

Testimony on
The Effect of the Drug Sentencing Guidelines
on the Latino Community

Presented by:

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I. INTRODUCTION

Chairman Hinojosa, Vice Chairs Castillo, Sessions, and Steers, and the other commissioners, on behalf of the National Council of La Raza (NCLR), I thank you for holding this hearing on an issue that is very important to the Latino¹ community in the United States. NCLR is the largest national Latino civil rights and advocacy organization in the U.S. Through its network of nearly 300 affiliated community-based organizations (CBOs), NCLR reaches millions of Hispanics each year in 41 states, Puerto Rico, and the District of Columbia. NCLR conducts applied research, policy analysis, and advocacy, providing a Latino perspective in five key areas – assets/investments, civil rights/immigration, education, employment and economic status, and health. In addition, it provides capacity-building assistance to its Affiliates who work at the state and local level to advance opportunities for individuals and families.

I appreciate the opportunity to testify in support of a thorough revision of the drug sentencing guidelines in the United States, particularly in light of the 20-year anniversary of the enactment of the Anti-Drug Abuse Act of 1986. First, this statement begins with a brief overview of NCLR's work on criminal justice issues. Second, I will highlight the disparate impact of existing drug laws on the Latino community. Finally, my testimony concludes with recommendations to promote drug sentencing policies and practices that are equitable for all Americans.

II. BACKGROUND

A. NCLR's Work on Criminal Justice Issues

Traditionally, NCLR activity on criminal justice issues has been relatively modest. This has not been attributable to any serious doubt that Latinos are adversely and disproportionately affected by the criminal justice system; rather, this limited focus in large part simply reflected resource constraints, especially in light of other competing priorities, e.g., education, immigration, and economic mobility issues. Moreover, the virtual absence of Hispanic data in this area meant that an enormous effort, and substantial resources, would have been required to conduct rigorous policy analysis and to build a case for criminal justice reform.

However, over the past decade, numerous reports from credible sources have documented severe racial and ethnic disparities in the criminal justice system. Many of those reports now include at least some Latino data, which almost uniformly substantiate patterns of discrimination against Hispanics at every stage of the system. As more evidence of such disparities is published, and as more Hispanic families are affected by growing incarceration rates, there appears to be greater Latino grassroots support for sentencing reform proposals to address such disparities. In response, in August 2000, the Executive Committee of the Board of Directors of the National Council of La Raza authorized the establishment of a new criminal justice policy project,

¹ The terms "Latino" and "Hispanic" are used interchangeably by the U.S. Census Bureau and throughout this document to identify persons of Mexican, Puerto Rican, Cuban, Central and South American, Dominican, and Spanish descent; they may be of any race.

charged with the task of working to reduce disparities in the criminal justice system. As a result, over the last six years NCLR has substantially increased its work on criminal and juvenile justice reform issues, including:

- Publishing a number of reports specific to Latinos in the justice system:
 - 1999, *The Mainstreaming of Hate*, a major report on hate crimes, racial profiling, and law enforcement abuse
 - 2000, contributed to the production of *Justice on Trial*, an important Leadership Conference on Civil Rights (LCCR) report on racial and ethnic disparities in the criminal justice system
 - 2002, *Latinos in the Federal Criminal Justice System*, a statistical brief documenting the status of Latinos in the federal criminal justice system
 - 2002, Testimony on *Drug Sentencing and its Effects on the Latino Community*, before the U.S. Sentencing Commission
 - 2003, *Latinos and the Texas Criminal Justice System*, a statistical brief documenting the status of Latinos in the Texas criminal justice system
 - 2004, *Lost Opportunities: The Reality of Latinos in the U.S. Criminal Justice System*, the first book ever to examine the factors that contribute to the overrepresentation of Latinos in the criminal justice system
 - 2004, *District of Columbia Responses to Youth Violence: Impact on the Latino Community*, a major report that documents the possible negative effects that proposed policies would have on Latino children and families
 - 2005, *They All Come Home: Breaking the Cycle Between Prison and the Community*, a report which discusses programs and services designed to respond to the prisoner reentry crisis, offering strategies to successfully reintegrate former inmates into the community
 - 2006, Testimony on the *Disparate Impact of Federal Mandatory Minimums on Minority Communities in the United States*, submitted to the Inter-American Commission on Human Rights
- Advocating on Capitol Hill on behalf of Latinos concerning a number of issues ranging from racial profiling to sentencing reform, and from gang violence to reentry.
- Engaging in justice system reform at the state level in Texas, the District of Columbia, and most recently in Pennsylvania, Illinois, Washington, and Louisiana.

It is in this context that I appear before you today as the Commission reviews the current sentencing structure and its impact on Latinos and other minority communities.

B. Two Decades after the Anti-Drug Abuse Act of 1986

A lot has changed since the enactment of the Anti-Drug Abuse Act of 1986, including an exponential increase in the prison population,² primarily due to the increase in drug convictions;

² According to the Bureau of Justice Statistics reports, the prison population in 1986 was approximately 500,000 compared to 2.1 million in 2006.

a negligible difference currently in the average length of stay for a drug offense and a violent offense;³ high costs associated with the booming prison population; and the perceived and real crime rates in the U.S.

In short, the 1986 law intended to curb the “crack epidemic” by focusing on “major traffickers.” This resulted in the conviction of individuals found in possession of five grams of crack cocaine triggering a five-year mandatory minimum sentence, while it takes 500 grams of powder cocaine possession to trigger the same sentence. And while possession of 50 grams of crack cocaine triggers a ten-year mandatory minimum sentence, the law requires possession of 5,000 grams of powder cocaine to trigger the same sentence.

Numerous studies have documented that the 100:1 powder-crack sentencing ratio directly contributes to blatant racial discrimination in the justice system, affecting mainly African Americans but increasingly Latinos as well.⁴ Although the spirit of the law was to go after the “big ring leaders,” what we know now is that prisons are filled with low-level, mostly nonviolent drug offenders, many of whom turn in friends and family members to law enforcement in return for more lenient sentences. Furthermore, the drug use rates per capita among minorities and White Americans has consistently been remarkably similar over the years.⁵ However, government has done little to institute a real solution to drug addiction – specifically, treatment – despite the fact that substance abuse treatment is more effective and less costly than incarceration.⁶

III. DISPARATE IMPACT OF DRUG LAWS ON LATINOS

In 2000, Latinos constituted 12.5% of the population in the United States, according to the 2000 Census. Yet, according to the Sentencing Commission’s own data, Hispanics accounted for 43.4% of the total drug offenders that year; of those, 50.8% were convicted for possession or trafficking of powder cocaine, and 9% for crack cocaine. This is a significant increase from the 1992 figures which show that 39.8% of Hispanic drug offenders were convicted for possession or trafficking of powder cocaine, and 5.3% for crack cocaine.⁷

Contrary to popular belief and as stated above, the fact that Latinos and other racial and ethnic minorities are disproportionately disadvantaged by sentencing policies is not because minorities commit more drug crimes, or use drugs at a higher rate, than Whites. Instead, the disproportionate number of Latino drug offenders appears to be the result of a combination of

³ According to the *Compendium of Federal Justice Statistics, 2003*, the average length of stay for a violent offense was 97.2 months, while the average length of stay for a drug offense was 81.4 months.

⁴ According to the Sentencing Project, *Hispanic Prisoners in the United States*, the number of Hispanic in federal and state prisons rose by 219% from 1985 to 1995, with an average annual increase of 12.3%.

⁵ According to the Department of Health and Human Services, *2005 National Survey on Drug Use & Health*, illicit drug use associated with race/ethnicity in 2005 was as follows: American Indians or Alaska Natives, 12.8%; persons reporting two or more races, 12.2%; Blacks, 9.7%; Native Hawaiians or Other Pacific Islanders, 8.7%; Whites, 8.1%; Hispanics, 7.6%; and Asians, 3.1%.

⁶ Incarceration costs an average of \$25,000 per person per year, while treatment can cost as little as \$1,700 for outpatient non-methadone treatment. Walker, N., J. M. Senger, F. Villarruel, and A. Arboleda, *Lost Opportunities: The Reality of Latinos in the U.S. Criminal Justice System*. Washington, DC: National Council of La Raza, 2004.

⁷ *Report to the Congress: Cocaine and Federal Sentencing Policy*, United States Sentencing Commission, May 2002, p. 63.

factors, beginning with the phenomenon now widely known as “racial profiling.” NCLR’s 1999 report, and a series of other studies, demonstrates that the Hispanic community is often targeted by law enforcement for drug offenses based on their ethnicity.

Furthermore, the evidence strongly suggests that, from the moment of arrest to the pretrial detention phase and the charging and plea bargain decisions of prosecutors, through the adjudication process, the determination of a sentence, and the availability of drug treatment, Latinos encounter a criminal justice system plagued with prejudice and discrimination. For example:

- **In 2003, Hispanics were arrested by the Drug Enforcement Agency (DEA) at a rate three times their proportion of the general population.** Hispanics constituted 43% of the arrests made by the DEA between October 2002 and September 2003, while they constituted 14% of the total U.S. population.⁸
- **Hispanic defendants were about three times less likely as non-Hispanic⁹ defendants to be released before trial.** In 2003, only 19% of Hispanics were released before trial, compared to 60% of non-Hispanics.¹⁰
- **Hispanic defendants had less extensive criminal histories than White defendants.** In 1996, 56.6% of Hispanic defendants, compared to 60.5% of White defendants, had been arrested on at least one prior occasion.¹¹
- **In 1999, Hispanic federal prison inmates arrested for drug offenses were less likely than either Blacks or Whites to have had a previous criminal conviction.** In 1999, while 70% of Black drug offenders and 60% of White drug offenders had previous convictions, only 35% of Hispanic drug offenders had a previous conviction.¹²
- **Hispanics accounted for approximately one in four of the federal inmate population in 1998.** Racial/ethnic data show that Hispanics accounted for 30.3% of federal inmates in 1998, a rate that is twice as high as this group’s percentage of the population that year.¹³
- **Among defendants convicted of drug charges, Hispanics constituted close to half of those convicted in 2003.** Hispanic federal defendants were 43.5% of all those convicted for drug offenses, while non-Hispanics constituted 56.5% of those convicted for the same charges.¹⁴

⁸ *Compendium of Federal Justice Statistics, 2003*. Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics, October 2005.

⁹ “Non-Hispanics” may be Black, White, or Asian individuals who are not of Hispanic descent.

¹⁰ *Ibid*

¹¹ *Federal Pretrial Release and Detention, 1996*. Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics, February 1999.

¹² *Federal Drug Offenders, 1999 with Trends, 1984-99*. Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics, August 2001.

¹³ *Correctional Populations in the United States, 1998*. Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics, September 2002.

¹⁴ *Ibid*

- **Hispanic federal prison inmates in 1997 were the least likely of all racial/ethnic groups to receive any type of substance abuse treatment.** Only 36.4% of Hispanic federal prison inmates received any substance abuse treatment or program during 1997, while 53.7% of Whites and 48.4% of Blacks received some type of treatment or program to address their substance abuse dependency.¹⁵
- **Hispanic parolees were less likely than Blacks or Whites to violate parole by committing a new crime.** In 2003, Hispanic parolees constituted 9.2% of those whose parole was terminated for committing a new crime compared to Black parolees at 18.3% and White parolees at 11%.¹⁶

In sum, despite the fact that Latinos are no more likely than other groups to use illegal drugs, they are more likely to be arrested and charged with drug offenses and less likely to be released before trial. Once convicted, Latinos do not receive lighter sentences, even though the majority of Hispanic offenders have no criminal history. As a result, Hispanics are severely overrepresented in the federal prison system, particularly for drug offenses, and once in prison are the least likely to receive any substance abuse treatment. That these sobering statistics are largely the result of irregularities in drug enforcement is largely beyond dispute.

Thus, contrary to the popular stereotype, the overwhelming majority of incarcerated Latinos have been convicted of relatively minor nonviolent offenses, are first-time offenders, or both. Over the past decade, public opinion research reveals that a large majority of the public is prepared to support more rational sentences including substance abuse treatment for low-level drug offenders. The costs of excessive incarceration to the groups affected, and the broader American society – in terms of reduced current economic productivity, barriers to future employment, inhibited civic participation, and growing racial/ethnic societal inequalities – are extremely high. NCLR believes that this Commission can play a critical role in reducing unnecessary and excessive incarceration rates of Latinos in the U.S., as discussed in further detail below.

IV. RECOMMENDATIONS

NCLR commends the Commission's 1995, 1997, and 2002 recommendations to Congress which called for the elimination of the threshold differential that exists between crack and powder sentences. Given that crack is derived from powder cocaine, and that crack and powder cocaine have exactly the same physiological and pharmacological effects on the human brain,¹⁷ equalizing the ratio to 1:1 is the only fair solution to eradicating the disparity. Today, NCLR urges the U.S. Sentencing Commission to consider the following recommendations as the Commission prepares its report to Congress.

¹⁵ *Correctional Populations in the United States, 1997*. Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics, November 2000.

¹⁶ *Ibid.*

¹⁷ Instead, it is the way by which the drug is consumed – ingesting, smoking, injecting, or snorting – which causes higher levels of addiction, which in turn calls for a greater demand for the drug. *Report to the Congress: Cocaine and Federal Sentencing Policy*, United States Sentencing Commission, May 2002.

1. **Substantially redress the crack-powder ratio disparity by raising the crack thresholds and maintaining the powder thresholds.** Over the past 20 years, it has been proven that the 100:1 powder-crack sentencing ratio has a negative impact mainly on African Americans but increasingly on Latinos as well. Therefore, NCLR calls for closing the gap between crack and powder sentences, so that five grams of crack triggers the same exact sentence as five grams of powder.
 - African American drug offenders have a 20% greater chance of being sentenced to prison than White drug offenders.¹⁸
 - The average sentence for a crack cocaine offense in 2003 (123 months) was three and a half years longer than for an offense involving the powder form of the drug (81 months). The average sentence for crack cocaine were also 27 months longer than for methamphetamine and 60 months longer than for heroin.¹⁹

2. **Resist proposals that would lower the powder thresholds in order to achieve equalization between crack and powder.** NCLR believes that the only proper way of equalizing the ratio is by raising the crack threshold, not by lowering the powder threshold. According to the Commission's data, reducing the powder threshold would have a disproportionate, negative impact on the Latino community. Achieving equalization by lowering the powder threshold might be perceived as reducing sentencing inequalities. In fact, it would have the perverse effect of not reducing high levels of incarceration of low-level, nonviolent African Americans while substantially increasing incarceration of low-level, nonviolent Latinos. In our judgment, the real-world, tangible harm produced by lowering the powder thresholds would far outweigh the abstract, symbolic value of reducing statutory sentencing ratios.
 - Lowering powder thresholds would increase average sentences by at least 14 months,²⁰ with the inevitable increase in incarceration rates.

3. **Make more widely available alternative methods of punishment for low-level, nonviolent drug offenders.** Under 18 USC Section 3553(a), penalties should not be more severe than necessary and should correspond to the culpability of the defendant. Where current law prevents judges from imposing just sentences for such offenders, the Commission should recommend that Congress enact appropriate reforms.
 - A study conducted for the White House's Office of National Drug Control Policy (ONDCP) found treatment to be 15 times more cost-effective than law enforcement at reducing cocaine abuse.²¹
 - A SAMHSA study found that treatment reduces drug sales by 78%, shoplifting by almost 82%, and assaults by 78%. Treatment decreases arrest of any crime by 64%. After only one year, use of welfare has been shown to decline by 10.7%, while employment increased by 18.7%.²²

¹⁸ *Fifteen Years of Guidelines Sentencing*. United States Sentencing Commission, November 2004.

¹⁹ *2003 Sourcebook of Federal Sentencing Statistics*. United States Sentencing Commission, 2005.

²⁰ *Drug Briefing*. United States Sentencing Commission, January 2002, Figure 26.

²¹ Rydell, C. Peter and Susan Everingham, *Controlling Cocaine*. Santa Monica, CA: The RAND Corporation, 1994.

Prepared for the Office of National Drug Control Policy and the U.S. Army.

²² *National Treatment Improvement Evaluation Study*. Washington, DC: Center for Substance Abuse and Treatment, 1996.

4. DEA agents and federal prosecutors should concentrate on solving the real problem – deterring the importation of millions of tons of powder cocaine – and prosecuting ring leaders with the fullest weight of the law. Even at the current highest levels for crack (50 grams) and powder (5,000 grams) which trigger the maximum mandatory minimum sentence (ten years), it is a relatively insignificant measure to deter drug trafficking and promote community safety. These low-level actors are disposable given that they are easily replaceable. In the spirit of the 1986 law, the Act should be renewed by investing in training and resources and reserving prison beds for high-level kingpins. Prosecuting low-level crack and/or powder defendants who serve as a courier/mule, street dealer, or look-out does nothing to dismantle well-orchestrated drug rings, and little to protect our communities from drugs.

- Data from the U.S. Sentencing Commission show that 70% of the federal cocaine cases have been brought against the lowest-level offenders, and that only 7% have been brought against the highest-level dealers.²³
- In FY 2000, the average length of stay for the lowest-level crack offenders was approximately 104 months for a quantity averaging 52 grams, while the highest-level powder trafficker received an average sentence of 101 month for a quantity that averaged 16,000 grams.²⁴ It is difficult to justify the resources spent on investigation, prosecution, and incarceration of insignificant offenders, when the reality is that 52 grams of crack or 16,000 grams of powder are miniscule amounts in the greater scheme of the drug trade.
- Readjust the budget for ONDCP to reflect the “demand and supply” reduction of drugs. The basic theme has been that for every new dollar spent on demand reduction, two new dollars would be spent to curb supply. However, the trend over the past decade has been to split the budget cost down the middle at a 50-50 split between demand and supply. This has resulted in more resources funneled to domestic drug law enforcement rather than international drug interdiction.²⁵

In 1987, Carlos Lehder Rivas, one of the co-founders of the Medellin Cartel, also known as the “godfather” of cocaine trafficking, was accused of smuggling 3.3 tons of powder cocaine, constituting 80% of cocaine imports into the U.S. At the peak of Lehder’s leadership, a jet loaded with as much as 300 kilograms would arrive at his private airport at Norma’s Cay every hour of every day.

Although Lehder was convicted and sentenced to life plus 135 years for drug trafficking, distribution, and money laundering, none of his assets – estimated to be worth between \$2.5 and \$3 billion – were seized. In exchange for testimony against Manuel Noriega, Panama’s former dictator – in 1992 – the U.S. government reduced Lehder’s sentence to 55 years.

Fabio Ochoa Vazquez, a high-ranking member of the Medellin Cartel, was later accused of leading a smuggling operation of approximately 30 tons a month of powder cocaine into the U.S. between 1997 and 1999. He was indicted in 1999, extradited in 2001, and convicted in 2003 in the U.S. for trafficking, conspiracy, and distribution of powder cocaine. He was sentenced to 30 years in U.S. federal prison.

²³ Sterling, E. Eric, *Getting Justice Off Its “Junk Food Diet.”* Silver Spring, Maryland: Criminal Justice Policy Foundation, May 31, 2006.

²⁴ *Report to the Congress: Cocaine and Federal Sentencing Policy.* United States Sentencing Commission, May 2002.

²⁵ Office of National Drug Control Policy (ONDCP) available at: <http://www.whitehousedrugpolicy.gov/>.

NCLR urges that any new thresholds be scientifically and medically justified and correlated directly to the impact of penalties on both the defendant and the larger society. The current massive disparities in the criminal justice system and the resulting excessive rates of incarceration of racial and ethnic minorities offend the nation's commitment to the principle of equality under the law. For Latinos and other minorities, these policies constitute a major barrier to economic opportunity and civic participation; for the nation as a whole, they inhibit economic growth and social cohesion. Finally, they severely undermine the credibility of and confidence in the nation's entire system of criminal justice.

We urge the Commission to seize this unique opportunity simultaneously to narrow drug sentencing disparities and reduce incarceration of low-level, nonviolent offenders.