily prohibited from being sentenced to a term of probation, see, e.g., 18 U.S.C. § 3561(a)(1) (prohibiting a defendant convicted of a Class A or Class B felony from being sentenced to a term of probation).

As a further reason for the zone expansion, Commission data indicate that courts often sentence offenders in Zone D with an applicable guideline range of 12-18 months to a term of imprisonment of 12 months and one day for the specific purpose of making such offenders eligible for credit for satisfactory behavior while in prison. See 18 U.S.C. § 3624(b). For such an offender, assuming the maximum "good time credit" is

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earned, the sentence effectively becomes approximately ten and one-half months. Given that prior to the amendment the highest guideline range in Zone C was 10-16 months, the Commission determined that offenders in Zone D with an applicable guideline range of 12-18 months, many of whom effectively serve a sentence at the lower end of the highest Zone C sentencing range, should be included in Zone C.

Second, the amendment clarifies and illustrates certain cases in which a departure may be appropriate to accomplish a specific treatment purpose. Specifically, it amends an existing departure provision at §5C1.1 (Imposition of a Term of Imprisonment), Application Note 6. As amended, the application note states that a departure from the sentencing options authorized for Zone C of the Sentencing Table to accomplish a specific treatment purpose should be considered only in cases where the court finds that (A) the defendant is an abuser of narcotics, other controlled substances, or alcohol, or suffers from a significant mental illness, and (B) the defendant's criminality is related to the treatment problem to be addressed.

Under the application note as amended, the court may depart from the sentencing options authorized for Zone C (under which at least half the minimum term must be satisfied by imprisonment) to the sentencing options authorized for Zone B (under which all or most of the minimum term may be satisfied by intermittent confinement, community confinement, or home detention instead of imprisonment) to accomplish a specific treatment purpose. The application note also provides that, in determining whether such a departure is appropriate, the court should consider, among other things, two factors relating to public safety: (1) the likelihood that completion of the treatment program will successfully address the treatment problem, thereby reducing the risk to the public from further crimes of the defendant, and (2) whether imposition of less imprisonment than required by Zone C will increase the risk to the public from further crimes of the defendant. Some public comment, testimony, and research suggested that successful completion of treatment programs may reduce recidivism rates and that, for some defendants, confinement at home or in the community instead of imprisonment may better address both the defendant's need for treatment and the need to protect the public. Accordingly, the Commission amended the application note to clarify the criteria and to provide examples of such cases.

The amendment also makes two other changes to the Commentary to §5C1.1 regarding the factors to be considered in determining whether to impose an alternative to incarceration. The amendment adds an application note providing that, in a case in which community confinement in a residential treatment program is imposed to accomplish a specific treatment purpose, the court should consider the effectiveness of the treatment program. The amendment also deletes as unnecessary the second sentence of Application Note 7.

Amendment:

Part A:

§5C1.1. **Imposition of a Term of Imprisonment**

(a) A sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range.

(b) If the applicable guideline range is in Zone A of the Sentencing Table, a sentence of imprisonment is not required, unless the applicable guideline in Chapter Two expressly requires such a term.

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(c) If the applicable guideline range is in Zone B of the Sentencing Table, the minimum term may be satisfied by --

(1) a sentence of imprisonment; or

(2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in subsection (e), provided that at least one month is satisfied by imprisonment; or

(3) a sentence of probation that includes a condition or combination of conditions that substitute intermittent confinement, community confinement, or home detention for imprisonment according to the schedule in subsection (e).

(d) If the applicable guideline range is in Zone C of the Sentencing Table, the minimum term may be satisfied by --

(1) a sentence of imprisonment; or

(2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in subsection (e), provided that at least one-half of the minimum term is satisfied by imprisonment.

(e) Schedule of Substitute Punishments:

(1) One day of intermittent confinement in prison or jail for one day of imprisonment (each 24 hours of confinement is credited as one day of intermittent confinement, provided, however, that one day shall be credited for any calendar day during which the defendant is employed in the community and confined during all remaining hours);

(2) One day of community confinement (residence in a community treatment center, halfway house, or similar residential facility) for one day of imprisonment;

(3) One day of home detention for one day of imprisonment.

(f) If the applicable guideline range is in Zone D of the Sentencing Table, the minimum term shall be satisfied by a sentence of imprisonment.

Commentary

Application Notes:

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* * *

6. ~~*There may be cases in which a departure from the guidelines by substitution of a longer period of community confinement than otherwise authorized for an equivalent number of months of imprisonment is warranted to accomplish a specific treatment purpose (e.g., substitution of twelve months in an approved residential drug treatment program for twelve months of imprisonment). Such a substitution should be considered only in cases where the defendant's criminality is related to the treatment problem to be addressed and, there is a reasonable likelihood that successful completion of the treatment program will eliminate that problem.*~~

There may be cases in which a departure from the sentencing options authorized for Zone C of the Sentencing Table (under which at least half the minimum term must be satisfied by imprisonment) to the sentencing options authorized for Zone B of the Sentencing Table (under which all or most of the minimum term may be satisfied by intermittent confinement, community confinement, or home detention instead of imprisonment) is appropriate to accomplish a specific treatment purpose. Such a departure should be considered only in cases where the court finds that (A) the defendant is an abuser of narcotics, other controlled substances, or alcohol, or suffers from a significant mental illness, and (B) the defendant's criminality is related to the treatment problem to be addressed.

In determining whether such a departure is appropriate, the court should consider, among other considerations, (1) the likelihood that completion of the treatment program will successfully address the treatment problem, thereby reducing the risk to the public from further crimes of the defendant, and (2) whether imposition of less imprisonment than required by Zone C will increase the risk to the public from further crimes of the defendant.

Examples: The following examples both assume the applicable guideline range is 12-18 months and the court departs in accordance with this application note. Under Zone C rules, the defendant must be sentenced to at least six months imprisonment. (1) The defendant is a nonviolent drug offender in Criminal History Category I and probation is not prohibited by statute. The court departs downward to impose a sentence of probation, with twelve months of intermittent confinement, community confinement, or home detention and participation in a substance abuse treatment program as conditions of probation. (2) The defendant is convicted of a Class A or B felony, so probation is prohibited by statute (see §5B1.1(b)). The court departs downward to impose a sentence of one month imprisonment, with eleven months in community confinement or home detention and participation in a substance abuse treatment program as conditions of supervised release.

7. *The use of substitutes for imprisonment as provided in subsections (c) and (d) is not recommended for most defendants with a criminal history category of III or above.* ~~*Generally, such defendants have failed to reform despite the use of such alternatives.*~~

8. *In a case in which community confinement in a residential treatment program is imposed to accomplish a specific treatment purpose, the court should consider the effectiveness of the residential treatment program.*

~~8~~9. *Subsection (f) provides that, where the applicable guideline range is in Zone D of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is twelve*

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months or more), the minimum term must be satisfied by a sentence of imprisonment without the use of any of the imprisonment substitutes in subsection (e).

Part B:

Chapter Five, Part A, is amended in the Sentencing Table by redesignating Zones A, B, C, and D (as designated by Amendment 462, see USSG Appendix C, Amendment 462 (effective November 1, 1992)) as follows: Zone A (containing all guideline ranges having a minimum of zero months); Zone B (containing all guideline ranges having a minimum of at least one but not more than nine months); Zone C (containing all guideline ranges having a minimum of at least ten but not more than twelve months); and Zone D (containing all guideline ranges having a minimum of fifteen months or more).

The amendment to the Sentencing Table, as executed, is as follows (with the existing boundaries of Zones B and C marked with straight lines; the new lower boundary of Zone B shaded; and the new lower boundary of Zone C marked with a wavy line):

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SENTENCING TABLE
(in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
	4	0-6	0-6	0-6	2-8	4-10	6-12
Zone A	5	0-6	0-6	1-7	4-10	6-12	[illegible]
	6	0-6	1-7	2-8	6-12	[illegible]	12-18
	7	0-6	2-8	4-10	[illegible]	12-18	15-21
	8	0-6	4-10	6-12	10-16	15-21	18-24
	9	4-10	6-12	[illegible]	12-18	18-24	21-27
Zone B	10	6-12	[illegible]	10-16	15-21	21-27	24-30
	11	[illegible]	10-16	12-18	18-24	24-30	27-33
Zone C	12	10-16	12-18	15-21	21-27	27-33	30-37
	13	12-18	15-21	18-24	24-30	30-37	33-41
	14	15-21	18-24	21-27	27-33	33-41	37-46
	15	18-24	21-27	24-30	30-37	37-46	41-51
	16	21-27	24-30	27-33	33-41	41-51	46-57
	17	24-30	27-33	30-37	37-46	46-57	51-63
	18	27-33	30-37	33-41	41-51	51-63	57-71
	19	30-37	33-41	37-46	46-57	57-71	63-78
	20	33-41	37-46	41-51	51-63	63-78	70-87
	21	37-46	41-51	46-57	57-71	70-87	77-96
	22	41-51	46-57	51-63	63-78	77-96	84-105
	23	46-57	51-63	57-71	70-87	84-105	92-115
	24	51-63	57-71	63-78	77-96	92-115	100-125
	25	57-71	63-78	70-87	84-105	100-125	110-137
	26	63-78	70-87	78-97	92-115	110-137	120-150
Zone D	27	70-87	78-97	87-108	100-125	120-150	130-162
	28	78-97	87-108	97-121	110-137	130-162	140-175
	29	87-108	97-121	108-135	121-151	140-175	151-188
	30	97-121	108-135	121-151	135-168	151-188	168-210
	31	108-135	121-151	135-168	151-188	168-210	188-235
	32	121-151	135-168	151-188	168-210	188-235	210-262
	33	135-168	151-188	168-210	188-235	210-262	235-293
	34	151-188	168-210	188-235	210-262	235-293	262-327
	35	168-210	188-235	210-262	235-293	262-327	292-365
	36	188-235	210-262	235-293	262-327	292-365	324-405
	37	210-262	235-293	262-327	292-365	324-405	360-life
	38	235-293	262-327	292-365	324-405	360-life	360-life
	39	262-327	292-365	324-405	360-life	360-life	360-life
	40	292-365	324-405	360-life	360-life	360-life	360-life
	41	324-405	360-life	360-life	360-life	360-life	360-life
	42	360-life	360-life	360-life	360-life	360-life	360-life
	43	life	life	life	life	life	life

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§5B1.1. Imposition of a Term of Probation

(a) Subject to the statutory restrictions in subsection (b) below, a sentence of probation is authorized if:

(1) the applicable guideline range is in Zone A of the Sentencing Table; or

(2) the applicable guideline range is in Zone B of the Sentencing Table and the court imposes a condition or combination of conditions requiring intermittent confinement, community confinement, or home detention as provided in subsection (c)(3) of §5C1.1 (Imposition of a Term of Imprisonment).

(b) A sentence of probation may not be imposed in the event:

(1) the offense of conviction is a Class A or B felony, 18 U.S.C. § 3561(a)(1);

(2) the offense of conviction expressly precludes probation as a sentence, 18 U.S.C. § 3561(a)(2);

(3) the defendant is sentenced at the same time to a sentence of imprisonment for the same or a different offense, 18 U.S.C. § 3561(a)(3).

Commentary

Application Notes:

1. *Except where prohibited by statute or by the guideline applicable to the offense in Chapter Two, the guidelines authorize, but do not require, a sentence of probation in the following circumstances:*

(a) Where the applicable guideline range is in Zone A of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is zero months). In such cases, a condition requiring a period of community confinement, home detention, or intermittent confinement may be imposed but is not required.

(b) Where the applicable guideline range is in Zone B of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is at least one but not more than ~~six~~nine months). In such cases, the court may impose probation only if it imposes a condition or combination of conditions requiring a period of community confinement, home detention, or intermittent confinement sufficient to satisfy the minimum term of imprisonment specified in the guideline range. For example, where the offense level is 7 and the criminal history category is II, the guideline range from the Sentencing Table is 2-8 months. In such a case, the court may impose a sentence of probation only if it imposes a condition or conditions requiring at least two months of community confinement,

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home detention, or intermittent confinement, or a combination of community confinement, home detention, and intermittent confinement totaling at least two months.

2. *Where the applicable guideline range is in Zone C or D of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is ~~eight~~ten months or more), the guidelines do not authorize a sentence of probation. See §5C1.1 (Imposition of a Term of Imprisonment).*

Background: This section provides for the imposition of a sentence of probation. The court may sentence a defendant to a term of probation in any case unless (1) prohibited by statute, or (2) where a term of imprisonment is required under §5C1.1 (Imposition of a Term of Imprisonment). Under 18 U.S.C. § 3561(a)(3), the imposition of a sentence of probation is prohibited where the defendant is sentenced at the same time to a sentence of imprisonment for the same or a different offense. Although this provision has effectively abolished the use of "split sentences" imposable pursuant to the former 18 U.S.C. § 3651, the drafters of the Sentencing Reform Act noted that the functional equivalent of the split sentence could be "achieved by a more direct and logically consistent route" by providing that a defendant serve a term of imprisonment followed by a period of supervised release. (S. Rep. No. 225, 98th Cong., 1st Sess. 89 (1983)). Section 5B1.1(a)(2) provides a transition between the circumstances under which a "straight" probationary term is authorized and those where probation is prohibited.

* * *

§5C1.1. Imposition of a Term of Imprisonment

* * *

Commentary

Application Notes:

* * *

3. *Subsection (c) provides that where the applicable guideline range is in Zone B of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is at least one but not more than ~~six~~nine months), the court has three options:*

* * *

4. *Subsection (d) provides that where the applicable guideline range is in Zone C of the Sentencing Table (i.e., the minimum term specified in the applicable guideline range is ~~eight, nine, or ten months~~ten or twelve months), the court has two options:*

   (A) It may impose a sentence of imprisonment.

   (B) Or, it may impose a sentence of imprisonment that includes a term of supervised release with a condition requiring community confinement or home detention. In such case, at least one-half of the minimum term specified in the guideline range

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must be satisfied by imprisonment, and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, where the guideline range is ~~8-14~~10-16 months, a sentence of ~~four~~five months imprisonment followed by a term of supervised release with a condition requiring ~~four~~five months community confinement or home detention would satisfy the minimum term of imprisonment required by the guideline range.

The preceding example illustrates a sentence that satisfies the minimum term of imprisonment required by the guideline range. The court, of course, may impose a sentence at a higher point within the guideline range. For example, where the guideline range is ~~8-14~~10-16 months, both a sentence of ~~four~~five months imprisonment followed by a term of supervised release with a condition requiring six months of community confinement or home detention (under subsection (d)), and a sentence of ~~five~~ten months imprisonment followed by a term of supervised release with a condition requiring four months of community confinement or home detention (also under subsection (d)) would be within the guideline range.

* * *

8. *Subsection (f) provides that, where the applicable guideline range is in Zone D of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is ~~twelve~~15 months or more), the minimum term must be satisfied by a sentence of imprisonment without the use of any of the imprisonment substitutes in subsection (e).*

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Questions for the Record
From Senator Grassley

1. **How many offenders does the Commission estimate may apply for retroactivity if the ration is changed to one-to-one level? Please provide an analysis of how a retroactivity provision in a statutory change may affect the resources of the criminal justice system—not simply a rehash of statistics related to the Sentencing Commission's retroactive guidelines.**

ANSWER: The Commission cannot state with absolute certainty the number of offenders who may apply for retroactivity if the statutory ratio between the quantities of crack cocaine and powder cocaine required for a court to impose a statutory mandatory minimum sentence were changed from the current ratio of 100:1 to 1:1 (the "quantity ratio") and corresponding changes to the federal sentencing guidelines were made. This is because Congress may include other factors, such as mandatory minimums or changes to the federal sentencing guidelines for certain aggravators[1] that are not reflected in your question.

The Commission has, however, conducted an analysis of the number of offenders who may be impacted by a retroactive change in federal cocaine sentencing policy based solely on a change in the quantity ratio, with all other aspects of the current statutory and federal sentencing guidelines schemes remaining the same. For example, if the quantity ratio was changed to 1:1 with the five-year statutory mandatory minimum triggered at 500g (the current level for powder cocaine) and the 10-year statutory mandatory minimum triggered at five kilograms (the current level for powder cocaine), the Commission estimates that approximately 27,631 federal offenders would be eligible to seek a reduction in their sentences based on retroactive application of the change. The Commission projects that the average sentence length of such offenders would decrease from 168 months to 83 months. This analysis, along with analyses for other ratios and quantities of crack cocaine and powder cocaine, is set forth in Appendix A to this document.[2]

Assessing the impact of any retroactive changes to federal cocaine sentencing policy on the criminal justice system requires consideration of a number of factors and the input of all members of the criminal justice system. Should Congress enact legislation that results in lower federal sentencing guideline ranges for a class or category of offenders, the Commission would follow a thorough process to determine whether retroactive application of any guideline changes is appropriate.

Section 994(u) of title 28, United States Code, grants "the Commission the unusual explicit power to decide whether and to what extent its amendments reducing sentences will be given retroactive effect."[3] The Commission has articulated three primary factors it

[1] The Commission likewise may not be able to account for application of mitigating factors that Congress may direct the Commission to consider promulgating in the federal sentencing guidelines. *See, e.g.*, Secs. 6-7 of S. 1789, the Fair Sentencing Act of 2010 ("Fair Sentencing Act") (directing the Commission to amend the federal sentencing guidelines to account for the presence of aggravating and mitigating factors).
[2] The Commission also has produced a prison impact assessment for the Fair Sentencing Act, which the Senate passed by unanimous consent on March 19, 2010. That assessment is attached as Appendix B to this document.
[3] *See* Braxton v. United States, 500 U.S. 344, 348 (1991).

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considers when assessing whether a particular amendment should be applied retroactively: the purposes of the amendment, the magnitude of the change in the guideline range made by the amendment and the difficulty of applying the amendment retroactively to determine an amended guideline range.[4] The last two factors, in particular, take into account any burdens that might be imposed on the criminal justice system.

It also is likely that the Commission would seek public comment on the issue of retroactivity, particularly from the judiciary and practitioners regarding potential burdens to the system of making such amendments retroactive.[5] The Commission would then take all of the information made available to it under advisement. If the Commission made the determination to give retroactive effect to any guideline amendments retroactive, it would work closely with the criminal justice community to reduce the administrative burdens that may result.[6]

The retroactive application of the Commission's 2007 amendment has gone quite smoothly. In October 2007, the Commission estimated that approximately 21,000 people would be eligible to seek a reduction in sentence based upon the retroactive application of the amendment.[7] Since March 3, 2008 (the date that the amendment became retroactive), through May 19, 2010, the criminal justice community had processed 24,058 motions.[8] Of those motions, 15,778 (65.6%) were granted and 8,280 (34.4%) were denied. The Commission estimated in 2007 that the average sentence length for offenders granted a reduced sentence would decrease by about 17.0 percent. Data through May 19, 2010, show that the average sentence length for these offenders has decreased from 147 months to 122 months, a decrease of 16.9 percent.[9]

One factor that may have contributed to the ability of courts to process the large volume of motions in a relatively short period of time, is that the proceedings under 18 U.S.C. § 3582(c)(2) have been considered by the appellate courts to be limited. Section 3582(c)(2) grants a district court authority to reduce a sentence only "if such a reduction is consistent

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[4] *See* USSG §1B1.10, comment. (backg'd) (discussing process Commission follows in determining retroactive application of amendments).

[5] The Commission followed this process when it considered making its 2007 guideline amendment to the drug quantity table for crack cocaine offenses retroactive. Following submission of the crack cocaine amendment to Congress, the Commission published a *Federal Register* notice seeking public comment on whether the amendment should be given retroactive effect and whether additional guidance was necessary to ease any potential administrative burdens on the criminal justice system. 72 *Fed. Reg.* 41,794 (July 31, 2007).

[6] This is consistent with the approach taken by the Commission in 2007-2008. First, it listened carefully to the criminal justice community's concerns about administrative burdens. Second, it delayed retroactive effect of the amendment to ensure that all parties to the proceedings that would follow had ample time to prepare. Third, it worked very closely with the judges, probation officers, prosecutors, defense attorneys, and advocates to develop processes for handling the motions that would follow.

[7] 28 U.S.C. § 994(u) grants the Commission the power to consider and authorize retroactivity of its amendments. 18 U.S.C. § 3582(c)(2) is the statutory provision that allows a defendant to seek a modification of sentence based on retroactive application of a federal sentencing guideline amendment. If a defendant seeks retroactive relief from the court under section 3582(c)(2), "the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(2).

[8] *See* Table 1 (attached as Appendix C).

[9] *See id.* at Table 8.

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with the applicable policy statements of the Commission." Consistent with the authority Congress granted to it under 28 U.S.C. § 994(u), the Commission's policy statement at USSG §1B1.10 states in what circumstances an amendment may be applied retroactively and by what amount a defendant's term of imprisonment may be reduced.

The Supreme Court heard oral argument in *United States v. Dillon*, 09-6338, on March 30, 2010, a case involving the retroactive application of the Commission's 2007 crack cocaine amendment. The questions presented in *Dillon* are:

I. Whether the Federal Sentencing Guidelines are binding when a district court imposes a new sentence pursuant to a revised guideline range under 18 U.S.C. § 3582.[10]
II. Whether during a § 3582(c)(2) sentencing, a district court is required to impose sentence based on an admittedly incorrectly calculated guideline range.

If the Court determines that defendants are entitled to full resentencings under 18 U.S.C. § 3582(c)(2), the administrative burden of such proceedings may increase. The Commission has submitted an amicus brief in this case in support of the Government's position that proceedings under 18 U.S.C. § 3582(c)(2) are limited.

2. What accounts for [] changes in the racial makeup of federal crack offenders?

ANSWER: The Commission does not maintain information on drug trafficking patterns that may answer this question. Commission data is limited to information provided to it by the courts in their sentencing submissions.[11] As indicated in the preface to your question, the Commission has noted a slight decline in the percentage of Black offenders involved in crack cocaine trafficking since 1992; however, Black offenders continue to represent the overwhelming

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[10] The question presented is framed in the context of the Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), which held that mandatory sentencing guidelines violated a defendant's Sixth Amendment right to have to have any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts in a plea or a jury verdict by admitted by the defendant or proved to a jury beyond a reasonable doubt. All but one circuit (the 9th) to have addressed the application of *Booker* to 3582(c)(2) proceedings had determined that *Booker* did not apply. *See, e.g.*, *United States v. Doublin*, 572 F.3d 235, 238 (5thCir.) (per curiam), *cert. denied*, 130 S. Ct. 517 (2009); *see also United States v. Fanfan*, 558 F.3d 105, 109-10 (1st Cir.), *cert. denied*, 130 S. Ct. 99 (2009); *United States v. Savoy*, 567 F.3d 71, 73 (2d Cir.) (per curiam), *cert. denied*, 130 S. Ct. 342 (2009); *United States v. Doe*, 564 F.3d 305, 313-14 (3d Cir.), *cert. denied*, 130 S. Ct. 563 (2009); *United States v. Dunphy*, 551 F.3d 247, 252-55 (4th Cir.), *cert. denied*, 129 S. Ct. 240 (2009); *United States v. Cunningham*, 554 F.3d 703, 706-07 (7th Cir.), *cert. denied*, 129 S. Ct. 2826, 2840 (2009); *United States v. Starks*, 551 F.3d 839, 841-42 (8th Cir.), *cert. denied*, 129 S. Ct. 2746 (2009); *United States v. Rhodes*, 549 F.3d 833, 839-41 (10th Cir. 2008), *cert. denied*, 129 S. Ct. 2052 (2009); *United States v. Melvin*, 556 F.3d 1190, 1192-93 (11th Cir.), *cert. denied*, 129 S. Ct. 2382 (2009). *But see United States v. Hicks*, 472 F.3d 1167, 1169-72 (9th Cir. 2007). In *United States v. Fox*, 583 F.3d 596 (9th Cir. 2009), the Ninth Circuit granted initial hearing en banc to consider whether to overrule *Hicks*; that review has been stayed pending the Court's resolution of the *Dillon* case.

[11] Within 30 days of entry of judgment, the chief judge of the district is required to ensure the Commission is provided with copies of (1) the charging document; (2) the plea agreement (if any); the presentence report; (4) the judgment and commitment order; and (5) the statement of reasons form. 28 U.S.C. § 994(w). The Commission extracts information from these documents to complete its datasets which provide the basis for its analytical research, guideline promulgation, and other work product.

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majority of crack cocaine offenders. In 1992, 91.4 percent of crack cocaine offenders were Black. In 2000, 84.7 percent were Black and in 2009, 79.0 percent were Black.

By comparison, the number of Hispanic offenders involved in crack or powder cocaine drug trafficking has increased since 1992. In 1992, 39.8 percent of powder cocaine offenders were Hispanic and 5.3 percent of crack cocaine offenders were Hispanic. In 2000, 50.8 percent of powder cocaine offenders were Hispanic and 9.0 percent of crack cocaine offenders were Hispanic. In 2009, Hispanics accounted for 53.2 percent of all powder cocaine offenders and 10.3 percent of crack cocaine offenders.

3. Based upon your understanding, how many criminal currently serving [in federal prison] would be considered low-level dealers as opposed to drug kingpins?

ANSWER: The Commission does not categorize drug offenders into "low level dealers" or "drug kingpins." In its 2007 Report to Congress on Cocaine and Federal Sentencing Policy ("2007 Report"), the Commission discussed the general drug trafficking patterns for cocaine and noted that there are five broad categories of functions involved in cocaine distribution that can be targeted by law enforcement: (1) smugglers; (2) high-level dealers; (3) mid-level dealers; (4) retail dealers; and (5) users.[12]

As part of its 2007 Report, the Commission conducted its own analysis that was consistent with the presence of a "pyramidal structure" in drug trafficking, with the largest numbers of federal cocaine offenders performing lower functions.[13] As part of its analysis, the Commission identified 21 offender functions performed in cocaine drug trafficking for purposes of its special coding project conducted for the report.[14] These functions were then placed into eight function categories for ease of analysis and presentation.[15] These categories, listed from most to least culpable included:

1. Importer/High-level Supplier
2. Organizer/Leader/Grower/Manufacturer/Financier/Money Launderer
3. Wholesaler
4. Manager/Supervisor
5. Pilot/Captain/Bodyguard/Chemist/Cook/Broker/Steerer
6. Street-level Dealer
7. Courier/Mule
8. Renter/Loader/Lookout/Enabler/User/All Other[16]

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[12] 2007 Report at 83, 84 (citing Peter Reuter, RAND Corporation, *Do Middle Markets for Drugs Constitute an Attractive Target for Law Enforcement?* (April 2003) available through the National Criminal Justice Reference Service at htto://www.ncjrs.gov) ("RAND Study"). *See also*, STRIDE Abstract, http://www.dea.giv/foia/stride.html (discussing model for drug trafficking consistent with the RAND study).
[13] 2007 report at 85.
[14] *See* 2007 Report at A-2. The functions also are defined in the 2007 Report. *Id.*
[15] *See* 2007 Report at A-3. The functions and categories set forth in the 2007 Report coincide with the functions and categories set forth in the Commission's 2002 Report to Congress on Federal Cocaine Sentencing Policy (2002 Report).
[16] *See, e.g.*, 2007 Report at Figure 2-4, p.19.

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Assignment of a cocaine offender to one of those 21 categories (and subsequently, the eight function categories) was based on the most serious conduct described in the offense conduct section of the presentence report.[17] In the 2007 Report, the Commission noted that 7.6 percent of powder cocaine offenders functioned as importers or high-level suppliers as their most serious function, and 1.8 percent of crack cocaine offenders performed those functions.[18] The most serious function for more than half of crack cocaine offenders (55.4%) was street-level dealer (compared with 7.3% of powder cocaine offenders). The most serious function for 22.7 percent of crack cocaine offenders was whole-sale dealer (compared to 24.1% of powder cocaine offenders). By comparison, 33.1 percent of all powder cocaine offenders performed as couriers/mules for their most serious function (compared to 1.4% of all crack cocaine offenders studied).[19]

The Commission also looked at the most common function performed by cocaine offenders.[20] Data reviewed for the 2007 Report indicated that 92.2 percent of all powder cocaine offenders most commonly performed a wholesaler function whereas 63.1 percent of all crack cocaine offenders most commonly performed a wholesaler function.[21] The Commission defined a wholesaler as anyone who "sells one ounce or more in a single transaction, sells any amount to another dealer, buys two ounces in a single transaction, possesses two ounces or more" of cocaine, in any form.[22] This definition is consistent with observed cocaine drug trafficking patterns including the middle market functions of "taking the bundle [of imported drugs] roughly from one kilogram to one ounce."[23]

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[17] 2007 Report at A-3.
[18] 2007 Report at Figure 2-4, p.19.
[19] For a complete analysis of the distribution of offenders by most serious function, see Figures 2-4 through 2-6 of the 2007 Report.
[20] 2007Report at 24, Fig. 2-9.
[21] *Id.*
[22] 2007 Report at A-3.
[23] 2007 Report at 84 (citing RAND Study). In its 2007 Report, the Commission observed that almost all cocaine smuggled into the United States is in the powder form and purchases of cocaine cluster at one kilogram, one ounce, and one gram levels that tend to distinguish the different levels of cocaine markets. *Id.* at 83.

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Table A
Summary of Prospective Sentencing Impact and Prison Impact
Modification of Statutory Penalties and Sentencing Guidelines
for Simple Possession Cases[1]

Crack Cocaine Drug Offenses Five and Ten Year Mandatory Minimum Penalty Thresholds	Total Cases	Number of Cases Affected	Percent of Cases Affected[2]	Affected Cases: Current Average Sentence (months)	Affected Cases: Estimated New Average Sentence (months)
None	24	20	83.3%	59	3

Annual Estimated Changes to Hypothetical Prison Population[3]

Years After Implementation	1 year	2 years	3 years	4 years	5 years	6 years	7 years	10 years
Number of Prison Beds	-20	-38	-56	-70	-75	-77	-78	-81

[1] This analysis estimates the impact of the modification to existing statutes accomplished through this legislation. This analysis also assumes changes to the Sentencing Guidelines as a result of this amendment. All cases involving crack cocaine as the only drug type which had a conviction under 21 U.S.C. § 844 (Simple Possession) and the corresponding statutory minimum was 60 months. Fiscal year 2008 data is used to estimate the impact on offenders convicted in the future.

[2] The percent of affected cases indicates the proportion of cases affected by the specific change in the quantity ratio.

[3] The prison impact model estimated the change to a hypothetical "steady-state" prison population resulting from changes that affect prison sentence length. The concept of a "steady-state" population envisions a prison system in homeostasis. That is, the number of new, in-coming inmates is assumed to be equal to the number of out-going (released) inmates and all beds are assumed to be occupied. In order to isolate the changes to the system caused by the specific policy under review, a number of factors are artificially held constant in the model. For example, arrest rates, charging practices, conviction rates, other sentencing polities, *etc.* are assumed to remain constant over time.

Other assumptions incorporated into the prison impact model include: 1) defendants are re-sentenced to a position in the estimated new guideline range that is equivalent to the position of the sentence in the original guideline range; 2) defendants earn the maximum allowable good-time (currently 54 days per year served for imposed sentences greater than one year but not life imprisonment); and 3) defendants serve the minimum of A) the sentence imposed less the maximum allowable good conduct time, or B) their estimated remaining life expectancy, based upon an actuary table incorporating age, race and sex.

SOURCE: United States Sentencing Commission, Prison and Sentencing Impact Model, Fiscal Year 2008 Datafile.

Appendix A

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Table B-1
Summary of Prospective Sentencing Impact and Prison Impact
Modification of Statutory Penalties and Sentencing Guidelines
Crack Cocaine 500g = 5 year Mandatory Minimum[1]
Ratio: 1:1

Crack Cocaine Drug Offenses Five and Ten Year Mandatory Minimum Penalty Thresholds	Total Cases	Number of Cases Affected	Percent of Cases Affected[2]	Affected Cases: Current Average Sentence (months)	Affected Cases: Estimated New Average Sentence (months)
Only Crack Cocaine = 500g/5kg	3,292	2,995	91.0%	106	46
Multiple Drug Cases = 500g/5kg	1,592	1,206	75.8%	127	69
TOTAL	**4,884**	**4,201**	**86.0%**	**112**	**53**

Annual Estimated Changes to Hypothetical Prison Population[3]

Years After Implementation	1 year	2 years	3 years	4 years	5 years	6 years	7 years	10 years
Number of Prison Beds	-639	-2,234	-4,216	-6,176	-7,773	-9,219	-10,608	-13,561

[1] This analysis estimates the impact of the modification to existing statutes accomplished through this legislation. This analysis also assumes changes to the Sentencing Guidelines as a result of this amendment. All cases involving crack cocaine which were sentenced under USSG §2D1.1 (Drug Trafficking) with drug weights available for all drugs involved in the case are included in this analysis. Fiscal year 2008 data is used to estimate the impact on offenders convicted in the future.

[2] The percent of affected cases indicates the proportion of cases affected by the specific change in the quantity ratio.

[3] The prison impact model estimated the change to a hypothetical "steady-state" prison population resulting from changes that affect prison sentence length. The concept of a "steady-state" population envisions a prison system in homeostasis. That is, the number of new, in-coming inmates is assumed to be equal to the number of out-going (released) inmates and all beds are assumed to be occupied. In order to isolate the changes to the system caused by the specific policy under review, a number of factors are artificially held constant in the model. For example, arrest rates, charging practices, conviction rates, other sentencing polities, *etc.* are assumed to remain constant over time.

Assumptions incorporated into the prison impact model include: 1) defendants are re-sentenced to a position in the estimated new guideline range that is equivalent to the position of the sentence in the original guideline range; 2) defendants earn the maximum allowable good-time (currently 54 days per year served for imposed sentences greater than one year but not life imprisonment); and 3) defendants serve the minimum of A) the sentence imposed less the maximum allowable good conduct time, or B) their estimated remaining life expectancy, based upon an actuary table incorporating age, race and sex.

SOURCE: United States Sentencing Commission, Prison and Sentencing Impact Model, Fiscal Year 2008 Datafile.

Appendix A

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Table B-2
Summary of Prospective Sentencing Impact and Prison Impact
Modification of Statutory Penalties and Sentencing Guidelines
Crack Cocaine 400g and Powder Cocaine 400g = 5 Year Mandatory Minimum[1]
Ratio: 1:1

Crack Cocaine Drug Offenses Five and Ten Year Mandatory Minimum Penalty Thresholds	Total Cases	Number of Cases Affected	Percent of Cases Affected[2]	Affected Cases: Current Average Sentence (months)	Affected Cases: Estimated New Average Sentence (months)
Only Crack Cocaine = 400g/4kg	3,292	2,992	90.9%	106	48
Only Powder Cocaine = 400g/4kg	3,575	775	21.7%	62	78
Multiple Drug Cases	2,702	1,332	49.3%	121	75
TOTAL	**9,569**	**5,099**	**53.3%**	**104**	**59**

Annual Estimated Changes to Hypothetical Prison Population[3]

Years After Implementation	1 year	2 years	3 years	4 years	5 years	6 years	7 years	10 years
Number of Prison Beds	-542	-2,024	-3,804	-5,604	-6,966	-8,282	-9,554	-12,140

[1] This analysis estimates the impact of the modification to existing statutes accomplished through this legislation. This analysis also assumes changes to the Sentencing Guidelines as a result of this amendment. All cases involving crack cocaine and powder cocaine which were sentenced under USSG §2D1.1 (Drug Trafficking) with drug weights available for all drugs involved in the case are included in this analysis. Fiscal year 2008 data is used to estimate the impact on offenders convicted in the future.

[2] The percent of affected cases indicates the proportion of cases affected by the specific change in the quantity ratio.

[3] The prison impact model estimated the change to a hypothetical "steady-state" prison population resulting from changes that affect prison sentence length. The concept of a "steady-state" population envisions a prison system in homeostasis. That is, the number of new, in-coming inmates is assumed to be equal to the number of out-going (released) inmates and all beds are assumed to be occupied. In order to isolate the changes to the system caused by the specific policy under review, a number of factors are artificially held constant in the model. For example, arrest rates, charging practices, conviction rates, other sentencing polities, *etc.* are assumed to remain constant over time.

Other assumptions incorporated into the prison impact model include: 1) defendants are re-sentenced to a position in the estimated new guideline range that is equivalent to the position of the sentence in the original guideline range; 2) defendants earn the maximum allowable good-time (currently 54 days per year served for imposed sentences greater than one year but not life imprisonment); and 3) defendants serve the minimum of A) the sentence imposed less the maximum allowable good conduct time, or B) their estimated remaining life expectancy, based upon an actuary table incorporating age, race and sex.

SOURCE: United States Sentencing Commission, Prison and Sentencing Impact Model, Fiscal Year 2008 Datafile.

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Table B-3
Summary of Prospective Sentencing Impact and Prison Impact
Modification of Statutory Penalties and Sentencing Guidelines
Crack Cocaine 250g and Powder Cocaine 250g = 5 Year Mandatory Minimum[1]
Ratio 1:1

Crack Cocaine Drug Offenses Five and Ten Year Mandatory Minimum Penalty Thresholds	Total Cases	Number of Cases Affected	Percent of Cases Affected[2]	Affected Cases: Current Average Sentence (months)	Affected Cases: Estimated New Average Sentence (months)
Only Crack Cocaine = 250g/2.5kg	3,292	2,984	90.6%	106	51
Only Powder Cocaine = 250g/2.5kg	3,575	2,042	57.1%	66	85
Multiple Drug Cases	2,702	1,578	58.4%	115	85
TOTAL	**9,569**	**6,604**	**69.0%**	**96**	**70**

Annual Estimated Changes to Hypothetical Prison Population[3]

Years After Implementation	1 year	2 years	3 years	4 years	5 years	6 years	7 years	10 years
Number of Prison Beds	**-370**	**-1,558**	**-2,893**	**-4,297**	**-5,235**	**-6,244**	**-7,241**	**-9,065**

[1] This analysis estimates the impact of the modification to existing statutes accomplished through this legislation. This analysis also assumes changes to the Sentencing Guidelines as a result of this amendment. All cases involving crack cocaine and powder cocaine which were sentenced under USSG §2D1.1 (Drug Trafficking) with drug weights available for all drugs involved in the case are included in this analysis. Fiscal year 2008 data is used to estimate the impact on offenders convicted in the future.

[2] The percent of affected cases indicates the proportion of cases affected by the specific change in the quantity ratio.

[3] The prison impact model estimated the change to a hypothetical "steady-state" prison population resulting from changes that affect prison sentence length. The concept of a "steady-state" population envisions a prison system in homeostasis. That is, the number of new, in-coming inmates is assumed to be equal to the number of out-going (released) inmates and all beds are assumed to be occupied. In order to isolate the changes to the system caused by the specific policy under review, a number of factors are artificially held constant in the model. For example, arrest rates, charging practices, conviction rates, other sentencing polities, *etc.* are assumed to remain constant over time.

Other assumptions incorporated into the prison impact model include: 1) defendants are re-sentenced to a position in the estimated new guideline range that is equivalent to the position of the sentence in the original guideline range; 2) defendants earn the maximum allowable good-time (currently 54 days per year served for imposed sentences greater than one year but not life imprisonment); and 3) defendants serve the minimum of A) the sentence imposed less the maximum allowable good conduct time, or B) their estimated remaining life expectancy, based upon an actuary table incorporating age, race and sex.

SOURCE: United States Sentencing Commission, Prison and Sentencing Impact Model, Fiscal Year 2008 Datafile.

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Table B-4
Summary of Prospective Sentencing Impact and Prison Impact
Modification of Statutory Penalties and Sentencing Guidelines
Crack Cocaine 100g and Powder Cocaine 100g = 5 Year Mandatory Minimum[1]
Ratio: 1:1

Crack Cocaine Drug Offenses Five and Ten Year Mandatory Minimum Penalty Thresholds	Total Cases	Number of Cases Affected	Percent of Cases Affected[2]	Affected Cases: Current Average Sentence (months)	Affected Cases: Estimated New Average Sentence (months)
Only Crack Cocaine = 100g/1kg	3,292	2,923	88.8%	104	61
Only Powder Cocaine = 100g/1kg	3,575	2,970	83.1%	70	100
Multiple Drug Cases	2,702	1,805	66.8%	111	104
TOTAL	**9,569**	**7,698**	**80.4%**	**92**	**86**

Annual Estimated Changes to Hypothetical Prison Population[3]

Years After Implementation	1 year	2 years	3 years	4 years	5 years	6 years	7 years	10 years
Number of Prison Beds	-116	-561	-1,161	-1,716	-1,970	-2,191	-2,519	-2,738

[1] This analysis estimates the impact of the modification to existing statutes accomplished through this legislation. This analysis also assumes changes to the Sentencing Guidelines as a result of this amendment. All cases involving crack cocaine and powder cocaine which were sentenced under USSG §2D1.1 (Drug Trafficking) with drug weights available for all drugs involved in the case are included in this analysis. Fiscal year 2008 data is used to estimate the impact on offenders convicted in the future.

[2] The percent of affected cases indicates the proportion of cases affected by the specific change in the quantity ratio.

[3] The prison impact model estimated the change to a hypothetical "steady-state" prison population resulting from changes that affect prison sentence length. The concept of a "steady-state" population envisions a prison system in homeostasis. That is, the number of new, in-coming inmates is assumed to be equal to the number of out-going (released) inmates and all beds are assumed to be occupied. In order to isolate the changes to the system caused by the specific policy under review, a number of factors are artificially held constant in the model. For example, arrest rates, charging practices, conviction rates, other sentencing polities, *etc.* are assumed to remain constant over time.

Other assumptions incorporated into the prison impact model include: 1) defendants are re-sentenced to a position in the estimated new guideline range that is equivalent to the position of the sentence in the original guideline range; 2) defendants earn the maximum allowable good-time (currently 54 days per year served for imposed sentences greater than one year but not life imprisonment); and 3) defendants serve the minimum of A) the sentence imposed less the maximum allowable good conduct time, or B) their estimated remaining life expectancy, based upon an actuary table incorporating age, race and sex.

SOURCE: United States Sentencing Commission, Prison and Sentencing Impact Model, Fiscal Year 2008 Datafile.

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Table B-5
Summary of Prospective Sentencing Impact and Prison Impact
Modification of Statutory Penalties and Sentencing Guidelines
Crack Cocaine 100g = 5 year Mandatory Minimum[1]
Ratio: 5:1

Crack Cocaine Drug Offenses Five and Ten Year Mandatory Minimum Penalty Thresholds	Total Cases	Number of Cases Affected	Percent of Cases Affected[2]	Affected Cases: Current Average Sentence (months)	Affected Cases: Estimated New Average Sentence (months)
Only Crack Cocaine = 100g/1kg	3,292	2,923	88.8%	104	61
Multiple Drug Cases = 100g/1kg	1,592	1,149	72.2%	124	80
TOTAL	**4,884**	**4,072**	**83.4%**	**110**	**66**

Annual Estimated Changes to Hypothetical Prison Population[3]

Years After Implementation	1 year	2 years	3 years	4 years	5 years	6 years	7 years	10 years
Number of Prison Beds	-272	-1,031	-2,274	-3,561	-4,715	-5,800	-6,913	-9,247

[1] This analysis estimates the impact of the modification to existing statutes accomplished through this legislation. This analysis also assumes changes to the Sentencing Guidelines as a result of this amendment. All cases involving crack cocaine which were sentenced under USSG §2D1.1 (Drug Trafficking) with drug weights available for all drugs involved in the case are included in this analysis. Fiscal year 2008 data is used to estimate the impact on offenders convicted in the future.

[2] The percent of affected cases indicates the proportion of cases affected by the specific change in the quantity ratio.

[3] The prison impact model estimated the change to a hypothetical "steady-state" prison population resulting from changes that affect prison sentence length. The concept of a "steady-state" population envisions a prison system in homeostasis. That is, the number of new, in-coming inmates is assumed to be equal to the number of out-going (released) inmates and all beds are assumed to be occupied. In order to isolate the changes to the system caused by the specific policy under review, a number of factors are artificially held constant in the model. For example, arrest rates, charging practices, conviction rates, other sentencing polities, *etc.* are assumed to remain constant over time.

Assumptions incorporated into the prison impact model include: 1) defendants are re-sentenced to a position in the estimated new guideline range that is equivalent to the position of the sentence in the original guideline range; 2) defendants earn the maximum allowable good-time (currently 54 days per year served for imposed sentences greater than one year but not life imprisonment); and 3) defendants serve the minimum of A) the sentence imposed less the maximum allowable good conduct time, or B) their estimated remaining life expectancy, based upon an actuary table incorporating age, race and sex.

SOURCE: United States Sentencing Commission, Prison and Sentencing Impact Model, Fiscal Year 2008 Datafile.

Appendix A

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Table B-6
Summary of Prospective Sentencing Impact and Prison Impact
Modification of Statutory Penalties and Sentencing Guidelines
Crack Cocaine 50g = 5 year Mandatory Minimum[1]
Ratio: 10:1

Crack Cocaine Drug Offenses Five and Ten Year Mandatory Minimum Penalty Thresholds	Total Cases	Number of Cases Affected	Percent of Cases Affected[2]	Affected Cases: Current Average Sentence (months)	Affected Cases: Estimated New Average Sentence (months)
Only Crack Cocaine = 50g/500g	3,292	2,831	86.0%	102	69
Multiple Drug Cases = 50g/500g	1,592	1,088	68.3%	121	86
TOTAL	**4,884**	**3,919**	**80.2%**	**108**	**74**

Annual Estimated Changes to Hypothetical Prison Population[3]

Years After Implementation	1 year	2 years	3 years	4 years	5 years	6 years	7 years	10 years
Number of Prison Beds	-158	-567	-1,421	-2,340	-3,084	-3,900	-4,780	-6,687

[1] This analysis estimates the impact of the modification to existing statutes accomplished through this legislation. This analysis also assumes changes to the Sentencing Guidelines as a result of this amendment. All cases involving crack cocaine which were sentenced under USSG §2D1.1 (Drug Trafficking) with drug weights available for all drugs involved in the case are included in this analysis. Fiscal year 2008 data is used to estimate the impact on offenders convicted in the future.

[2] The percent of affected cases indicates the proportion of cases affected by the specific change in the quantity ratio.

[3] The prison impact model estimated the change to a hypothetical "steady-state" prison population resulting from changes that affect prison sentence length. The concept of a "steady-state" population envisions a prison system in homeostasis. That is, the number of new, in-coming inmates is assumed to be equal to the number of out-going (released) inmates and all beds are assumed to be occupied. In order to isolate the changes to the system caused by the specific policy under review, a number of factors are artificially held constant in the model. For example, arrest rates, charging practices, conviction rates, other sentencing polities, *etc.* are assumed to remain constant over time.

Assumptions incorporated into the prison impact model include: 1) defendants are re-sentenced to a position in the estimated new guideline range that is equivalent to the position of the sentence in the original guideline range; 2) defendants earn the maximum allowable good-time (currently 54 days per year served for imposed sentences greater than one year but not life imprisonment); and 3) defendants serve the minimum of A) the sentence imposed less the maximum allowable good conduct time, or B) their estimated remaining life expectancy, based upon an actuary table incorporating age, race and sex.

SOURCE: United States Sentencing Commission, Prison and Sentencing Impact Model, Fiscal Year 2008 Datafile.

Appendix A

57626.029

Table B-7
Summary of Prospective Sentencing Impact and Prison Impact
Modification of Statutory Penalties and Sentencing Guidelines
Crack Cocaine 25g = 5 year Mandatory Minimum[1]
Ratio: 20:1

Crack Cocaine Drug Offenses Five and Ten Year Mandatory Minimum Penalty Thresholds	Total Cases	Number of Cases Affected	Percent of Cases Affected[2]	Affected Cases: Current Average Sentence (months)	Affected Cases: Estimated New Average Sentence (months)
Only Crack Cocaine = 25g/250g	3,292	2,287	69.5%	99	72
Multiple Drug Cases = 25g/250g	1,592	805	50.6%	121	91
TOTAL	**4,884**	**3,092**	**63.3%**	**105**	**77**

Annual Estimated Changes to Hypothetical Prison Population[3]

Years After Implementation	1 year	2 years	3 years	4 years	5 years	6 years	7 years	10 years
Number of Prison Beds	**-64**	**-283**	**-770**	**-1,301**	**-1,723**	**-2,205**	**-2,732**	**-4,119**

[1] This analysis estimates the impact of the modification to existing statutes accomplished through this legislation. This analysis also assumes changes to the Sentencing Guidelines as a result of this amendment. All cases involving crack cocaine which were sentenced under USSG §2D1.1 (Drug Trafficking) with drug weights available for all drugs involved in the case are included in this analysis. Fiscal year 2008 data is used to estimate the impact on offenders convicted in the future.

[2] The percent of affected cases indicates the proportion of cases affected by the specific change in the quantity ratio.

[3] The prison impact model estimated the change to a hypothetical "steady-state" prison population resulting from changes that affect prison sentence length. The concept of a "steady-state" population envisions a prison system in homeostasis. That is, the number of new, in-coming inmates is assumed to be equal to the number of out-going (released) inmates and all beds are assumed to be occupied. In order to isolate the changes to the system caused by the specific policy under review, a number of factors are artificially held constant in the model. For example, arrest rates, charging practices, conviction rates, other sentencing polities, *etc.* are assumed to remain constant over time.

Assumptions incorporated into the prison impact model include: 1) defendants are re-sentenced to a position in the estimated new guideline range that is equivalent to the position of the sentence in the original guideline range; 2) defendants earn the maximum allowable good-time (currently 54 days per year served for imposed sentences greater than one year but not life imprisonment); and 3) defendants serve the minimum of A) the sentence imposed less the maximum allowable good conduct time, or B) their estimated remaining life expectancy, based upon an actuary table incorporating age, race and sex.

SOURCE: United States Sentencing Commission, Prison and Sentencing Impact Model, Fiscal Year 2008 Datafile.

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Table B-8
Summary of Prospective Sentencing Impact and Prison Impact
Modification of Statutory Penalties and Sentencing Guidelines
Crack Cocaine 20g and Powder Cocaine 400g = 5 Year Mandatory Minimum[1]
Ratio: 20:1

Crack Cocaine Drug Offenses Five and Ten Year Mandatory Minimum Penalty Thresholds	Total Cases	Number of Cases Affected	Percent of Cases Affected[2]	Affected Cases: Current Average Sentence (months)	Affected Cases: Estimated New Average Sentence (months)
Only Crack Cocaine = 20g/200g	3,292	1,928	58.6%	98	73
Only Powder Cocaine = 400g/4kg	3,575	775	21.7%	62	78
Multiple Drug Cases	2,702	858	31.8%	113	97
TOTAL	**9,569**	**3,561**	**37.2%**	**94**	**80**

Annual Estimated Changes to Hypothetical Prison Population[3]

Years After Implementation	1 year	2 years	3 years	4 years	5 years	6 years	7 years	10 years
Number of Prison Beds	**-15**	**-158**	**-437**	**-737**	**-909**	**-1,178**	**-1,474**	**-2,340**

[1] This analysis estimates the impact of the modification to existing statutes accomplished through this legislation. This analysis also assumes changes to the Sentencing Guidelines as a result of this amendment. All cases involving crack cocaine and powder cocaine which were sentenced under USSG §2D1.1 (Drug Trafficking) with drug weights available for all drugs involved in the case are included in this analysis. Fiscal year 2008 data is used to estimate the impact on offenders convicted in the future.

[2] The percent of affected cases indicates the proportion of cases affected by the specific change in the quantity ratio.

[3] The prison impact model estimated the change to a hypothetical "steady-state" prison population resulting from changes that affect prison sentence length. The concept of a "steady-state" population envisions a prison system in homeostasis. That is, the number of new, in-coming inmates is assumed to be equal to the number of out-going (released) inmates and all beds are assumed to be occupied. In order to isolate the changes to the system caused by the specific policy under review, a number of factors are artificially held constant in the model. For example, arrest rates, charging practices, conviction rates, other sentencing polities, *etc.* are assumed to remain constant over time.

Other assumptions incorporated into the prison impact model include: 1) defendants are re-sentenced to a position in the estimated new guideline range that is equivalent to the position of the sentence in the original guideline range; 2) defendants earn the maximum allowable good-time (currently 54 days per year served for imposed sentences greater than one year but not life imprisonment); and 3) defendants serve the minimum of A) the sentence imposed less the maximum allowable good conduct time, or B) their estimated remaining life expectancy, based upon an actuary table incorporating age, race and sex.

SOURCE: United States Sentencing Commission, Prison and Sentencing Impact Model, Fiscal Year 2008 Datafile.

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FY2009 Crack Cocaine Cases
Assumes 28 grams = 5 Year and 280 grams = 10 Year Mandatory Minimums
Assumes 28 grams = Base Offense Level 24 and 280 grams = Base Offense Level 30

Sentencing impact:

	Affected Cases					All Cases			
28g = 5 Years and set at BOL 24	Number Affected	Percent Affected	Current Average Sentence	New Average Sentence	Percent Change	Total Number	Current Average Sentence	New Average Sentence	Percent Change
280g = 10 Years and set at BOL 30	3,421	74.1	110 months	75 months	-31.8%	4,618	117 months	92 months	-21.4%

Prison impact:

	Estimated Cumulative Beds Saved							
28g = 5 Years and set at BOL 24	1 year after effective date	2 years after effective date	3 years after effective date	4 years after effective date	5 years after effective date	6 years after effective date	7 years after effective date	10 years after effective date
280g = 10 Years and set at BOL 30	163	619	1,294	1,912	2,625	3,393	4,164	5,874

Source: U.S. Sentencing Commission Prison Impact Model, FY2009 datafile.
Cases were selected if crack cocaine was involved in the sentencing either as a primary drug or a secondary drug.
The Commission's prison impact assessment cannot model possible application of aggravating or mitigating factors included in S.1789.

Appendix B

FY2009 Crack Cocaine Cases
Assumes 28 grams = 5 Year and 280 grams = 10 Year Mandatory Minimums
Assumes 28 grams = Base Offense Level 26 and 280 grams = Base Offense Level 32

Sentencing impact:

	Affected Cases					All Cases			
	Number Affected	**Percent Affected**	**Current Average Sentence**	**New Average Sentence**	**Percent Change**	**Total Number**	**Current Average Sentence**	**New Average Sentence**	**Percent Change**
28g = 5 Years and set at BOL 26 280g = 10 Years and set at BOL 32	2,918	63.2	106 months	79 months	-25.5%	4,618	117 months	101 months	-13.7%

Prison impact:

	Estimated Cumulative Beds Saved							
	1 year after effective date	**2 years after effective date**	**3 years after effective date**	**4 years after effective date**	**5 years after effective date**	**6 years after effective date**	**7 years after effective date**	**10 years after effective date**
28g = 5 Years and set at BOL 26 280g = 10 Years and set at BOL 32	67	282	725	1,189	1,547	1,985	2,472	3,826

Source: U.S. Sentencing Commission Prison Impact Model, FY2009 datafile.
Cases were selected if crack cocaine was involved in the sentencing either as a primary drug or a secondary drug.
This prison impact models only the guideline amendment to the Drug Quantity Table at USSG §2D1.1. The Commission's prison impact assessment cannot model possible application of aggravating or mitigating factors included in S.1789.

Appendix B

U.S. Sentencing Commission
Preliminary Crack Cocaine Retroactivity Data Report

May 2010 Data

Appendix C

Introduction

As part of its ongoing mission, the United States Sentencing Commission provides Congress, the judiciary, the executive branch, and the general public with data extracted from and based on sentencing documents submitted by courts to the Commission.[1] Data is reported on an annual basis in the Commission's *Annual Report* and *Sourcebook of Federal Sentencing Statistics.*[2]

The Commission also reports preliminary data for an on-going fiscal year in order to provide real-time analysis of sentencing practices in the federal courts. Since 2005, the Commission has published a series of quarterly reports that are similar in format and methodology to tables and figures produced in the *Sourcebook of Federal Sentencing Statistics* or in the Commission's *Final Report on the Impact of the United States v. Booker on Federal Sentencing.*[3] The quarterly reports contain cumulative data for the on-going fiscal year (i.e., data from the start of the fiscal year through the most current quarter).

This report is another in the Commission's efforts to provide analysis of federal sentencing practices. It provides data concerning recent court decisions considering motions to reduce the length of imprisonment for certain offenders convicted of offenses involving crack cocaine prior to November 1, 2007.

On May 1, 2007, pursuant to 28 U.S.C. § 994(a) and (p), the Commission submitted to Congress amendments to the federal sentencing guidelines that became effective on November 1, 2007. One of those amendments, Amendment 706, modified the drug quantity thresholds in the Drug Quantity Table of §2D1.1 so as to assign, for crack cocaine offenses, base offense levels corresponding to guideline ranges that include the statutory mandatory minimum penalties. Crack cocaine offenses for quantities above and below the mandatory minimum threshold quantities similarly were adjusted downward by two levels. The amendment also included a mechanism to determine a combined base offense level in an offense involving crack cocaine and other controlled substances.

On December 11, 2007, the Commission voted to promulgate Amendment 713, which added Amendment 706 as amended by 711, to the amendments listed in subsection (c) in §1B1.10 that apply retroactively. The Commission voted to make Amendment 713 effective on March 3, 2008. As a result, some incarcerated offenders are eligible to receive a reduction in their sentence under 18 U.S.C. § 3582(c)(2) pursuant to Amendment 706.

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[1] In each felony or Class A misdemeanor case sentenced in federal court, sentencing courts are required to submit the following documents to the Commission: the judgment and commitment order, the statement of reasons, the plea agreement (if applicable), the indictment or other charging document, and the presentence report. See 28 U.S.C. § 994(w).

[2] See the Commission's website, www.ussc.gov, for electronic copies of the 1995-2007 *Annual Report* and *Sourcebook of Federal Sentencing Statistics.*

[3] See www.ussc.gov/bf.htm for an electronic copy of the Commission's *Final Report on the Impact of United States v. Booker on Federal Sentencing.*

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This report provides information on all cases reported to the Commission in which the court considered a motion to reduce a sentence under 18 U.S.C. § 3582(c)(2) for an offender convicted of an offense involving crack cocaine. The data in this report represents information concerning motions decided through May 19, 2010, and for which court documentation was received, coded and edited at the U.S. Sentencing Commission by May 24, 2010. Users of this information are cautioned that the data are preliminary only and subject to change as the Commission receives, analyzes, and reports on additional cases.

In particular, the reader is cautioned with respect to drawing conclusions based on data concerning the denial of motions for sentence reduction pursuant to the crack cocaine amendment, as the judicial districts are employing various methods to prioritize the review of these motions. For example, in many districts, contested motions have not been decided by the court. Consequently, the data the Commission has received to date concerning cases in which the motion for a sentence reduction was denied may not be representative of the decisions that ultimately may be made in all districts or the nation as a whole.

Appendix C

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Table 1

GEOGRAPHICAL DISTRIBUTION OF APPLICATION OF RETROACTIVE CRACK COCAINE AMENDMENT BY DISTRICT

District	N	Granted N	Granted %	Denied N	Denied %
TOTAL	24,058	15,778	65.6	8,280	34.4
Eastern Virginia	1,538	1,002	65.1	536	34.9
Middle Florida	1,323	718	54.3	605	45.7
Western North Carolina	931	418	44.9	513	55.1
South Carolina	924	720	77.9	204	22.1
Eastern North Carolina	855	471	55.1	384	44.9
Western Virginia	836	515	61.6	321	38.4
Western Texas	643	438	68.1	205	31.9
Eastern Texas	560	436	77.9	124	22.1
Northern Florida	556	236	42.4	320	57.6
Southern Florida	549	269	49.0	280	51.0
Eastern Missouri	517	450	87.0	67	13.0
Southern New York	453	189	41.7	264	58.3
Northern Texas	450	268	59.6	182	40.4
Eastern Louisiana	431	199	46.2	232	53.8
Northern West Virginia	430	425	98.8	5	1.2
Southern Georgia	429	215	50.1	214	49.9
Maryland	422	307	72.7	115	27.3
Central Illinois	410	158	38.5	252	61.5
Middle Georgia	392	306	78.1	86	21.9
Western Missouri	391	226	57.8	165	42.2
Southern Texas	385	278	72.2	107	27.8
Southern Alabama	377	253	67.1	124	32.9
Southern West Virginia	358	260	72.6	98	27.4
Western Louisiana	353	203	57.5	150	42.5
Northern Ohio	344	308	89.5	36	10.5
Middle Pennsylvania	336	216	64.3	120	35.7
Southern Illinois	311	278	89.4	33	10.6
Nebraska	305	244	80.0	61	20.0
Eastern Tennessee	294	180	61.2	114	38.8
Northern Illinois	279	245	87.8	34	12.2
Middle North Carolina	277	149	53.8	128	46.2
Connecticut	273	174	63.7	99	36.3
Northern Indiana	271	218	80.4	53	19.6
Northern Alabama	270	130	48.1	140	51.9
Eastern Pennsylvania	265	216	81.5	49	18.5
Minnesota	263	184	70.0	79	30.0
Puerto Rico	262	94	35.9	168	64.1
Northern Iowa	261	147	56.3	114	43.7
Eastern Michigan	245	217	88.6	28	11.4
Southern Ohio	245	210	85.7	35	14.3
Southern Mississippi	235	197	83.8	38	16.2
Western Michigan	234	122	52.1	112	47.9
Western New York	218	137	62.8	81	37.2
District of Columbia	217	206	94.9	11	5.1
Western Tennessee	211	141	66.8	70	33.2
Eastern New York	197	99	50.3	98	49.7
Massachusetts	195	128	65.6	67	34.4
Kansas	195	192	98.5	3	1.5
Western Kentucky	181	89	49.2	92	50.8
Western Wisconsin	178	126	70.8	52	29.2
Southern Iowa	168	99	58.9	69	41.1
Northern New York	160	113	70.6	47	29.4
Eastern Arkansas	159	104	65.4	55	34.6
Eastern Kentucky	153	79	51.6	74	48.4
Northern Mississippi	151	151	100.0	0	0.0
Eastern Wisconsin	142	101	71.1	41	28.9
Middle Alabama	136	129	94.9	7	5.1
Colorado	131	69	52.7	62	47.3
New Jersey	126	106	84.1	20	15.9
Northern Georgia	123	73	59.3	50	40.7
Western Pennsylvania	119	107	89.9	12	10.1
Maine	107	59	55.1	48	44.9
Southern Indiana	103	60	58.3	43	41.7
Middle Louisiana	101	66	65.3	35	34.7
Central California	99	64	64.6	35	35.4
New Hampshire	94	48	51.1	46	48.9
Eastern California	93	92	98.9	1	1.1
Western Arkansas	85	52	61.2	33	38.8
Northern Oklahoma	77	43	55.8	34	44.2
Alaska	70	41	58.6	29	41.4
Rhode Island	69	56	81.2	13	18.8
Nevada	67	58	86.6	9	13.4
Western Oklahoma	64	64	100.0	0	0.0
Middle Tennessee	57	44	77.2	13	22.8
Western Washington	48	47	97.9	1	2.1
New Mexico	45	41	91.1	4	8.9
Northern California	42	42	100.0	0	0.0
Delaware	35	26	74.3	9	25.7
Hawaii	29	25	86.2	4	13.8
Vermont	23	23	100.0	0	0.0
Oregon	20	19	95.0	1	5.0
Eastern Oklahoma	17	13	76.5	4	23.5
Utah	17	16	94.1	1	5.9
Eastern Washington	16	9	56.3	7	43.8
Southern California	13	13	100.0	0	0.0
Montana	8	4	50.0	4	50.0
Virgin Islands	5	5	100.0	0	0.0
South Dakota	4	4	100.0	0	0.0
Arizona	3	3	100.0	0	0.0
Idaho	3	2	66.7	1	33.3
Wyoming	1	1	100.0	0	0.0

SOURCE: U.S. Sentencing Commission, Preliminary 2008-2010 Datafiles, USSCFY08-USSCFY10.

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Table 2

GEOGRAPHICAL DISTRIBUTION OF APPLICATION OF RETROACTIVE CRACK COCAINE AMENDMENT BY JUDICIAL CIRCUIT

Circuit	N	Granted	Denied
TOTAL	**24,058**	**15,778**	**8,280**
FOURTH CIRCUIT	6,571	4,267	2,304
ELEVENTH CIRCUIT	4,155	2,329	1,826
FIFTH CIRCUIT	3,309	2,236	1,073
EIGHTH CIRCUIT	2,153	1,510	643
SIXTH CIRCUIT	1,964	1,390	574
SEVENTH CIRCUIT	1,694	1,186	508
SECOND CIRCUIT	1,324	735	589
THIRD CIRCUIT	886	676	210
FIRST CIRCUIT	727	385	342
TENTH CIRCUIT	547	439	108
NINTH CIRCUIT	511	419	92
D.C. CIRCUIT	217	206	11

SOURCE: U.S. Sentencing Commission, Preliminary 2008-2010 Datafiles, USSCFY08-USSCFY10.

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Table 3

APPLICATION OF RETROACTIVE CRACK COCAINE AMENDMENT BY YEAR OF ORIGINAL SENTENCE[1]

Fiscal	Total	Granted		Denied	
Year	N	N	%	N	%
Total	**23,481**	**15,421**	**65.7**	**8,060**	**34.3**
2009	38	1	2.6	37	97.4
2008	572	147	25.7	425	74.3
2007	3,342	2,285	68.4	1,057	31.6
2006	3,256	2,311	71.0	945	29.0
2005	2,817	1,917	68.1	900	31.9
2004	2,374	1,646	69.3	728	30.7
2003	2,212	1,484	67.1	728	32.9
2002	1,723	1,144	66.4	579	33.6
2001	1,370	910	66.4	460	33.6
2000	1,229	781	63.5	448	36.5
1999	987	645	65.3	342	34.7
1998	780	487	62.4	293	37.6
1997	611	382	62.5	229	37.5
1996	576	362	62.8	214	37.2
1995	419	255	60.9	164	39.1
1994	387	204	52.7	183	47.3
1993	286	163	57.0	123	43.0
1992	215	127	59.1	88	40.9
1991	121	68	56.2	53	43.8
1990	115	65	56.5	50	43.5
1989	51	37	72.5	14	27.5

[1]Of the 24,058 cases, 577 were excluded from this analysis because the case cannot be matched with an original case in the Commission's records.

SOURCE: U.S. Sentencing Commission, Preliminary 2008-2010 Datafiles, USSCFY08-USSCFY10.

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Table 4

ORIGIN OF GRANTED MOTION FOR SENTENCE REDUCTION DUE TO RETROACTIVE APPLICATION OF CRACK COCAINE AMENDMENT[1]

		Defendant		Director BOP[2]		Court	
CIRCUIT	N	N	%	N	%	N	%
TOTAL	**14,381**	**12,049**	**83.8**	**0**	**0.0**	**2,332**	**16.2**
D.C. CIRCUIT	181	177	97.8	0	0.0	4	2.2
FIRST CIRCUIT	374	318	85.0	0	0.0	56	15.0
SECOND CIRCUIT	689	475	68.9	0	0.0	214	31.1
THIRD CIRCUIT	579	573	99.0	0	0.0	6	1.0
FOURTH CIRCUIT	3,940	3,354	85.1	0	0.0	586	14.9
FIFTH CIRCUIT	1,933	1,435	74.2	0	0.0	498	25.8
SIXTH CIRCUIT	1,277	1,133	88.7	0	0.0	144	11.3
SEVENTH CIRCUIT	1,155	1,125	97.4	0	0.0	30	2.6
EIGHTH CIRCUIT	1,442	1,339	92.9	0	0.0	103	7.1
NINTH CIRCUIT	330	295	89.4	0	0.0	35	10.6
TENTH CIRCUIT	429	410	95.6	0	0.0	19	4.4
ELEVENTH CIRCUIT	2,052	1,415	69.0	0	0.0	637	31.0

[1]Of the 15,778 cases in which the court granted a motion for a sentence reduction due to retroactive application of the crack cocaine amendment, 1,458 were excluded from this analysis because the information received by the Commission prevented a determination of motion origin. Additionally, courts may cite multiple origins for a motion; consequently, the total number of origins cited generally exceeds the total number of cases. In this table, 14,381 origins were cited for the 14,320 cases.

[2]In nine cases, documents provided to the Commission indicated that the Bureau of Prisons Director made a motion. Those cases appear to be clerical errors.

SOURCE: U.S. Sentencing Commission, Preliminary 2008-2010 Datafiles, USSCFY08-USSCFY10.

Table 5

DEMOGRAPHIC CHARACTERISTICS OF OFFENDERS CONSIDERED FOR SENTENCE REDUCTION DUE TO APPLICATION OF RETROACTIVE CRACK COCAINE AMENDMENT

		Granted		Denied[1]	
Race/Ethnicity	**Total**	**N**	**%**	**N**	**%**
White	1,010	917	5.9	93	5.0
Black	14,874	13,266	86.0	1,608	86.8
Hispanic	1,244	1,103	7.2	141	7.6
Other	145	134	0.9	11	0.6
Total	**17,273**	**15,420**		**1,853**	
Citizenship					
U.S. Citizen	16,209	14,443	94.8	1,766	95.3
Non-Citizen	882	794	5.2	88	4.7
Total	**17,091**	**15,237**		**1,854**	
Gender					
Male	16,379	14,612	94.0	1,767	95.2
Female	1,017	927	6.0	90	4.8
Total	**17,396**	**15,539**		**1,857**	
Average Age					
	30	**30**		**30**	

[1]The 1,857 offenders represented in this column are those whom the Commission previously identified as eligible to seek a sentence reduction but whose petition for a reduction was denied by the court. Of the remaining 6,423 cases in which the court denied the request for a sentence reduction, 4,212 were excluded from this analysis because the offender was not previously identified as eligible to seek a sentence reduction for one or more reasons (*see* 'Analysis of the Impact of the Crack Cocaine Amendment If Made Retroactive' (October 3, 2007) *available at* www.ussc.gov). Of the remaining 2,211 cases, 495 were excluded from this analysis because the offender had been identified as released or projected to be released prior to November 1, 2007 and so was excluded from the Commission's prior analysis of eligible offenders, 586 were excluded from this analysis because the offender was not sentenced for a drug offense, 910 were excluded from this analysis because crack cocaine was not involved in the offense, and 220 were excluded from this analysis because the reason for the court's decision cannot yet be determined.

SOURCE: U.S. Sentencing Commission, Preliminary 2008-2010 Datafiles, USSCFY08-USSCFY10.

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Table 6

SELECTED SENTENCING FACTORS FOR OFFENDERS WHO WERE CONSIDERED FOR SENTENCE REDUCTION DUE TO APPLICATION OF RETROACTIVE CRACK COCAINE AMENDMENT

	All Cases	Granted	Denied[1]
	%	%	%
Weapon			
Weapon Specific Offense Characteristic	24.3	23.8	28.0
Firearms Mandatory Minimum Applied	10.3	9.9	13.6
Safety Valve	9.1	9.7	4.5
Guideline Role Adjustments			
Aggravating Role (USSG §3B1.1)	10.1	9.2	17.9
Mitigating Role (USSG §3B1.2)	2.9	2.7	4.5
Obstruction Adjustment (USSG §3C1.1)	6.1	6.0	7.2
Sentence Relative to the Guideline Range			
Within Range	69.2	70.9	55.4
Above Range	0.4	0.3	1.1
Below Range	30.4	28.8	43.5
Criminal History Category			
I	22.1	22.8	15.9
II	12.9	12.9	12.6
III	23.0	23.1	21.7
IV	16.9	17.2	13.8
V	10.3	10.2	11.3
VI	14.9	13.7	24.6

[1]The 1,857 offenders represented in this column are those whom the Commission previously identified as eligible to seek a sentence reduction but whose petition for a reduction was denied by the court. Of the remaining 6,423 cases in which the court denied the request for a sentence reduction, 4,212 were excluded from this analysis because the offender was not previously identified as eligible to seek a sentence reduction for one or more reasons (*see* 'Analysis of the Impact of the Crack Cocaine Amendment If Made Retroactive' (October 3, 2007) *available at* www.ussc.gov). Of the remaining 2,211 cases, 495 were excluded from this analysis because the offender had been identified as released or projected to be released prior to November 1, 2007 and so was excluded from the Commission's prior analysis of eligible offenders, 586 were excluded from this analysis because the offender was not sentenced for a drug offense, 910 were excluded from this analysis because crack cocaine was not involved in the offense, and 220 were excluded from this analysis because the reason for the court's decision cannot yet be determined.

SOURCE: U.S. Sentencing Commission, Preliminary 2008-2010 Datafiles, USSCFY08-USSCFY10.

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Table 7

POSITION OF WITHIN RANGE SENTENCES FOR OFFENDERS GRANTED A SENTENCE REDUCTION DUE TO APPLICATION OF RETROACTIVE CRACK COCAINE AMENDMENT[1]

	ORIGINAL SENTENCE		CURRENT SENTENCE	
	N	%	N	%
TOTAL	**6,268**	**100.0**	**6,268**	**100.0**
Guideline Minimum	4,051	64.6	4,188	66.8
Lower Half of Range	1,095	17.5	841	13.4
Midpoint of Range	299	4.8	465	7.4
Upper Half of Range	415	6.6	382	6.1
Guideline Maximum	408	6.5	392	6.3

[1]Of the 15,778 cases in which a motion for retroactive application of the crack cocaine amendment was granted, 8,169 received a sentence within the guideline range at both their original and current sentencing. Of these, 1,901 cases were excluded from this analysis due to one or more of the following reasons: the case is missing sentence length or guideline relevant statutory information from the new sentence (1,383), the case is missing sentence length or guideline relevant statutory information from the original sentence (449), the new sentence had a guideline minimum and maximum that were identical (184) or the original sentence had a guideline minimum and maximum that were identical (30).

SOURCE: U.S. Sentencing Commission, Preliminary 2008-2010 Datafiles, USSCFY08-USSCFY10.

Table 8

DEGREE OF DECREASE IN SENTENCE DUE TO RETROACTIVE APPLICATION OF CRACK COCAINE AMENDMENT[1]

CIRCUIT District	N	Average Current Sentence in Months	Average New Sentence in Months	Average Decrease in Months From Current Sentence	Average Percent Decrease From Current Sentence
TOTAL	**14,206**	**147**	**122**	**26**	**16.9**
D.C. CIRCUIT	**138**	**134**	**113**	**21**	**15.7**
District of Columbia	138	134	113	21	15.7
FIRST CIRCUIT	**332**	**120**	**99**	**21**	**17.3**
Maine	59	125	103	22	16.7
Massachusetts	92	139	116	23	16.8
New Hampshire	46	94	76	18	19.4
Puerto Rico	88	108	87	21	18.0
Rhode Island	47	125	106	20	15.7
SECOND CIRCUIT	**625**	**122**	**103**	**19**	**15.8**
Connecticut	149	115	96	20	17.2
New York					
Eastern	86	121	100	21	17.1
Northern	79	134	113	21	15.6
Southern	169	140	119	21	14.7
Western	126	103	89	15	14.5
Vermont	16	97	78	18	18.6
THIRD CIRCUIT	**569**	**131**	**109**	**22**	**16.2**
Delaware	25	165	136	30	17.6
New Jersey	102	119	100	19	15.9
Pennsylvania					
Eastern	176	147	121	26	16.4
Middle	172	123	103	20	16.5
Western	93	120	101	18	15.6
Virgin Islands	1	--	--	--	--
FOURTH CIRCUIT	**3,912**	**155**	**128**	**27**	**16.9**
Maryland	266	159	131	28	17.3
North Carolina					
Eastern	460	172	143	29	16.6
Middle	144	149	124	25	16.5
Western	329	188	157	30	15.4
South Carolina	695	154	126	28	17.5
Virginia					
Eastern	914	156	128	27	16.9
Western	490	152	129	24	15.5
West Virginia					
Northern	365	117	95	22	18.2
Southern	249	138	113	26	18.5

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Table 8 (continued)

DEGREE OF DECREASE IN SENTENCE DUE TO RETROACTIVE APPLICATION OF CRACK COCAINE AMENDMENT

CIRCUIT District	N	Average Current Sentence in Months	Average New Sentence in Months	Average Decrease in Months From Current Sentence	Average Percent Decrease From Current Sentence
FIFTH CIRCUIT	**2,045**	**144**	**119**	**25**	**17.2**
Louisiana					
Eastern	188	135	117	19	13.8
Middle	57	118	100	18	15.3
Western	184	163	135	28	17.1
Mississippi					
Northern	136	123	101	22	17.9
Southern	178	124	103	21	17.4
Texas					
Eastern	429	137	111	26	18.7
Northern	254	175	143	31	18.1
Southern	227	153	128	26	16.2
Western	392	140	116	24	17.3
SIXTH CIRCUIT	**1,303**	**126**	**105**	**21**	**16.2**
Kentucky					
Eastern	71	104	87	18	16.3
Western	88	124	106	18	14.5
Michigan					
Eastern	168	155	127	27	16.7
Western	120	102	87	15	15.1
Ohio					
Northern	304	107	89	18	17.2
Southern	205	132	111	21	16.3
Tennessee					
Eastern	176	133	114	20	14.4
Middle	39	149	121	28	17.0
Western	132	137	114	23	16.9
SEVENTH CIRCUIT	**1,082**	**153**	**125**	**28**	**17.7**
Illinois					
Central	143	167	138	29	16.8
Northern	218	145	120	24	16.6
Southern	271	168	136	32	18.0
Indiana					
Northern	209	131	108	22	17.2
Southern	47	190	160	31	15.7
Wisconsin					
Eastern	94	131	106	24	18.7
Western	100	162	127	35	21.0
EIGHTH CIRCUIT	**1,346**	**141**	**116**	**24**	**16.8**
Arkansas					
Eastern	82	140	115	25	17.9
Western	52	101	85	16	16.7
Iowa					
Northern	127	164	135	29	17.6
Southern	93	160	134	27	16.2
Minnesota	157	173	142	31	17.0
Missouri					
Eastern	419	116	97	19	16.2
Western	180	159	131	29	17.0
Nebraska	233	138	114	25	17.1
North Dakota	0	--	--	--	--
South Dakota	3	136	94	42	32.6

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QUESTIONS AND ANSWERS

Senator Grassley's Questions for the Record
Subcommittee on Crime & Drugs Hearing "Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity"

TO MR. HUTCHINSON:

(1) Quantity as a Sentencing Factor:

In your testimony, you promoted using factors other than quantity of cocaine in sentencing. Although quantity held at time of arrest is not a perfect proxy for level of criminal conduct, it is one strong indication of level of culpability.

- **If you don't believe in using quantity as a marker for sentencing, what factors do you believe should be included in the sentencing guidelines?**

Please refer to my testimony in which I stated that quantity should be one factor but the sentencing guidelines should include additional criteria as well (T. 69). So, I do believe quantity should be one of many factors but not the exclusive basis for the length of sentence.

- **How would this impact other sentences for narcotics violations apart from cocaine? Do you favor a complete rewrite of the entire narcotics sentencing structure?**

Currently, the crack cocaine sentences are out of line with other illegal drugs. I favor addressing the crack/powder disparity. I would think this could be done without impacting the other guidelines.

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Response of Judge Walton to Senator Grassley

(1) Increased number of Trials and Trial length:

I do not believe I testified that the length of trials are extended because of mandatory-minimum sentences; if I did, that was in error.

However, I do reiterate that mandatory-minimum sentencing legislation does increase the number of cases that have to proceed to trial. This occurs in circumstances where there are no means by which a defendant can avoid a mandatory-minimum sentence other than rolling the dice and going to trial with the hope that a favorable verdict will avoid the imposition of the mandatory-minimum sentence. And this sometimes occurs in situations solely because a defendant is a low-level member of a drug organization and because of that status is unable to provide substantial assistance to the government to avoid receiving a mandatory-minimum sentence. Therefore, knowing that there is not a substantial likelihood that a sentence greater than the mandatory-minimum sentence will be imposed following a trial due to his or her level of culpability, defendants will opt to pursue a trial, which is the only course that might avoid the imposition of a mandatory sentence.

(2) Perceived Injustice:

From both discussions I have had outside of the courtroom and from jurors either during the process of selecting juries and after trials have been completed, I have heard concerns expressed about the fairness of the judicial system because of the disparity that exists between crack verses powder cocain sentencing. I even had this concern expressed by jurors in trials I conducted in the Superior Court of the District of Columbia prior to my appointment to the United States District Court for the District of Columbia, even though the disparity was not part of the District of Columbia Code sentencing scheme.

However, I cannot identify specific cases where such concerns have been expressed without reviewing either my notes or the transcripts of the trials where the concerns have been expressed, and my busy schedule does not provide me the time to conduct such an extensive review. Nonetheless, I can state without reservation that on a number of occasions I have had jurors indicate their inability to be fair in cases involving crack cocaine or who I have learned refused to return a guilty verdict despite the weight of the evidence because of their concerns about the crack versus powder cocaine sentencing disparity.

As to whether I believe redressing the disparity would engender greater confidence in the perceived fairness of the judicial system, I definitely believe it would. While I have heard the concern expressed by diverse segments of our population, more often the concerns are expressed by African-Americans. This is obviously the result of the disparate number of African-Americans who have been impacted by the disparity between crack and powder cocaine sentences. So for many in the African-American community, redressing the disparity would remove a component of our legal system that has played a significant role in incarcerating larger percentages of African-American drug offenders to longer terms of incarceration than drug offenders that are members of other ethnic groups. And in my opinion, redressing the disparity would inevitably enhance the view that our system is truly color blind.

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Senator Grassley's Questions for the Record
Subcommittee on Crime & Drugs Hearing "Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity"

TO MR. TIMONEY:

(1) High Level Dealers Versus Users:

In your testimony, you illustrated an example of a defendant with 5 grams of crack, valued at $150 in Miami, being subject to the same sentence as a defendant with 500 grams of powder, which is more than a pound, valued around $14,000. This is a powerful example. I think all members agree that it is important to concentrate our limited federal resources to crack down on dealers and drug traffickers. However, we can't forget that users also place a tremendous burden on our communities, law enforcement, and hospitals. We need a comprehensive approach that includes strong law enforcement operations against all those who break the law. I often hear from constituents with relatives in prison who were convicted of large drug offenses for selling drugs. These constituents tell me that it would have helped had their relatives been caught early as a user so they would've understood the consequences for their actions.

- **How often are users, not dealers, caught up in the federal system because of the sentencing structure?**
- **Do you think we can quantify the number of individuals who are deterred from using drugs or aspiring to sell drugs because they are arrested for a possession of narcotics? Why or why not.**
- **Do you agree that there is some deterrent effect to arresting drug users? Why or why not?**
- **How often are street level crack dealers dealt sentences commensurate with high-level cocaine dealers?**
- **How has the sentencing disparity affected the decisions of your police force?**

(2) Leverage Against Higher Level Offenders:

The law enforcement community has long used the current sentencing structure against lower level drug dealers to elicit their cooperation to target the upper echelons of a drug organization.

- **Will a change in the sentencing structure affect the government's ability to prosecute higher level offenders in a drug trafficking organization? In other words, will reducing sentence lengths for street level offenders affect the government's ability to extract cooperation from the defendants in exchange for reduced sentences or keeping the charges in the state court system, rather than the federal system?**

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Senator Grassley's Questions for the Record
Subcommittee on Crime & Drugs Hearing "Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity"

TO MR. BREUER:

(1) Sentencing Enhancements:

At the hearing, you indicated that the Administration aims to eliminate the sentencing enhancement for drug-related violence. Currently, the Sentencing Guidelines include enhancements for violence as a way to fully address criminal culpability and prevent crimes of drug-related violence.

- **Does the Administration believe there should be no sentencing enhancements for violence, even if the sentencing of crack and powder is based on a 1:1 ratio?**

(2) DOJ Working Group:

You announced the Department of Justice is putting together a working group to analyze cocaine sentencing policy.

- **What are the working group's identified goals, and how long will it operate? How is its membership determined? Will you commit to provide regular updates to the Judiciary Committee on the working group's progress?**

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United States Senate
The Senate Committee on the Judiciary
Subcommittee on Crime and Drugs

Testimony of Nicole M. Austin-Hillery[1]
Director and Counsel- Washington Office
The Brennan Center for Justice
At New York University School of Law
Wednesday, April 29, 2009

Mr. Chairman, the Brennan Center is greatly appreciative for your leadership in the effort to eliminate the disparities in federal law between crack and powder cocaine sentences. We thank you and members of the subcommittee for holding this hearing in an effort to help end the overarching problem of racial disparities in the criminal justice system.

Introduction

The Brennan Center for Justice at New York University School of Law was founded in 1995 as a living tribute to the late Supreme Court Associate Justice, William J. Brennan, Jr. The Center is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. The Justice Project at the Brennan Center works on issues of equal justice particularly as they relate to ensuring fairness in the criminal justice system.

In 2007, the Brennan Center issued a report entitled *Prosecutorial Discretion and Racial Disparities in Federal Sentencing: Some Views of Former U.S. Attorneys* (the "racial disparities report").[2] This report was the product of a convening hosted

[1] Nicole M. Austin-Hillery is Director and Counsel of the Washington, D.C. Office of the Brennan Center for Justice at New York University School of Law where she oversees the Washington, D.C, operations, advocacy efforts and issue focus.
[2] *Federal Sentencing Reporter*, Vol. 19, No. 33, pp.192-201 (2007).

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by the Brennan Center and the National Institute for Law and Equity ("NILE"), at which 12 former United States Attorneys discussed the "effects of racial disparities in sentencing on communities devastated by mass, long-term incarceration and on public confidence in federal law enforcement."[3] In the report, we describe the impact that disparate drug sentencing laws have on communities of color. More pointedly, the report describes the role of prosecutors in criminal sentencing and examines specific opportunities and duties that prosecutors have to promote equal justice.

As a result of our work on this report, and as part of our broader work to eliminate racial disparities in the criminal justice system, the Brennan Center strongly supports the effort to end disparities between crack and powder cocaine sentences. We know that eliminating these sentencing disparities is the first step in addressing the array of racial disparities that exist in the criminal justice system. We hope that our comments here will help to bring attention not only to the need for sentencing reform with respect to crack and powder cocaine but also to the need to examine other areas of the criminal justice system where such disparities exist.

The Crack-Cocaine Sentencing Disparities are Racial Disparities

As the Preamble to the Brennan Center's racial disparities report articulates:

> "[o]ur country was founded on the principle that all are created equal. We are a nation of laws that promote liberty and justice for all without regard to race, ethnic origin, religion, creed or gender. We are mindful that our nation's racial history has sorely tested those beliefs of equality, liberty, and justice and that there should be no room for the vestiges of racial or ethnic discrimination in our criminal justice system.[4]

The enactment of the *Anti-Drug Abuse Act of 1986*[5] resulted in "mandatory penalties for crack cocaine offenses which were the harshest ever adopted for low-level drug offenses and established drastically different penalty structures for crack and powder cocaine."[6] Federal law establishes a 100 to1 difference between sentences for the two categories of crimes.[7] The mandatory sentencing structure created by this law—which remains in effect today—results in average sentences for crack cocaine offenses that are 3 years longer than for offenses involving powder cocaine.[8] The effect of these uneven punishments has resulted in extremely severe prison terms for very low-level crack cocaine

[3] Id. at 192.
[4] Id. at 198.
[5] Pub. L. 99-570, Oct. 27, 1986, 100 Stat. 3207.
[6] *Federal Crack Cocaine Sentencing*, the Sentencing Project, pp. 1-2, January, 2009.
[7] The Drug Policy Alliance, *Crack/Cocaine Sentencing Disparity* (Nov. 2007) *available at* http://www.drugpolicy.org/drugwar/mandatorymin/crackpowder.cfm.
[8] *Federal Crack Cocaine Sentencing*, The Sentencing Project, p. 2, January, 2009.

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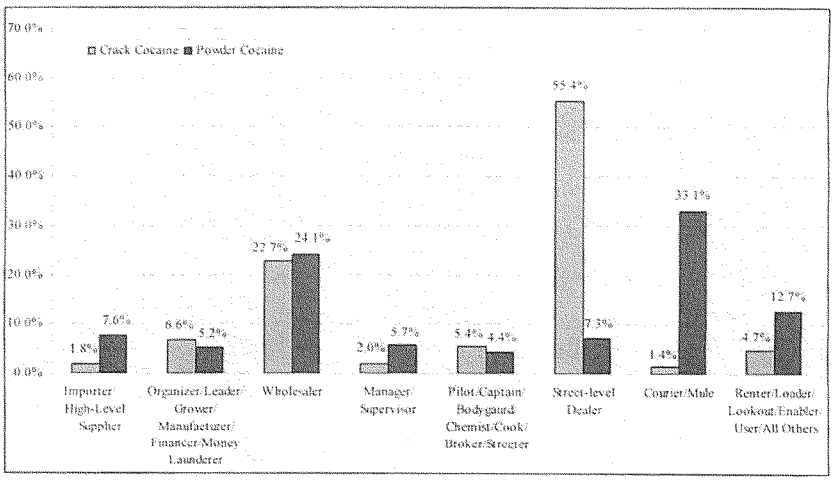
offenses, which represent more than 60% of federal crack defendants. (See Figure 2 from Sentencing Project report).[9]



SOURCE: U.S. Sentencing Commission, 2005 Drug Sample.

The racial impact of the crack cocaine sentencing laws is plain. The vast majority of low-level offenders most affected by these laws are African-American.[10] "In 2006, 82% of those sentenced under federal crack cocaine laws were black and only 8.8% were white—even though more than two-thirds of people who use crack cocaine are white."[11] Research by the U.S. Sentencing Commission ("the Commission") found that "sentences appear to be harsher and more severe for racial minorities than others as a result of [these] laws."[12] In the

[9] *Federal Crack Cocaine Sentencing*, The Sentencing Project, pp. 3, January, 2009 (citing U.S. Sentencing Commission, 2005 Drug Sample).
[10] *See generally,* Where *are All the Young Men and Women of Color*, Melvin Delgado (Oct. 2001).
[11] The Drug Policy Alliance, *Crack/Cocaine Sentencing Disparity* (Nov. 2007) (citing to U.S. Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy (Washington, D.C.: U.S. Sentencing Commission, May 2007) *available at* http://www.drugpolicy.org/drugwar/mandatorymin/crackpowder.cfm.
[12] The Drug Policy Alliance, *Crack/Cocaine Sentencing Disparity* (Nov. 2007) (citing to U.S. Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy (Washington, D.C.: U.S. Sentencing Commission, April 1997 at p.8) *available at* http://www.drugpolicy.org/drugwar/mandatorymin/crackpowder.cfm.

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year 2000, the Commissions data show[ed] that of all federal crack defendants, 84% were black.[13]

These numbers portray a startling difference in the treatment that offenders of crack cocaine laws receive as contrasted with offenders of powder cocaine laws. A close examination of all cocaine offenders (including crack) shows that African American drug defendants have a 20% greater chance of being sentenced to prison than white drug defendants.[14] Statistics compiled by the Department of Justice indicate that as a result of the sentencing requirements for crack cocaine offenses, African Americans serve virtually as much time in prison for a drug offense as whites do for violent offenses.[15]

At this juncture in the fight to end sentencing disparities between crack and powder cocaine, the statistical data has been thoroughly and frequently discussed. Many respected experts have come before Congress in a series of legislative sessions and recounted the data, and the numbers are clear—crack cocaine offenders, who are disproportionately African American, serve time in prison at a much higher rate and for much longer periods of time than do powder cocaine offenders, most of whom are not African American.[16]

The stark reality of these numbers has impressed Senators on both sides of the aisle. In 2001, Senator, Jeff Sessions (R-AL) introduced the *Drug Sentencing Reform Act* which would have raised the threshold possession amount for a five year mandatory minimum in the case of crack offenses.[17] During the 110th Congress, Senators Orrin Hatch (R-UT) and Joseph Biden (D-DE) introduced bills that would either reduce or eliminate the sentencing disparity between crack and powder cocaine.[18] Additionally, Representatives Sheila Jackson Lee (D-TX), Charles Rangel (D-NY) and Robert Scott (D-VA) introduced their own versions of bills seeking to end this disparity. It is clear that many members of Congress understand that "the uneven treatment [of these sentencing laws] strikes at the heart of the justice system."[19]

With this hearing today, the 111th Congress is primed to right this ongoing wrong. The President himself declared earlier this year that "the

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[13] *Race and Class Penalties in Crack Cocaine Sentencing*, Michael Coyle, The Sentencing Project, ( ) *available at* http://www.sentencingproject.org/Admin/Documents/publications/rd_raceandclass_penalties.pdf.
[14] United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing* (Nov. 2004), p.122.
[15] Bureau of Justice Statistics, *Compendium of Federal Justice Statistics*, 2003 (Washington, D.C.: Oct. 2004), referencing Table 7.16, p. 112.
[16] *See, ABA Testimony on Crack Disparity, February 12, 2008, available at* www.abanet.org/poladv/letters/crimlaw/2008feb12_crackdisparity_t.pdf; *ACLU Testimony*, February 12, 2008, *available at* www.aclu.org/drugpolicy/sentencing/index.html - 36k; *Report to Congress: Cocaine and Federal Sentencing Policy*, United States Sentencing Commission, May 2007.
[17] *Federal Crack Cocaine Sentencing*, The Sentencing Project, p. 7, January 2009.
[18] Id.
[19] *Time to End the Crack Disparity*, editorial, The Philadelphia Inquirer, April 27, 2009, *available at* http://www.philly.com/inquirer/opinion/43758552.html.

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disparity between sentencing [for] crack and powder-based cocaine is wrong and should be completely eliminated."[20] The 111th Congress has the best opportunity to put an end to this uneven meting out of justice that has been pervasive in the criminal justice system for over 20 years.

Racial Disparities in the Criminal Justice System Go Beyond the Crack-Powder Cocaine Issue

Racial disparities, so troubling in crack and powder cocaine sentencing, impose an additional cost in many other contexts within the criminal justice system. The Sentencing Commission has observed that, beyond the direct impact on individuals, "[p]erceived improper racial disparity fosters disrespect for and lack of confidence in the criminal justice system..."[21] The current moment, in which our society is considering eliminating disparities in crack and powder cocaine sentencing, thus provides us with an important opportunity to step up our national efforts to eliminate racial disparities in all aspects of the criminal justice system.

The prosecutors who we called upon in producing the Brennan Center's report on racial disparities in the criminal justice system developed a set of "Guiding Principles of Equal Justice" which they designed to serve as the foundation for reform efforts focused on racial justice. These guiding principles are the following:

1) The pursuit of justice requires the fair application of the law to ensure public confidence and trust in the criminal justice system;

2) Justice means observing the highest ethical standards by ensuring that racial bias and stereotyping do not play a role in federal prosecutions;

3) Fairness and equality demand that similarly situated defendants be treated equally and that unwarranted racially disparate impact be eliminated; and

4) Prosecutorial decision-making should be well-reasoned and transparent.[22]

These principles were developed with the recognition that racial disparities in the criminal justice system, are at least in part, a product of

[20] *Federal Crack Cocaine Sentencing*, The Sentencing Project, p.1, January 2009.
[21] United States Sentencing Commission, *Report to Congress: Cocaine and Federal Sentencing Policy*, May 2002, p.103.
[22] *Prosecutorial Discretion and Racial Disparities in Federal Sentencing: Some Views of Former U.S. Attorneys*, Federal Sentencing Reporter, Vol. 19, No. 33, pp.198-199 (2007).

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decisions made by prosecutors and other law enforcement officials. The report therefore builds from the premise that those who work in the frontlines of our criminal justice system are among the best positioned to help end the racial disparities in the criminal justice system. In the report, the participating prosecutors concluded that "conscious attention to the role of race in prosecutorial decision-making, as well as concerted efforts to monitor and improve the decision-making process, is essential for mitigating unwarranted racial disparities in the outcomes of federal criminal prosecutions."[23]

In addition to fixing crack-powder cocaine disparities, new legislation to promote such "conscious attention to the role of race" and to "monitor and improve the decision-making process" can serve as an essential tool with which to respond to the problem. The Justice Integrity Act embodies this approach. In the 110th Congress, then-Senator Biden (D-DE) introduced the Justice Integrity Act of 2008, a bill that would establish pilot programs in 10 selected U.S. Attorney districts, enabling an advisory group in each district to gather data with respect to racial and ethnic disparities in prosecutions. The bill would also provide for analysis of that data to determine the root causes of any such disparities. The legislation has been bi-camerally introduced in the 111th Congress by Senators Benjamin Cardin (D-MD) and Arlen Specter (R-PA) and Representative James Cohen (D-TN).

In addition to the Justice Integrity Act, the following additional initiatives are also important and currently, or soon to be, pending: the National Criminal Justice Act of 2009, S.714, sponsored by Senator James Webb (D-VA) and the End Racial Profiling Act, which will hopefully be introduced during the first term of this legislative session. We are confident that the Justice Integrity Act, and similar legislation, will help our nation gain more insight into the additional racial disparities that exist in the criminal justice system.

While we applaud the Committee's commitment to end the divisive disparities that are inherent in federal cocaine sentencing laws, we also recognize that there is more to do to make our system fair and strong and to renew our nations commitment to ensuring that race is not a factor in how individuals are treated in our criminal justice system. The time is ripe for Congress to take bold steps to reduce race-based criminal justice disparities. We encourage support for reforms that will help achieve this goal.

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[23] Id. at 194.

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Department of Justice

STATEMENT OF

LANNY A. BREUER
ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CRIME AND DRUGS

HEARING ENTITLED

"RESTORING FAIRNESS TO FEDERAL SENTENCING: ADDRESSING THE CRACK-POWDER DISPARITY"

PRESENTED

APRIL 29, 2009

Introduction

Mr. Chairman, Senator Graham, distinguished members of the Subcommittee — thank you for giving the Department of Justice the opportunity to appear before you today to share our views on the important issue of disparities in federal cocaine sentencing policy.

The Obama Administration firmly believes that our criminal and sentencing laws must be tough, predictable, fair, and not result in unwarranted racial and ethnic disparities. Criminal and sentencing laws must provide practical, effective tools for federal, state, and local law enforcement, prosecutors, and judges to hold criminals accountable and deter crime. The certainty of our sentencing structure is critical to disrupting and dismantling the threat posed by drug trafficking organizations and gangs that plague our nation's streets with dangerous illegal drugs and violence; it is vital in the fight against violent crime, child exploitation, and sex trafficking; and it is essential to effectively punishing financial fraud.

Ensuring fairness in the criminal justice system is also critically important. Public trust and confidence are essential elements of an effective criminal justice system – our laws and their enforcement must not only be fair, but they must also be perceived as fair. The perception of unfairness undermines governmental authority in the criminal justice process. It leads victims and witnesses of crime to think twice before cooperating with law enforcement, tempts jurors to ignore the law and facts when judging a criminal case, and draws the public into questioning the motives of governmental officials.

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Changing these perceptions will strengthen law enforcement through increased public trust and cooperation, coupled with the availability of legal tools that are both tough and fair. This Administration is committed to reviewing criminal justice issues to ensure that our law enforcement officers and prosecutors have the tools they need to combat crime and ensure public safety, while simultaneously working to root out any unwarranted and unintended disparities in the criminal justice process that may exist.

There is no better place to start our work than with a thorough examination of federal cocaine sentencing policy. Since the United States Sentencing Commission first reported 15 years ago on the differences in sentencing between crack and powder cocaine, a consensus has developed that the federal cocaine sentencing laws should be reassessed. Indeed, over the past 15 years, our understanding of crack and powder cocaine, their effects on the community, and the public safety imperatives surrounding all drug trafficking has evolved. That refined understanding, coupled with the need to ensure fundamental fairness in our sentencing laws, policy, and practice, necessitates a change. We think this change should be addressed in this Congress, and we look forward to working with you and other Members of Congress over the coming months to address the sentencing disparity between crack and powder cocaine.

In committing ourselves to pursuing federal cocaine sentencing policy reform, we do not suggest in any way that our prosecutors or law enforcement agents have acted improperly or imprudently during the last 15 years. To the contrary, they have applied

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the laws as passed by Congress to address serious crime problems in communities across the nation.

Most in the law enforcement community now recognize the need to reevaluate current federal cocaine sentencing policy – and the disparities the policy creates. Chief Timoney, Administrator Hutchison, and many other enforcement leaders have repeatedly and clearly indicated that the current federal cocaine sentencing policy not only creates the perception of unfairness, but also has the potential to misdirect federal enforcement resources. They have stressed that the most effective anti-drug enforcement strategy will deploy federal resources to disrupt and dismantle major drug trafficking organizations and drug organizations that use violence to terrorize neighborhoods.

For these and others reasons I will describe in the remainder of my testimony, we believe now is the time for us to re-examine federal cocaine sentencing policy – from the perspective of both fundamental fairness and public safety.

Background

A. *The Drug Trafficking Threat*

Cocaine and other illegal drugs pose a serious risk to the health and safety of Americans. The National Drug Intelligence Center's 2009 National Drug Threat Assessment identifies cocaine as the leading drug threat to society. Cocaine is a dangerous and addictive drug, and its use and abuse can be devastating to families regardless of economic background or social status. Statistics on abuse, emergency room

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visits, violence, and many other indicators tell the story of tremendous harms caused by cocaine. We must never lose sight of these harms, their impact on our society, and our responsibility to reduce cocaine use and abuse.

Moreover, drug trafficking organizations and gangs have long posed an extremely serious public health and safety threat to the United States. The Administration is committed to rooting out these dangerous organizations. Whether it is Mexican or Colombian drug cartels moving large quantities of powder cocaine into and through the United States, or local gangs distributing thousands of individual rocks of crack in an American community, we will focus our resources on dismantling these enterprises – and disrupting the flow of money both here and abroad – to help protect the American public.

In the fight against illegal drugs, we also recognize that vigorous drug interdiction must be complemented with a heavy focus on drug prevention and treatment. Many state and federal inmates struggle with drug addiction, and not all get the treatment they need. The result is that many prisoners are unprepared to return to society. They not only re-offend, but they feed the lucrative black market for drugs. We cannot break this cycle of recidivism without increased attention to prevention and treatment, as well as comprehensive prisoner reentry programs.

It is only through a balanced approach – combining tough enforcement with robust prevention and treatment efforts – that we will be successful in stemming both the

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demand and supply of illegal drugs in our country. Strong and predictable sentencing laws are part of this balanced approach.

B. *The Enactment of the Current Cocaine Sentencing Scheme*

In the 1980s, crack cocaine was the newest form of cocaine to hit American streets. As this Committee well knows, in 1986, in the midst of this exploding epidemic, Congress passed the Anti-Drug Abuse Act, which set the current federal penalty structure for crack and powder cocaine trafficking.[1]

In doing so, Congress established the five- and ten-year mandatory minimum sentencing regime still in effect today. Under the law, selling five grams of crack cocaine triggers the same five-year mandatory minimum sentence as selling 500 grams of powder cocaine; those who sell 50 grams of crack are sentenced to the same ten-year mandatory minimum as those selling 5,000 grams of powder cocaine. Pursuant to its mandate to ensure that the federal sentencing guidelines are consistent with all federal laws, the U.S. Sentencing Commission in 1987 applied this same "100-to-1" ratio to the sentencing guidelines.

Leading up to the enactment of this law, Congress was confronted with heightened public attention on the scourge of illegal drugs and high profile drug overdose deaths, including that of Len Bias, a National Collegiate Athletic Association basketball star drafted by the Boston Celtics. Proposals for making crack penalties more severe than

[1] In 1988, Congress also established a five gram, five-year mandatory minimum sentence for simple possession of crack cocaine, the only federal mandatory minimum penalty for a first offense of simple possession of a controlled substance. Anti-Drug Abuse Act of 1988, P.L., 100-690.

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powder penalties ranged from the Reagan Administration's proposed 20-to-1 ratio to the late-Senator Chiles' 1000-to-1 disparity.

The legislative history does not provide definitive evidence for the rationale behind the adoption of the 100-to-1 ratio. What we do know from floor statements and reports on earlier versions of the enacted legislation is that during this debate, Congress sought to focus the tough five- and ten-year mandatory minimum penalties on "serious" and "major" traffickers—the traffickers who keep the street markets operating and the heads of drug trafficking organizations, responsible for delivering very large quantities of drugs. With stiff mandatory minimum penalties for crack cocaine set at levels as low as five grams, many have questioned whether these policy goals were achieved. An analysis by the Sentencing Commission using Fiscal Year 2005 data shows that 55 percent of federal crack defendants were street-level dealers. This compares with only 7.3 percent of powder defendants who were street-level dealers. And while both crack and powder offenders are concentrated in lower-level functions, crack cocaine offenders continue to be dominated by street-level dealers.

C. *The Science of Cocaine: One Drug, Two Forms*

Since the time Congress passed the crack cocaine penalties, much of the information on the different impact and effects of crack cocaine as compared to powder cocaine has come under scrutiny. We have since learned that powder cocaine and crack cocaine produce similar physiological and psychological effects once they reach the

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brain. Whether in its powder or crack form, both types of cocaine are addictive and both pose serious health risks.

According to the National Institute on Drug Abuse (NIDA), the key difference in cocaine's effects depends on how it is administered – by snorting, inhaling, or injecting. The intensity and duration of cocaine's effects – in any form – depend on the speed with which it is absorbed into the bloodstream and delivered to the brain. Smoking or injecting cocaine produces a quicker, stronger high than snorting it. For that reason, the user who is smoking or injecting the drug may need more of it sooner to stay high. Because powder cocaine is typically snorted, while crack is most often smoked, crack smokers can potentially become addicted faster than someone snorting powder cocaine. Notably, however, the NIDA has found that smoked cocaine is absorbed into the bloodstream as rapidly as injected cocaine, both of which have similar effects on the brain.

D. *The Policy Debate*

For nearly two decades, the 100-to-1 disparity has been the subject of dynamic debate and discussion among policymakers, academics, criminal justice organizations, and others.

The supporters of the current cocaine penalty structure believe that the disparity is justified because it accounts for the greater degree of violence and weapon possession or

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use associated with some crack offenses, and because crack can be potentially more addictive than powder, depending on the usual method of use.

This Administration shares these concerns about violence and guns used to commit drug offenses and other crimes associated with such offenses. We recognize that data suggests that weapons involvement and violence in the commission of cocaine-related offenses are generally higher in crack versus powder cases: a 2007 Sentencing Commission report found that weapons involvement for cocaine offenses was 27 percent for powder cocaine and 42.7 percent for crack. The same sample found that some form of violence occurred in 6.3 percent of powder cocaine crimes and in 10.4 percent of crack cocaine crimes.

Violence associated with any offense is a serious crime and must be punished; we think that the best way to address drug-related violence is to ensure the most severe sentences are meted out to those who commit violent offenses. However, increased penalties for this conduct should generally be imposed on a case-by-case basis, not on a class of offenders the majority of whom do not use any violence or possess a weapon. We support sentencing enhancements for those who use weapons in drug trafficking crimes, or those who use minors to commit their crimes, or those who injure or kill someone in relation to a drug trafficking offense. We also support charging separate weapons offenses to increase a sentence when an offender uses a weapon in relation to a drug trafficking offense.

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But we cannot ignore the mounting evidence that the current cocaine sentencing disparity is difficult to justify based on the facts and science, including evidence that crack is not an inherently more addictive substance than powder cocaine. We know of no other controlled substance where the penalty structure differs so dramatically because of the drug's form.

Moreover, the Sentencing Commission has documented that the quantity-based cocaine sentencing scheme often punishes low-level crack offenders far more harshly than similarly situated powder cocaine offenders. Additionally, Sentencing Commission data confirms that in 2006, 82 percent of individuals convicted of federal crack cocaine offenses were African American, while just 9 percent were White. In the same year, federal powder cocaine offenders were 14 percent White, 27 percent African American, and 58 percent Hispanic. The impact of these laws has fueled the belief across the country that federal cocaine laws are unjust. We commend the Sentencing Commission for all of its work on this issue over the last 15 years. The Sentencing Commission reports are the definitive compilation of all of the data on federal cocaine sentencing policy. We cannot ignore their message.

Moving Forward: A Tide of Change

Since 1995, at Congress's request, the Commission has called for legislation to substantially reduce or eliminate the crack/powder sentencing disparity. Most recently, in 2007, the Commission called the crack/powder disparity an "urgent and compelling" issue that Congress must address. Both chambers of Congress have held multiple

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hearings on the topic, and legislation to substantially reduce or eliminate the disparity has been introduced by members of both political parties.

In addition, the overwhelming majority of states do not distinguish between powder cocaine and crack cocaine offenses.

For the reasons outlined above, this Administration believes that the current federal cocaine sentencing structure fails to appropriately reflect the differences and similarities between crack and powder cocaine, the offenses involving each form of the drug, and the goal of sentencing serious and major traffickers to significant prison sentences. We believe the structure is especially problematic because a growing number of citizens view it as fundamentally unfair. The Administration believes Congress's goal should be to completely eliminate the sentencing disparity between crack cocaine and powder cocaine.

Earlier this month the Attorney General asked the Deputy Attorney General to form and chair a working group to examine federal sentencing and corrections policy. The group's comprehensive review will include possible recommendations to the President and Congress for new sentencing legislation affecting the structure of federal sentencing. In addition to studying issues related to prisoner reentry, Department policies on charging and sentencing, and other sentencing-related topics, the group will also focus on formulating a new federal cocaine sentencing policy; one that completely eliminates the sentencing disparity between crack and powder cocaine but also fully accounts for

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violence, chronic offenders, weapon possession and other aggravating factors associated – in individual cases – with both crack and powder cocaine trafficking. It will also develop recommendations for legislation, and we look forward to working closely with Congress and the Sentencing Commission on this important policy issue and finding a workable solution.

Until a comprehensive solution – one that embodies new quantity thresholds and perhaps new sentencing enhancements – can be developed and enacted as legislation by Congress and as amended guidelines by the Sentencing Commission, federal prosecutors will adhere to existing law. We are gratified that the Sentencing Commission has already taken a small step to ameliorate the 100:1 ratio contained in existing statutes by amending the guidelines for crack cocaine offenses. We will continue to ask federal courts to calculate the guidelines in crack cocaine cases, as required by Supreme Court decisions. However, we recognize that federal courts have the authority to sentence outside the guidelines in crack cases or even to create their own quantity ratio. Our prosecutors will inform courts that they should act within their discretion to fashion a sentence that is consistent with the objectives of 18 U.S.C. § 3553(a) and our prosecutors will bring the relevant case-specific facts to the courts' attention.

Conclusion

As the history of this debate makes clear, there has been some disagreement about whether federal cocaine sentencing policy should change, and, if so, how it should change. This Administration and its components, including the Justice Department and

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the Office of National Drug Control Policy, look forward to working with this Committee and members of Congress in both chambers to develop sentencing laws that are tough, smart, fair, and perceived as such by the American public. We have already begun our own internal review of sentencing and the federal cocaine laws. Our goal is to ensure that our sentencing system is tough and predictable, but at the same time promotes public trust and confidence in the fairness of our criminal justice system. Ultimately, we all share the goals of ensuring that the public is kept safe, reducing crime, and minimizing the wide-reaching, negative effects of illegal drugs.

Thank you for the opportunity to share the Administration's views, and I welcome any questions you may have.

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Statement of Senator Richard J. Durbin
Chairman, Subcommittee on Crime and Drugs
Hearing on "Restoring Fairness to Federal Sentencing:
Addressing the Crack-Powder Disparity"
April 29, 2009

This hearing will come to order. The subject of today's hearing is "Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity."

This is the second hearing of the Crime and Drugs Subcommittee in the 111th Congress. First, a word about our initial hearing, which focused on the greatest organized crime threat to our country – Mexican drug cartels. Based on what we learned at the hearing, Senator Graham and I are working on bipartisan legislation to crack down on drug cartels, which we will introduce soon.

There is a direct connection between Mexican drug cartels and the subject of today's hearing – drug sentencing policy. We learned at our first hearing that Mexican drug cartels supply 90% of the cocaine in the United States and that our drug policy, which focuses largely on criminal sanctions instead of prevention and treatment, has failed to stem America's insatiable demand for illegal narcotics.

Cocaine, whether powder or crack, has a devastating effect on families and on our society but we cannot address this problem through law enforcement alone. We need a comprehensive approach that cracks down on drug trafficking organizations while emphasizing prevention and treatment for addicts.

Our drug sentencing policy also is the single greatest cause of the record levels of incarceration in our country. Today in the United States more than 2.3 million people are imprisoned. We have the most prisoners of any country in the world, as well as the highest per capita rate of prisoners in the world. One in 31 Americans are in prison, on parole, or on probation, including one in 11 African-Americans. And over 50% of federal inmates are imprisoned for drug crimes.

The United States has made great strides in the last half century in ensuring equal treatment under the law for all. When it comes to the federal criminal justice system, however, inequalities are growing rather than shrinking. African Americans are incarcerated at nearly six times the rate of whites, while Hispanics are incarcerated almost twice as much.

Today we turn our attention to one especially troubling aspect of our failed drug policy: the so-called crack-powder disparity. It takes 100 times more powder cocaine than crack cocaine to trigger the same harsh mandatory minimum sentences. Under current law, mere possession of five grams of crack—the weight of five packets of sweetener —carries the same sentence as distribution of half a kilogram of powder – or 500 packets of sweetener.

The crack-powder disparity is one of the most significant causes of the disparity in incarceration rates between African Americans and Caucasians. The dramatically higher penalties for crack have disproportionately affected the African American community: 81 percent of those convicted for crack offenses in 2007 were African American, although only about 25% of crack cocaine users are African American. The low crack threshold also diverts scarce law enforcement resources away from efforts to combat major traffickers and drug cartels.

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These racial disparities undermine trust in our criminal justice system and have a corrosive effect on the relationship between law enforcement and minority communities. As the U.S. Sentencing Commission has said, even "perceived improper racial disparity fosters disrespect for and lack of confidence in the criminal justice system."

This sentencing framework, created in 1986, was fueled by fears about the newest drug epidemic and based on assumptions that we now know were exaggerated, or plain false. The intentions of those who crafted the 100:1 disparity were pure; they wanted to protect the victims of the crack epidemic.

But we have learned a great deal since then. Vice President Biden, the previous chair of this Subcommittee, was one of the authors of the crack-powder disparity. When he chaired a hearing of this Subcommittee on this issue last year, he said, "each of the myths upon which we based the disparity has since been dispelled or altered."

Some argue that the sentencing disparity is justified because crack cocaine is associated with more violence than its powder counterpart. But the truth is that crack-related violence has decreased significantly since the 1980's and today 94 percent of crack cocaine cases don't involve violence. And cases that do involve violence are subject to increased sentences, including a mandatory minimum for use of a weapon in connection with a drug trafficking offense.

Sadly, both the crack trade and—as we are witnessing along our Southern border – the trade in cocaine powder are frequently associated with violence. But the evidence just doesn't justify a sentencing disparity between two forms of the same drug.

In the 110th Congress, I was the chair of the Human Rights Subcommittee, and we focused on issues like genocide in Darfur, internet censorship in China, and rape as a weapon of war in the Democratic Republic of Congo. But Americans must also be prepared to look ourselves in the mirror and recognize that we are not above reproach. Our record-high incarceration rates and the racial disparities in our criminal justice system are human rights issues that we must address.

The first important step we should take is to completely eliminate the crack-powder disparity and to adopt a one-to-one sentencing ratio for crack and powder cocaine. As the Sentencing Commission has said, "Revising the crack cocaine thresholds would better reduce the [sentencing] gap than any other single policy change, and it would dramatically improve the fairness of the federal sentencing system." Given what we have learned during the past 23 years, the sentencing disparity between crack and powder cocaine is both unjustified and unjust.

In closing, it is important to note that there is a bipartisan consensus that we must address the crack-powder disparity. In particular, I want to acknowledge and commend the leadership of Senator Hatch and Senator Sessions on this issue. I look forward to working with them, Senator Graham, other members of this Committee, and the Obama Administration to address this important issue on a bipartisan basis.

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For Immediate Release – April 29, 2009
Contact: Zach Lowe & Katie Rowley - (202) 224-5323

Statement of U.S. Senator Russ Feingold

Hearing on "Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity"
Senate Judiciary Committee

"The disparity in sentencing between crack and powder cocaine offenses is a serious blemish on our justice system. Over the past 20 years, it has become clear that neither public health nor law enforcement considerations justify the disparity. To the contrary, its effects are pernicious. It diverts resources to low-level offenders and exacerbates overcrowding in federal prisons. And it has a dramatically disproportionate effect on African Americans, which undermines confidence in the federal system of justice in many communities.

"I applaud the U.S. Sentencing Commission for taking an important step to address this problem by lowering the base offense level for crack cocaine offenses. I wrote to the commission, along with Senators Webb and Kerry, urging the commission to make this adjustment retroactive, and I was pleased that it did so. As the commission recognized, a sentence that is unfair for people who are sentenced today is equally unfair for people who were sentenced a year or a decade ago. That's why the commission, for the past 20 years, has made every reduction in drug sentencing retroactive. It's hard to understand why this decision prompted such a strong reaction. It's a matter of simple fairness.

"We must now build on this progress. In the last Congress, I was a cosponsor of then-Senator Biden's Drug Sentencing Reform and Cocaine Kingpin Act. The bill would eliminate the disparity by increasing the amount of crack cocaine necessary to trigger the mandatory minimum sentence. The bill would also eliminate the five-year mandatory minimum sentence for possession of crack cocaine, which is the only mandatory minimum that exists for simple drug possession. It would substitute more effective tools, such as grants for improving drug treatment for prisoners; increased monetary penalties for major drug traffickers; and revised guidelines, if the Sentencing Commission finds it appropriate, to reflect the use of a dangerous weapon or violence in drug offenses. I continue to support this legislation, and I hope the Committee will finally take up the issue this year.

"For two decades, the evidence has accumulated that the current approach to crack cocaine offenses is wrong. On multiple occasions, the U.S. Sentencing Commission has urged Congress to address this problem. It is high time that we fulfill our responsibility as legislators to fix this law."

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Written Statement of
John Wesley Hall, President
National Association of Criminal Defense Lawyers

before the
Subcommittee on Crime and Drugs
United States Senate

**"Restoring Fairness to Federal Sentencing:
Addressing the Crack-Powder Disparity"**

April 29, 2009

For more than twenty years, the sentencing disparity for crack as compared to powder cocaine has come to symbolize the flaws of the federal sentencing system and the shortcomings of the Sentencing Reform Act. Former Chief Justice William Rehnquist opined that "mandatory minimum sentences are perhaps a good example of the law of unintended consequences," and nothing demonstrates this better than the crack cocaine sentencing regime. Despite countless reports by academics, interest groups, the U.S. Sentencing Commission and other government agencies documenting these problems and debunking the rationales for any disparity between crack and powder sentences, actual reform has remained elusive.

We welcome this hearing and the committee members' recent support for ameliorative legislation as a clear sign that reform is finally within reach. We urge the committee to make the most of this window of opportunity.

The Federal Bureau of Prisons' inmate population has swelled to more than 200,000, 52 percent of whom are drug offenders. A 1997 survey reveals that nearly one quarter of the drug offenders in federal prisons at that time were there because of a crack cocaine conviction.[1] Every year, at least 5,000 more offenders are sentenced under the disproportionately severe crack cocaine laws. The failure to correct this grave injustice means that the crack/powder sentencing disparity has continued to gain prominence as a symbol of racism in the criminal justice system.

I. The adverse impact of excessive and disparate crack sentences.

Eighty percent of defendants sentenced in the federal system for crack cocaine are black, and their sentences are approximately 40 percent longer than those for cocaine powder. This is true even though two-thirds of crack defendants are low-level street dealers. Also troubling is the fact that the average sentence for crack cocaine is far longer than the average sentences for violent crimes such as robbery and sexual abuse.

While we fully recognize the harmful effects of crack cocaine distribution on inner-city communities, the negative social and economic impact of the uniquely severe sentencing scheme must also be taken into account. "Far from saving the inner cities, our barbaric crack penalties are only adding to the decimation of inner-city youth."[2] Over-incarceration within black communities adversely impacts those communities by removing young men and women who could benefit from rehabilitation, educational and job training opportunities and a second chance. Drug amounts consistent with state misdemeanors become federal felonies, resulting in disenfranchisement, disqualification for important public benefits including student loans and public housing, and significantly diminished economic opportunity. As a result, many of these persons become outsiders for a lifetime, and their families experience incalculable damage and suffering. Excessive sentences greatly exacerbate all of these harms.

II. The current 100:1 ratio undermines effective law enforcement.

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[1] U.S. Department of Justice, Office of Justice Programs, *Federal Drug Offenders, 1999, with Trends 1984-99* at 11 (2001).

2 Stuart Taylor Jr., Courage, Cowardice on Drug Sentencing, Legal Times, April 24, 1995, at 27.

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The current penalty scheme not only skews law enforcement resources towards lower-level crack offenders, it punishes those offenders more severely than their powder cocaine *suppliers*, an effect known as "inversion of penalties." The 500 grams of cocaine that can send one powder defendant to prison for five years can be distributed to eighty-nine street dealers who, if they convert it to crack, could make enough crack to trigger the five-year mandatory minimum sentence for each defendant.[3] Similarly, the Sentencing Commission reports document that the profit generated from the sale of crack and powder cocaine is equally disproportionate to the sentence imposed. As many have noted, this is at odds with Congress's intended targets for the 5- and 10-year terms of imprisonment, mid-level managers and high-level suppliers, respectively.

Moreover, sentencing policies and law enforcement practices that operate in a racially disparate manner erode public confidence in our criminal justice system, particularly in minority communities. In the past, former Attorney General Janet Reno and a long list of federal judges, all of whom had served as United States Attorneys, emphasized this disturbing consequence in urging reform. At the very least, the penalties likely discourage cooperation with law enforcement. And some stakeholders have suggested that the notoriety of the crack/powder sentencing disparity may actually discourage jury service, permeate jury deliberations and affect trial outcomes.

III. Arguments for maintaining the sentencing disparity between crack and powder cocaine are unpersuasive; both substances should be punished at the current powder cocaine levels.

As set forth in the Sentencing Commission's 2007 report, there is no sound basis -- scientific or otherwise -- for the current disparity. Crack and powder cocaine are simply different forms of the same drug, and they should carry the same penalties.[4] Many of the supposed crack-related harms referenced by Congress in 1986 have proven false or have subsided considerably over time. For example, recent Commission data reveals that 88% of crack cases do not involve violence, 73% of crack offenders have no weapon involvement, and rarely is a weapon ever brandished or used in a crack offense. Existing guideline and statutory enhancements are more than sufficient to punish these aggravating circumstances.

Even more importantly, crack cocaine and powder cocaine are part of the same supply chain. Anyone trafficking in powder cocaine is contributing to the potential supply of crack

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[3] The flipside of this argument -- that similar penalties will encourage distributors to take the final step of converting powder cocaine to crack -- is specious. The Guidelines' relevant conduct rules require that a powder distributor be sentenced according to the crack guidelines if conversion was reasonably foreseeable and within the scope of the defendant's agreement.

[4] Even the number of doses per gram is nearly identical: Five grams of crack cocaine represents approximately 10-50 doses; 500 grams of cocaine powder, which triggers the same five-year sentence, represents approximately 2500-5000 doses. William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 Ariz. L. Rev. 1233, 1273 (1996).

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cocaine; thus, any dangers inherent in crack are necessarily inherent in powder cocaine. This simple truth, in our view, is perhaps the more persuasive rationale for treating the two forms of cocaine identically. This is what the Sentencing Commission proposed in its 1995 report, and we believe it is the most principled approach.

IV. Congress should not undercut this long-overdue reform by ratcheting up sentences in other areas or by encouraging the Sentencing Commission to do so.

Current sentences for powder cocaine and drug offense-related enhancements are more than sufficient. NACDL opposes any proposal to reduce the 100:1 ratio by increasing powder cocaine penalties. Raising already harsh powder cocaine sentencing levels is no answer to the problem of disproportionate and discriminatory crack sentences. There is no credible evidence that powder cocaine penalties, which are generally much longer than heroin or marijuana sentences, are insufficiently harsh. Given that 83% of defendants sentenced at the federal level for powder cocaine offenses are non-white, increasing powder sentences would exacerbate the disproportionate impact of cocaine sentencing on minorities.

Likewise, there is absolutely no need to amend the Sentencing Guidelines so as to add or increase sentencing enhancements. The majority of crack cases do not involve aggravating circumstances, and current laws provide sufficient enhancements for the most common aggravating factors; in addition, sentencing judges have discretion to consider unmentioned factors. Because the existing guideline enhancements, in concert with the applicable statutes, more than adequately punish such offense aggravators (e.g., weapon involvement or prior criminal conduct), there is no need for the Commission to consider new enhancements.

V. Conclusion.

The Sentencing Commission took action in 2007 to reduce its crack guidelines without deviating from the mandatory minimum statutes passed by Congress. At the same time, the Commission called on Congress to enact a more comprehensive solution. While we strongly support legislation that would completely abolish the sentencing disparity without increasing current sentences, we commend all the Committee members who have devoted attention to this injustice by sponsoring corrective legislation.

On behalf of NACDL, I urge you to help complete the unfinished reform process and approve legislation eliminating this unwarranted and unjust disparity from the federal criminal code.

Thank you for considering our views.

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Statement of Glen Hanson, MD
To the Senate Judiciary Committee
Subcommittee on Crime and Drugs

"Restoring Fairness to Federal Sentencing:
Addressing the Crack-Powder Disparity"

Wednesday, April 29, 2009

Dear Chairman Durbin and Senator Graham,

I would like to go on the record concerning the sentencing disparity between crack and powder cocaine. My opinion is based on my experience and record as a scientist (I have authored 37 original research articles in peer-reviewed scientific journals), a full professor in the Department of Pharmacology and Toxicology (at the University of Utah), the director of the Utah Addiction Center (housed in the office of the Senior Vice President of Health Sciences, University of Utah), the former acting director of the National Institute on Drug Abuse (one of the NIH institutes in Washington DC) and a Senior Advisor to the current director of the National Institute on Drug Abuse.

Because of my extensive experience in this scientific area, I have been approached before regarding the pharmacology of different forms of cocaine. One of these occasions was when I was the acting director of the National Institute on Drug Abuse in Washington (Bethesda, MD to be specific). I testified before the United States Sentencing Commission which was at that time considering similar issues to those you are now considering. Consistent with my testimony at that time, I would like to inform Senators Durbin and Graham and the members of the Subcommittee that as a pharmacologist and acknowledged expert in the field of stimulant neurobiology, there is no scientific evidence to suggest that the physiological effects of I.V., smoked, or snorted cocaine differ significantly. The active ingredient in all of these preparations is the same psychostimulant drug, cocaine. The differences in the pharmacological effects resulting from the administration of cocaine are not dependent on how the drug enters the body (e.g., across the nasal mucosal, through the lungs after inhalation, or directly into the blood of the veins), but rather how much reaches the target organs such as the brain. A user can get addicted, overdose, or have a psychotic episode by consuming repeated large quantities of cocaine through snorting, I.V. injection or smoking. Consequently, to try to make legal distinctions between the different forms (e.g., free base, "crack" or cocaine HCl powder) based on pharmacology makes little sense.

If you have any further questions concerning this matter, please do not hesitate to contact me.

Dr. Hanson

Dr. Glen R. Hanson
Professor, Department of Pharmacology and Toxicology

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Joint Statement of Thomas W. Hillier, II
Federal Public Defender for the Western District of Washington
Chair, Federal Defender Legislative Expert Panel
and
Jon Sands
Federal Public Defender for the District of Arizona
Chair, Federal Defender Sentencing Guidelines Committee

April 29, 2009

Hearing before the Senate Judiciary Committee,
Subcommittee on Crime and Drugs

Restoring Fairness to Sentencing: Addressing the Crack-Powder Disparity

Chairman Durbin and Members of the Subcommittee:

Thank you for holding a hearing on restoring fairness to the federal criminal justice system and giving us this opportunity to provide you with information on behalf of the Federal Public and Community Defenders regarding the need to reform federal sentencing laws, particularly those that disproportionately impact people of color. The Defenders represent clients in 90 of 94 federal judicial districts. We represent thousands of people charged with federal offenses, including those charged with federal crack cocaine offenses, 82% of whom are African American.[1]

People of color are dramatically overrepresented in the federal criminal justice system. Blacks and African Americans represent only 12.4% of the U.S. population.[2] Yet, they represent 39% of the Bureau of Prisons ("BOP") inmate population.[3] The rate of incarceration for Hispanics is also disproportionate. Hispanics or Latinos (of any race) represent 14.7% of the U.S. population,[4] but account for 32% of the BOP inmate population.[5]

The reasons people of color are so overrepresented in the federal prison population are many. Here, our focus is on just a few of the federal sentencing provisions that adversely impact minorities without sufficient penological justification and perpetuate disparities found at earlier

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[1] USSC, *Cocaine and Federal Sentencing Policy* at 16 (May 2007).

[2] U.S. Census Bureau, *2005-2007 American Community Survey 3-Year Estimates*, available at http://factfinder.census.gov.

[3] *Quick Facts about the Bureau of Prisons*, available at http://www.bop.gov/news/quick.jsp#2.

[4] U.S. Census Bureau, *2005-2007 American Community Survey 3-Year Estimates*, available at http://factfinder.census.gov.

[5] *Quick Facts about the Bureau of Prisons*, available at http://www.bop.gov/news/quick.jsp#2.

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points in the criminal justice system. We limit our focus to the penalties for crack cocaine, certain mandatory minimum sentencing provisions, recidivist sentencing statutes, and drug distribution in a protected zone.

The Defenders support the following reforms:

1. Penalties for offenses involving the same quantity of crack and powder cocaine should be equalized at a level no greater than the current level for powder cocaine.
2. Differences among offenses and offenders should be taken into account by the sentencing judge in the individual case. Aggravating circumstances should not be built into every sentence for crack cocaine, but should affect the sentence only if they exist in the individual case, as with all other drug types.
3. The mandatory minimum for simple possession of crack cocaine should be repealed.
4. Mandatory minimums should be repealed.
5. Recidivist sentencing enhancements should be narrowly tailored to minimize their disparate impact on people of color.
6. Enhanced penalties for drug distribution near protected zones should be repealed.

I. The Current Cocaine Penalty Structure Undermines the Purposes of Sentencing and Results in Unjustified Disparities.

The severity of crack cocaine penalties remains the single greatest contributor to racial disparity in federal sentencing. As well-documented by the U.S. Sentencing Commission in its four reports to Congress beginning in 1995, the severity of crack cocaine penalties based on drug type is unjustified and unfair, has a disproportionate impact on African Americans, and creates the widely held perception that the penalty structure promotes unwarranted disparity based on race.[6]

Both the Sentencing Commission and the Supreme Court of the United States have acknowledged the unfairness of the current penalty structure. The Sentencing Commission has taken a first step to "somewhat alleviate" these "urgent and compelling problems."[7] With the overwhelming support of the Judiciary, U.S. Probation, the Federal Defenders, the private defense bar, and community groups, the Commission promulgated a two-level reduction, which became law on November 1, 2007 with congressional approval. On December 11, 2007, after receiving over 33,000 letters from the public in support of making the amendment retroactive, the Commission voted unanimously to do so, as with prior amendments benefiting offenders of other races and more serious offenders.

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[6] 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).

[7] USSC, *Cocaine and Federal Sentencing Policy* at 9 (May 2007).

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The amended guideline range now includes, but no longer exceeds, the mandatory minimum penalty at the two statutory quantity levels for an offender in Criminal History Category I (defendants with no or only one minor prior conviction). Guideline ranges above, between and below the two statutory quantity levels continue to be keyed to the mandatory minimum penalties.[8] Before the amendment, guideline sentences for crack were three to over six times longer than for powder cocaine;[9] now they are two to five times longer.[10] In the Commission's view, the amendment is "only a partial remedy to some of the problems associated with the 100-to-1 drug quantity ratio," those problems require a "comprehensive solution" from Congress, and the guidelines can be further amended at that time.[11]

Like the Sentencing Commission, the Supreme Court recognized in December 2007, and repeatedly since then, that the sentencing guidelines for crack undermine the purposes of sentencing and create unwarranted disparity, even as amended. Thus, a sentencing court may impose a below-guideline sentence for those reasons.[12] Again, however, a sentencing court's discretionary authority to impose a lower sentence is only a partial remedy. Many judges remain hesitant to sentence outside the guideline range. For those judges willing to do so, mandatory minimum sentences often stand in the way.[13] A judge cannot sentence below a mandatory minimum unless the government asks for a lesser sentence based on the defendant's substantial assistance to the government,[14] or the defendant qualifies under the narrow provisions of the "safety-valve."[15]

Thus, notwithstanding the Commission's amendments and the Supreme Court's decisions, racial disparities persist in federal sentencing. Recent data show that on the state level in 2005, Black offenders comprised a smaller percentage of drug offenders than they did in 1999.[16] No such decline appears on the federal level. Instead, for the same time period, Black

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

[9] *Id.* at 3.

[10] USSG § 2D1.1 (Nov. 1, 2007).

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

[12] *Kimbrough v. United States*, 128 S.Ct. 558 (2007); *Spears v. United States*, 129 S.Ct. 840 (2009); *Nelson v. United States*, 129 S.Ct. 890 (2009).

[13] *See* 21 U.S.C. § 841.

[14] 18 U.S.C. § 3553(e).

[15] 18 U.S.C. § 3553(f).

[16] Marc Mauer, *The Sentencing Project, Changing Racial Dynamics of the War on Drugs* 4 (2009) (in 1999, 57.6% of drug offenders in state prison were Black; in 2005, the number had dropped to 44.8%).

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offenders have consistently represented 43% of the drug offenders in federal prison.[17] Because of these persistent racial disparities in the federal system, prompt legislative action is critical.[18]

A. Penalties for Offenses Involving the Same Quantity of Crack and Powder Cocaine Should Be Equalized at a Level No Greater Than the Current Level for Powder Cocaine.

Nothing justifies using drug type as a basis for punishing crack cocaine offenders any more severely than powder cocaine offenders. Crack and powder cocaine have the same effects. Crack cocaine was once powder. Persons higher in the distribution chain generally deal with the drug in its powder form. Yet, the current penalty structure often punishes low, street-level crack cocaine offenders more severely than wholesale level powder cocaine offenders. Because low level street dealers are easy targets and prosecutors and law enforcement agents are incentivized by the high penalties, the majority of crack cocaine prosecutions are of low level street dealers. Such prosecutions divert law enforcement resources from high level offenders and contribute to the overcrowding of federal prisons with people who do not need to be there. At the same time, it does not prevent or deter drug crime. Instead, it destroys individuals, families and communities, contributes to recidivism, and undermines confidence in the justice system.

1. The Current Cocaine Penalty Structure Often Results in Punishment That is More Severe for Low Level Offenders Than for High Level Offenders, Serving No Legitimate Law Enforcement Goal and Wasting Resources.

A "major goal" of the Anti-Drug Abuse Act of 1986 was "to give greater direction to the DEA and the U.S. Attorneys on how to focus scarce law enforcement resources" on "major" and "serious" drug traffickers.[19] In practice, low level offenders, *i.e.*, street level dealers of crack cocaine and couriers of powder cocaine, are prosecuted far more often than higher level offenders.[20] This misplaced focus is particularly serious in crack cocaine prosecutions, as 55.4% of all crack cocaine offenders are street level dealers, while 33.1% of powder cocaine offenders are couriers.[21]

In 2006, over 35% of all crack cocaine cases involved less than 25 grams,[22] and nearly 50% involved less than 50 grams.[23] The numbers are skewed toward low-level offenders

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[17] Id. at 6 (in 1999, 43.3% of drug offenders in federal prison were Black; in 2005, 42.9% were Black).

[18] *Id.* at 20; *see also Sentencing Project's Criminal Justice Priorities, Policy Priorities for the 111th Congress* (2009).

[19] H.R. Rep. No. 99-845, 99th Cong., 2d Sess. 1986, 1986 WL 295596 (Background).

[20] USSC, *Cocaine and Federal Sentencing Policy* at 21, 85 (May 2007).

[21] *Id.* at 20-21, Figures 2-5 & 2-6.

[22] *See* USSC, *Cocaine and Federal Sentencing Policy* 112, Table 5.3 (May 2007).

[23] *Id.* at 25, Figure 2.10.

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because "sellers at the retail level are the most exposed and easiest targets for law enforcement, provide an almost unlimited number of cases for prosecution, and are easily replaced."[24]

The current policy of focusing on small-time dealers and users is ineffective in reducing crime, while breaking generation after generation of poor minority young men, according to John P. Walters, former Director of the Office of National Drug Control Policy.[25] As the Sentencing Commission has found, "retail-level drug traffickers are readily replaced by new drug sellers so long as the demand for a drug remains high. Incapacitating a low level drug seller prevents little, if any, drug selling; the crime is simply committed by someone else."[26]

Focusing law enforcement resources on low level crack offenders is particularly irrational since "virtually all cocaine is imported in powder form."[27] Powder cocaine is a necessary ingredient of crack cocaine without which crack cocaine cannot be made. Yet, high level powder dealers are punished less severely than low level crack dealers. A person with no criminal history who possesses 5 grams of crack (10-50 doses or the weight of two sugar packets), whether for personal use or sale, is subject to a guideline sentence of 51-63 months (after the 2007 amendment) and a mandatory minimum of five years. Five grams of powder converts to about 4 ½ grams of crack cocaine by simply adding baking soda, water and heat. But a person possessing 5 grams of powder (25-50 doses) with intent to distribute receives a guideline sentence of only 10-16 months, or if for personal use, no more than 12 months. To receive a five-year mandatory minimum sentence, a powder cocaine offender must distribute 500 grams, or 2,500-5,000 doses.[28]

Comparing sentences for crack cocaine offenses with other offenses further shows the irrationality of current penalties for crack cocaine. The five-year sentence for possessing or distributing 5 grams or 10-50 doses of crack, estimated to be worth on average less than $350,[29] is the same as the guideline sentence for dumping toxic waste knowing that it creates an imminent danger of death, the same as that for theft of $7 million, and the same as for frauds involving $2.5-$7 million. It is double that for aggravated assault resulting in bodily injury.[30] The ten-year sentence for distributing 50 grams or 100-500 doses of crack is far greater than any

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[24] *Id.* at 85.

[25] Kris Axtman, *Signs of Drug-War Shift*, Christian Science Monitor (May 27, 2005).

[26] USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 134 (2004). *See also* USSC, *Cocaine and Federal Sentencing Policy* 68 (Feb. 1995) (DEA and FBI reported that dealers were immediately replaced).

[27] *Id.* at 85.

[28] USSC, *Cocaine and Federal Sentencing Policy* at 63 (May 2007).

[29] Institute for Defense Analysis, *Technical Report for the Price and Purity of Illicit Drugs*, 1981-2007 (July 2008), available from www.whitehousegrugpolicy.gov/publications/price_purity/price_purity07.pdf. Table B-2 price per pure gram in 2007 Q4, estimated at the 5 g purchase quantity.

[30] *See* USSG §§ 2A2.2, 2B1.1 2Q1.1.

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of those, and the same as frauds involving $50-100 million, slightly more than that for voluntary manslaughter, and the same as that for theft of $50 million.[31]

Additional evidence of the unfairness of crack penalties is provided by comparing the relative street prices of the amount of drugs involved in drug trafficking offenses receiving sentences at the two mandatory minimum guideline offense levels:[32]

Level 24: 51-63 months, Criminal History Category I	
Crack: 5 grams @ $68.44/gram	$342
Powder: 400 grams @ $73.46/gram	$29,384
Marijuana: 80 kg. @ $16.22 gram	$1,297,600
Heroin: 80gm @ $218.04 gram	$17,443
Level 30: 97-121 months, Criminal History Category I	
Crack: 50 grams @ $68,44/gram	$3,422
Powder: 3.5 kg. @ $73.46/gram	$257,110
Marijuana: 700 kg. @ $16.22/gram	$11,354,000
Heroin: 700g @ 218.04/gram	$152,628

As one example of the vast disparities among drugs at the five year mandatory minimum level, offenders must sell 500 grams of cocaine power, with a street value of $36,730 to be subject to a five year mandatory minimum. A marijuana dealer must sell 100 kg. marijuana with a 2007 street value of $1,622,000 to be subject to the same sentence. A crack dealer need sell only $342 worth of the drug to be subject to a mandatory minimum five-year term.

These disparity problems cannot be resolved with changes that would continue to punish crack offenders more harshly than powder cocaine offenders. Anything other than a 1-to-1 ratio would perpetuate existing problems. For example, a 20-to-1 ratio, in which 25 grams of crack cocaine would be subject to a five-year sentence and 250 grams would be subject to a ten-year sentence, would still focus law enforcement resources on low level offenders rather than kingpins or major traffickers. Because street-level offenses typically involve quantities greater than 25 grams of crack, setting the five-year sentence at that level would cast the net too wide.[33] The 250 gram level would suffer similar flaws. A 250 gram quantity is more commonly associated with offenders in such lowly roles as cook or courier,[34] rather than high level

[31] *See* USSG §§ 2A1.3, 2B1.1, 2E1.1.

[32] Prices were taken from Price and Purity, supra note 28, Tables B-1 to B-5. Estimated prices (EPH) for all drugs and quantities were based on 2007Q4 single transaction sizes of 2.5-5 grams of pure drug. See Table I-1.

[33] USSC, *Cocaine and Federal Sentencing Policy* at 45, Figure 10 (May 2002) (median drug weight for street level crack dealers was 52 grams in 2000).

[34] *Id.* (median weight of crack in 2000 for managers was 253 grams, for cooks was 180 grams, and for couriers was 338 grams).

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suppliers who may deal in quantities at least ten times that amount.[35] As these figures suggest, quantity is a poor and imprecise measure of culpability.

Additionally, both quantity and type are subject to happenstance and manipulation.[36] A typical street level dealer who supervises no one and makes little profit may continue to sell small quantities of crack to an informant until he is arrested. That he is arrested after selling 250 grams of crack to an informant over the course of weeks or months does not make him a major drug trafficker. The Commission has found that drug quantity manipulation and untrustworthy information provided by informants are continuing problems in federal drug cases.[37] These problems are particularly pronounced in cocaine cases because the simple process of cooking powder into crack results in a dramatically higher sentence. To compound the problem, a very small increase in the quantity of crack severely lengthens the term of imprisonment. The result is that agents and eager-to-please informants insist that powder be cooked into crack, arrange to buy the threshold amount in a single sale, or make additional buys, all for the purpose of arriving at the higher crack sentence.[38] Rather than encouraging law enforcement to focus on existing "major" and "serious" drug traffickers, the unfortunate fact is that the crack/powder disparity lends itself to abuse, creating long sentences for low level offenders who have no information to offer while more culpable offenders receive shorter sentences in return for their cooperation. This is the very definition of unwarranted disparity, wastes taxpayer dollars, and should be eliminated from the federal cocaine sentencing laws.

2. All of the Evidence Supports Equal Punishment for Equal Quantities of Crack and Powder Cocaine at a Level No Greater Than the Current Level for Powder Cocaine.

Addiction and other medical effects on the user are the same for crack and powder cocaine and less serious in many respects than those of heroin, nicotine and alcohol. Crack and powder cocaine cause identical physiological and psychotropic effects regardless of the method of ingestion.[39] In any form, cocaine is potentially addictive.[40] While snorting powder

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[35] *Id.* (median weight for high level supplier of crack was 2962 grams in 2000).

[36] Jeffrey L. Fisher, *When Discretion Leads to Distortion: Recognizing Pre-Arrest Sentence-Manipulation Claims under the Federal Sentencing Guidelines*, 94 Mich L. Rev.2385 (1996).

[37] USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 50, 82 (2004).

[38] *See, e.g., United States v. Fontes*, 415 F.3d 174 (1st Cir. 2005) (at agent's direction, informant rejected two ounces of powder defendant delivered and insisted on two ounces of crack); *United States v. Williams*, 372 F.Supp.2d 1335 (M.D. Fla. 2005) ("[I]t was the government that decided to arrange a sting purchase of crack cocaine [producing an offense level of 28]. Had the government decided to purchase powder cocaine (consistent with Williams' prior drug sales), the base criminal offense level would have been only 14."); *United States v. Nellum*, 2005 WL 300073 (N.D. Ind. Feb. 3, 2005) (defendant could have been arrested after the first undercover sale, but agent purchased the same amount on three subsequent occasions, doubling the guideline sentence from 87-108 months to 168-210 months).

[39] USSC, *Cocaine and Federal Sentencing Policy* at 62-64 (May 2007).

[40] *Id.* at 65.

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cocaine is less addictive than smoking crack or injecting powder, "powder cocaine that is injected is more harmful and more addictive than crack cocaine."[41] The risk and severity of addiction to any drug are significantly affected by the way they are ingested,[42] but no drug other than crack is punished more severely based on the most common method of ingestion.

One reason cocaine is smoked more often than it is injected is that smoking is safer given the risk of infection from sharing needles.[43] The danger to public health associated with needles, including the spread of AIDS and hepatitis, is more severe than the threat to public health posed by smoking crack. "People who inject cocaine can experience severe allergic reactions and, as with all injecting drug users, are at increased risk for contracting HIV and other blood-borne diseases."[44]

The number of deaths, emergency room visits, and treatment admissions associated with crack cocaine do not justify disproportionately high penalties. In 2004, opioid painkiller deaths outnumbered the total deaths from heroin or cocaine.[45] Emergency room admissions are highest, and approximately equal, for alcohol and any kind of cocaine.[46] The highest rate of treatment admissions is for alcohol abuse, followed by marijuana, heroin, crack cocaine, methamphetamine, and powder cocaine.[47] Cocaine addiction appears to be more treatable than heroin or alcohol addiction. *See, e.g.*, Drug and Alcohol Services Information Report, *Admissions with 5 or More Prior Episodes: 2005* (of people seeking treatment in 2005 who had 5 or more prior treatment episodes, 37% were addicted to opiates, 36% to alcohol, and only 16% to cocaine). According to one study, it is more difficult to quit using nicotine or heroin than to quit using cocaine, withdrawal symptoms are more severe for alcohol and heroin than for cocaine, and the level of intoxication is greater for alcohol and heroin than for cocaine.[48]

Nor does the rate of use for crack cocaine justify higher penalties. The rate of use has remained constant notwithstanding years of harsh penalties. The most recently available data for

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[41] USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 132 (2004).

[42] USSC, *Cocaine and Federal Sentencing Policy* at 65 (May 2007).

[43] *Id.* at 66 (May 2007).

[44] National Institute on Drug Abuse, *NIDA InfoFacts: Crack and Cocaine*, available at http://www.nida.nih.gov/Infofacts/cocaine.html.

[45] Testimony of Dr. Leonard J. Paulozzi, Medical Epidemiologist, Centers for Disease Control and Prevention, before Committee on Energy & Commerce, U.S. House of Representatives (Oct. 24, 2007) (emphasis added), available at http://www.cdc.gov/washington/testimony/2007/t20071024.htm.

[46] USSC, *Cocaine and Federal Sentencing Policy* at 77-78 (May 2007).

[47] *Id.* at 79.

[48] Phillip J. Hilts, *Relative Addictiveness of Drugs*, New York Times, Aug. 2, 1994 (study by Dr. Jack E. Henningfield of the National Institute on Drug Abuse and Dr. Neal L. Benowitz of the University of California at San Francisco ranked six substances based on five problem areas), available at http://www.tfy.drugsense.org/tfy/addictvn.htm.

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persons 12 years of age and older reporting past month use of crack cocaine shows no significant difference between 2002 and 2007.[49]

Negative effects of prenatal exposure are mild and identical for crack and powder cocaine and less severe than for other substances including alcohol. The negative effects of prenatal crack cocaine exposure are identical to the negative effects of prenatal powder cocaine exposure, which are significantly less severe than previously believed, are similar to prenatal tobacco exposure, less severe than heroin or methamphetamine exposure, and far less severe than prenatal alcohol exposure. The 2005 National Survey of Drug Use and Health estimated that of all infants exposed to illicit drugs in utero, 7% were exposed to powder cocaine, 2% were exposed to crack cocaine, 73% were exposed to marijuana, and 34% were exposed to unauthorized prescription drugs.[50] A recent study found no differences in growth, IQ, language or behavior between three-year-olds who were exposed to cocaine in the womb and those who were not. *See* Kilbride, Castor, Cheri, *School-Age Outcome of Children With Prenatal Cocaine Exposure Following Early Case Management*, Journal of Developmental & Behavioral Pediatrics, 27(3):181-187, June 2006.

The incidence of violence is low, steadily decreased after the 1980s, and is addressed, if it occurred, through available enhancements in individual cases. In 2005, 94.5% of the crack cases involved no actual violence and 89.6% involved no violence or threat of violence. Death occurred in only 2.2% of cases, injury occurred in only 3.3% of cases, and a threat was made in just 4.9% of cases.[51] Only 2.9% of crack offenders in 2005 used a weapon. "Weapon enhancement rates were nearly equal for powder cocaine offenders and crack cocaine offenders at the low-level functions of street-level dealer (23.8% for powder cocaine offenses versus 22.4% for crack cocaine offenses), courier/mule (2.0% for powder cocaine offenses versus 0.0% crack cocaine offenses), and renter/loader/lookout/enabler/user/all others (13.1% for powder cocaine offenses versus 12.7% crack cocaine offenses)." [52]

The violence associated with crack has declined since 1992. According to the Commission, reduced levels of violence are consistent with the aging of the crack cocaine user and trafficker populations.[53] "By the early 1990s . . . the relationship between crack and unwelcome social outcomes had largely disappeared. . . . After property rights were established

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[49] Substance Abuse and Mental Health Services Administration, *Results from the 2007 National Survey on Drug Use and Health: National Findings* at 17 (2008) ("The number of past month crack users was also similar over this period (610,000 in 2007 vs.702,000 in 2006 and 567,000 in 2002").

[50] USSC, *Cocaine and Federal Sentencing Policy* at 68-71 (May 2007).

[51] *Id.* at 33, 38.

[52] *Id.* at 36.

[53] *Id.* at 83, 87.

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and crack prices fell sharply reducing the profitability of the business, competition-related violence among drug dealers declined."[54]

Rather than set high penalties across the board on the erroneous assumption that crack offenses are more violent or potentially dangerous than other drug offenses, violence or weapon involvement should be taken into account through enhancements in individual cases. The federal sentencing guidelines provide for a higher sentence for offenders who possessed a dangerous weapon, including a firearm, during the offense. USSG § 2D1.1(b)(1). The guidelines also invite upward departure if death or serious bodily injury resulted from the offense, or if a weapon was used in a particularly dangerous way. USSG § 5K2.1, 5K2.2, 5K2.6. Section 924(c) of title 18 provides for a series of graduated penalties for individuals who possessed, brandished, or discharged a firearm during and in relation to a drug trafficking crime. Section 924(j) of title 18 (which incorporates first-degree murder, second-degree murder, and manslaughter) applies if death results from the 924(c) offense. In light of these various sentencing provisions, it is wholly unnecessary and unjustifiable to increase sentences for *any* quantity of crack cocaine on the assumption that weapon possession or violence is associated with *every* case. Setting penalties high across the board punishes offenders for conduct that did not occur or double counts it when it did occur.

Rather than continue to punish *all* offenders as if they were violent offenders, it would be far more effective to promote "focused deterrence" strategies where violent dealers are arrested and prosecuted, but nonviolent dealers are offered support services and encouraged by community members and the police to stop dealing. Such programs, which engage the community, police, and nonviolent offenders in a collaborative process, have produced promising results in reducing violent and drug-related crime. [55]

Recidivism is relatively low and is addressed if it exists through the criminal history score and other enhancements in the individual case. For Criminal History Categories II and higher, drug offenders have the *lowest* rate of recidivism of all offenders[56] Further, across all criminal history categories and for all offenders, the largest proportion of "recidivating events" that count toward rates of recidivism are supervised release revocations, which are based on anything from failing to file a monthly report to failing to report a change of address.[57] Drug

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[54] Roland G. Fryer, Jr., Paul S. Heaton, Steven D. Leavitt, Kevin M. Murphy, National Bureau of Economic Research, *Measuring the Impact of Crack Cocaine* (May 2005), available at http://pricetheory.uchicago.edu/levitt/Papers/FryerHeatonLevittMurphy2005.pdf.

[55] *See* Keyuanda Evans and K. Michelle Smawley, *New Program Reforms Drug-Torn Neighborhood*, ABC Primetime (August 20, 2008), available at http://abcnews.go.com/TheLaw/Story?id=5612013&page=1. For more information on how these programs operate, *see* Bureau of Justice Assistance, *Drug-Market Intervention Training Initiative*, available at http://www1.cj.msu.edu/~outreach/psn/DMI/dmiresources9basicsteps.pdf.

[56] USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* at 13 & Ex. 11 (May 2004).

[57] *Id.* at 4, 5 & Exs. 2, 3, 13.

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trafficking accounts for only a small fraction – as little as 4.1% – of recidivating events for all offenders.[58]

While it is true that crack cocaine offenders generally have higher criminal history categories than powder cocaine offenders,[59] as the Commission has explained, "African-Americans have a higher risk of conviction for a drug trafficking crime than do similar White drug traffickers" because of "the relative ease of detecting and prosecuting offenses that take place in open-air drug markets, which are most often found in impoverished neighborhoods."[60] Indeed, though African Americans comprise only 15% of drug users, they comprise 37% of those arrested for drug offenses, 59% of those convicted, and 74% of those sentenced to prison for a drug offense.[61]

Because African Americans have a higher risk of conviction than similar White offenders, they already (1) have higher criminal history scores and thus higher guideline ranges, (2) are sentenced more often under the career offender guideline, (3) are subjected to higher mandatory minimums for prior drug trafficking felonies under 21 U.S.C. § 841, and (4) are more often disqualified from safety valve relief. In short, criminal history is already accounted for in a host of ways in individual cases. Building it into every crack cocaine sentence effectively double counts criminal history and exacerbates racial disparity.

No evidence supports raising powder cocaine penalties. We join the Commission in urging Congress to "reject addressing the 100-1 drug quantity ratio by decreasing the . . . threshold quantities for powder cocaine offenses." As the Commission has found, "there is no evidence to justify an increase in quantity-based penalties for powder cocaine offenses."[62] Further, reducing the powder threshold would have a disproportionate impact on Latino offenders who are overrepresented among powder cocaine offenders.[63]

3. The Harsh Federal Penalties for Crack Cocaine Offenses Destroy Individuals, Families and Communities, Undermine Public Confidence in the Justice System, and Create a Greater Risk of Recidivism.

Over 32% of Black males born in 2001 are expected to go to prison during their lifetimes if current incarceration rates continue. In 2001, the percentage of Black males in prison was

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[58] *Id.* at Ex. 13.

[59] USSC, *Cocaine and Federal Sentencing Policy* at 44 (May 2007).

[60] USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 134 (2004).

[61] *See* Interfaith Drug Policy Initiative, *Mandatory Minimum Sentencing Fact Sheet*, http://idpi.us/dpr/factsheets/mm_factsheet.htm.

[62] *See* USSC, *Cocaine and Federal Sentencing Policy* at 8 (May 2007).

[63] National Council of La Raza, *Drug Sentencing and Its Effects on the Latino Community* at 6 (February 2002), available at http://www.nclr.org/files/38305_file_Drug_Sentencing_USSC_testimony_2.pdf.

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twice that of Hispanic males and six times that of White males.[64] In 2003, African Americans were incarcerated in federal prison at a rate 4.5 times that of Whites.[65] One of every fourteen African American children has a parent in prison, and thirteen percent of all African American males are not permitted to vote because of felony convictions.[66] The harsh treatment of federal crack offenders has contributed to this deplorable situation.

The persistent removal of persons from the community for lengthy periods of incarceration weakens family ties and employment prospects, and thereby contributes to increased recidivism.[67] Reputable studies show that if a small portion of the budget currently dedicated to incarceration were used for drug treatment, intervention in at-risk families, and school completion programs, it would reduce drug consumption by many tons and save billions of taxpayer dollars.[68]

Defenders see the pointless destruction of our clients' lives and families on a frequent basis. Under the statute and guidelines, even a first offender must spend a substantial period of time in prison, cutting off education and meaningful work, and greatly diminishing prospects for the future. As one example, the Defender in the District of Columbia represented a 22-year-old young man who was working toward his GED and taking a weekly class in the plumbing trade when he was sentenced to prison for selling 7 grams of crack to a cooperating informant. He had no prior convictions or even any prior arrests, no history of drug or alcohol abuse, was in a stable relationship, and had two small children to whom he was devoted. He was a random casualty of an investigation of a serious drug trafficking conspiracy in which he was not involved. A cooperator in that investigation, who happened to live in the same housing project, approached the young man to get him some crack, and he unwisely agreed in order to get cash to support his family. The government prosecuted the client in federal court, not because he was involved in the conspiracy under investigation, but to make a track record for its cooperator. If the client had been prosecuted in superior court, he would have received a sentence of probation. If he had been prosecuted in federal court for selling 7 grams of powder cocaine, he would have received a

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[64] U.S. Department of Justice, Bureau of Justice Statistics, *Special Report: Prevalence of Imprisonment in the U.S. Population, 1974-2001* (August 2003).

[65] Christopher Hartney and Linh Vuong, National Council on Crime and Delinquency, *Created Equal: Racial and Ethnic Disparities in the U.S. Criminal Justice System* at 19 (March 2009).

[66] *See* American Civil Liberties Union, *Cracks in the System: Twenty Years of the Unjust Federal Crack Cocaine Law* at 3-4, October 2006; Justice Policy Institute, *Cellblocks or Classrooms?: The Funding of Higher Education and Corrections and its Impact on African American Men* at 10 (2002); Human Rights Watch & the Sentencing Project, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States* at 8 (1998).

[67] The Sentencing Project, *Incarceration and Crime: A Complex Relationship* at 7-8 (2005) (hereinafter "*Incarceration and Crime*"), available at http://www.sentencingproject.org/pdfs/incarceration-crime.pdf.

[68] Caulkins, Rydell, Schwabe & Chiesa, *Mandatory Minimum Sentences: Throwing Away the Key or the Taxpayers' Money?* at xvii-xviii (RAND 1997); Rydell & Everingham, *Controlling Cocaine: Supply Versus Demand Programs* (RAND 1994); Aos, Phipps, Barnoski & Lieb, *The Comparative Costs and Benefits of Programs to Reduce Crime* (Washington State Institute for Public Policy 2001), http://www.nicic.org/Library/020074.

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sentence of probation. He is now serving a prison sentence, while the cooperator, who had a very substantial record, was sentenced to time served.

In a case handled by the Defender in Los Angeles, the client was just finishing up a sentence for being a felon in possession of a firearm. He had completed the 500-hour drug treatment program, had served as a suicide watch companion in prison for over a year, had been released to a halfway house, was working full time, and was about to regain custody of his son. On the eve of his return home and just before the statute of limitations would have expired, the government indicted him for a sale of four ounces of crack to a confidential informant, which had occurred seven months *before* the felon in possession offense. In that case, the informant, at the direction of law enforcement officers, rejected the four ounces of powder cocaine the client brought him and insisted on four ounces of crack instead. If the government had indicted the client for both offenses at once, he would have received a concurrent sentence. If the informant had not insisted on crack, the entire sentence would be wrapped up, the client would be working, and his son would have a parent to care for him. Instead, he is now serving a ten-year mandatory minimum sentence.

In a case handled by the Defender in the Southern District of Alabama, a forty year old mother of three and grandmother of two with no criminal history was convicted of conspiring to distribute crack. The only evidence against her was the uncorroborated testimony of serious drug dealers, one a former boyfriend, who had gun charges dismissed and received lower sentences in return. Her lawyer moved for a mistrial when he learned that the cooperators were placed in the same holding cell and were coordinating their testimony. The witnesses assured the judge that they did not discuss their testimony and the motion was denied. The woman was sentenced to twenty years in prison. Her 20-year-old daughter was forced to leave college to support and care for the family.

B. Aggravating Circumstances, Rather Than Being Built Into Every Sentence for Crack Cocaine Offenses, Should Affect the Sentence Only If Present In The Individual Case, as With Any Other Drug Type.

The aggravating circumstances once thought to be particularly prevalent in or unique to crack cocaine offenses are already available in existing guidelines and statutes applicable to all drug cases.[69] As discussed in the section I(A)(2), numerous sentencing enhancements exist for violence and weapon involvement. Other guidelines provide for increased sentences for individuals who play aggravating roles in drug trafficking, USSG § 3B.1.1, or commit drug offenses as part of their livelihood, USSG § 4B1.3 Thus, under the current penalty structure, for crack cocaine offenders, this means that they are being punished once based on an assumption that aggravating circumstances exist in every case even if they do not exist in the individual case, and twice if the aggravating circumstance is actually present in the case.

[69] *See* USSG § 2D1.1(b)(1) (actual possession of a weapon by the defendant or access to a weapon by an unindicted participant); 18 U.S.C. § 924(c) (consecutive mandatory minimum if weapon was possessed, used or brandished); USSG § 4B1.3 (offense was part of a pattern of criminal livelihood); USSG Chapter Four (criminal history score); USSG § 3B1.4 (use of a minor); USSG § 3B1.1 (aggravating role); USSG § 2D1.2 (sales to pregnant women, minors, or in protected locations); USSG § 2D1.1(a) (death or serious bodily injury); USSG § 5K2.1 (death); USSG § 2K2.2 (bodily injury); USSG § 3C1.1 (obstruction of justice).

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As with all other drug types, any additional harm in a crack cocaine offense should not be addressed through the blunt instrument of a higher penalty built into the punishment at every quantity level, but by enhancements that may or may not exist in individual cases. Those enhancements are already available under current law. *See* footnote 69, *supra*.

C. The Mandatory Minimum for Simple Possession of Crack Cocaine Should Be Repealed.

Like the penalties for felony drug offenses, the mandatory minimum penalty for the simple possession of crack cocaine has a racially disparate impact that bears no rational relationship to legitimate penological objectives. As the Commission has unanimously and repeatedly recommended, the mandatory minimum for simple possession of crack should be eliminated. Under 21 U.S.C. § 844, the possession of 5 grams of crack for personal use triggers a mandatory minimum of five years – a felony offense. Possession of any other drug (except flunitrazepam)[70] in the same or even greater quantities is a misdemeanor offense. To saddle a crack user with a felony conviction and to remove him from society for a minimum term of five years does nothing to deal with the critical issue fueling the offense – drug addiction. Punitive incarceration rather than treatment decreases the chances of the offender becoming a successful and productive member of society and often has deleterious consequences for his family. The collateral consequences of a felony conviction are many. Such persons can no longer vote and may be denied such basic benefits as food stamps and access to services designed for their children – the neediest and least protected members of society.[71] The unavailability of such services not only increases the offender's risk of recidivism, but places family members at risk of engaging in criminal or anti-social behavior.

II. Mandatory Minimum Sentencing Statutes Should Be Repealed.

Seventeen years ago, the Sentencing Commission found that mandatory minimums create unwarranted disparity and unwarranted uniformity, and transfer sentencing power from impartial judges to interested prosecutors.[72] Mandatory minimum statutes result in sentences that are unfair, disproportionate to the seriousness of the offense and the risk of re-offense, and racially discriminatory.[73] The Commission, in its Fifteen Year Report, detailed many of these problems with support from many sources, including evidence from the Department of Justice "that mandatory minimum statutes [are] resulting in lengthy imprisonment for many low-level, non-

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[70] Possession of flunitrazepam carries a maximum penalty of three years with no mandatory minimum. 21 U.S.C. § 844(a).

[71] 21 U.S.C. § 862a.

[72] *See* USSC, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (1991).

[73] *See* Families Against Mandatory Minimums and National Council of La Raza, *Disparate Impact of Federal Mandatory Minimums on Minority Communities in the United States* (March 2006).

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violent, first-time drug offenders."[74] The Commission concluded: "Today's sentencing policies, crystallized into sentencing guidelines and mandatory minimum statutes have a greater adverse impact on Black offenders than did the factors taken into account by judges in the discretionary system in place immediately prior to guidelines implementation."[75]

The Commission recently reported that in 2006, Black offenders were the only racial group comprising a greater percentage of offenders convicted under a mandatory minimum statute (32.9%) than their percentage in the overall offender population (23.8%). In drug cases, only Hispanics and Blacks comprised a greater percentage of offenders convicted under a mandatory minimum statute (42.4% and 32% respectively) than their percentage in all drug cases (41.7% and 29.2% respectively).[76] Because Native Americans are subject to federal law and not state law, they too bear a disproportionate burden of the 190 plus mandatory minimum provisions scattered throughout the federal criminal code.

Data from fiscal year 2007 show the same pattern of racially disparate impact of mandatory minimum drug penalties. Black defendants represented 25.7 percent of offenders for whom race and mandatory penalty information were available.[77] However, black offenders represented 33.6 percent of those receiving a mandatory minimum drug penalty.

Today, there is a solid consensus in opposition to mandatory minimums among an ideologically diverse range of judges, governmental bodies and organizations dedicated to policy reform, including the Judicial Conference of the United States, the U.S. Conference of Mayors, The Constitution Project's Sentencing Initiative, the American Bar Association's Justice Kennedy Commission, and Justice Kennedy himself.[78] One of the many reasons why the Judicial Conference opposes mandatory minimums is that they create unwarranted sentencing disparity.[79]

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[74] *See* USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 51 (2004), citing U.S. Department of Justice, *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories*, Executive Summary (February 4, 1994).

[75] *Id.* at 135.

[76] *See* Statement of Ricardo H. Hinojosa, Chair, United States Sentencing Commission, Before the Subcommittee on Crime, Terrorism and Homeland Security of the House Judiciary Committee 3, 12 (June 26, 2007).

[77] USSC FY2007 Monitoring Dataset, available from the Interuniversity Consortium of Political and Social Research, at http://www.icpsr.umich.edu. Offenders were classified for this analysis using the MONRACE variable, which divides offenders into white, black, and other groups. Hispanics are classified as either white, black or other and are not counted separately. Mandatory drug penalty information was obtained using the DRUGMIN variable.

[78] *See* Statement of Hon. Paul J. Cassell Before the Subcommittee on Crime, Terrorism and Homeland Security of the House Judiciary Committee on Behalf of the Judicial Conference of the United States (June 26, 2007); U.S. Conference of Mayors, *Resolution Opposing Mandatory Minimum Sentences* at 47-48 (June 2006); Constitution Project, *Sentencing Initiative, Principles for the Design and Reform of Sentencing Systems: A Background Report* (June 7, 2005); American Bar Association, *Report of the ABA Justice Kennedy Commission* (June 23, 2004); Associate Justice Anthony M. Kennedy, *Speech at the*

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III. Mandatory Minimum Statutes Based on Criminal History Should Be Repealed and other Sentencing Provisions, like the Safety-Valve, that Depend on Criminal History Should Be Revisited.

The federal criminal code contains numerous provisions for enhanced sentences based on prior convictions. Our clients are most affected by recidivist sentencing provisions in the drug statutes, 21 U.S.C. §§ 841 and 851, the federal firearms fifteen year mandatory minimum for persons who unlawfully possess firearms and have three previous convictions for, among other things, a "serious drug offense," 18 U.S.C. § 924(e), the recidivist 25 year mandatory minimum for possession, use, or carrying of a firearm during a drug tracking crime, 18 U.S.C. § 924(c), and the sentencing enhancements for illegal reentry after being deported for certain felony and misdemeanor offenses. 8 U.S.C. § 1326(b). Even if these statutes appear race neutral, they have a significant adverse impact on people of color that is not needed to accomplish a legitimate sentencing purpose.

For those with federal criminal justice contact, the proportion of Black offenders with prior convictions is greater than that of White offenders. Data from the Commission show that offenders in criminal history categories II through VI "are more likely (41.8%) to be Black than are offenders in categories I." [80] While Hispanic offenders are more equally represented across criminal history categories, those with misdemeanor convictions or a single aggravated felony (broadly defined to include theft, criminal trespass, and failure to appear) are punished severely under 8 U.S.C. § 1326 and the sentencing guidelines if they reenter the country after sustaining those convictions.

Black offenders come into the federal criminal justice system with lengthier criminal histories not because they pose greater risks of recidivism or threats to public safety, but because of racial/ethnic/socio-economic disparities existing elsewhere. These disparities manifest themselves in several ways. A few examples demonstrate the point. First, minorities are more likely to have contact with the criminal justice system and experience higher rates of conviction and incarceration than White offenders because law enforcement officers concentrate their efforts in certain areas – predominantly poor minority neighborhoods. [81]

Second, people of color in poorer communities are more likely to sit in jail pending trial and must rely on underfunded and inadequate systems of indigent defense for legal

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American Bar Association Annual Meeting at 4 (Aug. 9, 2003); Leadership Conference on Civil Rights, Justice on Trial (2000); Federal Judicial Center, *The Consequences of Mandatory Prison Terms* (1994).

[79] *See* Letter of Criminal Law Committee, Judicial Conference of the United States, March 2007, available at http://www.ussc.gov/hearings/03_20_07/walton-testimony.pdf.

[80] USSC, *Recidivism and the First Offender* at 7 (May 2004).

[81] USSC, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 134 (2004). *See also* Michael Tonry, Malign Neglect – Race, Crime, and Punishment in America. New York: Oxford University Press (1995).

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representation. [82] Anxious to resolve the charges against them, uninformed about the collateral consequences of doing so, and lacking faith in the system's ability to dispense justice, they often accept plea bargains with shorter sentences or time served rather than challenge the police conduct leading to their arrest or contest their guilt. The result is that many may be convicted of state misdemeanor drug offenses or other crimes that are considered federal felonies because they carry a *potential* punishment of more than one year.

Third, Black youth are waived into the adult system at an alarming rate compared to their White counterparts.[83] Recent research shows that "[t]he proportion of White youth waived to the adult system is just 75% of their proportion in the general population, while the proportion of African American youth waived is 200% of their proportion in the general population."[84] For youth charged with drug offenses, African-Americans are "substantially more likely than their white counterparts to be tried as adults.[85] Hispanic and Native Americans youth are also overrepresented in the adult criminal justice system.[86]

Although Black offenders may come into the federal criminal justice system with lengthier criminal histories, the empirical evidence does not show that they are more dangerous or serious offenders. Indeed, for crack offenders, the Commission's data shows that criminal history category appears unrelated to the offender's role in the offense.[87] Thus, lower level offenders with criminal histories are being sentenced to long periods of incarceration, but without any proof that removing them from the street will protect the community and in the face of substantial evidence that they will be readily replaced by others.[88]

As a result of their disproportionately high representation at earlier points in the criminal justice process, Black offenders are also denied relief from mandatory minimum punishments under the "safety-valve" at 18 U.S.C. § 3553(f), which applies only in drug cases. Only offenders in criminal history category I are eligible for safety-valve relief. In 2007, however, only 21 percent of crack cocaine offenders (who are predominantly Black) satisfied this

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[82] *See generally* Norman Lefstein and Robert Spagenerg, The Constitutional Project, Justice Denied, America's Continuing Neglect of our Constitutional Right to Counsel, Ch. 2 (2009).

[83] See generally Barry C. Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative "Backlash*, 87 Minn. L. Rev. 1447, 1451 (2003). Christopher Hartney and Linh Vuong, National Council on Crime and Delinquency, *Created Equal: Racial and Ethnic Disparities in the U.S. Criminal Justice System* at 18 (March 2009) (Native Americans held in federal prison at 2.6 times the rate of Whites).

[84] *Id.* at 34; Amanda Burgess-Proctor, et.al., Campaign for Youth Justice, *Youth Transferred to Adult Court: Racial Disparities* (2006).

[85] *Id.* at 9.

[86] Hartney, *supra* n. 78.

[87] USSC, *Cocaine and Federal Sentencing Policy* at 55 (May 2007).

[88] USSC, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 134 (2004).

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requirement. [89] While we believe that Congress should repeal all mandatory minimums, an interim step toward fairer sentences would be to expand safety-valve eligibility.

Immigration offenses that carry enhanced penalties based on prior convictions fall disproportionately on Hispanic offenders. In 2007, almost half (48.4%) of Hispanic offenders were sentenced for violating immigration law.[90] Virtually all of these offenders were sentenced to prison. [91] Both the illegal reentry statute, 8 U.S.C. § 1326, and the applicable sentencing guidelines, USSG § 2L1.2 provide for significant penalties for persons unlawfully entering or remaining in the United States after being convicted of certain specified offenses. 8 U.S.C. § 1101(a)(43). A defendant convicted of one type of aggravated felony – a *single* drug distribution charge with a sentence over 13 months -- receives a 16 level enhancement in his sentence under the guidelines. Because Hispanics are more likely to be arrested and charged with drug offenses, held in jail pretrial, and then given longer sentences than White defendants, they are disproportionately burdened by this penalty structure.[92] Even a defendant convicted of another type of aggravated felony -- a minor shoplifting charge -- faces an 8 level enhancement under the guidelines and a statutory maximum of twenty years. In contrast, a defendant with no prior conviction faces a statutory maximum of two years. 8 U.S.C. § 1326(a). No empirical evidence suggests that the mass incarceration of the Hispanic population, and the devastating effect that incarceration has on families and children, serves the purposes of sentencing or deters undocumented persons from entering the United States.

IV. Enhanced Penalties for Drug Distribution Near School and other Protected Zones Have Disproportionate Impacts on Racial and Ethnic Minorities

Congress enacted special penalty provisions for those who distribute drugs near schools, playgrounds, public housing, and other protected locations. 21 U.S.C. § 860. These laws have a disproportionate impact on racial and ethnic minorities who tend to be concentrated in urban areas.[93] While seeking to protect school children from being sold drugs, the laws have not accomplished their purpose. Anyone distributing in the school zone is subject to prosecution regardless of the intended target of the distribution and whether or not a child is the buyer or even nearby. One study of school zone legislation in New Jersey – legislation similar to the federal statute – showed that it had a "a devastatingly disproportionate impact on New Jersey's minority community" and "failed entirely to accomplish their primary objective of driving drug activity away from schools and schoolchildren. The study found that the law had no measurable

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[89] *Id.* at 44.

[90] Mark Lopez, Pew Hispanic Center, *A Rising Share: Hispanics and Federal Crime* at 4 (Feb. 2009).

[91] *Id.* at 7 (96% of Latino offenders were sentenced to prison in 2007)

[92] National Council of La Raza, *Drug Sentencing and Its Effects on the Latino Community* at 5 (February 2002), available at http://www.nclr.org/files/38305_file_Drug_Sentencing_USSC_testimony_2.pdf.

[93] Marc Mauer, *Racial Impact Statements: Changing Policies to Address Disparities*, 23 Criminal Justice (2009); *see also* L. Buckner Innis, *Moving Violation? Hypercriminalized Spaces and Fortuitous Presence in Drug Free School*, 8 Tex. F. on C.L. & C.R. 51, 74-75 (2003).

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deterrent effect and was not being used to sanction individuals that sell drugs to children." [94] Consequently, policymakers in New Jersey and elsewhere "are moving to reform or replace drug-free zone laws with more effective measures." [95] In New Jersey, 96% of offenders jailed for violating protected zone laws were Black or Hispanic.[96] In a Massachusetts study, researchers found a disturbing trend. "While roughly 80 percent of all arrests took place within a school zone (meeting the first eligibility criteria), only 15 percent of whites were charged with an eligible offense (distribution or possession with intent) compared to 52 percent of non-white defendants."[97]

Given the proven adverse impacts of school and protected zone statutes on minority communities and the ineffectiveness of such laws in deterring crime, Congress should revisit 21 U.S.C. § 860. If any individual defendant actually distributes drugs to a child, then such conduct may be considered by the district judge in assessing culpability. Across the board increases for persons distributing drugs within a protected zone should be repealed.

In conclusion, thank you again for holding this hearing and permitting us to share with you our views on the immediate and compelling need for meaningful sentencing reform that reduces the disproportionate impact of the present system on people of color, their families, and their communities.

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[94] Justice Policy Institute, *Disparity by Design: How Drug-free Zone Laws Impact Racial Disparity and Fail to Protect Youth* at 4 (March 2006).

[95] *Id.* at 44.

[96] *Id.* at 14.

[97] *Id.*at 15.

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Statement of Ricardo H. Hinojosa
Acting Chair, United States Sentencing Commission
Before the Senate Committee on the Judiciary
Subcommittee on Crime and Drugs

April 29, 2009

Chairman Durbin, Ranking Member Graham, and members of the Subcommittee, I appreciate the opportunity to appear before you on behalf of the United States Sentencing Commission to discuss federal cocaine sentencing policy.

The Commission has considered cocaine sentencing issues over a number of years[1] and has worked closely with Congress to address the sentencing disparity that exists between the penalties for powder cocaine and crack cocaine offenses. The Commission amended the federal sentencing guidelines in 2007 to partially address the sentencing disparity and, pursuant to its authority under 28 U.S.C. § 994(u),[2] gave retroactive effect to that amendment effective March 3, 2008. The Commission continues to be of the view, however, that any comprehensive solution to the problem of federal cocaine sentencing policy requires revision of the current statutory penalties and therefore must be legislated by Congress. The Commission urges Congress to take legislative action on this important issue.

Part I of this statement briefly summarizes the statutory and guideline penalty structure for crack cocaine offenses. Part II provides an analysis of federal cocaine sentences, including information on differences in average sentence length between crack cocaine and powder cocaine offenses. Part III provides a brief update on case law concerning crack cocaine sentencing and data on recent cocaine sentencing practices. Part IV provides information concerning the retroactive application of the 2007 crack cocaine guideline amendment. Part V sets forth the Commission's recommendations for statutory penalty revisions.

I. Statutory and Guideline Penalty Structure

The Anti-Drug Abuse Act of 1986[3] established the basic framework of statutory mandatory minimum penalties currently applicable to federal drug trafficking offenses. The quantities triggering those mandatory minimum penalties differ for various drugs and in some cases, including cocaine, for different forms of the same drug.

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[1] *See* United States Sentencing Commission (hereinafter "USSC" or "Commission"), *Report On Cocaine and Federal Sentencing Policy* ("May 2007 Report"), USSC, *2002 Report to Congress: Cocaine and Federal Sentencing Policy* (May 2002); USSC, *1997 Special Report to Congress: Cocaine and Federal Sentencing Policy* (as directed by section 2 of Pub. L. 104–38) (April 1997); USSC, *1995 Special Report to Congress: Cocaine and Federal Sentencing Policy* (as directed by section 280006 of Pub. L. 103–322) (February 1995).

[2] 28 U.S.C. § 994(u) provides that "[i]f the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced." *See also* USSG, App. C, Amendment 713 (March 3, 2008).

[3] Pub. L. 99–570, 100 Stat. 3207 (1986) (hereinafter "1986 Act").

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In establishing the mandatory minimum penalties for cocaine, Congress differentiated between two principal forms of cocaine: cocaine hydrochloride (commonly referred to as "powder cocaine") and cocaine base (commonly referred to as "crack cocaine"). Because of congressional concern at that time about the dangers associated with crack cocaine,[4] the 1986 Act provided significantly higher punishment for crack cocaine offenses based on the quantity of the drug involved in the offense.

As a result of the 1986 Act, federal law requires a five-year mandatory minimum penalty for a first-time trafficking offense involving at least five grams of crack cocaine, or at least 500 grams of powder cocaine, and a ten-year mandatory minimum penalty for a first-time trafficking offense involving at least 50 grams of crack cocaine, or at least 5,000 grams of powder cocaine. Because it takes 100 times more powder cocaine than crack cocaine to trigger the same mandatory minimum penalty, this penalty structure is commonly referred to as the "100-to-1 drug quantity ratio." In addition, unlike for any other drug, in 1988 Congress enacted a five-year statutory mandatory minimum penalty for simple possession of at least five grams of crack cocaine.[5]

When Congress passed the 1986 Act, the Commission was in the process of developing the initial sentencing guidelines. The Commission responded to the legislation by generally incorporating the statutory mandatory minimum sentences into the guidelines and extrapolating upward and downward to set guideline sentencing ranges for all drug quantities. Offenses involving at least five grams of crack cocaine or at least 500 grams of powder cocaine, as well as all other drug offenses carrying a five-year mandatory minimum penalty, were assigned a base offense level of 26, corresponding to a sentencing guideline range of 63 to 78 months for a defendant in Criminal History Category I. Similarly, offenses involving at least 50 grams of crack cocaine or at least 5,000 grams of powder cocaine, as well as all other drug offenses carrying a 10-year mandatory minimum penalty, were assigned a base offense level of 32, corresponding to a sentencing guideline range of 121 to 151 months for a defendant in Criminal History Category I. Crack cocaine offenses and powder cocaine offenses involving quantities above and below the mandatory minimum penalty threshold quantities were set proportionately using the same 100-to-1 drug quantity ratio.

The Commission's 2007 crack cocaine guideline amendment reduced by two levels the base offense levels assigned to the various quantities of crack cocaine. Consequently, for crack cocaine offenders, the base offense levels now correspond to guideline ranges that include rather than exceed the five-year and ten-year mandatory minimum terms of imprisonment.[6] Offenses involving quantities of crack cocaine above

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[4] *See* USSC, *2002 Report to Congress: Cocaine and Federal Sentencing Policy* (May 2002) at 7-10 for a discussion of the legislative history of the 1986 Act as it pertains to crack cocaine.

[5] *See* 21 U.S.C. § 844.

[6] USSG, App. C, Amendment 706 (Nov. 1, 2007). Specifically, the 2007 crack cocaine guideline amendment reduced the base offense level for offenses involving at least five grams of crack cocaine by two levels, from level 26 to level 24, which corresponds to a sentencing guideline range of 51 to 63 months for a defendant in Criminal History Category I. The base offense level for offenses involving at least 50 grams of crack cocaine similarly was reduced by two levels, from level 32 to level 30, which corresponds to a sentencing guideline range of 97-121 months for a defendant in Criminal History Category I. If a statutory mandatory minimum applies, the applicable guideline range is 60 to 63 months

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and below the mandatory minimum threshold quantities similarly were adjusted downward by two levels.

The Commission promulgated the 2007 crack cocaine guideline amendment after an extensive review of the issues associated with federal cocaine sentencing policy. Consistent with previous Commission conclusions that the 100-to-1 drug quantity ratio should be modified[7] but recognizing Congress's authority to establish federal cocaine sentencing policy through statutory mandatory minimum penalties, the Commission tailored the 2007 crack cocaine guideline amendment to fit within the current statutory penalty scheme.

II. Analysis of Federal Cocaine Sentences

A. Federal Cocaine Offenses and Offenders

1. Number of Offenses

Powder cocaine and crack cocaine offenses together historically have accounted for nearly half of the federally sentenced drug trafficking offenders. As indicated in Figure 1, of 24,605 total drug trafficking cases in fiscal year 2008, there were 5,913 crack cocaine cases (24.0% of all drug trafficking cases) and 5,769 powder cocaine cases (23.4% of all drug trafficking cases). Of 24,748 total drug trafficking cases in fiscal year 2007, there were 5,248 crack cocaine cases (21.2% of all drug trafficking cases) and 6,172 powder cocaine cases (24.9% of all drug trafficking cases).[8]

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in a case in which the five-year mandatory minimum applies, and 120 to 121 months in a case in which the ten-year mandatory minimum applies. *See* USSG §5G1.1 (Sentencing on a Single Count of Conviction).

[7] *See supra* note 1.

[8] In fiscal year 2008, there were 105 federal cases for simple possession of crack cocaine, in which 58 offenders were subject to the statutory mandatory minimum penalty. In fiscal year 2007, there were 109 such cases, in which 49 offenders were subject to the statutory mandatory minimum penalty.

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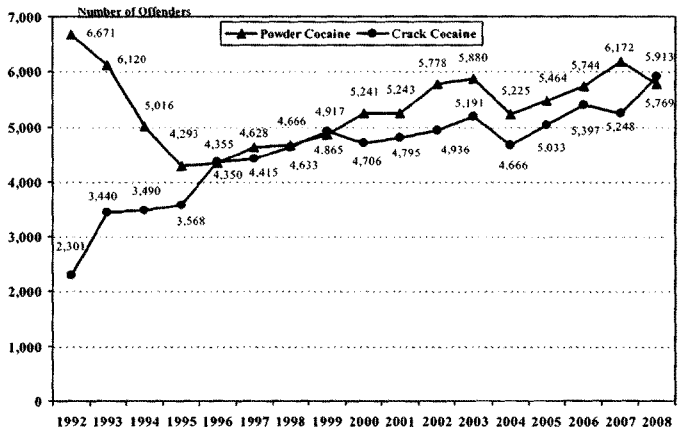
Figure 1
Trend in Number of Powder Cocaine and Crack Cocaine Offenders
FY1992-FY2008



Only cases sentenced under USSG §2D1.1 (Drug Trafficking) with a primary drug type of powder cocaine or crack cocaine are included in this figure. This figure excludes cases with missing information for the variables required for analysis. Note that total percentages may not add up to exactly 100 percent due to rounding.

SOURCE: U.S. Sentencing Commission, 1992-2008 Datafiles, MONFY92 - USSCFY08.

2. Demographics

As indicated in Table 1, Black offenders continue to comprise the majority of federal crack cocaine trafficking offenders, but that has decreased from 91.4 percent in fiscal year 1992 to 80.6 percent in fiscal year 2008. White offenders comprised 10.2 percent of crack cocaine offenders in fiscal year 2008, compared to 3.2 percent in 1992. Hispanic offenders comprised 8.2 percent in fiscal year 2008, compared to 5.3 percent in 1992.

Hispanic offenders comprise the majority of powder cocaine offenders, having increased from 39.8 percent in fiscal year 1992 to 52.5 percent in fiscal year 2008. Black offenders comprised 30.2 percent of powder cocaine offenders in fiscal year 2008, compared to 27.2 percent in fiscal year 1992. White offenders comprised 16.4 percent of powder cocaine offenders in fiscal year 2008, compared to 32.3 percent of powder cocaine offenders in fiscal year 1992.

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Table 1
Demographic Characteristics of Federal Cocaine Offenders
Fiscal Years 1992, 2000 & 2008

	Powder Cocaine						Crack Cocaine					
	1992		2000		2008		1992		2000		2008	
	N	%	N	%	N	%	N	%	N	%	N	%
Race/Ethnicity												
White	2,113	32.3	932	17.8	942	16.4	74	3.2	269	5.6	605	10.2
Black	1,778	27.2	1,596	30.5	1,734	30.2	2,096	91.4	4,069	84.7	4,753	80.6
Hispanic	2,601	39.8	2,662	50.8	3,018	52.5	121	5.3	434	9.0	484	8.2
Other	44	0.7	49	0.9	57	1.0	3	0.1	33	0.7	57	1.0
Total	6,536	100	5,239	100	5,751	100	2,294	100	4,805	100	5,899	100
Citizenship												
U.S. Citizen	4,499	67.7	3,327	63.9	3,636	63.1	2,092	91.3	4,482	93.4	5,702	96.4
Non-Citizen	2,147	32.3	1,881	36.1	2,127	36.9	199	8.7	318	6.6	211	3.6
Total	6,646	100	5,208	100	5,763	100	2,291	100	4,800	100	5,913	100
Gender												
Female	787	11.8	722	13.8	546	9.5	270	11.7	476	9.9	512	8.7
Male	5,886	88.2	4,518	86.2	5,222	90.5	2,032	88.3	4,330	90.1	5,401	91.3
Total	6,673	100	5,240	100	5,768	100	2,302	100	4,806	100	5,913	100
Average Age	Average=34		Average=34		Average=35		Average=28		Average=29		Average=31	

This table excludes cases missing information for the variables required for analysis.
Total percentages may not add up to exactly 100 percent due to rounding.

SOURCE: U.S. Sentencing Commission, 1992, 2000, and 2008 Datafiles, MONFY92, USSCFY00, and USSCFY08.

B. Average Sentence Length

Federal crack cocaine offenders consistently have received longer sentences than powder cocaine offenders. As indicated in Figures 2 and 3, the difference in average sentence length between these two groups of offenders was greater in 2007 than it was in 1992. In fiscal year 1992, the average sentence length for crack cocaine offenders was 124 months compared to 99 months for powder cocaine offenders, amounting to a difference of 25 months, or 25.3 percent. That difference widened to 43 months, or 50.0 percent, in fiscal year 2007, when the average sentence length for crack cocaine offenders was 129 months compared to 86 months for powder cocaine offenders.

In fiscal year 2008, the difference in average sentence length between crack cocaine and powder cocaine offenses narrowed. This occurred not only because of the implementation of the 2007 crack cocaine guideline amendment but also because of an increase in the average sentence length for powder cocaine offenders. In fiscal year 2008, the average sentence length for crack cocaine offenders was 115 months, compared to 91 months for powder cocaine offenders, making the average sentence length for crack cocaine offenders 26.4 percent, or 24 months, longer than the average sentence length for powder cocaine offenders. However, while the difference in average sentence length narrowed, there remains a difference.

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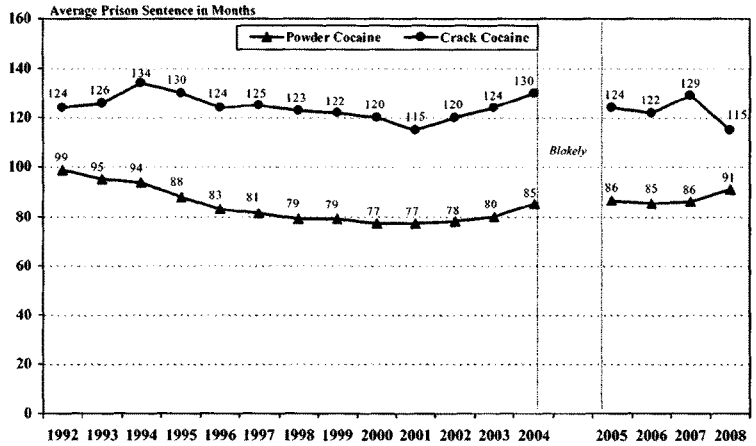
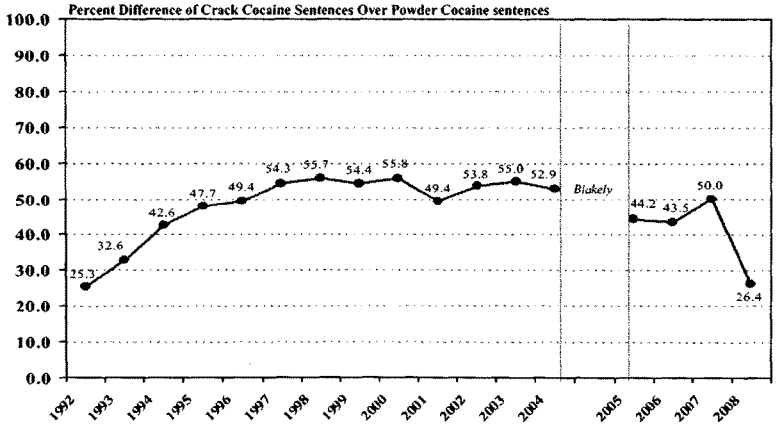
Figure 2
Trend in Prison Sentences for Powder Cocaine and Crack Cocaine Offenders
FY1992-FY2008



Only cases sentenced under USSG §2D1.1 (Drug Trafficking) with a primary drug type of powder cocaine or crack cocaine are included in this figure. Cases with sentences of probation or any time of confinement as defined in USSG §5C1.1 are not included in this figure. Cases with sentences greater than 470 months were included in the sentence average computation as 470 months. This figure excludes cases with missing information for the variables required for analysis. Note that total percentages may not add up to exactly 100 percent due to rounding.

SOURCE: U.S. Sentencing Commission, 1992-2008 Datafiles, MONFY92 – USSCFY08, 2004 Pre-*Blakely* Only Cases (October 1, 2003 – June 24, 2004), and 2005 Post-*Booker* Only Cases (January 12, 2005 – September 30, 2005).

Figure 3
Trend in Proportional Differences Between Average Cocaine Sentences
FY1992-FY2008



Only cases sentenced under USSG §2D1.1 (Drug Trafficking) with a primary drug type of powder cocaine or crack cocaine are included in this figure. Cases with sentences of probation or any time of confinement as defined in USSG §5C1.1 are not included in this figure. Cases with sentences greater than 470 months were included in the sentence average computation as 470 months. This figure excludes cases with missing information for the variables required for analysis. The figure shows, for each year, the percentage difference between prison sentences for crack cocaine and powder cocaine. For example, in Fiscal Year 1992, crack cocaine sentences were 25.3 percent greater than powder cocaine sentences. The percentage was calculated by dividing the difference between the average crack cocaine sentence and the average powder cocaine sentence by the average powder cocaine sentence. Note that total percentages may not add up to exactly 100 percent due to rounding.

SOURCE: U.S. Sentencing Commission, 1992-2008 Datafiles, MONFY92 – USSCFY08, 2004 Pre-*Blakely* Only Cases (October 1, 2003 – June 24, 2004), and 2005 Post-*Booker* Only Cases (January 12, 2005 – September 30, 2005).

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C. Reasons for Differences in Average Sentence Length

1. Statutory Mandatory Minimum Sentences

Most of the difference in average sentence length between crack cocaine and powder cocaine offenses is attributable to the current quantity-based statutory mandatory minimum penalties and the manner in which those penalties are incorporated into the guidelines. In fiscal year 2008, the median drug weight for powder cocaine offenses was 7,000 grams, an amount 135 times greater than the median drug weight for crack cocaine offenses, which was 52 grams. In fiscal year 2007, the median drug weight was 6,370 grams for powder cocaine offenses compared to 53 grams for crack cocaine offenses.

These quantities resulted in crack cocaine and powder cocaine offenders being convicted under statutes carrying a mandatory minimum sentence at virtually equal rates. In fiscal year 2008, 80.6 percent of crack cocaine offenders were convicted of a statute carrying a mandatory minimum term of imprisonment, compared to 80.0 percent of powder cocaine offenders.

Exposure to statutory mandatory minimum sentences further contributes to the difference in average sentence length because crack cocaine offenders are less likely to receive the benefit of statutory and guideline "safety valve" mechanisms that allow certain low-level offenders to be sentenced without regard to the statutory mandatory minimums. As indicated in Tables 2 and 2A, in fiscal year 2008, 14.3 percent of crack cocaine offenders received the benefit of a safety valve provision as set forth at 18 U.S.C. § 3553(f)[9] or through the federal sentencing guidelines[10] compared to 42.4 percent of powder cocaine offenders. In fiscal year 2007, 13.6 percent of crack cocaine offenders received the benefit of a safety valve provision compared to 44.7 percent of powder cocaine offenders. The difference in rates of safety valve application between crack cocaine and powder cocaine offenders is in part attributable to differences in their criminal history scores and the extent to which weapons are involved in the offense, as discussed below.[11]

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[9] The "safety valve" at 18 U.S.C. § 3553(f) provides a mechanism by which only drug offenders who meet certain statutory criteria may be sentenced without regard to the otherwise applicable drug mandatory minimum provisions. Enacted in 1994, the safety valve provision was created by Congress to permit offenders "who are the least culpable participants in drug trafficking offenses, to receive strictly regulated reductions in prison sentences for mitigating factors" recognized in the federal sentencing guidelines.

[10] The Commission uses "safety valve" to refer to cases that receive either the two-level reduction pursuant to USSG §2D1.1(b)(11) and USSG §5C1.2, or relief from the statutory mandatory minimum sentence pursuant to 18 U.S.C. § 3553(f), or both.

[11] Among the requirements to receive "safety valve" relief from the statutory mandatory minimum sentence, the defendant must not have more than one criminal history point, as determined under the sentencing guidelines, and the defendant must not have used violence or credible threats of violence or must not have possessed a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense. *See* 18 U.S.C. § 3553(f)(1).

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Table 2

Guideline Sentencing Characteristics, Criminal History, and Position Relative to the Guideline Range for Crack Cocaine Offenders[1]

	Fiscal Year 2007		Fiscal Year 2008	
Average Base Offense Level	30		28	
Median Crack Cocaine Weight in Grams	53		52	
Average Prison Sentence (Months)	130		116	
	N	%	N	%
TOTAL	**5,037**		**5,601**	
Weapon Enhancment				
Weapon SOC (USSG § 2D1.1(b)(1))	994	19.7	1,025	18.3
18 U.S.C. § 924(c) Conviction	543	10.8	548	9.8
Safety Valve §5C1.2[2]	683	13.6	800	14.3
Guideline Role Adjustment				
Aggravating Role §3B1.1	233	4.6	260	4.6
Mitigating Role §3B1.2	286	5.7	287	5.1
Criminal History Category	N	%	N	%
I	1,052	20.9	1,242	22.2
II	596	11.8	685	12.2
III	1,015	20.2	1,093	19.5
IV	601	11.9	678	12.1
V	383	7.6	474	8.5
VI	1,390	27.6	1,429	25.5
Total	**5,037**	**100.0**	**5,601**	**100.0**
Sentence Relative to Guideline Range	N	%	N	%
Within Range	2,946	56.3	3,306	56.1
Above Range	22	0.4	39	0.7
Government Sponsored	1,596	30.5	1,637	27.8
Non-Government Below Range	673	12.9	916	15.5
Total	**5,237**	**100.0**	**5,898**	**100.0**

[1]This tables includes only cases sentenced under §2D1.1 (Drug Trafficking) where crack cocaine was the primary drug type. Total percentages may not add up to exactly 100 percent due to rounding. This table excludes cases with missing information for the variables required for analysis.

[2]Safety valve includes cases that received either a two-level reduction pursuant to USSG §2D1.1(b)(11) and USSG §5C1.2, or relief from the statutory mandatory minimum sentence pursuant to 18 U.S.C. § 3553(f), or both.

SOURCE: U.S. Sentencing Commission, 2007-2008 Datafiles, USSCFY07-USSCFY08.

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Table 2A

Guideline Sentencing Characteristics, Criminal History, and Position Relative to the Guideline Range for Powder Cocaine Offenders[1]

	Fiscal Year 2007		Fiscal Year 2008	
Average Base Offense Level	30		30	
Median Powder Cocaine Weight in Grams	6,370		7,000	
Average Prison Sentence (Months)	86		91	
	N	%	N	%
TOTAL	**5,888**		**5,578**	
Weapon Enhancement				
Weapon SOC (USSG § 2D1.1(b)(1))	583	9.9	632	11.3
18 U.S.C. § 924(c) Conviction	274	4.7	314	5.6
Safety Valve §5C1.2[2]	2,633	44.7	2,365	42.4
Guideline Role Adjustment				
Aggravating Role §3B1.1	451	7.7	453	8.1
Mitigating Role §3B1.2	1,193	20.3	1,116	20.0
Criminal History Category	N	%	N	%
I	3,579	60.8	3,349	60.0
II	688	11.7	646	11.6
III	736	12.5	671	12.0
IV	298	5.1	301	5.4
V	144	2.4	142	2.6
VI	443	7.5	469	8.4
Total	**5,888**	**100.0**	**5,578**	**100.0**
Sentence Relative to Guideline Range	N	%	N	%
Within Range	3,236	52.7	2,879	50.1
Above Range	29	0.5	33	0.6
Government Sponsored	2,196	35.7	2,048	35.6
Non-Government Below Range	683	11.1	789	13.7
Total	**6,144**	**100.0**	**5,749**	**100.0**

[1]This tables includes only cases sentenced under §2D1.1 (Drug Trafficking) where powder cocaine was the primary drug type. Total percentages may not add up to exactly 100 percent due to rounding. This table excludes cases with missing information for the variables required for analysis.

[2]Safety valve includes cases that received either a two-level reduction pursuant to USSG §2D1.1(b)(11) and USSG §5C1.2, or relief from the statutory mandatory minimum sentence pursuant to 18 U.S.C. § 3553(f), or both.

SOURCE: U.S. Sentencing Commission, 2007-2008 Datafiles, USSCFY07-USSCFY08.

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2. Aggravating and Mitigating Factors

In addition to drug quantity, the current penalty structure for drug offenses accounts for certain aggravating and mitigating factors, such as weapon involvement and role in the offense. Differences in the prevalence of these factors in crack cocaine and powder cocaine offenses also contribute to the difference in average sentence length for these offenses.

a. Weapon Involvement

Some of the difference in average sentence length is attributable to the higher rate at which a guideline[12] or statutory[13] weapon enhancement applies in crack cocaine offenses compared to powder cocaine offenses. Although a weapon enhancement applies in a minority of both crack cocaine and powder cocaine offenses, as indicated in Tables 2 and 2A, such an enhancement applies more often in crack cocaine offenses.

In fiscal year 2008, 28.1 percent of crack cocaine offenders either received the guideline weapon enhancement (18.3%) or were convicted pursuant to 18 U.S.C. § 924(c) (9.8%). By comparison, 16.9 percent of powder cocaine offenders either received the guideline weapon enhancement (11.3%) or were convicted pursuant to 18 U.S.C. § 924(c) (5.6%). In fiscal year 2007, 30.5 percent of crack cocaine offenders either received the guideline weapon enhancement (19.7%) or were convicted pursuant to 18 U.S.C. § 924(c) (10.8%). By comparison, 14.6 percent of powder cocaine offenders either received the weapon enhancement (9.9%) or were convicted pursuant to 18 U.S.C. § 924(c) (4.7%).

b. Role in the Offense

Some of the difference in average sentence length is attributable to the relative infrequency with which crack cocaine offenders receive a mitigating role adjustment under the guidelines compared to powder cocaine offenders.[14] In fiscal year 2008, 5.1 percent of crack cocaine offenders received a mitigating role adjustment compared to 20.0 percent of powder cocaine offenders. In fiscal year 2007, 5.7 percent of crack cocaine offenders received a mitigating role adjustment compared to 20.3 percent of powder cocaine offenders.

With respect to aggravating role,[15] in fiscal year 2008, 4.6 percent of crack cocaine offenders received an aggravating role adjustment compared to 8.1 percent of powder cocaine offenders. In fiscal year 2007, 4.6 percent of crack cocaine offenders received an aggravating role adjustment compared to 7.7 percent of powder cocaine offenders.

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[12] The guidelines provide a two-level enhancement (an approximate 25% increase in penalty) at §2D1.1(b)(1) if a dangerous weapon (including a firearm) was possessed.

[13] *See* 18 U.S.C. § 924(c).

[14] Pursuant to USSG §3B1.2 (Mitigating Role), a two- to four-level reduction in offense level applies in a case in which the offender's role in the offense was minimal or minor (or between minimal and minor).

[15] Pursuant to USSG §3B1.1 (Aggravating Role), a two- to four-level increase in offense level applies in a case in which the offender was an organizer, leader, manager, or supervisor of the criminal activity.

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3. Criminal History

In addition to offense severity (as measured by drug quantity and applicable aggravating and mitigating factors), criminal history is a major component in determining an offender's sentence under the federal sentencing guidelines. Some of the difference in average sentence length is attributable to the fact that crack cocaine offenders generally have more extensive criminal history than powder cocaine offenders. In both fiscal years 2008 and 2007, the average criminal history category for crack cocaine offenders was Criminal History Category IV, compared to Criminal History Category II for powder cocaine offenders. Tables 2 and 2A show the distribution of crack cocaine offenders and powder cocaine offenders by criminal history category in both fiscal years 2007 and 2008.[16]

As discussed in Part IIC, the difference in criminal history between crack cocaine and powder cocaine offenders contributes to the relatively low rates at which crack cocaine offenders qualify for statutory and guideline "safety valve" provisions compared to powder cocaine offenders. An offender in a criminal history category higher than Criminal History Category I cannot receive the benefit of these provisions. In fiscal year 2008, 77.8 percent of crack cocaine offenders were in a criminal history category higher than Criminal History Category I, compared to 40.0 percent of powder cocaine offenders. In fiscal year 2007, 79.1 percent of crack cocaine offenders were in a criminal history category higher than Criminal History Category I, compared to 39.2 percent of powder cocaine offenders.

III. Recent Crack Cocaine Sentencing Case Law and Cocaine Sentencing Practices

A. Supreme Court Case Law

The sentencing disparity between crack cocaine and powder cocaine offenses has been the subject of recent Supreme Court case law. In *Kimbrough v. United States*,[17] the Court relied on the Commission's conclusion that the disparity between the treatment of crack cocaine and powder cocaine offenses "fails to meet the sentencing objectives set forth by Congress in both the Sentencing Reform Act and the 1986 Act"[18] in holding that a sentencing judge may consider that disparity when determining an appropriate sentence in a crack cocaine case. In *Spears v. United States*,[19] the Supreme Court clarified in a *per curiam* decision that, under its holding in *Kimbrough*, district courts have "authority to vary from the crack cocaine Guidelines based on *policy* disagreements with them, and not simply based on an individualized determination that they yield an

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[16] Of the 1,429 crack cocaine offenders who were in Criminal History Category VI in fiscal year 2008, 951 were career offenders. Of these 951 career offenders, 535 would have been in a lower criminal history category but for their career offender status. Of the 469 powder cocaine offenders who were in Criminal History Category VI in fiscal year 2008, 356 were career offenders. Of these 356 career offenders, 251 would have been in a lower criminal history category but for their career offender status.

[17] ___ U.S. ___, 128 S. Ct. 558 (2007).

[18] *Id.* at 568 (internal quotations omitted).

[19] ___ U.S. ___, 129 S. Ct. 840 (2009) (per curiam).

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excessive sentence in a particular case."[20] Thus, a sentencing judge may categorically reject the existing guidelines ratio and "apply a different ratio which, in his judgment, corrects the disparity."[21]

Of the 959 crack cocaine cases sentenced after *Spears* that have been received, coded, and analyzed by the Commission as of April 24, 2009, five cases specifically cite *Spears* in the court's written statement of reasons for the sentence imposed. Of those five cases, the court applied a 20-to-1 drug quantity ratio in two of the cases and a 1-to-1 drug quantity ratio in one of the cases. In the remaining two cases, the court cited *Spears* but did not apply a different ratio, although one of those cases referred to the applicable ratio as excessive. In an additional case,[22] the court cited *Spears* and applied a 10-to-1 drug quantity ratio.

B. Sentencing Practices

As indicated in Figure 4, during the immediate years preceding *United States v. Booker*,[23] which rendered the sentencing guidelines advisory, courts imposed non-government sponsored, below-range sentences in 7.7 percent, 6.6 percent, and 5.7 percent of the crack cocaine cases sentenced in fiscal years 2002, 2003, and 2004, respectively. By comparison, courts imposed non-government sponsored, below-range sentences in 15.2 percent, 13.3 percent, and 12.9 percent of the crack cocaine cases sentenced in fiscal years 2005, 2006, and 2007, respectively. Furthermore, in fiscal year 2008, approximately 10 months of which were post-*Kimbrough*, the rate of non-government sponsored, below-range sentences increased to 15.5 percent of crack cocaine cases sentenced that year.

Courts increasingly are sentencing powder cocaine offenders to sentences below the applicable sentencing guideline range but less often than for crack cocaine offenders. As indicated in Figure 5, courts imposed non-government sponsored, below-range sentences in 11.4 percent, 8.7 percent, and 5.7 percent of the powder cocaine cases sentenced in fiscal years 2002, 2003, and 2004, respectively. By comparison, courts imposed non-government sponsored, below-range sentences in 11.6 percent, 10.3 percent, and 11.1 percent in fiscal years 2005, 2006, and 2007, respectively. In fiscal year 2008, the rate of non-government sponsored, below-range sentences increased to 13.7 percent of the powder cocaine cases sentenced that year.[24]

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[20] *Id.* at 843-44 (emphasis in original).

[21] *Id.* at 843.

[22] *See United States v. Edwards*, 2009 WL 424464 (N.D. Ill. February 17, 2009).

[23] 543 U.S. 220 (2005).

[24] In addition, powder cocaine offenders also received government sponsored, below-range sentences more frequently than crack cocaine offenders. In fiscal years 2007 and 2008, the rate of government sponsored, below-range sentences for crack cocaine offenders was 30.5 percent and 27.8 percent, respectively, compared to 35.7 percent and 35.6 percent, respectively, for powder cocaine offenders.

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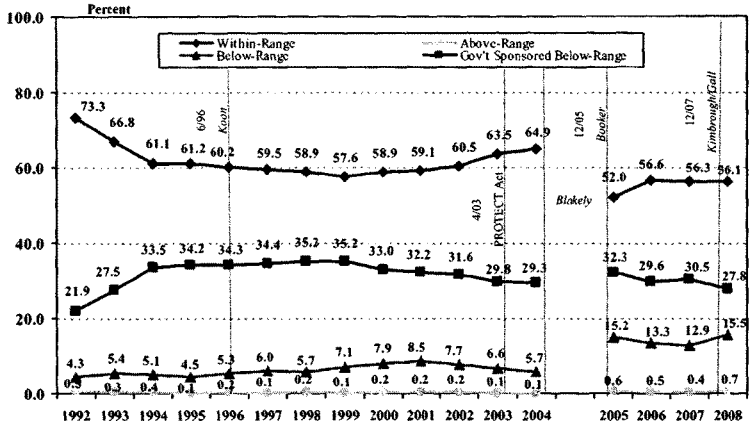
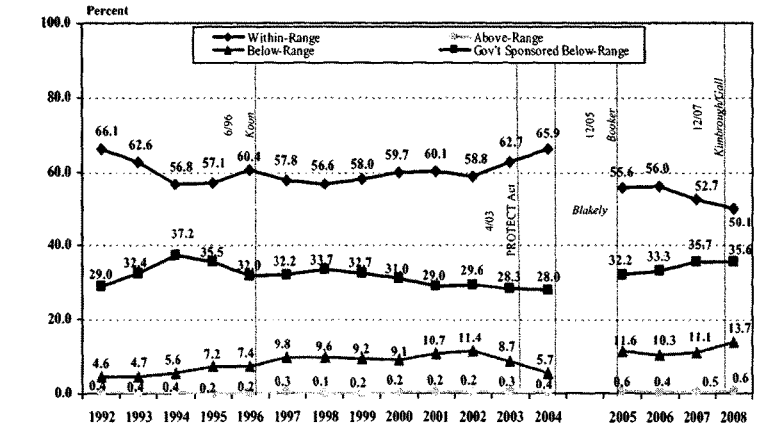
Figure 4
Rates of Within-Range and Out-of-Range Sentences for Crack Cocaine Offenses
FY1992 to FY2008



Only cases sentenced under USSG §2D1.1 (Drug Trafficking) with a primary drug type of crack cocaine are included in this figure. Government Sponsored Below-Range is comprised of: USSG §5K1.1 Departures Only (FY92-FY02), USSG §5K1.1 and Other Government Sponsored Departures (FY03), USSG §5K1.1, USSG §5K3.1 and Other Government Sponsored Departures (FY04) and USSG §5K1.1, USSG §5K3.1 and Other Government Sponsored Departures/Variances (FY05-FY08). This figure excludes cases with missing information for the variables required for analysis. Note that total percentages may not add up to exactly 100 percent due to rounding.
SOURCE: U.S. Sentencing Commission, 1992-2008 Datafiles, MONFY92 - USSCFY08; 2004 Pre-*Blakely* Only Cases (October 1, 2003 - June 24, 2004), and 2005 Post-*Booker* Only Cases (January 12, 2005 September 30, 2005).

Figure 5
Rates of Within-Range and Out-of-Range Sentences for Powder Cocaine Offenses
FY1992 to FY2008



Only cases sentenced under USSG §2D1.1 (Drug Trafficking) with a primary drug type of powder cocaine are included in this figure. Government Sponsored Below-Range is comprised of: USSG §5K1.1 Departures Only (FY92-FY02), USSG §5K1.1 and Other Government Sponsored Departures (FY03), USSG §5K1.1, USSG §5K3.1 and Other Government Sponsored Departures (FY04) and USSG §5K1.1, USSG §5K3.1 and Other Government Sponsored Departures/Variances (FY05-FY08). This figure excludes cases with missing information for the variables required for analysis. Note that total percentages may not add up to exactly 100 percent due to rounding.
SOURCE: U.S. Sentencing Commission, 1992-2008 Datafiles, MONFY92 - USSCFY08; 2004 Pre-*Blakely* Only Cases (October 1, 2003 - June 24, 2004), and 2005 Post-*Booker* Only Cases (January 12, 2005-September 30, 2005).

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When analyzed by periods marked by the dates of the Supreme Court's decisions in *Booker*, *Kimbrough*, and *Spears,* the data suggest that the Supreme Court's decisions have had some impact on federal crack cocaine sentencing practices. Courts imposed non-government sponsored, below-range sentences in 6.9 percent of the 11,649 crack cocaine cases sentenced in the three-year period immediately before enactment of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act[25] (October 1, 2000-April 30, 2003). By comparison, courts imposed non-government sponsored, below-range sentences in 13.3 percent of the 15,044 crack cocaine cases sentenced in the post-*Booker* period (January 12, 2005 to December 9, 2007) and 16.0 percent of the 5,998 crack cocaine cases sentenced during the post-*Kimbrough* period (December 10, 2007 to January 20, 2009).

Although too few cases have been sentenced post-*Spears* to draw any conclusions about the impact of that decision, the rate of non-government sponsored, below-range sentences increased to 18.4 percent, or 176 of the 959 crack cocaine cases sentenced during the post-*Spears* period (on or after January 21, 2009) that have been received, coded, and analyzed by the Commission.[26]

IV. Retroactivity of 2007 Crack Cocaine Guideline Amendment

As discussed in Part I, the Commission promulgated a guideline amendment in 2007 that reduced by two levels the base offense levels assigned to the various quantities of crack cocaine. The Sentencing Reform Act, at 28 U.S.C. § 994(u), authorizes the Commission to determine whether a guideline amendment that reduces the sentencing range may be retroactively applied. Pursuant to that authority, the Commission voted to give retroactive effect to the 2007 crack cocaine guideline amendment effective March 3, 2008. As a result, courts were authorized under 18 U.S.C. § 3582(c)(2) to consider motions for reduced sentence based on the 2007 crack cocaine guideline amendment.[27]

In addition to voting to give the crack cocaine guideline amendment retroactive effect, the Commission amended the relevant policy statement, §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range), to provide limitations and guidance to the courts on determining whether, and to what extent, to grant a motion for reduced sentence pursuant to 18 U.S.C. § 3582(c)(2).[28] In particular, the Commission amended the policy statement to clarify that the court shall not reduce the defendant's term of imprisonment to a term less than the minimum of the amended guideline range, except in certain limited circumstances. In addition, the Commission

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[25] Pub. L. 108–21.

[26] Of those 959 cases, 500 cases (52.1%) were sentenced within the applicable guideline range, 273 cases (28.5%) were sentenced below the applicable guideline range pursuant to a government motion, and 10 cases (1.0%) were sentenced above the applicable guideline range.

[27] 18 U.S.C. § 3582(c)(2) provides "in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission."

[28] USSG, App. C, Amendment 712 (Mar. 3, 2008).

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amended the policy statement to require courts to consider the nature and seriousness of the danger to the community that may be posed by such a reduction and to permit consideration of an offender's post-sentencing conduct.

Prior to voting on retroactivity, the Commission also prepared a retroactivity analysis that predicted that 19,500 offenders sentenced between 1991 and 2007 might be eligible to seek a reduction. [29] The retroactivity analysis further predicted that the average sentence reduction would be approximately 27 months.[30]

The Commission has received, coded and analyzed court documentation concerning motions for reduced sentence pursuant to 18 U.S.C. § 3582(c)(2) that were decided through March 5, 2009, which represents one year of retroactive application. During that one-year period, the courts decided 19,239 motions.[31] Of the 19,239 motions, 13,408 (69.7%) were granted. Of the 13,408 motions granted, information regarding the extent of the reduction granted was available in 11,951 cases. Of those 11,951 cases, the average sentence was reduced on average by 24 months – or 17.0 percent – from 140 months to 116 months.[32]

Of the 19,239 motions, 5,831 (30.3%) were denied.[33] Of the 5,831 motions denied, 706 (11.0%) involved offenders who were ineligible for a reduction under USSG §1B1.10 because the offense did not involve crack cocaine, and 4,175 (64.9%) involved offenders who were otherwise ineligible. Of these 4,175 denials, 1,536 were denied because a statutory mandatory minimum controlled the sentence (representing 23.9% of all denials), and 1,453 were denied because applicable career offender or armed career criminal statutory and/or guideline provisions controlled the sentence (representing 22.6% of all denials).[34] Of the 5,831 motions denied, 970 (15.1%) involved offenders who were eligible for a reduction but whose motions were denied on the merits, most often (445, or 6.9% of all denials) because the offender had already benefitted from a departure or variance at the initial sentencing.[35]

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[29] *See* USSC, *Analysis of the Impact of the Crack Cocaine Amendment If Made Retroactive* (Oct. 3, 2007), *available at* http://www.ussc.gov/general/Impact_Analysis_20071003_3b.pdf (hereinafter "Retroactivity Analysis").

[30] Retroactivity Analysis at 23. These predictions were based on a number of assumptions. For a discussion of the assumptions and model used, *see generally* Retroactivity Analysis.

[31] USSC, *Preliminary Crack Cocaine Retroactivity Data Report*, Table 1 (March 2009) (hereinafter "March 2009 Retroactivity Report").

[32] *Id.* at Table 8.

[33] *Id.*

[34] March 2009 Retroactivity Report at Table 9. In some cases, courts cite multiple reasons for denying a motion for reduction in sentence. Reasons for ineligibility include that the offender was sentenced at the statutory mandatory minimum, the offender was sentenced as a career offender or armed career offender, or that the case involved too high a drug quantity to benefit from a reduction. *Id.*

[35] *Id.*

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V. Recommendations

The Commission continues to believe that there is no justification for the current statutory penalty scheme for powder cocaine and crack cocaine offenses. The Commission is of the view that any comprehensive solution to this problem requires revision of the current statutory penalties and therefore must be legislated by Congress. The Commission remains committed to its recommendation in 2002 that any statutory ratio be no more than 20-to-1. Specifically, consistent with its May 2007 Report, the Commission recommends that Congress:

- Increase the five-year and ten-year statutory mandatory minimum threshold quantities for crack cocaine offenses to focus the penalties more closely on serious and major traffickers as described generally in the legislative history of the 1986 Act.

- Repeal the mandatory minimum penalty provision for simple possession of crack cocaine under 21 U.S.C. § 844.

- Reject addressing the 100-to-1 drug quantity ratio by decreasing the five-year and ten-year statutory mandatory minimum threshold quantities for powder cocaine offenses, as there is no evidence to justify such an increase in quantity-based penalties for powder cocaine offenses.

The Commission further recommended in its May 2007 Report that any legislation implementing these recommendations also provide emergency amendment authority for the Commission to incorporate the statutory changes in the federal sentencing guidelines.[36] Emergency amendment authority would enable the Commission to minimize the lag between any statutory and guideline modifications for cocaine offenders.

The Commission believes that the federal sentencing guidelines continue to provide the best mechanism for achieving the principles of the Sentencing Reform Act of 1984, including the consideration of all of the factors set forth at 18 U.S.C. § 3553(a). The Commission recommends to Congress that its concerns about the harms associated with cocaine drug trafficking are best captured through the sentencing guideline system.

VI. Conclusion

The Commission is committed to working with Congress to address the statutorily mandated disparities that still exist in federal cocaine sentencing. The Commission also is committed to working with Congress on all other issues related to maintaining just and effective national sentencing policy in a manner that preserves the bipartisan principles of the Sentencing Reform Act of 1984. Thank you for the opportunity to appear before you today, and I look forward to answering your questions.

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[36] "Emergency amendment authority" allows the Commission to promulgate guideline amendments outside of the ordinarily applicable amendment cycle provided by 28 U.S.C. § 994(a) and (p).

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Testimony of Asa Hutchinson

Former Administrator of U.S. Drug Enforcement Administration

Before the Senate Judiciary Committee

Chairman Durbin, Ranking Member Graham and Members of the Committee, it is my privilege to return to this Committee and to testify in support of Congressional action to reduce the sentencing disparity between crack and powder cocaine.

As a young federal prosecutor in Arkansas in the early 1980s, I aggressively prosecuted cocaine offenses. High quality powder cocaine was coming straight from Columbia to New York and then to rural areas of the country such as Arkansas. It seemed that no community or family was exempt from the threat of cocaine abuse and addiction. Shortly thereafter, in 1986, Congress passed the Anti-Drug Abuse Act of 1986, which toughened the criminal penalties for cocaine but also created the crack-powder disparity in sentencing.

The law established mandatory penalties for crack cocaine offenses and codified a 100-to-1 different penalty structure for crack as compared to powder cocaine. The result is that defendants convicted with just 5 grams of crack cocaine, the weight of less than 2 sugar packets, which yields about 10 to 50 doses, are subject to a five-year mandatory minimum sentence. For powder cocaine, the same 5 year mandatory minimum is not triggered unless the offense involves 500 grams, which equals between 2,500 and 5,000 doses. In addition, the 10 year mandatory minimum is triggered at differing levels resulting in the same 100-to-1 disparity.

Legislative history indicates that Congress created this distinction in sentencing structures because of its belief that crack cocaine was particularly addictive and associated with greater levels of violence than was powder cocaine. More than two decades of experience has given us a different perspective. The facts and the passage of time have built a growing consensus that the

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sentencing disparity is fundamentally unfair; has a disparate racial impact and undermines the perception of fairness and the integrity of our criminal justice system.

I am not a new convert on this issue. Ten years ago, as a member of Congress and a member of the House Judiciary Committee, I joined with Congressman Bobby Scott and others to express concern about the unfairness of the crack powder disparity. In 2001, I was appointed by President George W. Bush as Administrator of the U.S. Drug Enforcement Administration, and I continued my efforts to reduce this distinction.

While at the DEA, I looked closely at the sentencing disparity and particularly the arguments supporting the enhanced penalties for crack cocaine. Contrary to the legislative concerns of over 20 years ago, research clearly shows that the addictive properties of crack have more to do with the fact that crack is typically smoked than with its chemical structure.[1] There remains a justified concern about the level of violence associated with crack, but recent studies show that the violence is stable or even declining.[2]

As the lead drug enforcement official in the nation, I also did not want to do anything that would undermine the progress we were making in reducing the availability of illegal drugs in this country. As I talked to front line agents and drug task force officers, there was recognition that the current disparity was undermining confidence in the fairness of the criminal justice system. This makes it harder for the street agent to receive cooperation from informants and cooperating individuals. It also erodes the credibility of law enforcement and diminishes the ability to get jury convictions. The strength of our system of justice is totally dependent on the perception of fairness and the acceptance of penalties by the general public as being largely just. When significant numbers of African Americans question the fairness of our criminal justice

[1] See e.g. U.S. Sentencing Commission, 2007, Report to the Congress, at 63, note 1 (linking risk of addiction to mode of administration).
[2] See id. at 86-87 (reporting research showing declines in level of violence).

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system, then it becomes more difficult for the officer on the street to do his or her duty under the law. Under the current disparity, the credibility of our entire drug enforcement system is weakened.

Perhaps the easier part of this debate is to convince policy makers that the current disparity is unfair and needs to be changed. The more difficult aspect is to answer the tougher questions of how to address the issue of retroactivity for any change and whether to completely eliminate the disparity or to reach some compromise.

Let me just offer my views:

1. On the issue of retroactivity, I applaud the Congress for not reversing the retroactive application of the changes made by the Sentencing Commission last fall. As Judge Reggie Walton has said, "I just don't see how it's fair that someone sentenced on October 30th gets a certain sentence when someone sentenced on November 1 gets another." The most strenuous objection to the retroactive application comes from my former colleagues at Justice Department who are concerned about the attorney and court resources that are required when a change is made. First, the individualized review of each case by the Court is important and necessary to assure that violent or dangerous criminals are not released. In terms of resources, this legitimate concern should not be minimized but it should be answered by additional attorney resources in the jurisdictions with the greatest caseload.

2. In terms of adjusting the mandatory minimum sentences, I would suggest that the mandatory minimum sentences required of cocaine traffickers be directed more clearly to those that are engaged in the business of drug trafficking. Presently, the primary determining factor is the quantity of drugs. The quantity trigger has proven to be an unreliable ally in focusing federal resources on the most serious offenders. Research has shown that the 5 grams

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of crack set by Congress as the trigger for a 5 year mandatory sentence is not a quantity associated with anything but a small time street peddler. Quantity should be one factor but other factors should be considered to more particularly target federal resources toward mid and high level drug dealers. Congress should require additional factors indicating higher levels of culpability in order to trigger the mandatory minimum sentences. I would encourage Congress to listen carefully to the expertise of the DEA in determining the additional factors.

3. Finally, whatever Congress does in terms of changes to the sentencing structure should be given time to work, and then the Sentencing Commission should be directed to report to Congress assessing the impact of the changes and recommending any necessary adjustments to continue down the path of fundamental fairness.

I appreciate the opportunity to appear before the Committee and I am happy to answer any questions.

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Testimony of Thomas Kosten MD and Andrea Stolar MD

Baylor College of Medicine, Departments of Psychiatry and Neuroscience
Houston, Texas

Prepared for the Senate Judiciary Committee
Subcommittee on Crime and Drugs

April 29, 2009

Senator Durbin:
We are writing to express our strong support for the multiple reports from the United States Sentencing Commission (most recently from 2002 and 2007) that address and provide excellent scientific evidence for eliminating the cocaine sentencing disparity. These reports have systematically countered the initial assumptions upon which the sentencing guidelines were based. However, despite these Commission reports, amendments and recommendations, Congress has passed legislation disapproving, or only slightly modifying the original Federal Sentencing Guidelines over the years. A recent landmark event bringing this issue to attention again was a US Supreme Court case decided in October 2007 (Kimbrough v. US) holding that these Federal Guidelines are advisory only and that the judge may consider the disparity between the Guidelines treatment of crack vs. powder cocaine in making a sentencing determination below the Guidelines.

Nora Volkow MD, the Director of the National Institute on Drug Abuse provided very important testimony to Congress in November 2006 that detailed our knowledge of cocaine and its biological actions in the brain. She clearly presented the data that all forms of cocaine enter the brain and can lead to significant brain toxicity and that smoked cocaine produces a very rapid euphoria. However, medical science does not support the distinction between crack and powder cocaine in the determination of sentencing guidelines with regard to: 1) addictive properties; 2) propensity to violence; 3) inherent dangerousness of the drug. These medical facts have been stated before, multiple times. Research consistently shows that the immediacy, duration and magnitude of cocaine's euphoric and addictive effects, which lead to increased frequency and amount of cocaine use, are not related to the crack vs. powder forms of cocaine. Either form of cocaine has similar psychoactive and physiological effects as well as destructive medical consequences.

Science does support that smoking cocaine is more addictive than snorting cocaine powder (hydrochloride), because cocaine smoking gets the cocaine to the brain faster and in greater bolus concentrations. Rapid increases in brain cocaine levels produce the euphoria commonly called a high or rush. Slow increases in brain levels of cocaine such as occur by oral cocaine do not produce a high and intranasal use produces some euphoria, but it less intense than from the smoked cocaine forms. However, science does not support distinguishing crack from any other form of cocaine that can be smoked. Crack is simply cocaine that is converted to a free base by heating with baking soda. The old methods of using ether to extract the free base from cocaine hydrochloride were dangerous and difficult, but these extractions are no longer used. While crack can be bought and directly smoked, anyone, including children can easily make crack from cocaine powder. Nonetheless one rationale for much harsher sentences being given to crack dealers than cocaine dealers was that crack dealers target children who presumably would not be able to make crack themselves.

It is certainly time to correct this distortion of scientific facts about these two forms of cocaine,

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and get on with the work of treating these addictive disorders with the behavioral and pharmacological interventions that are rapidly developing including research based community programs and a vaccine for cocaine addiction. Thank you for inviting our testimony at this important public hearing, and we welcome an opportunity to address any questions that you might have on this drug or its treatment.

Statement Of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee,
Hearing On "Restoring Fairness to Federal Sentencing:
Addressing the Crack-Powder Disparity"
April 29, 2009

Today marks the 100th day of President Obama's administration, and already we have seen a response to the President's call for change. The Judiciary Committee today considers necessary changes and reforms in our Federal sentencing laws.

Our hearing will examine the unequal and unfair penalties for crack and powder cocaine offenses. We will consider how best to make our drug laws more fair, more rational, and more consistent with the core values of justice. The Committee has examined this issue before, in hearings in 2002 and, more recently, last year.

I thank Senator Durbin for holding this hearing in the Crime and Drugs Subcommittee. We must do all we can to restore public confidence in our criminal justice system, and I hope this hearing can be a positive step towards reaching that goal.

For more than 20 years, our Nation has used a Federal cocaine sentencing policy that treats "crack" offenders one hundred times more harshly than cocaine offenders without any legitimate basis for the difference. We know that there is little or no pharmacological distinction between crack and powder cocaine, yet the resulting punishments for these offenses is radically different and the resulting impact on minorities has been particularly unjust.

Under this flawed policy, a first-time offender caught selling five grams of powder cocaine typically receives a six month sentence, and would often be eligible for probation. That same first-time offender selling the same amount of crack faces a mandatory five year prison sentence, with little or no possibility of leniency. This policy is wrong and unfair, and it has needlessly swelled our prisons, wasting precious Federal resources.

Even more disturbingly, this policy has had a significantly disparate impact on racial and ethnic minorities. According to the latest statistics of the United States Sentencing Commission, African-American offenders continue to make up the majority of Federal crack cocaine trafficking offenders, accounting for 80 percent of all Federal crack cocaine offenses, compared to white offenders who account for just 10 percent. These statistics are startling. It is no wonder this policy has sparked a nationwide debate about racial bias and undermined our citizens' confidence in the justice system.

These penalties, which Congress created in the mid-1980s, have failed to address basic concerns. The primary goal was to punish the major traffickers and drug kingpins who were bringing crack into our neighborhoods. Many people were also concerned about the impact of the crack epidemic on young people in urban areas. But the law has not been used to go after the most serious offenders; in fact, just the opposite has happened. The Sentencing Commission has consistently reported for many years that over half of Federal crack cocaine offenders are low-level street dealers and users, not the major traffickers Congress intended to target.

We revisit this issue at a time when attitudes are changing in our Nation about sentencing policy. The Sentencing Commission's 2008 report to Congress made clear that the reasons that

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led Congress to adopt these penalties were flawed, and have not withstood the test of time. Many recent reports and studies have concluded that the 100 to one ratio now in the law is scientifically flawed, and supported by no empirical evidence at all. These findings have been a driving force behind recent actions by the Sentencing Commission, and underlie the courts' efforts to begin fixing these unjust drug laws.

The Supreme Court of the United States ruled in 2007 that the Federal courts have the power to address the unfair crack-powder disparity in Federal sentencing laws in certain cases. Two years ago, the Sentencing Commission voted to change the guidelines and reduce the sentences for crack offenders in order to begin righting this wrong in the context of the law. Unfortunately, the past administration did not welcome these reforms.

In the last Congress, then-Attorney General Michael Mukasey testified before the House Judiciary Committee suggesting that thousands of violent gang members and dangerous drug offenders will be instantaneously and automatically set free in communities across the country. This was an effort to use fear and ignorance to oppose a reform supported by many Republicans and Democrats. Of course, no one can be released without a hearing before a Federal judge, who must evaluate a defendant's criminal history and propensity for violence before approving any release. And, as we will hear from Sentencing Commission Acting Chair, Judge Ricardo Hinojosa, nothing of the sort has happened. In fact, allowing those unfairly sentenced to be released has not led to a spike in crime, as predicted by former-Attorney General Mukasey, and the process, as supervised by the Judiciary, is proceeding smoothly and efficiently.

These modest changes have been welcomed by Federal judges across the country, including an outstanding Federal judge who will testify today – the Honorable Reggie Walton. The changes are also consistent with the goals of the Sentencing Reform Act, which requires all judges to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" before imposing any sentence. These reforms have started to bring us closer to a more rational drug policy. These changes, however, have done nothing to address the core problem, which is the codification of the 100 to one ratio in Federal law.

We have also heard bipartisan calls for cocaine sentencing reform in the Senate. In the Judiciary Committee, Senators Hatch, Sessions, and Cornyn have supported reducing the current 100 to one sentencing disparity to a 20 to one ratio. Senator Hatch, who has called the current ratio "an unjustifiable disparity," recognizes that because "crack and powder cocaine are pharmacologically the same drug" our sentencing laws do "not warrant such an extreme disparity." Senator Sessions, a former Federal prosecutor, has said "The 100-to-1 disparity in sentencing between crack cocaine and powder cocaine is not justifiable. Our experience with the guidelines has convinced me that these changes will make the criminal justice system more effective and fair. It's time to act." Senator Cornyn, a former state Supreme Court judge and Attorney General, has said "laws should be firm but fair. We not only need just laws, but they need the appearance and reality of fairness."

I am encouraged by these bipartisan calls for reform. It sends a strong message, from Senators on both sides of the aisle, that the 100 to one sentencing disparity between crack and powder cocaine is unjust, the data supporting it was unsound, and our drug laws need correction.

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More than a year before taking office, in September 2007, then-Senator Obama said:

> If you are convicted of a crime involving drugs, of course you should be punished. But let's not make the punishment for crack cocaine that much more severe than the punishment for powder cocaine when the real difference is where the people are using them or who is using them.

I agree. For far too long, the Federal crack-powder sentencing laws have created an injustice in our nation. For more than 20 years this policy has contributed to the swelling of our prison population, disproportionately impacted African and Hispanic Americans, and wasted limited federal resources on low-level street dealers rather than on the worst offenders – the drug kingpins.

We must be smarter in our Federal drug sentencing policy. Of course, law enforcement has been and continues to be central to combating the scourge of drugs, but we must also find meaningful, community-based solutions that address the underlying causes of these problems. Solving these problems as they arise is essential, but being able to prevent them is an important goal that would not only save time and effort, but large amounts of money in a time when budgets are tight.

American justice is about fairness and equality for each individual. To have faith in our system Americans must have confidence that the laws of this country, including our drug laws, are fair and administered justly. I hope this hearing will move us one step closer to reaching that goal.

# # # # #

Testimony of Marc Mauer
Executive Director
The Sentencing Project

Prepared for the Senate Judiciary Committee Subcommittee on Crime and Drugs

Hearing on Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity

April 29, 2009

I am writing to express the strong support of The Sentencing Project for the elimination of the cocaine sentencing disparity and to reprioritize federal law enforcement to target higher level drug operations instead of subjecting low-level nonviolent drug offenders to excessive mandatory minimum sentences. I am Marc Mauer, Executive Director of The Sentencing Project, a national non-profit organization engaged in research and advocacy on criminal and juvenile justice policy issues. In the area of drug and sentencing policy, I have published broadly, engaged with policymakers nationally, and have frequently presented testimony before Congress and state legislative bodies. I commend Chairman Durbin and the U.S. Senate Committee on the Judiciary, Subcommittee on Crime and Drugs, for holding today's hearing, "Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity."

The Sentencing Project has long been engaged in research and policy advocacy regarding federal cocaine sentencing. Our organization has published a series of policy analyses on the issue, delivered testimony before the United States Sentencing Commission ("Commission"), and submitted two amicus briefs to the United States Supreme Court on issues of sentencing in crack cocaine cases. I would like to take the opportunity in this written testimony to identify the fundamental inequities that uniquely exist within the federal drug laws for crack cocaine. I urge the members of this Committee and Congress to pass legislation to restore faith and fairness to a sentencing policy that has garnered near universal condemnation for more than two decades.

PRISON POPULATION EXPANDS WITH CHANGES IN DRUG POLICY

For more than a quarter century the "war on drugs" has exerted a profound impact on the structure and scale of the criminal justice system. The changes in sentencing and enforcement for drug offenses have been a major contributing factor to the historic rise in the prison population. From a figure of about 40,000 people incarcerated in prison or jail for a drug offense in 1980, there has since been an 1100% increase to a total of 500,000 today. To place some perspective on that change, the number of people incarcerated for a drug offense is now greater than the number incarcerated for *all* offenses in 1980.

The increase in incarceration for drug offenses has been fueled by sharply escalated law enforcement targeting of drug law violations, often accompanied by enhanced penalties for such offenses. Many of the mandatory sentencing provisions adopted in both state and federal law have been focused on drug offenses. At the federal level, the most notorious of these are the penalties for crack cocaine violations, whereby crack offenses are punished far more severely than powder cocaine offenses, even though the two substances are pharmacologically identical. Despite changes in federal sentencing guidelines, the mandatory provisions still in place require that anyone convicted of possessing as little as five grams of crack cocaine (the weight of two sugar packets) receive a five-year prison term for a first-time offense.

The dramatic escalation of incarceration for drug offenses has been accompanied by profound racial and ethnic disparities. African Americans comprise 13 percent of the United States' population and 14 percent of monthly illegal drug users, but represent 37 percent of those persons arrested for a drug offense and 56 percent of persons in state prison for a drug conviction.

Despite the recent findings in The Sentencing Project report, "The Changing Racial Dynamics of the War on Drugs," that between 1999 and 2005 state incarceration of African Americans for drug offenses declined 21.6 percent, perhaps due to a decline in the crack cocaine market, the same is not true for the federal system. Indeed, the number of federal prosecutions for crack offenses remains substantial, and the overall number of people in federal prison for a drug offense rose by 32.7% from 1999 to 2005. Racial disparities persist, with African Americans constituting more than 80% of the people convicted of a federal crack cocaine offense.

THE CASE OF CRACK COCAINE

In 1986 when Congress passed the Anti-Drug Abuse Act, the stated intent of the cocaine sentencing structure was to ensure mandatory sentences for major and serious traffickers – heads of drug organizations and those involved in preparing and packaging crack cocaine in "substantial street quantities." Congress calibrated the sentencing structure based on drug quantities that were believed to reflect the different roles in the drug trade, but in its effort to swiftly address rising concern over crack cocaine, the penalty structure became dramatically skewed. The rationale voiced at the time was that the smokable form of cocaine was more addictive, presented greater long-term consequences of use, and had a stronger association with violence in its distribution than the powder cocaine market. History has proven these concerns to be unfounded, yet Congress has remained silent.

Indeed, the actual differences between the two substances are far more subtle. Crack and powder cocaine share the same pharmacological roots, but crack cocaine is cooked with water and baking soda to create a smokable, rock-like substance. Crack cocaine is sold in small quantities and is a cheaper alternative to powder cocaine. However, crack and powder are both part of the same distribution continuum. Crack is, by definition, at the lower-level end of the distribution spectrum where small batches of powder cocaine are processed and sold in an inexpensive, smokable form.

The emergence of the crack cocaine market in the 1980s in a number of major urban areas was accompanied by massive media attention paid toward the drug's meteoric rise and its associated dangers. A core component of the media coverage was the thinly-veiled (and unfounded) link between the drug's use and low-income communities of color. In a matter of weeks, crack cocaine was widely believed by the American public to be a drug that was sold and used exclusively by poor African Americans. This framing of the drug in class and race-based terms provides important context when evaluating the legislative response.

The resulting federal legislation punished crack cocaine with historically punitive sanctions. Crack cocaine is the only drug in which simple possession can result in a mandatory sentence to prison. A defendant convicted with five grams of crack cocaine – between 10 and 50 doses – will receive at least a five-year mandatory sentence. To receive the same sentence for a powder cocaine violation, a defendant would have to have been involved in an offense involving 500 grams – between 2,500 and 5,000 doses. This is commonly referred to as the "100-to-1 sentencing disparity." In order to trigger a 10-year mandatory sentence, a defendant would need to be charged with 50 grams of crack cocaine – between 100 and 500 doses – or 5,000 grams of powder cocaine – up to 50,000 doses. The quantity levels associated with the two drugs codify an equivalency of punishment for low-level crack cocaine sellers and high-level powder cocaine traffickers.

On average, crack cocaine defendants do not play a sophisticated role in the drug trade. Nearly two-thirds (61.5 percent) of crack cocaine defendants were identified as a street-level dealer, courier, lookout, or user. Among powder cocaine defendants, this proportion was 53.1 percent. Although the distribution of offender roles is similar between the two substances, the median quantity and applicable mandatory minimum are vastly different. The median quantity for a crack cocaine street-level dealer is 52 grams, which triggers a ten-year mandatory sentence. For a powder cocaine street-level dealer, the median quantity is 340 grams, which would not even expose a defendant to a five-year mandatory sentence. This disparity has led the Commission to conclude that crack cocaine penalties "apply most often to offenders who perform low-level trafficking functions, wield little decision-making authority, and have limited responsibility." The Commission has further remarked that "[r]evising the crack cocaine thresholds would better reduce the [sentencing] gap than any other single policy change, and it would dramatically improve the fairness of the federal sentencing system."

CRACK COCAINE ON THE AFRICAN AMERICAN COMMUNITY

The impact of this policy on the African American community has been nothing less than devastating. While two-thirds of regular crack cocaine users in the United States are either white or Latino, 80 percent of persons sentenced in federal court for a crack cocaine offense are African American. Thus, African Americans disproportionately face the most severe drug penalties in the federal system.

These racial inequities have come as the result of deliberate decisions by policymakers and practitioners. When crafting mandatory minimum sentences, Congress had sought to establish generalized equivalencies in punishment across drug types by controlling for the perceived severity of the drug via the adjustment of quantity thresholds. However, in practice, sentences are frequently disproportionately severe relative to the conduct for which a person has been convicted because mandatory minimum sentences rely upon the quantity of the charged substance as a proxy for the degree of involvement of a defendant in the drug offense. Thus, the sentencing statutes function as a blunt instrument of punishment that is ineffective at appropriately assessing and calibrating sentences based on the specific circumstances of the charged crime.

Since their introduction, mandatory minimum sentences have consistently been shown to have a disproportionately severe impact on African Americans. A study by the Commission found that African Americans were 21 percent more likely to receive a mandatory minimum sentence than white defendants facing an eligible charge. A separate study by the Federal Judicial Center also concluded that African Americans face an elevated likelihood of receiving a mandatory minimum sentence relative to whites. More recently, the Commission, in a 15-year overview of the federal sentencing system, concluded that "mandatory penalty statutes are used inconsistently" and disproportionately affect African American defendants. As a

result, African American drug defendants are 20 percent more likely to be sentenced to prison than white drug defendants.

The Commission observed that the efforts to reform the federal sentencing system in the 1980s, notably in the guise of mandatory minimum sentencing and sentencing guidelines, have had "a greater adverse impact on Black offenders than did the factors taken into account by judges in the discretionary system immediately prior to guidelines implementation" and that there is some question as to "whether these new policies are necessary to achieve any legitimate purpose of sentencing." In other words, the cure has proven to be worse than the disease.

CONCLUSION

Although federal crack cocaine laws were forged with the intent of targeting high-level traffickers engaged in international and interstate drug distribution, an enterprise ill-suited for state and local law enforcement for obvious jurisdictional reasons, more than two decades of practice have clearly demonstrated that the laws are excessive and ineffective. The small quantity triggers for crack cocaine mandatory sentences subject street-level sellers of crack cocaine to sentences similar to those for interstate powder cocaine dealers. And those convicted with slightly higher quantities of crack cocaine, although still considered local sellers, receive average sentences longer than international powder cocaine traffickers.

Restoring fairness to the cocaine sentencing structure requires Congress to equalize the penalties for crack and powder offenses without increasing the current mandatory sentences. Harsh mandatory drug penalties have not protected communities or stopped drug addiction. Moreover, the Commission cautioned Congress in 2007 against any reduction in the quantity trigger for the powder cocaine mandatory minimum, "as there is no evidence to justify such an increase in quantity-based penalties for powder cocaine offenses." Legislative efforts to address sentencing reform with incremental approaches that do not root out the fundamental unfairness of the cocaine disparity will fall short of justice. I urge this Committee and the entire Congress to support elimination of the 100 to 1 sentencing disparity and to end the harsh mandatory minimum penalties for low-level crack cocaine offenses.

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April 28, 2009

The Honorable Richard J. Durbin
Chairman
Subcommittee on Crime and Drugs
Committee on the Judiciary
United States Senate
309 Hart Senate Office Building
Washington, DC 20510

The Honorable Lindsey Graham
Ranking Member
Subcommittee on Crime and Drugs
Committee on the Judiciary
United States Senate
290 Russell Senate Office Building
Washington, DC 20510

Re: Hearing before the United States Senate Committee on the Judiciary, Subcommittee on Crime and Drugs, on "Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity"

Dear Chairman Durbin and Ranking Member Graham:

The NAACP Legal Defense & Educational Fund, Inc. (LDF) thanks you for this opportunity to present its views concerning legislation to eliminate the unjust and discriminatory 100:1 crack/powder cocaine sentencing ratio in federal law, *see* Anti-Drug Abuse Act of 1986, 21 U.S.C. § 841(b), and the mandatory minimum sentences for simple possession of crack cocaine, *see* Anti-Drug Abuse Act of 1988, 21 U.S.C. § 844. These laws have had a pronounced disparate impact on the African-American community. These laws also violate longstanding principles of equal justice and invite significant skepticism and distrust in the criminal justice system. For these reasons, LDF has been an outspoken critic of both the crack/powder disparity and mandatory minimum sentences from their very inception, and urges Congress to take immediate action to eliminate this unfair sentencing disparity.

LDF is the nation's oldest non-profit civil rights law firm and has been engaged in criminal justice litigation and policy reform since its founding in 1940 under the direction of Thurgood Marshall. As part of LDF's longstanding concern with the effects of racial discrimination on the criminal justice system, we have consistently advocated for pragmatic reform of "War on Drugs" laws, policies and practices that impose a disproportionately negative impact on communities of color and undermine the legitimacy and fairness of the criminal justice system.

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LDF's work addressing the discriminatory 100:1 crack/powder cocaine sentencing ratio includes representing Kemba Smith, a young mother who received a 24 ½ year federal prison sentence for her minor role in a cocaine conspiracy. President William J. Clinton granted her clemency in December, 2000, after extensive litigation. More recently, LDF filed an *amicus* brief in *Kimbrough v. United States,* 128 S.Ct. 558 (2007), arguing that the extensive evidence of racial disparity associated with the 100:1 ratio and its associated harm is an appropriate consideration for a court when fashioning an individualized sentence. The Supreme Court agreed, stating that "[g]iven all this, it would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence 'greater than necessary' to achieve §3553(a)'s purposes, even in a mine run case."[1]

We set forth below the overwhelming case for legislation eliminating these disparities as well as our views on the form that such legislation should take.

Congress Should Act Now to Address the Disparities Created by the 100 to 1 Crack/Powder Cocaine Sentencing Ratio and the Mandatory Minimum Sentences for Simple Possession of Crack Cocaine.

The 100:1 crack/powder sentencing ratio and the mandatory minimum sentences for simple crack cocaine possession in the 1986 and 1988 Anti-Drug Abuse Acts have had a severe disparate impact on the African-American community, resulting in diminished trust in, and support for, the criminal justice system.

Disparate Impact on African Americans

The disparate impacts of these laws on the African-American community have been well documented and cannot be disputed. As a result of these laws, African Americans suffer from pronounced disparities as compared to whites in (1) rates of conviction and incarceration for drug possession and trafficking, (2) lengths of prison sentences, and (3) associated collateral consequences. Statistics reveal these stark disparities, but numbers can only partly convey the devastating impact of these laws on real people. As a result of these disparities, the 100:1 ratio and the mandatory minimum sentence for simple possession of crack has become one of the most notorious symbols of racial discrimination in the modem criminal justice system.

Since the enactment of the Anti-Drug Abuse Acts, far more African Americans have been convicted of federal crack-related offenses than whites, even though a higher percentage of whites use crack cocaine than African Americans. In 1995, the Sentencing Commission reported to Congress that the federal government's 1991 "National Household Survey on Drug Abuse" found that while 52% of reported crack users were

[1] 128 S. Ct. at 575.

white, whites represented only 10.3% of federal convictions for crack offenses.[2] Meanwhile African Americans represented one-third of reported crack cocaine users, but a startling 82% of federal convictions for crack-related offenses.[3] Similarly, over 88% of defendants sentenced in federal court for crack cocaine trafficking offenses were African American while only 4.1% were white.[4]

The 100:1 ratio has also contributed to marked racial disparities in sentence length. In 1986, prior to the implementation of the 100:1 ratio, the average federal drug sentence for African Americans was 11% higher than it was for whites. Four years later, after the introduction of the 100:1 ratio, the average federal drug sentence for African Americans was 49% higher.[5] Between 1994 and 2003, the average time served by an African American for a federal drug-related offense increased by 77%, whereas the average sentence of white offenders increased by only 28%.[6] African Americans now serve almost as much time in prison for a drug offense in the federal system (58.7 months) as whites do for a violent offense (61.7 months).[7]

These unacceptable sentencing disparities have had a devastating impact on the African-American community. For the individuals unfairly sentenced, of course, the lengthy confinement is itself unconscionable. But by requiring lengthy prison terms for crack offenses, the 100:1 sentencing disparity also subjects the broader African-American community to a host of negative consequences that far exceed the initial sentence:

Impaired Capacity for Re-Entry. The lengthy sentences imposed on even first-time crack cocaine offenders significantly undermine the offenders' capacity for

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[2] U.S. Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy, at 34 (1995) ("1995 Report").

[3] The Sentencing Project, *A 25-Year Quagmire: The War on Drugs and Its Impact on American Society* at 21.

[4] *Id.* at 152. *See also* U.S. Sentencing Commission, 2003 Sourcebook of Federal Sentencing Statistics, Table 34 (2003); Substance Abuse and Mental Health Services Administration, 2004 National Survey on Drug Use and Health, Population Estimates 1995, Table 1.43a (2005). Since "drug users generally purchase drugs from sellers of the same racial or ethnic background," the overrepresentation of African Americans among convicted drug offenders cannot be attributed to a rate of drug trafficking that exceeds the proportion of drug use within the African-American community. The Sentencing Project, *Federal Crack Cocaine Sentencing* at 4 (citing Dorothy Lockwood, Anne E. Pottieger, and James A. Inciardi, *Crack Use, Crime by Crack Users, and Ethnicity, in* ETHNICITY, RACE AND CRIME 21 (Darnell F. Hawkins ed., 1995)).

[5] *See* B.S. Meierhoefer, Federal Judicial Center, *The General Effect of Mandatory Minimum Prison Terms: A Longitudinal Study of Federal Sentence Imposed* 20 (1992).

[6] Bureau of Justice Statistics, *Compendium of Federal Justice Statistics,* 1994 (1998).

[7] *Compendium of Federal Statistics, 2003* (Oct. 2005), Table 7.16, p. 112.

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successful community reintegration. Prolonged incarceration frequently causes attenuated family and community relationships and the erosion of an individual's support network makes reintegration and reentry upon release more difficult upon release.[8]

Dilution of Voting Rights. The exponentially longer sentences required for federal crack cocaine-related convictions significantly contributes to the diminution of African-American voting power by exacerbating the problem of African-American felon disfranchisement. Some forty-six states and the District of Columbia deny incarcerated prisoners the right to vote.[9] In thirty-two states, convicted offenders may not vote while they are on parole, and twenty-nine of these states disfranchise offenders on probation.[10] Fifteen of these states permanently disfranchise all ex-felons and, therefore, once ex-offenders are no longer under court supervision, they may regain the opportunity to vote in the remaining states.[11] In the majority of states, therefore, the length of a prison sentence becomes a critical factor that determines how long an individual remains disenfranchised. The corrosive effects should not be underestimated: because political participation is largely a learned behavior, intergenerational disfranchisement can leave some communities largely cut-off from the political process.

Other Harms to the Community. The lengthy prison terms associated with crack cocaine offenses also reach beyond individual families and contribute to the breakdown of such community social structures as churches and schools, and generate a critical shortage of male community leaders and role models.[12]

Undermining Confidence in the Criminal Justice System

The unjustified racially disparate impact of the crack/powder cocaine sentencing disparity and the mandatory minimum sentence for simple possession of crack have led members of the African-American community and the public at large to view the

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[8] *See* James P. Lynch and William J. Sabol, The Urban Institute Justice Policy Center, Prisoner Reentry in Perspective 17-19 (2001), available at http://www.urban.org/UploadedPDF/410213_reentry.PDF.
[9] *See* Joint Report by Human Rights Watch and The Sentencing Project, available at http://www.sentencingproject.org/tmp/File/FVR/fd_losingthevote.pdf, last visited on April 23, 2009.

[10] *Id.*

[11] *Id.*

[12] *See* Steve Rickman, *The Impact of the Prison System on the African Community*, 34 How. L.J. 524,526 (1991); Gabriel J. Chin, *Race, The War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. Gender Race & Just. 253, 259 (2002).

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criminal justice system with skepticism and resentment, undermining confidence in the system and jeopardizing the effectiveness of our nation's anti-drug laws.

On four separate occasions, the Sentencing Commission has articulated its "consistently held position that the 100-to-1 drug quantity ratio significantly undermines the various congressional objectives set forth in the Sentencing Reform Act."[13] It has also concluded that the elimination of the 100:1 sentencing disparity -- by increasing the threshold weight requirement for crack cocaine to match that of powder cocaine -- would do more to reduce the sentencing gap between black and white defendants "than any other single policy change" and would "dramatically improve the fairness of the federal sentencing system."[14] The Sentencing Commission has done what it can to address this problem by enacting a retroactive amendment that will reduce the average crack sentence by 15 months, but the Commission has recognized that the "urgent and compelling" disparity caused by the 100:1 ratio could only be fully remedied by Congressional action.[15]

Similar concerns have been echoed by federal judges who have repeatedly found the 100:1 ratio to be "greater than necessary" to accomplish the purposes of punishment. In 1997, for example, 27 federal judges, all of whom had previously served as U.S. Attorneys, sent a letter to the U.S. Senate and House Judiciary Committees stating that "[i]t is our strongly held view that the current disparity between powder cocaine and crack cocaine in . . . the guidelines cannot be justified and results in sentences that are unjust and do not serve society's interest."[16] More recently, Judge Michael McConnell of the Tenth Circuit Court of Appeals has called the federal crack laws "virtually indefensible."[17] Numerous other courts - both district courts and courts of appeals - have likewise questioned the fairness of the 100:1 ratio.[18] These judicial views are widely

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[13] United States Sentencing Comm'n, Cocaine and Federal Sentencing Policy 7-8 (2007) ("2007 Report"); *see also* United States Sentencing Comm'm, Cocaine and Federal Sentencing Policy (2002) ("2002 Report"); United States Sentencing Comm'm, Cocaine and Federal Sentencing Policy 9 (1997) ("1997 Report"); 1995 Report (issued after a review of cocaine penalties as directed by Pub. L. No. 103-322, § 280006).

[14] United States Sentencing Commission, Fifteen Years of Guidelines Sentencing (Nov. 2003), p. 132.

[15] 2007 Report at 9-10.

[16] Letter from Judge John S. Martin, Jr. to Senator Orrin Hatch, Chairman of the Senate Judiciary Committee, and Congressman Henry Hyde, Chairman of the House Judiciary Committee (Sept. 16, 1997), reprinted in 10 FED. SENT'G RPTR. 195 (1998).

[17] *United States v. Pruitt,* 502 F.3d 1154, 1170 n.2 (10th Cir. 2007) (McConnell, concurring).

[18] *See also, e.g., United States* v, *Ricks,* No. 05-4832 (3d Cir. July 20, 2007) slip op. at 18 (100:1 ratio "leads to unjust sentences"); *United States* v. *Moore,* 54 F.3d 92, 102 (2d. Cir. 1995) (concluding that crack disparity "raise[s] troublesome questions about the fairness of the crack cocaine sentencing policy"); *United States* v. *Singleterry,* 29 F.3d 733, 741 (1st Cir. 1994) (concluding that "[a]lthough Singleterry has not

shared throughout the legal community. As the Sentencing Commission itself recognized, the crack cocaine sentences have been the subject of resounding condemnation by "representatives of the Judiciary, criminal justice practitioners, academics, and community interest groups" alike.[19]

The public shares the concerns of the Sentencing Commission and legal community about the fairness of the 100:1 crack/powder sentencing ratio and the mandatory minimum sentence for simple possession of crack cocaine. Dr. Peter H. Rossi of the University of Massachusetts, Amherst and Dr. Richard A. Berk of the University of California at Los Angeles published a study that assessed public opinion of federal sentences. The results indicate that the public is highly critical of the lengthy federal sentences for crack offenses and, instead, believes that cocaine and crack offenses deserve identical terms of imprisonment.[20]

The widespread perception of the 100:1 crack/powder cocaine disparity and mandatory minimum sentence for simple possession of crack cocaine as unjust results in a denigration of the principle of equality under the law and may actually increase crime and make law enforcement more difficult.[21] Moreover, the "perceived improper

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established a constitutional violation, he has raised important questions about the efficacy and fairness of our current sentencing policies for offenses involving cocaine substances"); *United States* v. *Johnson*, 40 F.3d 436,440 (D.C. Cir. 1994) (citing *United States* v. *Walls*, 841 F. Supp. 24 (D.D.C. 1994), "the disparity between the crack and powder penalties and the heavy impact of that disparity on black defendants is manifestly unfair"); *United States v. Willis*, 967 F.2d 1220, 1226 (8th Cir. 1992) (concurring opinion) (affirming 15-year crack sentence but suggesting that Congress had no "sound basis to make the harsh distinction between powder and crack cocaine," and quoting with approval district judge's description of the sentence as a "tragedy"); *United States v. Clary*, 846 F. Supp. 768, 792 (E.D. Mo. 1994); *United States v. Patillo*, 817 F. Supp. 839, 843-44 & n.6 (C.D. Cal. 1993).

[19] 2007 Report at 2.

[20] *See* Peter H. Rossi & Richard A. Berk, *National Sample Survey: Public Opinion on Sentencing Federal Crimes* 66-67, 80, & Table 4.7 (1995), available at http://www.ussc.gov/nss/jp_exsurn.htm (noting that there is "little support in public opinion for especially severe sentences for drug trafficking and little support for singling out crack cocaine for special attention"). *See also id.* at 78 ("the public does not regard trafficking in [crack cocaine] as more serious than dealing in either powder cocaine or heroin ... and trafficking in crack cocaine should not be singled out for especially severe punishments.").

[21] *See, e.g.*, Donald Braman, *Punishment and Accountability: Understanding and Reforming Criminal Sanctions in America*, 53 UCLA L. REV. 1143,1165 (2006) (explaining that "prominent legal theorists" and "a broad array of recent empirical studies" support the notion that "[w]hen citizens perceive the state to be furthering injustice ... they are less likely to obey the law, assist law enforcement, or enforce the law themselves"); R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 STANFORD L. REV. 571,597-98 (2003); *see also* Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399, 1399 (2005) (reviewing the literature and reporting new experimental evidence that "the perceived legitimacy of one law or legal outcome can influence one's willingness to comply with unrelated laws"); Tracey L. Meares et al, *Updating the Study of Punishment*, 56 STAN. L. REV. 1171, 1185 (2004) ("As penalties increase, people

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unwarranted disparity based on race fosters disrespect for and lack of confidence in the criminal justice system among those very groups that Congress intended would benefit from the heightened penalties for crack cocaine."[22]

Congress Should Act by Completely Eliminating the Disparity Between the Treatment of Crack and Powder Cocaine in Sentencing.

When reforming the unjustified and discriminatory racial disparity between crack and powder cocaine, Congress should not be satisfied with just ameliorating the problem. Instead, Congress should act to eradicate the disparity completely by increasing the threshold weight requirement for crack cocaine to match that of powder cocaine. While some proposals to reduce, rather than eliminate, the disparity may represent sincere efforts to address the problem, LDF urges Congress not to settle for such inadequate measures. Anything short of equalization would leave in place both a legacy and the reality of disproportionate sentencing. Any disparate treatment of crack and powder cocaine, even if reduced, will continue to erode confidence in the fairness of the criminal justice system.

Similarly, there is no penological justification for decreasing the threshold amounts for possession of powder cocaine to the current levels for crack cocaine. The impact of such a change on the criminal justice system, particularly the prison system, is simply not justified by any reasoned view that our present penalties are inadequate to address these violations. An arbitrary and unsupported increase in penalties for powder cocaine offenses, adopted primarily to justify the unwarranted harsh penalties currently in place for crack cocaine offenses, perpetuates the incorrect judgments that established the disparity in the first place and would further diminish respect for the criminal justice system.

* * *

The disparate sentences for crack and powder cocaine have proven to be an embarrassing stain on the criminal justice system. The disparity's disproportionate impact on African Americans and its lack of any penological justification engender disrespect for the law that undermines the criminal justice system itself. The inequity of this sentencing scheme and the resulting explosion in incarceration rates for non-violent drug offenders

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may not be as willing to enforce them because of the disproportionate impact on those caught."); Tom R. Tyler, WHY PEOPLE OBEY THE LAW 3-4 (1990) (explaining that cooperation with the law depends on the perception that the law is "just").

[22] 2002 Report at 103.

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demand immediate attention and reform. Accordingly, LDF strongly urges you to support legislation that eliminates completely the sentencing disparities for crack and powder cocaine.

Respectfully submitted,

John Payton
Director-Counsel and President
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6 May 2009

The Honorable Richard J. Durbin
Chairman
United States Senate Committee on the Judiciary
Subcommittee on Crime and Drugs
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Lindsey Graham
Ranking Member
United States Senate Committee on the Judiciary
Subcommittee on Crime and Drugs
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Durbin and Senator Graham:

Thank you for the opportunity to present the views of the National District Attorneys Association as a part of the record on your recent hearing titled: "Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity." I hope you will consider this testimony as the beginning of a dialogue over suggested legislative changes in the sentencing structure of federal cases involving powder and crack cocaine. While this issue only addresses federal sentencing, it could have a significant impact on how state and local prosecutors coordinate criminal drug cases with the federal prosecutor in their states. In consideration of that, I ask that you closely consider the concerns addressed in this testimony. The NDAA wholly supports the Subcommittees efforts to eliminate disparities in federal sentencing guidelines where they exist and where evidence indicates there is a justifiable way to address the disparity for the benefit of our communities.

Thank you for your time and consideration. The NDAA and I stand ready to answer any questions you may have. I look forward to working with you both on this issue as it moves through the congressional process.

Sincerely,

Joseph I. Cassilly
President

To Be the Voice of America's Prosecutors and to Support Their Efforts to Protect the Rights and Safety of the People

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Written Testimony of
Joseph I. Cassilly
State's Attorney Harford County, Bel Air, Maryland
and
President, National District Attorneys Association

"Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity"

Senate Judiciary Committee
Subcommittee on Crime and Drugs
United States Senate

April 29, 2009

I am writing on behalf of the National District Attorneys Association (NDAA), the oldest and largest organization representing State and local prosecutors. I appreciate the Subcommittee's willingness to hear all views on this issue and hope the NDAA's point of view will add to the debate and assist in the development of legislation to address the issue. I and the NDAA fully agree with the Chairman that we must work every day to ensure the justice system is equal and fair for all involved, while also protecting our communities.

I have attached a resolution adopted by NDAA regarding the sentencing disparity between crack and powder cocaine. NDAA agrees that some adjustment is warranted, but just as the 100:1 disparity cannot be justified by empirical data we are concerned that the proposed 1:1 realignment of Federal penalties for crack versus powder cocaine also lacks any empirical or clinical evidence. A random adjustment will have severe negative consequences on the efforts of this nation's prosecutors to remove the destructive effects of crack and violence from our communities.

I have been a criminal prosecutor for over 31 years. My prosecutors and I work on one of the most active and successful task forces in Maryland and cooperate with federal agents and prosecutors from the Office of the U. S. Attorney for Maryland.

The cooperation of Federal and State prosecutors and law enforcement that has developed over the years is due in large part to the interplay of Federal and State laws. Maryland state statutes differentiate sentences between crack and powder cocaine offenders on a 9:1 ratio based on the amount that would indicate a major dealer. There is not in reality a 100:1 difference in the sentences given to crack versus powder offenders. A DOJ report states, "A facial comparison of the guideline ranges for equal amounts of crack and powder cocaine reveals that crack penalties range from 6.3 times greater to approximately equal to powder sentences."

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In recent years local prosecutors have brought hundreds of large quantity dealers for Federal prosecution, primarily because of the discretion of Federal prosecutors in dealing with these cases. This discretion allows for pleas to lesser amounts of cocaine or the option of not seeking sentence enhancements. The end result is that the majority of these cases are ultimately resolved by a guilty plea to a sentence below the statutory amount.

The practical effect of guilty pleas is that serious violent criminals are immediately removed from our communities, they spend less time free on bail or in pre-trial detention, civilian witnesses are not needed for trial or sentencing hearings and are therefore not subject to threats and intimidation and undercover officers are not called as witnesses: all of which would happen if we were forced to proceed with these cases in courts. Yet meaningful sentences are imposed, which punish the offender but also protect the community. The plea agreements often call for testimony against higher ups in the crack organization. It is critical that Federal sentences for serious crack dealers remain stricter than State laws if this coordinated interaction is to continue.

Let me dispel myths about controlled substance prosecutions that are propagated by those who would de-criminalize the devastation caused by illegal drugs.

1. There is a difference between the affect of crack versus powder cocaine on the user [1]

In a study entitled "Crack Cocaine and Cocaine Hydrochloride: Are the Differences Myth or Reality?" by D. K. Hatsukami and M.W. Fischman, Department of Psychiatry, Division of Neurosciences, University of Minnesota, Minneapolis it is stated,

> "The physiological and psychoactive effects of cocaine are similar regardless of whether it is in the form of cocaine hydrochloride or crack cocaine (cocaine base). However, evidence exists showing a greater abuse liability, greater propensity for dependence, and more severe consequences when cocaine is smoked (cocaine-base) ... compared with intranasal use (cocaine hydrochloride). The crucial variables appear to be the immediacy, duration, and magnitude of cocaine's effect, as well as the frequency and amount of cocaine used rather than the form of the cocaine."

Smoked cocaine results in the quickest onset and fastest penetration. Generally, smoked cocaine reaches the brain within 20 seconds; the effects last for about 30 minutes, at which time the user to avoid the effects of a "crash" re-uses. The Drug Enforcement Administration's (DEA) intelligence indicates that a crack user is likely to consume anywhere from 3.3 to 16.5 grams of crack a week, or between 13.2 grams and 66 grams per month.

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[1] Most of the following comments are taken from reports of the United States Sentencing Commission or of the Department of Justice.

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Intranasally administered cocaine has a slower onset. The maximum psychotropic effects are felt within 20 minutes and the maximum physiological effects within 40 minutes. The effects from intranasally administered cocaine usually last for about 60 minutes after the peak effects are attained. A typical user snorts between two and three lines at a time and consumes about 2 grams per month.

Using these amounts, the cost per user per month for crack cocaine is between $1,300 and $6,600 as compared to a cost for powder cocaine of $200 per month; a 6.5 to 33:1 ratio in cost.

2. There is a difference in the associated crimes and the effect on the community caused by crack as opposed to powder cocaine.

The inability to legitimately generate the large amount of money needed by a crack addict leads to a high involvement in crimes that can produce ready cash such as robbery and prostitution. Studies show crack cocaine use is more associated with systemic violence than powder cocaine use. One study found that the most prevalent form of violence related to crack cocaine abuse was aggravated assault. In addition, a 1998 study identified crack as the drug most closely linked to trends in homicide rates. Furthermore, crack is much more associated with weapons use than is powder cocaine: in FY 2000, weapons were involved in more than twice as many crack convictions as powder.

One of the best-documented links between increased crime and cocaine abuse is the link between crack use and prostitution. In this study, 86.7% of women surveyed were not involved in prostitution in the year before starting crack use; one-third become involved in prostitution in the year after they began use. Women who were already involved in prostitution dramatically increased their involvement after starting to use crack, with rates nearly four times higher than before beginning crack use.

One complaint about the sentencing disparity is that it discriminates against black crack dealers versus white powder dealers. Unfortunately, what most discriminates against our black citizens is the violence, degradation and community collapse that is associated with crack use and crack dealers and their organizations. It is the black homeowners who most earnestly plead with me, as a prosecutor, for strict enforcement and long prison sentences for crack offenders. The stop snitching video was made by black crack dealers in Baltimore to threaten black citizens with retaliation and death for fighting the dealers. A black family of five was killed by a fire bomb which was thrown into their home at the direction of crack dealers because they were reporting crack dealers on the street in front of their house. Those areas with the highest violent crime rates are the same areas with the highest crack cocaine use.

Congress should consider that many persons serving federal crack sentences have received consideration from the prosecutors in return for a guilty plea. (i.e. pleas to lesser amounts of cocaine or the option of not seeking sentence enhancements) Many criminals who could be affected by a retroactive application of a new sentencing scheme have already received the benefits of lower sentences and would get a second reduction. New sentencing

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hearings would mean that citizens from the communities that crack dealers once ruined would have to come forward to keep the sentences from being cut.

The nation's prosecutors urge Congress to adopt a sentencing scheme with regard to the destruction caused by crack cocaine to our communities. If there is a need to reduce the disparity between crack and powder cocaine then perhaps the solution is to increase sentences for powder cocaine.

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RESOLUTION CONCERNING THE DISPARITY IN FEDERAL PENALTIES FOR COCAINE BASE (CRACK) AND POWDER COCAINE

WHEREAS Federal law provides for a 100:1 ratio in the amounts of powder cocaine and cocaine base (crack) that trigger mandatory minimum sentences; and

WHEREAS there currently exists a disparity between federal sentences for cocaine base (crack) and powder cocaine; and

WHEREAS the United States Sentencing Commission has recently lowered the sentencing tiers for cocaine base (crack) in order to reduce the disparity between penalties for cocaine base (crack) and powder cocaine; and

WHEREAS the United States Sentencing Commission has given consideration to the retroactive application of the sentencing guidelines changes; and

WHEREAS there currently exist several varying pieces of legislation in the 110th Congress that attempt to address the disparity; and

WHEREAS the National District Attorneys Association (NDAA) recognizes that significant differences exist in the manner in which cocaine base (crack) and powder cocaine are ingested, the onset of euphoria, the duration of the effects, the rate of addiction; and the likelihood of non-drug, revenue producing criminal activity; and

THEREFORE BE IT RESOLVED, that the National District Attorneys Association (NDAA) believes that there exist evidence-based reasons to recognize the differences between cocaine base (crack) and powder cocaine, however, the NDAA acknowledges that the current level of sentencing disparity that exists between cocaine base (crack) and powder cocaine is not justified nor evidence-based; and

BE IT FURTHER RESOLVED, that the National District Attorneys Association believes that the issue of sentencing disparity can and should be revisited by the United States Congress; and

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BE IT FURTHER RESOLVED, that due to the potentially negative impact on local communities the National District Attorneys Association opposes the retroactive application of the Federal sentencing guidelines changes as to sentences for cocaine base (crack) and powder cocaine convictions.

Adopted by the Board of Directors: December 1, 2007 (San Antonio, Texas)
2007-08 FALL

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Testimony of Cedric Parker
To the Senate Judiciary Committee
Subcommittee on Crime and Drugs

"Restoring Fairness to Federal Sentencing:
Addressing the Crack-Powder Disparity"

Wednesday, April 29, 2009

Thank you Chairman Durbin, Senator Graham and members of the Subcommittee for inviting me to testify before you today. I am Cedric Parker from Alton, Illinois. I am here to tell you the things that my sister, Eugenia Jennings, would say if she could be here today. The severity of mandatory minimums and especially the sharp disparity between those for crack and powder cocaine have touched my family directly. Eugenia cannot be here because she is in federal prison for selling crack cocaine.

I spoke with my sister when I learned you wanted to hear from me and these are the things she would like you to know. I want to say first that Eugenia does not excuse her conduct or hide behind her problems. She took immediate responsibility for her actions and I know a day does not go by that she is not sorry for what she did. She has learned her lesson.

Eugenia is the youngest of seven and our mother's only daughter. She was born and growing up as I was leaving Alton first for college and then for the military. As I began to hear about the things that were happening to my little sister, I tried repeatedly to intervene from overseas and find a safe harbor for her. But I could not.

Our mother was terribly challenged by illness, poverty, and other problems that made it difficult to provide us a stable family and safe environment or to get help. When Eugenia was very young, our mother would leave her with the Smiths, family friends in the projects, when she would go to work. The visits lengthened until she stopped bringing Eugenia home much at all.

Eugenia had an unspeakable childhood. Her surrogate mother, Annie, beat her and emotionally brutalized her from the time she arrived. She was surrounded by Annie's children, all of whom abused drugs and alcohol. When Eugenia was only seven years old she was left for days with a prostitute who sexually assaulted her, as did a teenage neighbor of the Smiths. A year later one of her half-brothers sexually abused her and when she became a teenager, her step-father tried to rape her.

Eugenia tried to escape but found only another set of problems. She left the Smith household when she was only 13, dropped out of school, and went to live with her boyfriend in a house where drugs and alcohol were the norm. She began abusing drugs and become addicted to crack by the time she was 15. She stopped using when she learned she was pregnant but after she

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gave birth at age 16, desperate for money to support her and her daughter, she began selling drugs. Of course, she was eventually caught.

Eugenia was convicted in Illinois in 1996 for two drug sales totaling less than 2 ½ grams of crack cocaine. While in prison she sought treatment for her drug addiction and resolved to remain drug free. She studied for and completed her GED. She gave birth to her youngest son Cardez while she was incarcerated.

Eugenia tried to live up to her commitment. But this young woman had never had anyone around her who believed in her and who she could count on for support. Following her release from prison in 1999 she relapsed and began using drugs and alcohol again.

In June 2000 Eugenia was arrested for trading crack cocaine on two different occasions for designer clothing. One sale involved 1.3 grams and the second, a few days later, involved 12.6 grams.

Eugenia was charged in federal court with two counts of distributing crack cocaine. She accepted responsibility and pleaded guilty. The federal prosecutor decided to charge her as a so-called "career offender." A career offender is someone who has two or more prior felony drug offenses. Her two Illinois state prior convictions for small amounts of drugs were enough to treat her as a major drug kingpin, driving her sentence from the mandatory minimum of five years to a sentence of almost 22 years. My sister was barely 23 years old and the mother of three young children when she was sentenced in January 2001 to over two decades behind bars.

Had Eugenia been sentenced for powder cocaine instead of crack cocaine, even as a "career offender," her sentence would have been less than half the one she received for crack cocaine. Today, she would be getting ready to come home, probably already in the halfway house. But, because she was sentenced for crack cocaine she will not be released from prison until 2019.

Eugenia has worked very hard while in prison to better herself and maintain her ties to her children. They correspond regularly and what little money she has managed to earn, she has sent home to them for birthdays and holidays. My sister has never been in trouble in prison and is very well regarded by staff and other prisoners. She is an avid student and model employee. She is involved with supporting battered women and is a member of the Youth Awareness Program, speaking with young people about the dangers of drugs. After a lifetime of substance addiction, Eugenia is proudly sober.

It strikes me that whatever the government had hoped to achieve by locking Eugenia up has been accomplished and yet she has ten more years than someone convicted of powder cocaine. My sister's children, 11, 14 and 15, have only seen their mother once since her imprisonment.

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My sister is a remarkable woman of courage and principles. I would give anything not to be here telling you this sad story but I hope that my words will help convince you to change this terrible law.

I want to leave you, not with Eugenia's words or mine, but with the words of the Honorable G. Patrick Murphy, who sentenced my sister. Here is what he told her:

> Mrs. Jennings, I'm not mad at you. . . . The fact of the matter is, nobody has ever been there for you when you needed it. Never. You never had anyone who stood up for you. All the government's ever done is just kick your behind. When you were a child and you had been abused, the government wasn't there. When your stepfather abused you, the government wasn't there. When your stepbrother abused you, the government wasn't there. But, when you get a little bit of crack, the government's there.
>
> "Now is that fair? No. It's not. And have you been punished? You bet. Your whole life has been a life of deprivation, misery, whippings, and there is no way to unwind that. But the truth of the matter is, it's not in my hands. As I told you, Congress has determined that the best way to handle people who are troublesome is we just lock them up. Congress passed the laws.
>
> "And it is an awful thing, an awful thing, to separate a mother from her children. And the only person who had the opportunity to avoid that was you. . . . .At every turn in the road we failed you. And we didn't come to you until it was time to kick your butt. That's what the government has done for Eugenia Jennings."

I am not here to ask the government to make it right for Eugenia. It is too late for that. I am here to bring you her message to end the sentencing gap between crack and powder cocaine. It causes racial disparity in sentencing that Eugenia witnesses every day. It also results in unduly harsh sentences for people whose only crime is selling the same drug in a different form. The fact that the 13 grams of drugs that my sister sold were the crack and not the powder form of cocaine surely cannot be enough to justify adding a decade onto an already lengthy sentence.

Thank you for hearing me.

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Written Testimony of Mary Price,
Vice President and General Counsel
Families Against Mandatory Minimums

On
"Restoring Fairness to Federal Sentencing:
Addressing the Crack-Powder Disparity"

Submitted to the
Subcommittee on Crime and Drugs
Of the Judiciary Committee of the United States Senate

April 29, 2009

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Thank you for the opportunity to submit testimony on behalf of the board, staff and 20,000 members of Families Against Mandatory Minimums (FAMM). We commend the subcommittee for its decision to address the sentencing disparity between crack and powder cocaine. This hearing gives hope to thousands, including many of our members, who have loved ones serving harsh sentences for low-level, nonviolent drug offenses.

FAMM is a national nonprofit, nonpartisan organization whose mission is to promote fair and proportionate sentencing policies and to challenge inflexible and excessive penalties required by mandatory sentencing laws. FAMM works every day to ensure that sentencing is individualized, humane and no greater than necessary to impose just punishment, secure public safety and support successful rehabilitation and reentry. In our view, punishment should fit the individual and the crime. Too frequently it does not.

We recognize that two decades ago little was known about crack cocaine. There was a perception that this derivative form of cocaine was more dangerous than the powder form, would significantly threaten public and prenatal health, and would greatly increase drug-related violence. Those assumptions drove Congress to adopt a particularly harsh sentencing structure for crack cocaine by establishing new, non-parolable mandatory minimums for a host of drug offenses in the Anti-Drug Abuse Act of 1986. That Act imposed the so-called "100:1 sentencing ratio," which dictates that crack defendants receive sentences identical to powder defendants convicted with 100 times as much drugs.

While that kind of dramatic response might have been justifiable given the prevailing beliefs about the "elevated threat" of crack cocaine, we now know, 23 years later, indeed we have known for some time, that those beliefs are not supported by research. Crack and powder cocaine produce the same psychological and psychotropic effects; crack users are not inherently predisposed to violence; and the effects of prenatal exposure to crack are significantly less harmful than once believed – and less harmful than prenatal exposure to alcohol or tobacco.[1]

Not only is the crack penalty unwarranted and insupportable, it has also caused great harm. It punishes small-time users and dealers as or even more harshly than international drug kingpins. Moreover, it does so in a way that is discriminatory. Powder cocaine is predominately used by whites, while the majority of offenders arrested, convicted, and sentenced on crack cocaine charges are African American. Intentionally or not, the harsher penalties for crack fall upon one racial group while powder users are treated more leniently. The end result is not drug-free cities, but devastated families and broken, suspicious communities.

The crack cocaine penalty structure is the most extreme example of a sentencing system gone seriously astray. Mandatory minimums impose one-size-fits-all sentences regardless of the culpability of the defendant. Specifically, drug mandatory minimums take into account only one variable – quantity – in determining sentence length. But drug quantity is a poor proxy for culpability.

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[1] U.S. Sentencing Commission, *Report to Congress: Cocaine and Federal Sentencing Policy* (2007) at 70 ("*2007 Report*").

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The federal judiciary, as well as criminal justice practitioners and experts, has long decried mandatory minimums in general and those for crack cocaine especially.[2] They point out that the current system requires courts to sentence defendants with differing levels of culpability to identical prison terms. The U.S. Sentencing Commission has for over a decade called upon Congress to address current quantity-based disparities. The Commission has noted that the current law overstates the relative harmfulness of crack cocaine compared to powder cocaine; is applied most often to lower-level offenders; overstates the seriousness of most crack cocaine offenses and fails to provide adequate proportionality; and impacts minority communities most heavily.[3]

FAMM's case files are filled with tragic but sadly predictable stories of low-level offenders sentenced to kingpin-size sentences. The 100:1 ratio can result in sentences for low-level crack offenders that exceed sentences for higher-level powder cocaine offenders. For example, "street level" crack cocaine defendants serve 97-month sentences on average, compared to 78 months for powder cocaine wholesalers.[4] Moreover, while the five- and ten-year mandatory minimums were intended by Congress to target the most serious and high-level drug traffickers,[5] 73.4 percent of street level dealers – in 2005, the most prevalent type of crack cocaine offender --were subject to five and ten-year mandatory minimum sentences.[6] In 2008, nearly 80 percent of all crack cocaine offenders were convicted under statutes carrying mandatory minimums.[7]

Of all drug defendants, crack defendants are most likely to receive a sentence of imprisonment as well as the longest average period of incarceration.[8]

Furthermore, unlike all other controlled substances, crack cocaine carries a mandatory minimum of five years for a first offense of simple possession of five grams of crack, about the weight of two sugar packets. That is five times longer than the maximum imposable sentence for first-time simple possession of a similar or greater quantity of any other drug.[9]

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[2] American Bar Association, *Report of the ABA Justice Kennedy Commission* (June 23, 2004); Judicial Conference of the United States, *Mandatory Minimum Terms Result In Harsh Sentencing* (June 26, 2007); Federal Public and Community Defenders, *Statement of A.J. Kramer, Federal Defender for the District of Columbia on Behalf of the Federal Public and Community Defenders Before the Subcommittee on Crime and Drugs of the Judiciary Committee of the United States Senate* (February 2007); National Association of Criminal Defense Lawyers, *Written Statement of Carmen D. Hernandez on behalf of the National Association of Criminal Defense Lawyers before the U.S. Sentencing Commission RE: Cocaine and Federal Sentencing Policy* (November 2006).

[3] 2007 *Report* at 8.

[4] *Id.* at 30, figure 2-14.

[5] Ten-year mandatory minimum sentences were intended to target "the kingpins – the masterminds" and five year sentences targeted serious traffickers. *See* U.S. Sentencing Commission, *Report to the Congress, Cocaine and Federal Sentencing Policy*, May 2002 at 6-7 ("2002 *Report*").

[6] 2007 *Report* at 21, figure 2-6 and 29, figure 2-13.

[7] U.S. Sentencing Commission, *2008 Sourcebook of Federal Sentencing Statistics*, at Table 43 (2008) ("2008 *Sourcebook*").

[8] U.S. Sentencing Commission, *Report to Congress: Cocaine and Federal Sentencing Policy* (1995).

[9] *See* 21 U.S.C. § 844(a) (2008) (permitting "a term of imprisonment of not more than 1 year" for simple possession of any drug except crack cocaine, which requires a minimum 5-year prison term).

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The vast majority of prisoners serving these unconscionable sentences are black. The crack cocaine penalty structure has been widely and rightly criticized as the source of significant race-based disparity in federal sentencing.

In 2008, the average sentence length for crack cocaine was 114 months (fully 23 months longer than that for powder cocaine),[10] and 80% of all crack offenders were black.[11] Crack cocaine sentences were also, on average, 39 months longer than heroin sentences, 15 months longer than methamphetamine sentences, and 78 months longer than marijuana offenses.[12] Crack cocaine's mandatory minimum penalties appear largely responsible for ensuring that African American drug offenders serve much longer sentences than White drug offenders.[13] It is no surprise that this disparity leads to a deleterious perception of race-based unfairness in our criminal justice system.

The Sentencing Commission has found that "[t]his one sentencing rule contributes more to the differences in average sentences between African-American and White offenders" than any other factor and revising it will "better reduce the gap than any other single policy change." Doing so, the Commission points out, "would dramatically improve the fairness of the federal sentencing system."[14]

The long sentences for crack cocaine for low-level dealers, despite their irrational premises and disproportionate racial impact, were considered necessary evils: something we put up with in order to protect our communities. Copious documentation and analysis by the Commission have proven otherwise. The Commission reports that the vast majority of crack cocaine offenders were not involved in violence. In fact, violence decreased in crack cocaine offenses from 11.6 percent in 2000 to 10.4 percent in 2005.[15] In this study, an offense was defined as "violent" if any participant in the offense made a credible threat or caused any actual physical harm to another person.[16]

Nor should we fear that our communities will be overrun with crack dealers if sentences were shortened. Drug offenders actually have one of the lowest rates of recidivism of all offenders, ranging from 16.7 percent (Criminal History Category II) to 48.1 percent (Criminal History Category V).[17] More importantly, across all criminal history categories and for all offenders, the largest proportion of "recidivating events" that count toward these rates are supervised release revocations, which can include revocations based on anything from failing to file a monthly report to failing to file a change of address. In fact, drug trafficking accounts for only a small fraction – as little as 4.1 percent – of recidivating events for all offenders.[18]

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[10] 2008 *Sourcebook*, at Figure J.
[11] *Id.* at Table 34.
[12] *Id.* at Figure J.
[13] *See* U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, at 131-32, 141 (Nov. 2004).
[14] *Id.* at 132.
[15] 2007 *Report* at 37.
[16] *Id.*
[17] U.S. Sentencing Commission, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (May 2004) at 32.
[18] *Id.* at 17.

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Most of this information, while different than the misperceptions the sentencing policy was based on 23 years ago, is not new. It became clear to me at some point in the 110th Congress that we all agreed on the facts and that the sentencing disparity between crack cocaine and powder cocaine is patently wrong. It seemed, though, that Republicans and Democrats could not agree on a solution. I am deeply afraid that we will find ourselves in the same predicament again this year. The economic and human toll of another two or four or twenty years of deliberation is too high for the American taxpayer and for the families and the communities of those who are sentenced under the law.

If Congress were to eliminate the sentencing disparity between crack and powder cocaine, we would save a minimum of over $26 million in the first year the reforms went into effect and nearly $530 million over the next fifteen years. Reform would reduce overcrowding and free funding for more effective rehabilitation efforts.

Even more than money, the impact on people serving long sentences away from their families and loved ones would be especially important. Sentences have become so inflated in the past two decades that a 10-year sentence for a nonviolent offender no longer sounds harsh. But 10 years is an extraordinarily long time to be locked away from society. It is 10 years of missed Thanksgiving dinners with family, missed birthday celebrations, missed marriages and childbirths and even missed funerals. If these sentences were appropriate, proportionate and fair, such suffering would seem warranted. But the chorus of voices and the criticisms that have been raised against them makes each individual sentencing story particularly poignant. I want to share one such story with you.

In 1992 Michael Short was sentenced for selling crack cocaine. Before then he had never spent a day in prison. He came from a good home and a good family. He had no criminal history. He was not a violent offender. He was not a gang member. But, on November 13, 1992, he was sentenced to serve nearly twenty years in federal prison. He was 21 years old.

Twenty years is the kind of sentence that drug kingpins should get, but he was no drug kingpin. His twenty year sentence was mandated because that was the mandatory minimum assigned to his sale of crack cocaine. If he had been selling powder cocaine, arrested and convicted, his sentence would have been nine years. Some might argue that nine years would be an excessive sentence; few would disagree that twenty years is unconscionable. While he was in prison, his mom died. He was unable to leave prison to attend her funeral.

Michael made a series of bad decisions. He was a small-time dealer and he broke the law. He deserved to be punished, but punishment must be both reasonable and fair. His punishment was neither.

There are so many stories like Michael's. It is time to fix the system.

If the only reason for this delay is a lack of political will, let me help put an end to that now. A 2008 FAMM poll found widespread support for ending mandatory minimum sentences for nonviolent offenses and found that Americans will support lawmakers who feel the same way.

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Fully 78 percent of Americans (nearly eight in 10) agree that courts - not Congress - should determine an individual's prison sentence. What this poll demonstrates is that the voters will support a repeal of mandatory minimums. Short of that, they will not begrudge you for fixing one inherently unjust mandatory minimum so that it better reflects the basic principle of American sentencing: that sentencing is individualized, humane and sufficient but not greater than necessary to impose just punishment, secure public safety, and support successful reentry.

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Written Statement

of over

Seventy-Five Organizations & Law Professors

in Support of

the Complete Elimination of the Crack-Powder Disparity

Submitted to
The Senate Committee on the Judiciary,
Subcommittee on Crime and Drugs
April 29, 2009 Hearing

"Restoring Fairness to Federal Sentencing:
Addressing the Crack-Powder Disparity"

We write to express our support for the complete elimination of the cocaine sentencing disparity and the refocus of federal law enforcement resources on high-level and international drug traffickers, instead of the largely low-level crack cocaine offenses punished under current federal sentencing law. Decades of research and data demonstrate that the current penalty structure for low-level crack cocaine offenses is excessive and ineffective. The undersigned applaud the convening of this critical hearing, and urge the expeditious enactment of legislation that completely ends this disparity by equalization at the current level for powder cocaine.

It has been 23 years since Congress enacted the Anti-Drug Abuse Act of 1986 which differentiated between two forms of cocaine – powder and crack – and singled out low-level crack cocaine offenses for dramatically harsher punishment. Two years later Congress further distinguished crack cocaine from both powder cocaine and every other drug by creating a mandatory felony penalty of five years in prison for first-time simple possession of five grams (the weight of two sugar packets) of crack cocaine. In what has come to be known as the 100-to-1 ratio, it takes 100 times more powder cocaine than crack cocaine to trigger severe five-and ten-year mandatory minimum sentences.

Government data for FY 2005 reveal that nearly two-thirds (61.5%) of all federal crack cocaine cases have been brought against the lowest level participants, with only 8.4% targeted against the

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highest level traffickers.[1] In FY 2006, federal crack cocaine defendants were prosecuted for an average quantity of 51 grams of crack – the weight of an ordinary candy bar.[2] For decades people convicted of low level crack cocaine offenses, many with no previous criminal history, have been punished far more severely than those who are wholesale traffickers of the drug in powder form. These results do not reflect Congress's intent to stem the traffic in cocaine and these prosecutorial practices have been unsuccessful in ending drug abuse.

Moreover, this sentencing structure has had an enormous racially discriminatory impact. Federal law enforcement's focus on inner city communities has resulted in African Americans and Latinos being disproportionally impacted by the facially neutral, yet unreasonably harsh, mandatory minimum cocaine penalties. Of all drug defendants, crack defendants are most likely to receive a sentence of imprisonment as well as the longest average period of incarceration. In 2007, 82.7% of those sentenced federally for crack cocaine offenses were black, despite the fact that only about 25% of crack cocaine users in the U.S. are African American.[3] The United States Sentencing Commission has noted that revising this one sentencing rule would better reduce the sentencing gap between blacks and whites "than any other single policy change," and would "dramatically improve the fairness of the federal sentencing system."[4]

We recognize that over two decades ago, little was known about crack cocaine, other than unsubstantiated fears that this new derivative form of cocaine was more dangerous than its original powder form, would significantly threaten public health, and greatly increase drug-related violence. Since then, copious documentation and analysis by the U.S. Sentencing Commission, criminologists and medical researchers have revealed that many assertions were not supported by sound data and, in retrospect, were exaggerated or simply incorrect. Crack cocaine and powder cocaine are pharmacologically identical and have similar physiological effects, differing only in manner of ingestion. Research indicates that the negative effects of both prenatal crack and powder cocaine exposure are identical, and no more severe than the impact of alcohol or tobacco on the fetus. Significantly less trafficking-related violence is associated with crack than was previously assumed, and any cases involving weapons are subject to the stiff mandatory minimum sentence for use of a weapon in connection with a drug trafficking offense, or otherwise enhanced sentences under the guidelines.

Attention to reform of crack cocaine sentences has gained significant momentum. Four reports from the independent U.S. Sentencing Commission have consistently appealed for a change in the mandatory minimum crack cocaine statutes, a change only Congress can accomplish. On November 1, 2007 the bipartisan Commission reduced the guideline sentence for crack cocaine by two levels – as low as the guideline could go and still be consistent with the mandatory minimum statute. In December 2007 the U.S. Supreme Court held that federal judges may consider the unfairness of the 100-to-1 ratio between crack and powder cocaine penalties and impose a sentence below the crack guideline in cases where they deem the guideline sentence is

---

[1] United States Sentencing Commission [USSC], *Report to Congress: Cocaine and Federal Sentencing Policy* 21 (Fig. 2-6) (2007), based on FY 2005 data. "Lowest level participants" include street-level dealers, courier/mule, and lookouts; "Highest level traffickers" include importers, organizers, & financiers.
[2] USSC, *Report to Congress: Cocaine and Federal Sentencing Policy* 108-110 (Table 5-2) (2007).
[3] See http://oas.samhsa.gov/NSDUH/2k7NSDUH/tabs/Sect1peTabs34to38.pdf
[4] USSC, *Fifteen Years of Guidelines Sentencing* 132 (2004).

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too severe. Again, however, neither the Sentencing Commission guideline change nor the Supreme Court ruling can eliminate or significantly alleviate the long, harsh mandatory minimum sentences that many people are serving for small quantity crack cocaine offenses. Only Congress can "crack the disparity" and eliminate the statutory 100-to-1 ratio in sentencing structure between crack and powder cocaine. [5]

The undersigned agree with the pronouncement of President Obama and Vice President Biden that "the disparity between sentencing crack and powder-based cocaine is wrong and should be completely eliminated."[6] Indeed, Vice President Biden was the sponsor of a bill last term that equalized crack and powder cocaine penalties, which was co-sponsored by then Senator Obama.

---

[5] Reducing the quantity threshold for powder cocaine to that of crack cocaine is an option that was unanimously rejected by the U.S. Sentencing Commission in 2002 as likely to exacerbate, rather than ameliorate, the problems with cocaine sentencing. Such an approach would not cause a shift in focus from bit players to drug "kingpins," but would lead to dramatically increased levels of federal incarceration, further burdening the federal system at a great cost to taxpayers.

[6] The President's civil rights agenda can be found at http://www.whitehouse.gov/agenda/civil_rights/.

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We strongly encourage you to support and pass legislation that completely eliminates the crack-powder disparity by equalizing at the current level for powder cocaine.

Sincerely,

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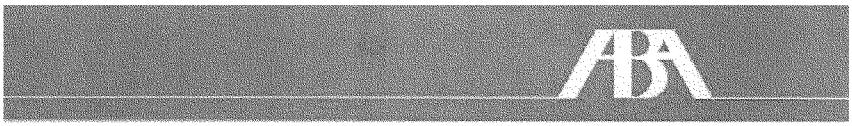

AMERICAN BAR ASSOCIATION

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STATEMENT OF

THOMAS M. SUSMAN

submitted on behalf of the

AMERICAN BAR ASSOCIATION

to the

SUBCOMMITTEE ON CRIME AND DRUGS

COMMITTEE ON THE JUDICIARY

of the

UNITED STATES SENATE

for the hearing on

"Federal Cocaine Sentencing Laws: Reforming the 100:1 Crack Powder Disparity"

April 29, 2009

Chairman Durbin, Ranking Member Graham and Members of the Subcommittee:

My name is Thomas M. Susman and I am pleased to submit this statement to the Subcommittee in my capacity as Director of Governmental Affairs, American Bar Association (ABA).

The crack-powder disparity is simply wrong, and it is now time to eliminate it. It has been more than a decade since the ABA joined an ever-growing consensus of those involved in and concerned about criminal justice issues that the disparity in sentences for crack and powder cocaine offenses is unjustifiable and plainly unjust. We applaud this Subcommittee and its leadership for conducting this hearing as an important step toward ending once and for all this enduring and glaring inequity.

The American Bar Association is the world's largest voluntary professional organization, with a membership of over 400,000 worldwide, including a broad cross-section of prosecuting attorneys and criminal defense counsel, judges and law students. The ABA continuously works to improve the American system of justice and to advance the rule of law in the world. I am please to reiterate to this Subcommittee the ABA's position on sentencing for cocaine offenses.

In 1995 the House of Delegates of the American Bar Association, after careful study, overwhelmingly approved a resolution endorsing the proposal submitted by the United States Sentencing Commission that would result in crack and powder cocaine offenses being treated similarly and would take into account in sentencing aggravating factors such as weapons use, violence, or injury to another person. The American Bar Association has never wavered from the position that it took in 1995.

The Sentencing Commission's May 2002 *Report to the Congress: Cocaine and Federal Sentencing Policy* confirms the ABA's considered judgment that there are no arguments

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supporting the draconian sentencing of crack cocaine offenders as compared to powder cocaine offenders. The Sentencing Commission's 2002 *Report* provides an exhaustive accounting of the research, data, and viewpoints that led to the Commission's recommendations for crack sentencing reform. The recommendations include:

- Raising the crack cocaine quantities that trigger the five-year and ten-year mandatory minimum sentences in order to focus penalties on serious and major traffickers;
- Repealing the mandatory minimum penalty for simple possession of crack cocaine; and
- Rejecting legislation that addresses the drug quantity disparity between crack and powder cocaine by lowering the powder cocaine quantities that trigger mandatory minimum sentences.

Unfortunately, the Sentencing Commission's 2002 recommendations have not yet been addressed. Recognizing the enduring unfairness of current policy, the Sentencing Commission returned to the issue and recently took an important, although limited, first step toward addressing these issues by reducing crack offense penalties by two offense levels in its 2007 amendments to the Sentencing Guidelines. As the Sentencing Commission explained in its report accompanying the amendment, *Report to the Congress: Cocaine and Federal Sentencing Policy* (May 2007), the Commission felt its two-level adjustment was as far as it should go given its inability to alter congressionally established mandatory minimum penalties and its recognition that establishing federal cocaine sentencing policy ultimately is Congress's prerogative. But it is critical to understand that this "minus-two" amendment is only a first step in addressing the inequities of the crack-powder disparity. The Sentencing Commission's 2007 *Report* made it

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plain that it views its recent amendment "only as a partial remedy" which is "neither a permanent nor a complete solution." As the Sentencing Commission noted, "[a]ny comprehensive solution requires appropriate legislative action by Congress."

The federal sentencing polices at issue in the 2002 and 2007 Sentencing Commission *Reports* were initially imposed by the Anti-Drug Abuse Act of 1986, which created a 100-to-1 quantity sentencing disparity between crack and powder cocaine, pharmacologically identical drugs. This means that crimes involving just five grams of crack, 10 to 50 doses, receive the same five-year mandatory minimum prison sentence as crimes involving 500 grams of powder cocaine, 2,500 to 5,000 doses. The 100-1 ratio yields sentences for crack offenses three to six times longer than those for powder offenses involving equal amounts of drugs. Many myths about crack were perpetuated in the late 1980s that claimed, for example, that crack cocaine caused violent behavior or that it was instantly addictive. Since then, research and extensive analysis by the Sentencing Commission have revealed that these assertions are not supported by sound evidence and, in retrospect, were exaggerated or simply false.

Although the myths perpetuated in the 1980s about crack cocaine have proven false, the disparate impact of this sentencing policy on the African American community continues to grow. The 1995 ABA policy, which supports treating crack and powder cocaine offenses similarly, was developed in recognition that the different treatment of these offenses has a "clearly discriminatory effect on minority defendants convicted of crack offenses." According to the 2007 *Report* by the Sentencing Commission, African Americans constituted 82% of those sentenced under federal crack cocaine laws. This is despite the fact that 66% of those who use crack cocaine are Caucasian or Hispanic. This prosecutorial disparity between crack and powder cocaine results in African Americans spending substantially more time in federal prisons for

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drug offenses than Caucasian offenders. Indeed, the Sentencing Commission reported that revising the crack cocaine threshold would do more to reduce the sentencing gap between African Americans and Caucasians "than any other single policy change" and would "dramatically improve the fairness of the federal sentencing system." The ABA believes that it is imperative that Congress act quickly to finally correct the gross unfairness that has been the legacy of the 100-to-1 ratio. Enactment by this Congress of legislation expected soon to be introduced would take that much needed step to end unjustifiable racial disparity and restore fundamental fairness in federal drug sentencing. Its enactment is also essential to refocus federal policy away from local, low-level crime toward major drug traffickers.

Moreover, the U.S. Sentencing Commission concluded in its May 2007 report to Congress that the current penalties for cocaine offenses "sweep too broadly and apply most often to lower level-offenders." Approximately 62% of federal crack cocaine convictions involved low-level drug activity, such as simple possession and street-level sales of user-level drug quantities in 2006. State criminal justice systems are well equipped to handle these kinds of cases but are unable to pursue the importers, international traffickers and "serious and major" interstate drug traffickers. Targeting drug kingpins is the domain of federal law enforcement, but federal resources have been misdirected toward low-level, neighborhood offenders.

It is important that I emphasize, however, that the ABA not only opposes the crack-powder differential, but also strongly opposes the mandatory minimum sentences that are imposed for all cocaine offenses. The ABA believes that if the differential penalty structure is modified so that crack and powder offenses are dealt with in a similar manner, the resulting sentencing system would nonetheless remain badly flawed so long as mandatory minimum sentences are prescribed by statute.

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At the ABA's 2003 annual meeting, Supreme Court Justice Anthony Kennedy challenged the legal profession to begin a new public dialogue about American sentencing practices. He raised fundamental questions about the fairness and efficacy of a justice system that disproportionately imprisons minorities. Justice Kennedy specifically addressed mandatory minimum sentences and stated, "I can neither accept the necessity nor the wisdom of federal mandatory minimum sentences." He continued that "[i]n too many cases, mandatory minimum sentences are unwise or unjust."

In response to Justice Kennedy's concerns, the ABA established a Commission (the ABA Justice Kennedy Commission) to investigate the state of sentencing in the United States and to make recommendations on how to address the problems Justice Kennedy identified. One year after Justice Kennedy addressed the ABA, the ABA House of Delegates approved a series of policy recommendations submitted by the Kennedy Commission. These recommendations included the repeal of all mandatory minimum statutes and the expanded use of alternatives to incarceration for nonviolent offenders.

Mandatory minimum sentences raise serious issues of public policy and routinely result in excessively severe sentences. Mandatory minimum sentences are also frequently arbitrary because they are based solely on "offense characteristics" and ignore "offender characteristics." They are a large part of the reason why the average length of sentence in the United States has increased threefold since the adoption of mandatory minimums. The United States now imprisons its citizens at a rate roughly five-to-eight times higher than the countries of Western Europe, and twelve times higher than Japan. Roughly one-quarter of all persons imprisoned in the entire world are imprisoned here in the United States.

Thus, the ABA strongly supports the repeal of the existing mandatory minimum penalty

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for mere possession of crack. Under current law, crack is the only drug that triggers a mandatory minimum for a first offense of simple possession. We would urge the Congress to go farther, however, and repeal mandatory minimum sentences across the board.

We also strongly support the appropriation of funds for developing effective alternatives to incarceration, such as drug courts, intensive supervised treatment programs, and diversionary programs. We know that incarceration does not always rehabilitate – and sometimes has the opposite effect. Drug offenders are peculiarly situated to benefit from such programs, as their crimes are often ones of addiction. That is why in February 2007, after considerable study, research, and public hearings by the ABA's Commission on Effective Sanctions, the ABA's House of Delegates approved a resolution – joined in by the National District Attorneys Association – calling for federal, state, and local governments to develop, support, and fund programs to increase the use of alternatives to incarceration, including for the majority of drug offenders. We believe enactment of cocaine sentencing reform will take a major step toward refocusing federal policy in the right direction, refocusing federal prosecutorial and corrections resources on "serious and major" offenders instead of the current misguided and expensive prosecution and imprisonment of offenders who are users or who sell user quantities of crack under current law.

In conclusion, for well over a decade the ABA has agreed with the Sentencing Commission's careful analysis that the 100-to-1 quantity ratio is unwarranted and results in penalties that sweep too broadly, apply too frequently to lower-level offenders, overstate the seriousness of the offenses, and produce a large racial disparity in sentencing. Indeed, as the Sentencing Commission noted in its 2007 *Report*, federal cocaine sentencing policy "continues to come under almost universal criticism from representatives of the judiciary, criminal justice

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practitioners, academics, and community interest groups ... [I]naction in this area is of increasing concern to many, including the Commission."

The ABA strongly supports passage by this Congress of legislation to totally eliminate the crack/powder cocaine sentencing disparity. We believe that the Obama Administration is ready to work with leaders in Congress with a sense of urgency to enact this reform this year. We applaud the Subcommittee for its leadership in holding this hearing and urge its members to support legislation in a bipartisan effort to eliminate the sentencing disparity.

On behalf of the American Bar Association, thank you for considering our views on an issue of such consequence for achieving justice in federal sentencing.

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TESTIMONY OF

JOHN F. TIMONEY
Chief of Police
Miami Police Department

BEFORE

THE SUBCOMMITTEE ON CRIME AND DRUGS

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

ON

"Restoring Fairness to Federal Sentencing:

Addressing the Crack-Powder Disparity"

APRIL 29, 2009

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Chairman Durbin and Ranking Member Graham and distinguished Members of the Subcommittee:

Thank you for affording me the opportunity to testify before your committee on reforming the federal cocaine sentencing laws, commonly referred to as the crack vs. powder cocaine controversy.

My name is John F. Timoney and I am the Chief of Police of the City of Miami, Florida, serving in that position for the past six and one half years. Prior to that I spent four years as the Police Commissioner of Philadelphia and before that I spent twenty nine years in the New York City Police Department, starting as a young police officer in the South Bronx and working my way up through the ranks to become the youngest "Four Star Chief" in the history of that department.

Others have testified today on the genesis of the 100 to 1 disparity and on the efforts of many, including the United States Sentencing Commission, to try to rectify or mitigate the disparity. To date none of these efforts have been effective, having, for whatever reason, fallen on deaf ears. I am here today to lend my voice to the chorus pleading with the Congress to right a wrong.

I have no idea if the reasons given for creating the original legislation, providing much stiffer penalties for crack cocaine versus powder cocaine, were valid or not: I have heard arguments from both sides. What I can tell you, from a practitioner's perspective, is that the results or the unintended consequences -I don't think for one moment that the consequences were intended - have been an unmitigated disaster!

Making an artificial distinction about a particular form of the same drug is a distinction without a difference and that's bad enough. But when the distinction results in a dramatic disparity in sentencing along racial lines, then that distinction is simply un-American and intolerable. Furthermore, it defies logic from a law enforcement perspective.

Here's what I mean: If I arrest a guy carrying five grams of crack -that's less than a fifth of an ounce- I figure this is a low-level street corner drug dealer. Or maybe he's someone carrying a lot crack for his own personal consumption. But if I arrest a guy with 500 grams of powder cocaine -that's more than a pound- I figure this guy is a serious trafficker. The notion that both of these guys are equal and deserve the same time in jail is ludicrous.

Now let me take my two guys and show you the monetary value of their illegal contraband. In Miami today you can purchase five grams of crack for around $150. If it is in Philadelphia or New York, my prior two cities, you may pay a higher cost of around $200. In Miami, my undercover officers are paying anywhere from $700 to $1,000 per

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ounce for powder cocaine and around $14,000 for a half-kilo, 500 grams. In Philadelphia and New York you may pay a little more. Bottom line is there is a hell of a difference between $150 and $14,000. If you were to present these numbers to the average 8th Grader and ask them which was the narcotic trafficker, they would have little problem with the answer. It's that simple.

Finally, when unfair laws are passed, police officers see the impact at the local level. Citizens do notice these things, and they become cynical. I remember back in 1974 when President Ford issued a pardon to former President Nixon. I was a young cop patrolling the streets of the South Bronx, and I was amazed at how people would throw it back in our face if we made an arrest; they'd say, "Oh, Nixon gets pardoned; only poor people get arrested."

Of course a lot of that was just street-level nonsense, but the point is that police departments face a much more difficult challenge gaining the trust of their communities if there are glaring inequities in the justice system that are allowed to persist. These inequities breed cynicism and mistrust and should be eliminated.

Thank you for indulging me and I am ready to answer any questions you have today.

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Statement for the Record
Subcommittee on Crime and Drugs
Committee on the Judiciary
United States Senate

Statement for the Record for hearing entitled, "Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity"

Statement of
Nora D. Volkow, M.D.
Director, National Institute on Drug Abuse
National Institutes of Health
U.S. Department of Health and Human Services

For Release on Delivery
Expected at 10:00 a.m.
Wednesday, April 29, 2009

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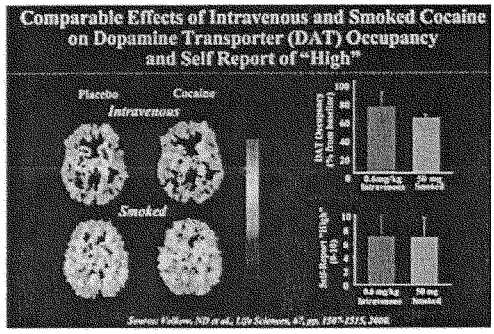
Statement for the Record

Thank you, Mr. Chairman and members of the Subcommittee, for the opportunity to contribute to this important discussion. The National Institute on Drug Abuse (NIDA), a component of the National Institutes of Health, an agency of the Department of Health and Human Services (HHS), is the world's leading supporter of research on the health aspects of all drugs of abuse. The research we fund has taught us much about what drugs can do to the brain and how best to use science to approach the complex problems of drug abuse and addiction.

I want to focus my comments on what our research has taught us about the scope, pharmacology, and health consequences of cocaine abuse and addiction, particularly with regard to two forms of cocaine - powder and freebase (aka "crack") - and the effects of various routes of administration. My statement will support the scientific view that cocaine's effects vary depending on how it is administered. My statement will also make it clear that cocaine in all its forms poses serious health risks, including addiction.

Cocaine abuse remains a significant threat to the public health. Regarding specific questions surrounding powder versus crack cocaine, research consistently shows that the form of the drug is not the crucial variable; rather it is the route of administration that accounts for the differences in its behavioral effects.



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Research supported by NIDA has found cocaine to be a powerfully addictive stimulant. Like other central nervous system (CNS) stimulants, such as amphetamine and methamphetamine, cocaine produces alertness and heightens energy. Cocaine, like many other drugs of abuse, produces a feeling of euphoria or "high" by increasing the neurotransmitter dopamine in the brain's reward circuitry. It does this by blocking dopamine transporters (DAT), which have the critical task of removing dopamine from in between neurons, thereby shutting off the neural signal once a rewarding stimulus is no longer present. The normal functioning of DAT is critical to the healthy

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operation of the brain's reward system, which allows us to register pleasure from everyday rewards. Cocaine, in any form, produces similar physiological and psychological effects once it reaches the brain, but the onset, intensity, and duration of its effects are directly related to the route of administration and to how rapidly cocaine enters the brain; the faster its entry the stronger its reinforcing effects.

Oral absorption is the slowest form of administration because cocaine has to pass through the digestive tract before it is absorbed into the bloodstream. Intranasal use, or snorting - the process of inhaling cocaine powder through the nostrils - leads to quicker absorption through the nasal tissue. Intravenous (IV) use, or injection, is faster still, introducing the drug directly into the bloodstream and heightening the intensity of effects. Finally, and similar to injection, the inhalation of cocaine vapor or smoke into the lungs is also a very effective method of delivering the drug into the bloodstream. Compared to the injection route, however, smoking produces quicker and higher peak blood levels in the brain -hence, a faster euphoria - and is devoid of the risks attendant to IV use, such as exposure to HIV from contaminated needles. Importantly, all forms of cocaine, regardless of route of administration, result in DAT blockade in the reward center of the brain (see Figure). This is why repeated use of any form and by any route can lead to addiction and other adverse health consequences.

Scope of the Problem

Although marijuana remains the most commonly used illicit drug in the country (an estimated 25.1 million past-year users 12 or older), according to the 2007 National Survey on Drug Use and Health (NSDUH), administered by HHS's Substance Abuse and Mental Health Services Administration's (SAMHSA), 5.7 million (2.3 percent) persons aged 12 years or older used cocaine in the year prior to the survey, and more than 2 million (0.8 percent) were current (past month) cocaine users. This percentage has remained fairly intractable for the past 5 years, with little variance occurring among persons aged 12 or older.

In 2007, roughly 1.5 million persons 12 years or older (0.6%) used crack (cocaine freebase) in the past year, and 610,000 (0.2%) were current (past month) crack users. Crack was first added to the NSDUH in 1988, and over successive years of the survey, estimates of past-month use have never exceeded 0.3% of the population 12 and older. However, past-month use of crack among Blacks 12 or older in 2007, at 0.5%, reflects a prevalence much higher than in the White (0.2%), Hispanic (0.1%) or American Indian/Alaska Native (0.3%) populations.

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The NIDA-supported Monitoring the Future (MTF) study, an annual survey that elicits information about drug use and attitudes among high school students, provides valuable information about the changing patterns of drug use in selected populations. The MTF reports that past year use of cocaine in any form has been essentially unchanged since 2003 among 12th, 10th, and 8th graders. Past-year abuse of cocaine (including powder and crack) was reported by 4.4% of 12th graders, 3.0% of 10th graders, and 1.8% of 8th graders in 2008. For crack cocaine, the rates were 1.6%, 1.3%, and 1.1%, respectively.

A decline has occurred in the number of people admitted to treatment for cocaine addiction, according to the Treatment Episode Data Set (TEDS), a SAMHSA-supported data system providing information about the number and characteristics of admissions at State-funded substance abuse treatment programs. Primary cocaine admissions have decreased from approximately 278,000 in 1995 (17% of all admissions reported that year) to around 234,700 (13%) in 2007. Smoked cocaine (crack) represented 72% of all primary cocaine admissions in 2007. Among smoked cocaine admissions, 49% were Black, 40% White, and 8% Hispanic, whereas a reverse pattern was evident among Blacks and Whites (23% and 54%, respectively, and 19% were Hispanic) for non-smoked cocaine.

In contrast to the generally downward or stable trends reflected in most nationally conducted surveys, other indicators appear to suggest that cocaine abuse may be on the rise in some localities. For example, one study looking at cocaine deaths in the State of Florida revealed a dangerous upward trend, with cocaine-related deaths nearly doubling from 2001 to 2005, from 1,000 to 2,000. The study also showed dramatic increases in the popularity of cocaine among the young and affluent, by all routes of drug administration. In addition, Department of Justice statistics demonstrate that the percentage of state and local law enforcement agencies that reported methamphetamine as their greatest drug threat declined between 2004 and 2007, but the percentage of these agencies that reported cocaine as their greatest drug threat increased overall during that time. These indicators are of grave concern to NIDA.

The Two Forms of Cocaine

The two forms of cocaine - powder and crack - correspond to two chemical compositions: the hydrochloride salt and the base form, respectively. The hydrochloride salt, or powdered form of cocaine, dissolves in water and when abused can be administered intravenously (by vein), intranasally, designated insufflation (through the nose), or orally. The "base" forms of

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cocaine include any form that is not neutralized by an acid to make the hydrochloride salt. Depending on the method of production, the base forms can be free-base or "crack". The medical literature is often ambiguous when differentiating between these two forms, which actually share similar properties when vaporized. In its "base" forms (freebase and crack), cocaine can be effectively smoked because it vaporizes at a much lower temperature (80°C) than cocaine hydrochloride (180°C). The higher temperature can result in chemical degradation of cocaine.

With regard to route of administration, the picture is not complete. Among those entering treatment in 2007 with cocaine as their primary drug, 72% (167,914) were in treatment for smoked cocaine (inhalation), and 28% (66,858) for cocaine used in another form. Of the latter, 81% reported insufflation as the route of administration, and 11% reported injection, so it is clear that powder cocaine is overwhelmingly inhaled. Moreover, it is widely accepted that the intranasal route of administration is often the first way that many cocaine-dependent individuals use cocaine.

Acute Effects of Cocaine

Cocaine's stimulant effects appear almost immediately after a single dose and fade away within minutes to hours, depending on route of administration and dose. Taken in small amounts (up to 100 milligrams), cocaine usually makes the abuser feel euphoric, energetic, talkative, and mentally alert, especially to the sensations of sight, sound, and touch. It can also temporarily decrease the perceived need for food and sleep. Some abusers find that the drug helps them to perform simple physical and intellectual tasks more quickly, while others can experience the opposite effect.

The short-term physiological effects of cocaine include constricted blood vessels, dilated pupils, and increased temperature, heart rate, and blood pressure. Larger amounts (several hundred milligrams or more) intensify the abuser's high but may also lead to erratic, psychotic and even violent behavior. These abusers may experience tremors, vertigo, muscle twitches, paranoia, or, with repeated doses, a toxic reaction closely resembling amphetamine poisoning. Some cocaine abusers report feelings of restlessness, irritability, and anxiety. In rare instances, sudden death can occur on the first use of cocaine or unexpectedly thereafter. Cocaine-related deaths are often a result of cardiac arrest or seizures followed by respiratory arrest. While tolerance to the "high" can develop, abusers can also become more sensitive to cocaine's adverse psychological or physiological effects with repeated doses.

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Medical Consequences of Cocaine

Cocaine abuse can cause significant medical complications, both acutely and after repeated use. Some of the most common stem from cardiovascular effects, including disturbances in heart rhythm and heart attacks; respiratory effects such as chest pain and respiratory failure; neurological effects, including strokes, seizures, and headaches; and gastrointestinal complications, including abdominal pain and nausea. Because cocaine has a tendency to decrease appetite, chronic abusers may also become malnourished. Different modes of administration can induce different adverse effects. Regularly insufflating ("snorting") cocaine, for example, can lead to loss of the sense of smell, nosebleeds, problems with swallowing, hoarseness, a chronically runny nose, and damage to the nasal septum; and ingesting cocaine can cause severe bowel gangrene due to reduced blood flow. Research has also revealed a potentially dangerous interaction between cocaine and alcohol, as evidenced by enhanced negative consequences when these substances are taken in combination.

Cocaine abuse can cause addiction. Cocaine is a powerfully addictive drug. Cocaine's stimulant and addictive effects are thought to be mainly a result of its effects on the dopamine transporter, a brain protein that regulates dopamine concentrations in the vicinity of nerve cells. Cocaine blocks the transport system, leading to a supraphysiological excess of dopamine in the brain. With repeated use, adaptation to the surge of dopamine sets in, and cocaine abusers often develop a rapid tolerance to the "high," sometimes referred to as tachyphylaxis. That is, even while the blood levels of cocaine remain elevated, the pleasurable feelings begin to dissipate, causing the user to crave more. This effect often leads to the compulsive pursuit and use of the drug, despite devastating consequences - the essence of addiction. Indeed, a recent study indicates that about 5% of recent-onset cocaine abusers become addicted to cocaine within 24 months of starting cocaine use. The risk of cocaine addiction, however, is not distributed randomly among recent-onset abusers. For example, in one study looking at a 2-year period, female initiates were three to four times more likely to become addicted to cocaine than males, and non-Hispanic Black/African American initiates were approximately nine times more likely to become addicted to cocaine than non-Hispanic Whites. Importantly, this excess risk was not attributable to crack-smoking or injecting cocaine.

The use and abuse of illicit drugs, including cocaine, is one of the leading risk factors for new cases of HIV. Cocaine abusers who inject the drug put themselves at increased risk for contracting such infectious diseases as HIV/AIDS and hepatitis through the use of contaminated needles

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and paraphernalia. Crack smokers constitute another high-risk group for HIV/AIDS and other infectious diseases. Research has long shown the strong epidemiological relationship between crack cocaine smoking and HIV, which appears to be due mainly to the greater frequency of high-risk sexual practices in the population.

Additionally, hepatitis C virus (HCV) has spread rapidly among injection drug users; studies indicate approximately 26,000 new acute HCV infections occur annually, of which approximately 60% are estimated to be related to intravenous drug use.

Prenatal exposure to cocaine requires urgent attention. Among pregnant women aged 15 to 44 years, 5%, or 135,000 women, used an illicit drug in the past month, according to combined 2006 and 2007 NSDUH data. Thus, an estimated 135,000 babies were exposed to abused psychoactive drugs before they were born. In 2002, compared to non-pregnant admissions, pregnant women aged 15 to 44 entering drug abuse treatment were more likely to report cocaine than other illicit drugs (22% vs. 17%) as their primary substance of abuse.

Babies born to mothers who abuse drugs during pregnancy can suffer varying degrees of adverse health and developmental outcomes. This is likely due to a confluence of interacting factors that frequently characterize pregnant drug abusers. Among these are poly-substance abuse, low socioeconomic status, poor nutrition and prenatal care, and chaotic lifestyles. These factors have made it difficult to tease out the contribution of the drug itself to the overall outcome for the child.

However, with the development of sophisticated instruments and analytical approaches, several findings have now emerged regarding the impact of in utero exposure to cocaine; notably, these effects have not been as devastating as originally believed. They include a greater tendency for premature births in women who abuse cocaine. In addition, recent follow-up study of 10-year-old children who were prenatally exposed uncovered subtle problems in attention and impulse control, placing them at greater risk of developing significant behavioral problems as cognitive demands increase. Still, estimating the full extent of the consequences of maternal cocaine (or any drug) abuse on the fetus and newborn remains a challenging problem, one reason we must be cautious when searching for causal relationships in this area, especially with a drug like cocaine. NIDA is supporting additional research to understand this relationship and to determine if any other subtle, or not so subtle, short- or long-term outcomes can be attributed to prenatal cocaine exposure.

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Treatment

Currently, the most effective treatments for cocaine addiction are behavioral therapies, which can be delivered in both residential and outpatient settings. Several approaches have shown efficacy in research-based and community programs, including (1) cognitive behavioral therapy, which helps patients recognize, avoid, and cope with situations in which they are most likely to abuse drugs; (2) motivational incentives, which use positive reinforcement, such as providing rewards or privileges, for staying drug free or for engaging in activities, such as attending and participating in counseling sessions, to encourage abstinence from drugs; and (3) motivational interviewing, which capitalizes on the readiness of individuals to change their behavior and enter treatment, performed at intake to enhance internal motivation to actively engage in treatment.

To date, no medication is approved for the treatment of cocaine addiction. Consequently, NIDA is aggressively evaluating several compounds, including some already in use for other indications (e.g., epilepsy or narcolepsy). In addition, NIDA-supported investigators have recently made significant progress toward the development of a vaccine, which can elicit specific antibodies to block the access of cocaine into the brain and thus its rewarding effects. These and others have shown promise for treating cocaine addiction and preventing relapse. Ultimately, the integration of both types of treatments, behavioral and pharmacological, will likely prove the most effective approach for treating cocaine (and other) addictions.

The same treatment principles that have proven effective in the general population should also be applied among incarcerated individuals. Approximately half of federal and state prisoners are beset with drug abuse or addiction problems (a rate more than 4 times that of the general population), and yet fewer than 20 percent of those who need treatment get it. We know from research that the enforced abstinence that occurs in prison does not "cure" a drug-addicted person, and that treatment within the criminal justice system, particularly when followed by ongoing care during the transition back to the community, reduces drug abuse and criminal recidivism and offers the best alternative for interrupting the vicious cycle of drug abuse and crime which is associated with economic costs and societal burden.

This concludes my statement. Thank you for the opportunity to present this information to you.

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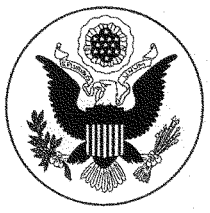
JUDICIAL CONFERENCE OF THE UNITED STATES

STATEMENT OF

JUDGE REGGIE B. WALTON
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA



BEFORE

THE SUBCOMMITTEE ON CRIME AND DRUGS

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

ON

"RESTORING FAIRNESS TO FEDERAL SENTENCING: ADDRESSING THE CRACK-POWDER DISPARITY"

April 29, 2009

Thank you for affording me the opportunity to appear before you today on behalf of the Judicial Conference of the United States. In recent years, the disparity between crack and powder cocaine sentences has been a subject of great interest to the Criminal Law Committee (upon which I serve as a member) and the Judicial Conference. Of course, it is not surprising that this should be an issue of concern for the judiciary. Crack has long been a contentious subject, a specter that has haunted the federal criminal justice system for more than twenty years.

In June 2006, the Criminal Law Committee discussed the fact that 100 times as much powder cocaine as crack is required to trigger the same five-year and ten-year mandatory minimum penalties, resulting in crack sentences that are 1.3 to 8.3 times longer than their powder equivalents.[1] Noting that most informed commentators agree that the ratio between crack and powder is unwarranted,[2] the Committee concluded that this disparity between sentences was unsupportable, and undermined public confidence in the criminal justice system. Upon the Committee's recommendation, in September 2006, the Judicial Conference voted to "oppose the

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[1]*See* U.S. Department of Justice, *Federal Cocaine Offenses: An Analysis of Crack and Powder Penalties* 19 (Mar. 17, 2002), *available at* http://www.usdoj.gov/olp/cocaine.pdf/crack_powder2002.pdf.

[2]*See* U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (May 2007) [hereafter, U.S. SENTENCING COMM'N, 2007 REPORT]. The Sentencing Commission noted that:

> Federal cocaine sentencing policy, insofar as it provides substantially heightened penalties for crack cocaine offenses, continues to come under almost universal criticism from representatives of the Judiciary, criminal justice practitioners, academics, and community interest groups, and inaction in this area is of increasing concern to many, including the Commission.

Id. at 2.

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existing differences between crack and powder cocaine sentences and support the reduction of that difference."[3]

I conveyed that view on behalf of the Criminal Law Committee at a Sentencing Commission hearing on cocaine sentencing policy in November 2006.[4] In 2007, the Sentencing Commission, implementing the policy conclusions that follow from its series of special congressional reports on cocaine and sentencing policy,[5] amended downward the guideline for crack cocaine.[6] Congress, with virtually no debate or opposition, permitted the amendment to become effective on November 1, 2007.

Soon thereafter, I testified before the Commission on the issue of retroactive application of the guideline amendment for crack.[7] I told the commissioners that the Criminal Law Committee wrestled with the question. On one side of the matter, there were considerations of fundamental fairness and an opportunity to undo a little of the harm that had been wrought by

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[3]JCUS-SEP 06, p. 18.

[4]*Public Hearing on Cocaine Sentencing Before the U.S. Sentencing Comm'n* 103-111 (Nov. 14, 2006) (testimony of Judge Reggie B. Walton), *available at* http://www.ussc.gov.

[5]The Commission has repeatedly condemned the crack-powder disparity in its reports to Congress. *See, e.g,.* U.S. SENTENCING COMM'N, 1995 SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (Feb. 1995); U.S. SENTENCING COMM'N, 1997 SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (Apr. 1997); U.S. SENTENCING COMM'N, 2002 REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (May 2002) [hereafter, U.S. SENTENCING COMM'N, 2002 REPORT]; U.S. SENTENCING COMM'N, 2007 REPORT, *supra* note 2.

[6]Notice of Submission to Congress of Amendments to Sentencing Guidelines Effective November 1, 2007, 72 Fed. Reg. 28558 (May 21, 2007).

[7]*Public Hearing on Retroactivity Before U.S. Sentencing Comm'n* 14-20 (Nov. 13, 2007) (testimony of Judge Reggie B. Walton), *available at* http://www.ussc.gov.

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two decades of too-severe crack guidelines; but on the other, there were serious concerns about community safety and practical implications for the workload of the federal judiciary. The representation of the Probation and Pretrial Services Chief's Advisory Group that probation offices can handle the anticipated increased workload was a key consideration in the Criminal Law Committee's decision. Eventually, however, we concluded that fundamental fairness compelled the retroactive application of the guideline amendment.[8]

The words "equal justice under law" – words etched into the rock of the west pediment of the Supreme Court of the United States – are not mere rhetoric; they are the expression of a principle that lies at the heart of the rule of law. In a nation of laws, similarly situated offenders should receive the same treatment under the law. Indeed, parity in punishment was the paramount objective of the Sentencing Reform Act of 1984.[9] Therefore, if, as the Commission explained in justifying its amendment, "the 100-to-1 drug quantity ratio significantly undermines the various congressional objectives set forth in the Sentencing Reform Act,"[10] then the same logic applies to those who were sentenced last year, or five years ago, as to those who will be sentenced for crack tomorrow. It is not often that courts are afforded the opportunity to ameliorate the wrongs of the past; however, by unanimously voting to apply the guideline

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[8]Letter from Judge Paul G. Cassell, Chair, Committee on Criminal Law of the Judicial Conference of the U.S., to Ricardo H. Hinojosa, Chair, U.S. Sentencing Comm'n (Nov. 2, 2007), *available at* http://www.ussc.gov.

[9]*See* U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINE SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 79 (2004) ("Eliminating unwarranted sentencing disparity was the primary goal of the Sentencing Reform Act.").

[10]U.S. SENTENCING COMM'N, 2007 REPORT, *supra* note 2, at 8.

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amendment retroactively, effective March 3, 2009 [11] the Commission was able to undo some of the injustices associated with crack sentencing.

This was a courageous and promising first step in ameliorating the disparity that exists between crack and powder sentences. But as the Commission itself acknowledged, the promulgation of the guideline amendment was only a partial solution to a much-larger problem, and the ultimate solution lies with Congress.[12] Congress, as well as the courts and the Sentencing Commission, has been interested in the sentencing disparity between crack and powder cocaine. In the 110th Congress, there were three different crack-powder sentencing bills introduced in the Senate[13] and five in the House of Representatives.[14] I testified before the Senate Judiciary

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[11] *See* Press Release, U.S. Sentencing Comm'n, U.S. Sentencing Comm'n Votes Unanimously to Apply Amendment Retroactively for Crack Cocaine Offenses (Dec.11, 2007), *available at* http://www.ussc.gov; *See also* Memorandum from Judge Julie E. Carnes, Chair, Committee on Criminal Law of the Judicial Conference of the U.S. and Ricardo H. Hinojosa, Chair, U.S. Sentencing Comm'n to members of the federal judiciary (Feb. 20, 2009), available at http://www.ussc.gov/TRAINING/DIR8-025.pdf.

[12] *Federal Cocaine Sentencing Laws: Reforming the 100-to-1 Crack/Powder Disparity* 1 (Feb. 12, 2008)(testimony of Ricardo H. Hinojosa, Chair, United States Sentencing Commission), *available at* http://www.ussc.gov/testimony/Hinososa_Testimony_021208.pdf. ("Although the Commission took action this past year to address some of the disparity existing in the federal sentencing guideline penalties for crack cocaine offenses, the Commission is of the opinion that any comprehensive solution to the problem of federal cocaine sentencing policy requires revision of the current statutory penalties and therefore must be legislated by Congress"). *Id.* at 1.

[13] *See* Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2007, S. 1711; Drug Sentencing Reform Act of 2007, S. 1383; Fairness in Drug Sentencing Act of 2007, S. 1685.

[14] *See* Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2007, H.R. 4545; Crack-Cocaine Equitable Sentencing Act of 2007, H.R. 460; Powder-Crack Cocaine Penalty Equalization Act of 2007, H.R. 79; Fairness in Cocaine Sentencing Act of 2008, H.R. 5035; H.R. 4842.

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Committee's Subcommittee on Crime and Drugs on the issue of cocaine sentencing on February 12, 2008,[15] and before the House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security about the issue on February 26, 2008.[16]

Congress established the crack-powder disparity with the passage of the Anti-Drug Abuse Act of 1986.[17] It did so not to frustrate the goal of eliminating unwarranted sentencing disparity in the federal courts,[18] but because it held a particular set of beliefs about crack cocaine. For example, the record reflects Congress's concern that crack cocaine was uniquely addictive,[19] was associated with greater levels of violence than was powder cocaine,[20] and was especially damaging to the unborn children of users.[21]

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[15]*Federal Cocaine Sentencing Laws: Reforming the 100-to-1 Crack/Powder Disparity* (Feb. 12, 2008)(testimony of Judge Reggie B. Walton), *available at* http://www.uscourts.gov/Press_Releases/walton_testimony_001.pdf.

[16]*Cracked Justice–Addressing the Unfairness in Cocaine Sentencing* (Feb. 26, 2008) (testimony of Judge Reggie B. Walton), *available at* http://www.uscourts.gov/newsroom/walton_hjc_feb_26_001.pdf.

[17]Pub. L. 99–570, 100 Stat. 3207 (1986).

[18]*See, e.g.*, 18 U.S.C. § 3553(a)(6)(2007) ("The Court, in determining the particular sentence to be imposed, shall consider...the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.").

[19]*See, e.g.*. U.S. SENTENCING COMM'N, 2002 REPORT 93 ("Crack cocaine can only be readily smoked, which means that crack cocaine is always in a form and administered in a manner that puts the user at the greatest potential risk of addiction.").

[20]*See id.* at 100 ("An important basis for the establishment of the 100-to-1 drug quantity ratio was the belief that crack cocaine trafficking was highly associated with violence generally.").

[21]*See id.* at 94 ("During the congressional debates surrounding the 1986 Act, many members voiced concern about the increasing number of babies prenatally exposed to crack cocaine and the devastating effects such exposure causes.").

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I understand the circumstances under which Congress passed the 1986 Act because many of those same beliefs about crack cocaine were in force during the late 1980s, when I served as the White House's Associate Director of the Office of National Drug Control Policy. But twenty years of experience has taught us all that many of the beliefs used to justify the 1986 Act were wrong. Research indicates that the addictive properties of crack have more to do with its typical mode of administration than with its chemical structure.[22] The national epidemic of crack use that many of us feared never actually materialized,[23] and recent studies suggest that levels of violence associated with crack are stable or even declining.[24]

Because experience has shown that many of the foundations of the 1986 Act were flawed, and because the existing disparity may actually frustrate (instead of advance) the goals of the Sentencing Reform Act,[25] there is now almost universal support in the United States to reduce the existing sentencing disparity between crack and powder cocaine.[26]

The Judicial Conference is to be counted among those entities calling for a reduction or elimination of the disparity.[27] After all, the federal courts must be fundamentally fair, but they

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[22]*See, e.g,.* U.S. SENTENCING COMM'N, 2007 REPORT, *supra* note 2, at 63 (linking risk of addiction to mode of administration).

[23]*See id.* at 72-76 (noting that use of crack has been stable in recent years).

[24]*See id.* at 86-87 (reporting research showing declining levels of actual violence).

[25]*See id.* at 8 ("[T]he Commission maintains its consistently held position that the 100-to-1 drug quantity ratio significantly undermines the various congressional objectives set forth in the Sentencing Reform Act.").

[26]*See supra* note 2 and accompanying text.

[27]JCUS-SEP 06, p. 18.

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must also be *perceived as fair* by the public. And today, that is not always the case. Today, some citizens believe that federal statutes (and the courts that interpret those statutes) have racial underpinnings.

I do not believe that the 1986 Act was intended to have a disparate impact on minorities, but while African-Americans comprise approximately only 12.3 percent of the United States population in general,[28] they comprise approximately 81.8 percent of federal crack cocaine offenders, but only 27 percent of federal cocaine powder offenses.[29] (Hispanics, though, account for a growing proportion of powder cocaine offenders. The U.S. Sentencing Commission noted in its 2007 report to Congress that "[i]n 1992, Hispanics accounted for 39.8 percent of powder cocaine offenders. This proportion increased to over half (50.8%) by 2000 and continued increasing to 57.5 percent in 2006."[30]) Furthermore, because crack offenses carry longer sentences than equivalent powder cocaine offenses,[31] African-American defendants sentenced for cocaine offenses wind up serving prison terms that are greater than those served by other cocaine defendants.[32] I have a concern that disparate impact of crack sentencing on African-American

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[28]www.census.gov/main/www/cen2000.html (follow American Fact Finder; then follow Fact Sheet link).

[29]U.S. SENTENCING COMM'N, 2007 REPORT, *supra* note 2, at 15 ("Historically the majority of crack cocaine offenders are black, but the proportion steadily has declined since 1992: 91.4 percent in 1992, 84.7 percent in 2000, and 81.8 percent in 2006.").

[30]*Id.*

[31]*See supra* note 1 (noting crack sentences that are 1.3 to 8.3 times longer than their powder equivalents).

[32]*See, e.g.*, U.S. SENTENCING COMM'N, 2007 REPORT, *supra* note 2, at B-18 ("In 1986, before the enactment of the federal mandatory minimum sentencing for crack cocaine offenses, the average federal drug sentence for African Americans was 11 percent higher than for

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communities shapes social attitudes. When large segments of the African-American population believe that our criminal justice system is in any way influenced by racial considerations, our course are presented with serious practical problems. People come to doubt the legitimacy of the law – not just the law associated with crack – but *all* laws. People come to view the courts with suspicion, as institutions that mete out unequal justice, and the moral authority of not only the federal courts, but all courts, is diminished. I have experienced citizens refusing to serve on juries, and there are reports of juries refusing to convict defendants.[33]

For these practical reasons, the Judicial Conference strongly supports legislation to reduce the sentencing disparity between crack and powder cocaine. The Criminal Law Committee and the Judicial Conference have no established view on whether the disparity should be reduced by raising penalties for powder, reducing penalties for crack, or through some combination of both approaches,[34] but Congress may find it prudent to reconsider whether existing minimum penalties

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whites. Four years later, the average federal drug sentence for African Americans was 49 percent higher than for whites.").

[33]*See* William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1282 (1996) ("Moreover, the 100:1 ratio is causing juries to nullify verdicts. Anecdotal evidence from districts with predominantly African-American juries indicates that some of them acquit African-American crack defendants whether or not they believe them to be guilty if they conclude that the law is unfair.") (citing Jeffrey Abramson, *Making the Law Colorblind*, N.Y. TIMES, Oct. 16, 1995, at A15); Symposium, *The Role of Race-Based Jury Nullification in American Criminal Justice*, 30 J. MARSHALL L. REV. 911 (1997).

[34]For a discussion of specific legislative recommendations, see, *e.g.*, U.S. SENTENCING COMM'N, 2007 REPORT, *supra* note 2, at 8-9.

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are necessary to achieve the goals of sentencing. Eliminating statutory minimum penalties would be consistent with the parsimony provision of the Sentencing Reform Act.[35]

Doing so would also address the Judicial Conference's longstanding opposition to mandatory minimum penalties.[36] For more than thirty years, it has been the view of the Judicial Conference that mandatory sentences unnecessarily prolong the sentencing process, increase the number of criminal trials, engender additional appellate review, and increase the expenditure of public funds without a corresponding increase in benefits.[37] Accordingly, as a general matter, the Conference favors legislation that leaves sentencing decisions to judges. Any legislation that increases the drug weights required to trigger mandatory minimum penalties would be consistent with Judicial Conference policy inasmuch as it narrows the pool of defendants subjected to mandatory minimum provisions.

Although at the time of preparing my written testimony I am not aware of any cocaine sentencing legislation heretofore introduced in the 111th Congress, I believe there are reasons to be optimistic about meaningful change in this area. The new administration counts the crack-powder disparity among the civil rights issues in need of reform, writing that "the disparity

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[35]*See* 18 U.S.C. § 3553(a) (2007).

[36]*See, e.g.*, JCUS-OCT 71, p. 40; JCUS-APR 76, p. 10; JCUS-SEP 81, pp. 90, 93; JCUS-MAR 90, p. 16; JCUS-SEP 91, p. 56; JCUS-MAR 93, p. 13; JCUS-SEP 93, p. 46; JCUS-SEP 94, p. 42; JCUS-SEP 95, p. 47 (all opposing mandatory minimum sentences).

[37]JCUS-APR 76, p. 10; JCUS-SEP 81, pp. 90, 93.

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between sentencing crack and powder-based cocaine is wrong and should be completely eliminated."[38]

Because the Sentencing Commission has already taken a preliminary step in that direction, we know that the reform of federal cocaine sentencing is possible, and that it can be implemented in a coordinated manner. When the Commission voted to apply the crack guideline reduction retroactively, two national "crack summits" were quickly convened, providing judges, probation officers, prosecutors, and defense counsel with information and a forum to plan for the smooth processing of retroactivity motions.[39] In the year that has passed, the courts have already reviewed more than 19,000 motions for sentencing modification pursuant to Amendment 706.[40]

Despite the Criminal Law Committee's concerns about workload, the courts have managed ably and the majority of the eligible cases have already been reviewed. Similarly, despite the Committee's concerns about public safety, the available data suggest that recidivism rates among those whose sentences were reduced are no higher than relevant comparison

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[38]White House Agenda, Civil Rights, *available at* http://www.whitehouse.gov/agenda/civil_rights/.

[39]*See National Summits Help Federal Courts Prepare for Sentence Reduction Requests*, THE THIRD BRANCH (Feb. 2008), *available at* http://www.uscourts.gov/ttb/2008-02/national_summit.cfm.

[40]*See* U.S. SENTENCING COMM'N, PRELIMINARY CRACK COCAINE RETROACTIVITY DATA REPORT (March 2009), available at http://www.ussc.gov/USSC_Crack_Cocaine_Retroactivity_Report_Mar2009.pdf.

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groups.[41] These facts suggest that the reform of federal cocaine sentencing can be done in a safe and efficient manner.

I would like to thank you for the opportunity to testify before you today. The disparity in crack and powder sentences is an important issue with practical consequences for the federal courts. I believe that existing cocaine policy in general, and the 100-to-1 ratio in particular, has a corrosive effect upon the public's confidence in the federal courts. As a representative of the Judicial Conference and as a sentencing judge who is regularly called upon to impose sentences on crack defendants, I urge Congress to pass legislation that would reduce the disparity between crack and powder cocaine sentences.

I thank you for your attention and would be happy to answer any questions that you might have.

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[41] Analysis conducted by the Administrative Office of the United States Courts of the Probation/Pretrial Services Automated Case Tracking System (PACTS) on April 17, 2009 revealed that of the inmates who have received reductions in their sentences, 6,968 have already commenced their terms of supervised release. Of these, 1,193 (17.1%) have had violations reported and 44 (0.6%) have had their supervision revoked as a result of a new arrest. The average revocation rate for federal offenders on terms of supervised release for new arrest is approximately 12.5%. *See* Table E-7A, Federal Probation System, Post Conviction Cases with and without Revocation, by Type, available at: http://jnet.ao.dcn/img/assets/6312/E7A_Ending12312008.pdf.

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