

Congress of the United States
Washington, DC 20515

March 30, 2007

The Honorable Ricardo H. Hinojosa
Chairman
United States Sentencing Commission
One Columbus Circle, N.E.
Washington, DC 20002-8002

Dear Chairman Hinojosa and Commission Members:

We, the undersigned Members of Congress, believe it is important that the United States Sentencing Commission ("the Commission") understand that we support equalization of the penalties for crack and powder cocaine at the current penalty level of powder cocaine.

Under current federal law, mere possession of just 5 grams of crack cocaine requires a 5-year mandatory minimum federal prison sentence, while it takes distribution of at least 500 grams of powder cocaine before a 5-year sentence is required. This 100-to-1 disparity in penalties for crack versus powder may be the only instance in the code where mere possession of a small portion of a diluted form of a drug is punished much more severely than trafficking in a much higher quantity of a purer form of the drug. For example, trafficking in "ICE", a purer form of methamphetamine, is punished more severely than trafficking in meth mixture, a less pure form of the drug. The crack/powder penalty disparity is certainly the only instance where the racial impact of trafficking in variations of the same drug is so severe.

Between 1994 and 1995, the Commission conducted an extensive study of the pharmacological, sociological, marketing and other aspects attendant to these two variations of the same drug. The Commission found no pharmacological differences in these variations, but found substantial differences in the sociological impact and the marketing process associated with the two forms. The Commission also found a severe racial impact in the sentencing of crack versus powder in that approximately 88% of offenders prosecuted and sentenced for crack offenses were Black with another 7% Hispanic, whereas with powder, most offenders were White and sentenced to much less for illegal involvement with the same amount of cocaine. Moreover, still today, while 95% of those held accountable for abuse of crack are Black and Hispanic, the evidence reveals that 2/3 of crack users are White.

As a result of the absence of a pharmacological distinction between crack and powder, the extreme racially disparate impact between the two variants of the same drug, and the fact that aggravations associated with either could be punished as add-ons on a case-by-case basis, the Commission recommended equal treatment of crack and powder at the outset of sentencing, adding any aggravating factors applicable. Although the recommendation was rejected for

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political reasons, the first rejection in the history of Commission recommendations, nothing of a more compelling scientific or policy rationale has been presented to the Congress since as a basis for addressing the disparity.

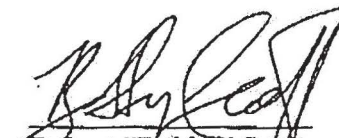
The great disparity in punishments for crack and powder was not reached on a reasoned and scientifically based foundation. Instead, it was based on political hysteria following the death of Maryland star basketball player, Len Bias, some 20 years ago, from what was then thought to be crack, but later shown to be powder, use.

It is clear that no one anticipated the severe racially disparate impact from punishing crack more severely than powder. Many of those who led the effort to create the penalty disparity now disavow the move, including current House Ways and Means Committee Chairman, Charles Rangel, who is a signatory to this letter.

Some suggest that the most politically feasible way out of what virtually all agree is the unreasonable and intolerable sentencing disparity between crack and powder is by a face-saving compromise solution lowering the disparity from 100 to 1 to some other disparate level such as 20 to 1. Given the lack of pharmacological differences in the two variations of the same drug, and the extreme, unintended racial impact from the disparate punishments between them, we believe that continuing any such disparate treatment is morally indefensible. If political realities recommend some compromise, that ought to be a legislative assessment. We rely on the Sentencing Commission for decisions based on research-based facts and evidence, and morally sound reasoning. A 20 to 1 sentencing disparity between crack and powder reflects neither. Unless there is a rational, informed, basis for changing the Sentencing Commission's original recommendation of a 1 to 1 ratio based on science and morality, we would expect the Commission's advice to remain the same.

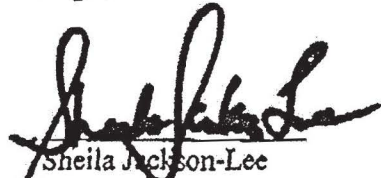
Sincerely,

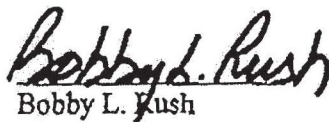

John Conyers, Jr.
Member of Congress


Robert "Bobby" Scott
Member of Congress


Charles B. Rangel
Member of Congress


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Sheila Jackson-Lee
Member of Congress

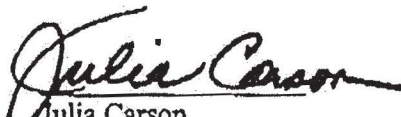

Bobby L. Rush
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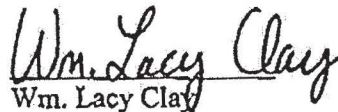

William Jefferson
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Keith Ellison
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Donald M. Payne
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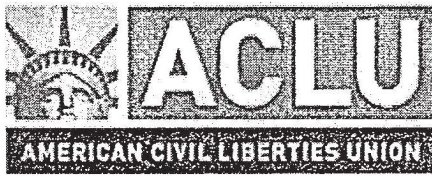

Maxine Waters
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March 16, 2007

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Dear Commissioners:

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TREASURER

On behalf of the American Civil Liberties Union (ACLU), and its hundreds of thousands of members, activists, and fifty-three affiliates nationwide, we submit comments pursuant to the U.S. Sentencing Commission's (USSC) request for public comments, as noticed in the Federal Register on January 30, 2007. We thank the Commission for providing us the opportunity to submit comments on the Commission's November 14, 2006 hearing on cocaine sentencing policy in order to rectify the 20-year sentencing disparity between powder and crack cocaine.

The ACLU has been deeply involved in advocacy regarding race and drug policy issues for more than a decade.¹ Recently, in 2002, we urged the Commission to amend the guidelines to equalize the crack and powder cocaine sentencing structure. Five years later, we continue to urge this body to support amendments to federal law that would equalize crack and powder cocaine sentences at the current level for powder cocaine. Currently, simple possession or distribution of just 5 grams of crack carries a minimum 5-year federal prison sentence, while for powder cocaine, distribution of 500 grams – 100 times the amount of crack cocaine – carries the same sentence.² This disparate sentencing regime has serious implications for due process and equal protection, and puts at risk our citizens' freedom of association and freedom from disproportionate punishment.

We are not alone in this sentiment. In 2001, then President-elect George W. Bush stated that the sentencing disparity between crack and powder cocaine "ought to be addressed by making sure powdered cocaine and crack cocaine penalties are the same. I don't believe we ought to be discriminatory."³ Moreover, in 2004, this body said, "[r]evising the crack cocaine thresholds" would do more to reduce the sentencing gap "than any other single policy change, and it would dramatically improve the fairness of the federal sentencing system."⁴

We agree with both statements and hope that this Commission will once again make a recommendation to Congress that this sentencing disparity is unjustified. Below we address four areas which caution against the continuation of this arbitrary system: 1) racial disparities and the deterioration of African American communities; 2) the unfounded perceptions of violence and crack use; 3) the myth of crack's chemical effects; and 4) the failure to focus on high-level drug traffickers.

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I. Racial Disparities and the Deterioration of African American Communities

In the twenty years that have passed since the Anti-Drug Abuse Act of 1986 was enacted,⁵ many of the myths surrounding crack cocaine have been dispelled, as it has become clear that there is no scientific or penological justification for the 100:1 sentencing disparity between crack and powder cocaine. Accordingly, on three separate occasions, this body has urged Congress to reconsider the statutory penalties for crack cocaine. Judges, commentators, federal prosecutors, medical professionals, and other experts have all concurred with this assessment.

A. Racial Disparities

One of the most egregious problems with the current 100:1 drug quantity ratio is that it promotes unwarranted disparities based on race.⁶ Because of its relative low cost, crack cocaine is more accessible for poor Americans, many of whom are African Americans. Conversely, powder cocaine is much more expensive and tends to be used by more affluent white Americans. Nationwide statistics compiled by USSC reveal that African Americans are more likely to be convicted of crack cocaine offenses, while whites are more likely to be convicted of powder cocaine offenses.⁷ Thus, the sentencing disparities punishing crack cocaine offenses more harshly than powder cocaine offenses unjustly and disproportionately penalize African American defendants as compared to white defendants.

Compounding the problem is the fact that whites are disproportionately less likely to be prosecuted for drug offenses in the first place; when prosecuted, are more likely to be acquitted; and even if convicted, are much less likely to be sent to prison.⁸ Recent data indicates that African Americans make up 15% of the country's drug users, yet they comprise 37% of those arrested for drug violations, 59% of those convicted, and 74% of those sentenced to prison for a drug offense.⁹ Specifically with regard to crack, in fiscal year 2006, more than 80% of the defendants sentenced for crack offenses were African American,¹⁰ despite the fact that in 2005 only 24% of crack users were African American and 72% of crack users were white or Hispanic.¹¹

Due in large part to the sentencing disparity based on the form of the drug, African Americans serve substantially more time in prison for drug offenses than do whites. The average sentence for a crack cocaine offense in 2003, which was 123 months, was 3.5 years longer than the average sentence of 81 months for an offense involving the powder form of the drug.¹² Also due in large part to mandatory minimum sentences for drug offenses, from 1994 to 2003, the difference between the average time African American offenders served in prison increased by 77%, compared to an increase of 28% for white drug offenders.¹³ African Americans now serve virtually as much time in prison for a drug offense at 58.7 months, as whites do for a violent offense at 61.7 months.¹⁴ The fact that African American defendants received mandatory minimum sentences more often than white defendants who were also eligible for mandatory minimum sentences, further supports the racially discriminatory impact of these penalties.

Over the last 20 years, federal and state drug laws and policies have also had a devastating impact on women. In 2003, 58% of all women in federal prison were convicted of drug offenses, compared to 48% of men.¹⁵ The growing number of women who are incarcerated

disproportionately impacts African American and Hispanic women. African American women's incarceration rates for all crimes, largely driven by drug convictions, increased by 800% from 1986, compared to an increase of 400% for women of all races for the same period.¹⁶ Mandatory sentencing laws prohibit judges from considering the many reasons women are involved in or remain silent about a partner or family member's drug activity such as domestic violence and financial dependency. Sentencing policies, particularly the mandatory minimum for low-level crack offenses, subject women who are low-level participants to the same or harsher sentences as the major dealers in a drug organization.¹⁷

B. Deterioration of Communities

Department of Justice officials have argued before this body that crack has been uniquely responsible for the deterioration of communities justifying the sentencing disparities with powder cocaine. Studies of the neighborhoods where crack was visible in the 1980s indicate, however, that the economic conditions were "hopeless" – declining employment, reduced social services, and out-migration of successful community members.¹⁸ This economic and social deterioration made possible the new market forces needed for crack. It is too simple to say this drug *caused* the deterioration of communities, increased prostitution, or higher rates of victimization without examining the lack of economic and educational opportunities already missing in some of these predominately African American communities.

As law enforcement focused its efforts on crack offenses, especially those committed by African Americans, a dramatic shift occurred in the overall incarceration trends for African Americans, relative to the rest of the nation, transforming federal prisons into institutions increasingly dedicated to the African American community. In 1986, before the enactment of federal mandatory minimum sentencing for crack cocaine offenses, the average federal drug sentence for African Americans was 11% higher than for whites. Four years later, the average federal drug sentence for African Americans was 49% higher.¹⁹ In 2000 there were approximately 791,600 African American men in prisons and jails. That same year, there were 603,032 African American men enrolled in higher education.²⁰ The fact that there are more African American men under the jurisdiction of the penal system than in college has lead scholars to conclude that our crime policies are a major contributor to the disruption of the African American family.²¹

These racial disparities are even more troubling considering the devastating impact that the nation's drug policy and mandatory minimums have on the African American family. Indeed, it is the punitive measures themselves that contribute to the deterioration of communities.²² The effects of mandatory minimums not only contribute to these disproportionately high incarceration rates, but also separate fathers from families, separate mothers with sentences for minor possession crimes from their children, leave children behind in an overwhelmed child welfare system, create massive disfranchisement of those with felony convictions, and prohibit previously incarcerated people from receiving social services such as welfare, food stamps, and access to public housing.²³ For example, one of every 14 African American children has a parent locked up in prison or jail today,²⁴ and African American children are 9 times more likely to have a parent incarcerated than white children.²⁵ In terms of financial effects, incarcerated black parents significantly reduce the aggregate income of African American families, further preventing many African American children from rising above the gross

poverty they face.²⁶ Incarceration on such a massive scale leads to more unemployed and unemployable parents, more poverty, and more deterioration of communities.

Exacerbating the problem, the damaging impact of incarceration continues after a family member's release from prison. Approximately 1.4 million African American males – 13% of all adult African American men – are disfranchised because of felony convictions. This represents 33% of the total disfranchised population and a rate of disfranchisement that is 7 times the national average.²⁷ In addition, as a result of federal welfare legislation in 1996, there is a lifetime prohibition on the receipt of welfare for anyone convicted of a drug felony, unless a state chooses to opt out of this provision.²⁸ The effect of mandatory minimums for a felony conviction, especially in the instance of simple possession or for very low-level involvement with crack cocaine, can be devastating, not just for the accused, but also for the entire community.

The ACLU is concerned that the desire to appear “tough on crime” is substituting for sound policymaking – policymaking that should, by contrast, be focused on equity and proper alternatives. In addition to diverting funds from social programs, harsh mandatory minimums and prison expansion have imposed a particular social cost on African American families. The best way to respond to the drug problem may not be to lock up thousands of young African Americans by over-punishing crack in relation to powder, but rather consider fairness in sentencing and building structures to help families – job training, drug treatment, housing, adequate health care, better schools, welfare reform, and sufficient family support.²⁹ Countries that do provide such services to their poorest members suffer less crime and drug abuse than does the United States.³⁰

II. Unfounded Perceptions of Violence and Crack Use

The 100:1 drug quantity ratio was designed in part to account for certain harmful conduct believed to be associated to a greater degree with crack cocaine offenses than with powder cocaine offenses. In particular, crack was said to cause particularly violent behavior in those who used the drug. In 1988, a study of homicides in New York City found that in all of the 414 homicide cases that year, there were only 3 homicides associated with behavior caused by using crack and in 2 of those cases the crack user was the victim.³¹ The study also found that 85% of all crack-related deaths resulted from the nature of the illegal drug market and not from the actual use of the drug.³² This violence occurred between dealers or between dealers and users in an illegal drug market that is inherently violent, regardless of what drug is being bought or sold. When crack began to permeate cities across the country in the mid to late 80s, much of the violence was associated with the territorial disputes between low-level street corner drug dealers.³³ Therefore, most violence associated with crack is the result of being part of an illegal market, similar to violence associated in trafficking of other drugs.³⁴

According to Dr. Alfred Blumstein, Professor of Urban Systems and Operations Research at Carnegie Mellon University, any violence associated with the crack trade could be attributable to the venue of the market (open-air, street crack markets compared to closed powder markets) or to the dispute resolution culture of the communities in which the market is located.³⁵ The assertion that crack physiologically causes violence has not been found to be true, and the violence that was once associated with the intense competition of a new drug market has

abated.³⁶ Differences that might appear between cocaine and crack markets, Blumstein concludes, has nothing to do with the difference between the drugs themselves.

Sociologist Katherine Beckett made a similar conclusion in her recent study of arrest practices in Seattle, Washington.³⁷ In her study she examined the popular explanations for higher arrest rates for African Americans involved in the crack market – explanations which include the idea that the targeting of outdoor markets is a priority of law enforcement and the idea that crack is more associated with violence than other drugs.³⁸ In 2005, Beckett found, however, that while only 33% of outdoor serious drug transactions (also including heroin, methamphetamine, and powder), involved crack, 75% of all arrests were for crack.³⁹ Moreover, the study found that crack was also much less associated with violence than the other drugs; crack arrests were only 10% as likely as heroin arrests to involve guns.⁴⁰ Beckett concluded that the patterns had to do with a racially polarized conception of who and what comprises the drug trade in Seattle.⁴¹

Certainly, recent data confirms that significantly less trafficking-related violence is associated with crack than was previously assumed. For example, in 2000: 1) 64.8% of overall crack offenses did not involve weapons with regard to any participant; 2) 74.5% of crack offenders had no personal weapons involvement; and 3) only 2.3% of crack offenders actively used a weapon.⁴² In 2006, available statistics in crack offenses stayed relatively constant – 74% of drug offenders had no weapons involvement.⁴³ Moreover, in 2000, death, resulting from violence rather than drug use itself, occurred at the exact same rate, 3.4%, for both forms of cocaine.⁴⁴

The fear that crack manifested violent behavior embedded a problematic assumption into the sentencing structure that a crack defendant also committed a concurrent serious crime.⁴⁵ By treating crack so much more severely than powder, Congress codified the now refuted belief that all crack defendants manifest violent behavior.⁴⁶ This means that for individuals who have not engaged in any violent behavior, the penalty scheme subjects crack offenders to punishment based on acts they did not commit. Moreover, for defendants charged with a concurrent offense, the sentencing differences then “double count” the charged conduct relative to a powder defendant.⁴⁷ In other words, an offender caught with 5 grams of crack and a holstered firearm could be punished for double the time in prison due to the presumption of serious violence-related conduct already part of the drug’s mandatory minimum.⁴⁸ The practical effect of this sentencing disparity is that a crack offender is held responsible for conduct in which he or she did not engage or is penalized for the same conduct twice.

In 2002, Dr. Blumstein testified that it would be more rational to use sentencing enhancements to punish individuals who use violence, regardless of the drug type, rather than to base sentencing disparities on the chemical itself. Such enhancements should also account for an offender’s role in the distribution hierarchy. Blumstein saw no reason why there should be any difference in sentencing guidelines between crack cocaine and powder cocaine offenses.⁴⁹ He also noted that the 100:1 drug quantity disparity suggests racial discrimination.⁵⁰

The federal sentencing scheme already provides two alternative means for increasing sentences for weapons possession in drug trafficking offenses. Federal drug offenders with weapons may either be statutorily convicted under 18 U.S.C. § 924(c) (possession of a firearm in relation to a

drug trafficking offense), or alternatively they may be subjected to application of the weapons enhancement in the drug trafficking guidelines.⁵¹ Thus, the mandatory minimum sentences implemented by the Anti-Drug Abuse Act of 1986 sweep far too broadly by treating all crack cocaine offenders as if their offenses involved weapons or violence, even though the evidence demonstrates that most crack cocaine offenses have not.

III. The Myth of Crack's Chemical Effects

Despite many of the misconceptions at the time of the 1986 Act, numerous scientific and medical experts have determined that in terms of pharmacological effects, crack cocaine is no more harmful than powder cocaine – the effects on users are the same regardless of form.⁵² In 1996, the Journal of the American Medical Association published a study that found that the physiological and psychoactive effects of cocaine are similar regardless of whether it is in the form of powder or crack.⁵³ The study concluded that the propensity for dependence varied by the method of use, amount used and frequency, not by the form of the drug.⁵⁴ The study also indicated that people who are incarcerated for the sale or possession of cocaine, whether powder or crack, are better served by drug treatment than imprisonment.⁵⁵

In both 2002 and 2006, the Commission had hearings with a wide range of experts who overwhelmingly concluded that there is no valid scientific or medical distinction between powder and crack cocaine.⁵⁶ Among those experts was Dr. Glen Hanson, then Acting Director of the National Institute on Drug Abuse, who, in 2002, testified before the Commission stating that in terms of pharmacological effects, crack cocaine is no more harmful than powder cocaine. He noted that although cocaine in any form produces the same effects, the onset, intensity, and duration of its effects are related directly to the method of use and how rapidly cocaine enters the brain.⁵⁷

In addition, research indicates that the negative effects of prenatal crack cocaine exposure are identical to the negative effects of prenatal powder cocaine exposure.⁵⁸ The media stories that appeared in the late 1980s of crack-addicted mothers giving birth to “crack babies” are now considered greatly exaggerated.⁵⁹ In many cases, the mothers are low income and use various drugs, both of which are factors that affect a child's development. In 2002, Dr. Ira J. Chasnoff, President of the Children's Research Triangle, testified before the Sentencing Commission that since the composition and effects of crack and powder cocaine are the same on the mother, the changes in the fetal brain are the same whether the mother used crack cocaine or powder cocaine.⁶⁰ According to Dr. Chasnoff, the studies found that a child's home environment is the single most influential factor in determining whether a child will be healthy.⁶¹ In fact, the children of drug-abusing mothers who develop poorly, may be suffering from a combination of factors that often correlate with this environment, including poor nutrition, smoking, and lack of prenatal care.⁶²

IV. Failure to Focus on High Level Traffickers

Finally, the federal law's goal of targeting high-level drug traffickers has failed. Congress made explicitly clear that in passing the current mandatory minimum penalties for crack cocaine, it intended to target “serious” and “major” drug traffickers. The opposite has proved true: mandatory penalties for crack cocaine offenses apply in the vast majority of crack cases to offenders who are low-level participants in the drug trade.

Indeed, if Congress wanted to send a message by enacting mandatory minimums that the Department of Justice should be more focused on high-level cocaine traffickers, Congress missed the mark. Instead of targeting large-scale traffickers, the law established low-level drug quantities to trigger lengthy mandatory minimum prison terms.⁶³ This Commission has reported that only 15% of federal cocaine traffickers can be classified as high-level, while 73% of crack defendants have low-level involvement in drug activity, such as street level dealers, couriers, or lookouts.⁶⁴ And because the mandatory minimums prohibit judges from considering the many reasons women are involved in or remain silent about a partner or family member's drug activity, we have seen the emergence of the "girlfriend problem" – women who are low-level participants in the drug trade, but subject to the same or harsher sentences as the major dealers in a drug organization.⁶⁵

Even judges and those prosecuting these cases have stood up against mandatory minimums, arguing such penalties are arbitrary and excessive. For example, U.S. District Judge Robert Sweet for the Southern District of New York has argued that the administration of mandatory minimums in crack cases "has resulted in Jim Crow justice," noting the 100:1 disparity between crack and powder cocaine.⁶⁶ Similarly, former prosecutor and U.S. District Judge Cassell for the District of Utah has condemned the legal disparity between crack and powder cocaine, contending that "apparent inequality in the sentencing guidelines produces actual injustice to the crack-cocaine defendant."⁶⁷ Moreover, in 1997, 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 both mandatory minimum statutes and the guidelines, can not be justified and results in sentences that are unjust and do not serve society's interest."⁶⁸

Recommendations

The ACLU commends the Commission for re-examining the Anti-Drug Abuse Act of 1986 and the harmful consequences of this legislation. Although there are more white crack cocaine users, national drug enforcement and prosecutorial policies and practices have resulted in the targeting of inner-city communities of color. This has caused the overwhelming number of prosecutions to be directed against African Americans, and because of the sentencing disparities, these African Americans are disproportionately given longer sentences than powder users. The sentences for low-level drug crimes are wasteful in terms of both tax dollars and human lives, and have had devastating collateral consequences for African American men, women, and families. Changing these policies would dramatically help African American families by removing the harsh penalties that currently disproportionately affect them and severely limit their opportunities.

After the 2002 hearings, the Sentencing Commission issued its third report on crack and powder cocaine disparities and once again found that the 100:1 ratio between the drugs was unjustified.⁶⁹ In so stating, the Commission made the following findings: 1) the current penalties exaggerate the relative harmfulness of crack cocaine; 2) the current penalties sweep too broadly and apply most often to lower level offenders; 3) the current quantity-based penalties overstate the seriousness of most crack cocaine offenses and fail to provide adequate proportionality; 4) the current penalties' severity mostly impacts minorities.⁷⁰ This body made

clear that it “firmly and unanimously” believed the ratio to be unjustified.⁷¹

Therefore, the ACLU urges the Commission make the following recommendations to Congress in the Commission’s 2007 report:

- The quantities of crack cocaine that trigger federal prosecution and sentencing must be equalized with and increased to the current levels of powder cocaine. As demonstrated above, there is no rational medical or penological reason for the 100:1 disparity between crack and powder cocaine sentences, and instead it causes an unjustified racial disparity in our penal system.
- In order for judges to exercise appropriate discretion and consider mitigating factors in sentencing, mandatory minimums for crack and powder offenses must be eliminated, including the mandatory minimum for simple possession.
- Federal prosecutions must be properly focused on the high-level traffickers of both crack and powder cocaine.

Thank you once again for re-visiting this very important policy matter.

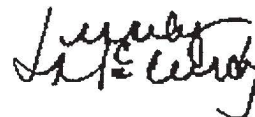
Sincerely,



Caroline Fredrickson,
Director



Deborah J. Vagins
Policy Counsel for
Civil Rights and Civil Liberties



Jesselyn McCurdy
Legislative Counsel

¹ For example, in 1993, the ACLU assisted in convening the first national symposium that examined the disparity in sentencing between crack and powder cocaine, entitled *Racial Bias in Cocaine Laws*. The conclusion, more than a decade ago, of the representatives from the civil rights, criminal justice, and religious organizations that participated in the symposium was that the mandatory minimum penalties for crack cocaine are not medically, scientifically or socially justifiable and result in a racially biased national drug policy. Most recently, in 2006, the ACLU authored a detailed report on the inequities of the crack/powder sentencing disparity at the twentieth anniversary of the Anti-Drug Abuse Act of 1986, as well as submitted testimony for the Commission’s November 2006 hearing. See DEBORAH J. VAGINS AND JESSELYN MCCURDY, ACLU, *CRACKS IN THE SYSTEM: TWENTY YEARS OF THE UNJUST FEDERAL CRACK COCAINE LAW* (2006), available at <http://www.aclu.org/drugpolicy/sentencing/27181pub20061026.html>; *Public Hearing on Cocaine Sentencing Policy Before the U.S. Sentencing Commission*, (Nov. 14, 2006) (Written statement of Jesselyn McCurdy, ACLU Legislative Counsel), available at <http://www.aclu.org/crimjustice/gen/27357leg20061114.html>.

² 21 U.S.C. § 841(b) (2000). In 1988, Congress created a 5-year mandatory minimum and 20-year maximum sentence for simple possession of 5 grams or more of crack cocaine. See 21 U.S.C. § 844 (2000).

³ MARC MAUER, *THE SENTENCING PROJECT, RACE TO INCARCERATE 83* (2006) (citing interview with Candy Crowley, CNN, Jan. 18, 2001) [hereinafter *RACE TO INCARCERATE*].

⁴ U.S. SENTENCING COMMISSION, *FIFTEEN YEARS OF GUIDELINES SENTENCING* 132 (2004).

- ⁵ Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended at 21 U.S.C. § 801 (2000)).
- ⁶ See U.S. SENTENCING COMMISSION, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 102-103 (2002) [hereinafter 2002 USSC REPORT].
- ⁷ U.S. SENTENCING COMMISSION, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 156, 161 (1995) (issued after a review of cocaine penalties as directed by Pub. L. No. 103-322, § 280006).
- ⁸ Gabriel J. Chin, *Race, The War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 266 (2002).
- ⁹ Interfaith Drug Policy Initiative, *Mandatory Minimum Sentencing Fact Sheet*, http://idpi.us/dpr/factsheets/mm_factsheet.htm.
- ¹⁰ U.S. SENTENCING COMMISSION, 2006 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Table 34 (2006).
- ¹¹ SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, 2005 NATIONAL SURVEY ON DRUG USE AND HEALTH: DETAILED TABLES, Table 1.43a (2006) : see also Clarence Page, *Legacy Hijacked, 20 Years Later*, THE WASHINGTON TIMES, June 24, 2006, available at <http://198.65.148.234/commentary/20060623-085057-3629r.htm>.
- ¹² U.S. SENTENCING COMMISSION, 2003 SOURCEBOOK OF FEDERAL SENTENCING, Figure J, at 91 (2003).
- ¹³ BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 1994, Table 6.11, at 85 (1998); BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2003, Table 7.16, at 112 (2004).
- ¹⁴ BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2003, Table 7.16, at 112 (2004).
- ¹⁵ ACLU ET AL., CAUGHT IN THE NET: THE IMPACT OF DRUG POLICIES ON WOMEN AND FAMILIES 1 (2005), available at <http://www.fairlaws4families.org/final-caught-in-the-net-report.pdf> [hereinafter CAUGHT IN THE NET] (citing BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, (30th ed. 2002)).
- ¹⁶ *Id.* at 17 (citing SUSAN BOYD, FROM WITCHES TO CRACK MOMS: WOMEN, DRUG LAW, AND POLICY 208-09 (2004)).
- ¹⁷ *Id.* at 4.
- ¹⁸ Michael Agar, *The Story of Crack: Towards a Theory of Illicit Drug Trends*, 11 ADDICTION RESEARCH AND THEORY, No. 1, 2003, at 25.
- ¹⁹ Drug Policy Alliance, *Race and the Drug War*, <http://drugpolicy.org/communities/race/index.cfm?printpage=1>; B.S. MEIERHOEFER, FEDERAL JUDICIAL CENTER, THE GENERAL EFFECT OF MANDATORY MINIMUM PRISON TERMS: A LONGITUDINAL STUDY OF FEDERAL SENTENCE IMPOSED 20 (1992).
- ²⁰ JUSTICE POLICY INSTITUTE, CELLBLOCKS OR CLASSROOMS?: THE FUNDING OF HIGHER EDUCATION AND CORRECTIONS AND ITS IMPACT ON AFRICAN AMERICAN MEN 10 (2002), available at <http://www.justicepolicy.org/coc1/corc.htm>.
- ²¹ See Common Sense for Drug Policy, *Drug War Facts: Race, Prison, and the Drug Laws*, <http://www.drugwarfacts.org/racepris.htm>; see also Craig Haney & Philip Zimbardo, *The Past and Future of U.S. Prison Policy: Twenty-five Years After the Stanford Prison Experiment*, 53 AMERICAN PSYCHOLOGIST, No. 7, July 1998, at 716 (stating that at the beginning of the 1990s, the United States had more African American men between the ages of 20 and 29 in the criminal justice system than in college).
- ²² See generally, E. Michelle Tupper, Note, *Children Lost in the Drug War: A Call for Drug Policy Reform to Address the Comprehensive Needs of Family*, 12 GEO. J. ON POVERTY L. & POL'Y 325, 336 (2005).
- ²³ See generally, Deborah N. Archer & Kele S. Williams, *Making America "The Land of Second Chances:" Restoring Socioeconomic Rights for Ex-Offenders*, 30 N.Y.U. REV. L. & SOC. CHANGE 527 (2006); Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 B.C. L. REV. 255 (2004); CAUGHT IN THE NET, *supra* note 15, at 47-55.
- ²⁴ See also Marc Mauer, *Race, Drugs Laws & Criminal Justice, from Symposium: U.S. Drug Laws: The New Jim Crow?*, 10 TEMP. POL. & CIV. RTS. L. REV. 321, 324 (2001).
- ²⁵ CAUGHT IN THE NET, *supra* note 15, at 49.
- ²⁶ Note, *Winning the War on Drugs: A "Second Chance" for Nonviolent Drug Offenders*, 113 HARV. L. REV. 1485, 1490 (2000).
- ²⁷ HUMAN RIGHTS WATCH & THE SENTENCING PROJECT, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 8 (1998); see also Mauer, *supra* note 24, at 324.
- ²⁸ THE SENTENCING PROJECT, DRUG POLICY AND THE CRIMINAL JUSTICE SYSTEM 6 (2001).
- ²⁹ David Cole, *The Paradox of Race and Crime: A Comment on Randall Kennedy's "Politics of Distinction,"* 83 GEO. L. J. 2547, 2569-70 (1995).
- ³⁰ *Id.* at 2570 (citing ELLIOTT CURRIE, RECKONING: DRUGS, THE CITIES, AND THE AMERICAN FUTURE 166, 180 (1993)).

- ³¹ Paul J. Goldstein et al., *Crack and Homicides in New York City: A Case Study in the Epidemiology of Violence*, in *CRACK IN AMERICA: DEMON DRUG, AND SOCIAL JUSTICE* 118 (Craig Reinerman & Harry G. Levine eds., 1997).
- ³² *Id.* at 119-120.
- ³³ *Id.*
- ³⁴ *Id.* at 120.
- ³⁵ *Public Hearing on Cocaine Sentencing Policy Before the U.S. Sentencing Commission* (Nov. 14, 2006) (Written statement of Dr. Alfred Blumstein, Professor of Urban Systems and Operations Research, Carnegie Mellon University, at 6).
- ³⁶ *See id.*
- ³⁷ *RACE TO INCARCERATE*, *supra* note 3, at 165 (citing Katherine Beckett, "Race and Law Enforcement in Seattle," May 3, 2004).
- ³⁸ *Id.* at 165-66.
- ³⁹ *Id.* at 166.
- ⁴⁰ *Id.*
- ⁴¹ *Id.*
- ⁴² 2002 USSC REPORT, *supra* note 6, at 54, 100, Table 17.
- ⁴³ U.S. SENTENCING COMMISSION, 2006 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Table 39 (2006).
- ⁴⁴ 2002 USSC REPORT, *supra* note 6, at 57.
- ⁴⁵ *Public Hearing on Cocaine Sentencing Policy Before the U.S. Sentencing Commission* (Nov. 14, 2006) (Written statement of Ryan S. King, Policy Analyst, The Sentencing Project, at 6).
- ⁴⁶ *Id.*
- ⁴⁷ *Id.*
- ⁴⁸ *Id.* at 7.
- ⁴⁹ 2002 USSC REPORT, *supra* note 6, at E-4.
- ⁵⁰ *Id.*
- ⁵¹ *Id.* at 55.
- ⁵² *Id.* at Appendix E, E-1-E-6.
- ⁵³ D. K. Hatsukami & M. W. Fischman, *Crack Cocaine And Cocaine Hydrochloride. Are The Differences Myth of Reality?*, 279 *JOURNAL OF THE AMERICAN MEDICAL ASSN.*, No. 19, Nov. 1996, at 1580.
- ⁵⁴ *Id.*
- ⁵⁵ *Id.*
- ⁵⁶ 2002 USSC REPORT, *supra* note 6, at Appendix E, E-1-E-6; *Public Hearing on Cocaine Sentencing Policy Before the U.S. Sentencing Commission*, (Nov. 14, 2006).
- ⁵⁷ 2002 USSC REPORT, *supra* note 6, at E-3.
- ⁵⁸ *Id.* at 94.
- ⁵⁹ *See also Crack in Context: America's Latest Drug Demon*, in *CRACK IN AMERICA: DEMON DRUG, AND SOCIAL JUSTICE* 4 (Craig Reinerman & Harry G. Levine eds., 1997).
- ⁶⁰ 2002 USSC REPORT, *supra* note 6, at E-4.
- ⁶¹ *Id.*
- ⁶² *RACE TO INCARCERATE*, *supra* note 3, at 171.
- ⁶³ Eric E. Sterling & Julie Stewart, *Undo This Legacy of Len Bias' Death*, *THE WASHINGTON POST*, June 24, 2006, at A21.
- ⁶⁴ *Id.*; *see also* 2002 USSC REPORT, *supra* note 6, at 38, 99.
- ⁶⁵ *See generally* *CAUGHT IN THE NET*, *supra* note 15, at 4.
- ⁶⁶ *National War on Drugs Symposium, Panel II: Social Justice & the War on Drugs* (2000) (statement of Hon. Robert Sweet), <http://www.pbs.org/wgbh/pages/frontline/shows/drugs/symposium/panel2.html>.
- ⁶⁷ *How Judges are Properly Implementing The Supreme Court's Decision in United States v. Booker: Hearing Before the Subcomm. On Crime, Terrorism, and Homeland Security of the H. Comm on the Judiciary*, 109th Cong. 68 (2006) (statement of Judge Paul G. Cassell, Chairman, Committee on Criminal Law, Judicial Conference of the United States), available at <http://www.uscourts.gov/testimony/Cassell031606.pdf#search=%22paul%20g%20cassell%20%22mandatory%20minimum%22>.
- ⁶⁸ 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), in 10 *FED. SENT'G RPTR.* 195 (No. 4, Jan./Feb. 1998).

⁶⁹ 2002 USSC REPORT, *supra* note 6, at v.

⁷⁰ *Id.* at v-viii.

⁷¹ *Id.* at 91-92.



MAINE CIVIL LIBERTIES UNION

March 30, 2007

United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500
Washington, DC 20002-8002

Dear Chairman Hinojosa and Commissioners:

The Maine Civil Liberties Union (MCLU) appreciates this opportunity to file comments with the United States Sentencing Commission, in accordance with notice in the Federal Register seeking recommendations concerning sentencing laws for crack and powder cocaine offenses. The MCLU urges the Commission to strongly recommend sentencing reform in order to reduce the severity of penalties for crack offenses to the level of penalties currently prescribed for offenses relating to powder cocaine.

In 18 U.S.C. § 3553(a), Congress instructed the courts to impose a sentence sufficient, but not greater than necessary to meet the following purposes:

- (1) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
- (2) to afford adequate deterrence to criminal conduct;
- (3) to protect the public from further crimes of the defendant; and
- (4) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

In determining specific sentences, Congress has instructed courts to consider the following factors in imposing a reasonable sentence:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the kinds of sentences available;

Crack and Powder Cocaine are Substantially the Same Substance and Have Identical Effects on the Brain

As the Commission knows, powder cocaine is made from coca paste, which is derived from the leaves of the coca plant. Crack cocaine is simply made by taking powder cocaine and cooking it with baking soda and water until it forms a hard rocky substance. These "rocks" are then broken into pieces and sold in small quantities¹. Apparently, Congress believed, at the time of the legislation creating the enormous crack/powder sentencing disparity, that crack was fifty times more addictive than powder cocaine². However, two decades later, there is little controversy about the falseness of that assumption and there is no legislative history that demonstrates that Congress used any rational basis to arrive at a 100: 1 sentencing ratio. Certainly, given what is known today, there can be no rational basis for adhering to the current policy³.

The Increased Violence Associated with Crack's Appearance on the Drug Market Was Not Associated With Inherent Properties of the Drug

To the extent that an increase in crime in the 1980s was associated with the widespread distribution of the crack form of cocaine, that increased violence was related to the lower price of crack and the nature and geography of its market, rather than any relationship with the properties of the substance itself or to any differential effects on the brain⁴. As in any market, the lower price of the product increased the demand for it in neighborhoods that were already associated with higher crime rates. Moreover, the increased violence is now widely seen as a function of a nascent market for crack, as new dealers competed for street distribution territory. However this violence has since subsided and therefore, can no longer represent even a pretense that would support the current sentencing disparity.⁵

Two Decades of Experience Reveals Unacceptable and Perverse Racial Effects Under Current Crack Sentencing Policy

Regardless of the presumed race-neutral intent of drug legislation creating the crack/powder sentencing disparity, the result has been an unambiguous and

¹ United States Sentencing Commission, *Report to Congress: Cocaine and Federal Sentencing Policy*, May 2002.

² For example, a 1996 study published in the *Journal of the American Medical Association* finds analogous effects on the body for both crack cocaine and powder cocaine. Similarly, Charles Schuster, former Director of the National Institute on Drug Abuse and Professor of Psychiatry and Behavioral Sciences, found that once cocaine is absorbed into the bloodstream and reaches the brain, its effects on brain chemistry are identical regardless of whether it is crack or powder.

³ As the ACLU stated in *Cracks in the System, Twenty Years of the Unjust Federal Crack Cocaine Law*, despite the hyped media reports of the death of Len Bias (which triggered a huge media-based anti-drug campaign and helped to motivate Congress to enact the new harsh crack penalties), "The ultimate irony of this anniversary is that Len Bias did not die of a crack overdose, but rather from snorting powder cocaine and alcohol" (October, 2006).

⁴ This Commission, in 2002, has already reported that the adoption of the current penalties for crack offenses were based on inaccurate beliefs concerning the association between crack and violence.

⁵ See Coyle, *Race and Class Penalties in Crack Cocaine Sentencing*, and *Federal Crack Cocaine Sentencing*, The Sentencing Project, February, 2007

serving unjustifiably long sentences. Finally, the large increase in the incarceration rates of non-white women as a result of harsh crack sentences, has resulted in substantial harm to children and families, especially in minority communities.

A legitimate goal of harsh sentencing would be to target large violent drug distributors. In order to accomplish that, the Commission should urge Congress to enact laws with a much sharper focus, replacing the current large net that results in long sentences for low-level offenders and tangential participants in drug offenses. A good start would be to reduce the penalty for crack offenses to the level prescribed for powder cocaine offenses.

Respectfully submitted,
Shenna Bellows
Executive Director
Maine Civil Liberties Union

Reason. Compassion. Justice.

Ethan A. Nadelmann
 Executive Director

Ira Glasser
 Director

March 30, 2007

United States Sentencing Commission
 Attn: Public Officer
 One Columbus Circle, N.E.
 Suite 2-500
 Washington, D.C. 20002-8002

Dear Commissioners:

Thank you for the opportunity to comment on this significant crisis in criminal justice policy. In my previous capacity as a sentencing advocate working in public defender offices, and as the former Research Director at the Justice Policy Institute, a criminal justice think tank, I have witnessed firsthand the negative repercussions of these unjust sentencing laws. Therefore, I suggest that the commission should take action to equalize the sentencing guidelines between crack cocaine and powder cocaine at the current level of powder cocaine and refocus efforts to target high-level traffickers rather than low-level offenders.

When considering the application of the 100-to-1 crack/powder cocaine sentencing law, it is disconcerting to note that a person who possesses or sells *one pound (only 454 grams)* of powder cocaine would still not fall under the same mandatory minimum sentence of 5 years that a crack cocaine seller possessing just *5 grams* would receive. This is due to the fact that it takes *500 grams* of powder cocaine to beget the same five-year mandatory minimum sentence for just *5 grams* of crack cocaine. That one pound of powder cocaine could be converted into enough crack cocaine to provide up to 64 sellers each with an eighth of an ounce. Simply because the powder cocaine seller had not altered the state of the drug, s/he is not subject to the same punishment as a crack cocaine seller.¹

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Crack Cocaine and Powder Cocaine are made from the same substance

As this body has previously determined, powder cocaine and crack cocaine are pharmacologically the same substance and "cause identical effects."ⁱⁱ In fact, one gram of powder cocaine yields less than one gram of crack cocaine. Understandably, cocaine *in either form* has a euphoric, energizing feeling and can be addictive. In fact, a typical dose of crack cocaine lasts a shorter period of time than a typical dose of powder cocaine.

Twenty years ago when the crack cocaine sentencing laws were first passed by Congress, the United States faced a panic about the alleged "crack epidemic" Congress responded under the impression that crack had inherent properties that made it infinitely more dangerous than powder cocaine. There were reports that crack cocaine was instantly addicting, invoked violent behavior and criminal activity in users, and had devastating effects on fetuses. These reports, which served as the basis for the huge disparity, have since been found to be fundamentally flawed, rendering the 100-to-1 disparity arbitrary and capricious. Further, these laws have proven ineffective in reducing drug use or distribution and have instead exacerbated racial disparity and injustices in our criminal justice system.

Crack cocaine sentencing policy has had an overwhelmingly disparate effect on people of color and the poor

Crack cocaine laws disproportionately target members of lower socio-economic and minority groups, particularly blacks. This body, in the previously mentioned 2002 report, noted "sentences appear to be harsher and more severe for racial minorities..." In 2003, blacks constituted 80% of those sentenced under federal crack cocaine laws while whites constituted only 7.8% despite the fact that more than 66% of people who use crack cocaine are white.ⁱⁱⁱ Perhaps the most blatant example of the racism inherent in these laws are statistics from a prison in Virginia. In 1983, prior to the hysteria surrounding crack cocaine and the subsequent introduction of sentencing laws, 63% of prison-sentenced drug offenders were white and 37% were minorities. By 1989, a mere 3 years after the laws

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were passed, 34% of offenders were white and 65% were minorities, although racial use rates did not change.^{iv} This extreme inverse can be attributed to the harsher crack cocaine sentences which are disproportionately applied to blacks and other minorities.

People convicted on nonviolent drug offenses have been disproportionately affected by crack cocaine sentencing policy

While mandatory minimum sentencing may have originally been intended to target high-level drug traffickers, members of organized crime rings and the violence associated with the crack cocaine market, this body's 2002 report found that 73% of crack cocaine defendants had low-level involvement in drug activity and *only 0.5%* were importers or high-level suppliers.^v Laws intended to decrease availability of crack cocaine and powder cocaine should target large-scale distribution networks rather than low-level sellers who have little to do with trafficking or distribution on a larger scale. According to the Department of Justice, individuals convicted of trafficking less than 25 grams of crack cocaine received an average sentence of almost 65 months, while individuals convicted of trafficking less than 25 grams of powder cocaine received an average of almost 14 months, a difference of four years.^{vi}

Furthermore, the current sentencing policy, and the targeting of low-level offenders, has proven to be devastating for families and communities that suffer high incarceration rates. According to a 2006 report by the American Civil Liberties Union, 1 in 14 black children has a parent in prison and 1.4 million black men are disfranchised because of felony drug convictions. Single-parent homes, unemployment, disillusionment with the justice system and stigmas from felony convictions and incarceration can contribute to the degradation of already disadvantaged communities which serves only to increase crime rates. Again, this body has noted the damage, stating even "perceived improper racial disparity fosters disrespect for and lack of confidence in the criminal justice system."

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Recommendations

The United States Sentencing Commission should continue to advocate for reforming the laws as it has for the last decade. Although Congress has continuously rejected this body's recommendation in this matter, we support you in your efforts to right this gross wrong in criminal justice policy. In 2004, this body asserted that, "[r]evising the disparity in sentences for crack and powder would do more to reduce the sentencing disparity 'than any other single policy change' and would 'dramatically improve the fairness of the federal sentencing system.'"^{vii}

We urge you to continue your efforts, and specifically ask that you recommend the following to the 110th U.S. Congress:

1. **Revise the crack cocaine and powder cocaine sentencing to a more equitable ratio of 1-1 by raising the crack cocaine quantity threshold, not lowering the quantity triggers for powder cocaine.** To engender vastly different sentences for the same substance, albeit in different forms, is a nonsensical and an extremely harmful policy. However, lowering the powder cocaine threshold would not remedy the injustice and only compound the crisis facing our overcrowded prison system. While past Congresses of past may have limited this body's recommendation language, we believe that you all have the power to voice your collective belief and recall the 1-1 recommendation made over a decade ago.
2. **Refocus law enforcement priorities to target cocaine traffickers.** Law enforcement time and money should be invested in targeting, and apprehending, individuals that traffic and/or import high levels of either form of cocaine. This change would have a two-fold benefit: it would impact the quantity of cocaine products on our streets and lessen the excessive sentences handed down to minorities and/or individuals convicted of low level, nonviolent offenses.

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Thank you for your dedicated and deliberate attention to this very important issue.

Sincerely,



Jasmine L. Tyler, M.A.
 Deputy Director
 Office of National Affairs

ⁱ Caulkins, Johnathan P., Peter C. Rydall, William L. Schwabe, and James Chiesa. Mandatory Minimum Drug Sentences: Throwing Away the Key or the Taxpayers Money? Drug Policy Research Center: Rand, 1997.

ⁱⁱ United States Sentencing Commission. Cocaine and Federal Sentencing Policy. May 2002.

ⁱⁱⁱ Vagins, Deborah J., and Jesselyn McCurdy. "Cracks in the System: Twenty Years of Unjust Federal Crack Cocaine Law." American Civil Liberties Union. October 2006.

^{iv} Duster, Troy. "Pattern, Purpose and Race in the Drug War: The Crisis of Credibility in Criminal Justice." Crack in America, Berkeley: University of California Press, 1997.

^v United States Sentencing Commission. Cocaine and Federal Sentencing Policy. May 2002.

^{vi} *ibid*

^{vii} Vagins, Deborah J., and Jesselyn McCurdy. "Cracks in the System: Twenty Years of Unjust Federal Crack Cocaine Law." American Civil Liberties Union. October 2006.

THE
SENTENCING
PROJECT
RESEARCH AND
ADVOCACY FOR REFORM

MARC MAUER
EXECUTIVE DIRECTOR

March 10, 2007

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002-8002
Attention: Public Affairs

Re: Public Comment on Notice of Proposed Amendments to Sentencing Guidelines,
Policy Statements, and Commentary – Issue for Comment 12: Cocaine Sentencing
Policy

To the Commission:

I am pleased to have the opportunity to write on behalf of The Sentencing Project in regard to the issue of federal cocaine sentencing policy. The Sentencing Project is an independent criminal justice policy organization that has been engaged in research and advocacy related to federal cocaine laws for more than a decade. We welcome this opportunity to lend our insight as a means of assisting the Commission to digest the broad range of issues raised in the public hearing of November 14, 2006.

To this end, we wish to use this letter to briefly discuss two important points highlighted in those hearings that merit further attention:

- First, the perceived association between the sale and use of crack cocaine and violent behavior has been profoundly exaggerated. Consequently, the current penalty structure is too broad and overreaches in the persons for whom the punishment is ostensibly intended.
- Second, this overly punitive sentencing scheme has had a harmful impact on the African American community both through unnecessarily lengthy terms of incarceration that are imposed and through a delegitimization of law enforcement efforts in those neighborhoods most acutely affected by these laws.

We applaud the Commission's initiative to revisit the federal cocaine laws and we urge the members to call upon Congress to repeal the 100-to-1 statutory weight ratio between powder and crack cocaine, while also adjusting the guidelines to reflect an equalization between the two substances at the current amount for powder cocaine.

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The comments delivered before the Commission by The Sentencing Project staff at the public hearing in November 2006 outlined four key reasons why it is imperative for the Commission to address the weight differential between powder and crack cocaine. These were:

- The current sentencing structure is flawed by design and is incorrectly calibrated to target low-level defendants.
- Drawing a link between a sentence for a crack cocaine offense and its perceived association with heightened violent conduct amounts to “double charging” for the purpose of sentencing.
- The current punishment scheme has produced no appreciable impact on use patterns of crack cocaine.
- The punitive emphasis of current policy is out of step with the evolving national consensus that a supply-side approach to drug abuse emphasizing law enforcement is ineffective and that resources should be focused on demand-side investments in prevention and treatment.

In this letter we will address two key issues relating to the current penalty structure for cocaine offenses: the relationship between crack cocaine and violence, and the effect of crack cocaine penalties on the African American community.

Crack Cocaine and Violence

While the issue of the perceived relationship between crack cocaine and violence is central to the 100-to-1 weight differential structure, a careful analysis of existing data reveals that there is no justification for this disparity. First, in 2006, a substantial majority of both crack (74%) and powder cocaine (87%) defendants did not have a weapon involved in their offense. Further, data from 2000 indicate that only 1.2% of powder cocaine offenders and 2.3% of crack cocaine offenders actually used a weapon in their offense. Over time, the rates of weapon involvement have remained relatively stable. Since 1996, the proportion of crack cocaine defendants who did not have a weapon involved in their offense has ranged from a low of 69% (pre-*Booker* 2004) to a high of 81% (1998). While there are slightly higher rates of weapon involvement for crack cocaine offenses than for powder cocaine offenses, it is critical to note that during the last decade, at least 7 out of 10 crack cocaine defendants *did not* have a weapon associated with their offense. However, because of the heightened punishment for a crack cocaine offense resulting from its preconceived association with violence, these defendants face a punishment disproportionately severe to their charged conduct.

A better response is to rely upon the statutorily created enhancement for drug trafficking crimes that are accompanied by the presence of a weapon. Section 18 U.S.C. 924(c) is clearly intended to punish defendants harshly for the presence and/or use of a weapon during the commission of a drug crime. For example, §§924(c)(1)(A)(i-iii) create a series

of mandatory minimum sentences for the use, brandishing, or discharge of a firearm during the commission of a drug trafficking crime. Subsequent offenses can result in consecutive 25-year mandatory sentences.

In the November 2006 hearings, Assistant U.S. Attorney R. Alexander Acosta argued that harsh crack cocaine penalties are necessary to address violent drug gang activity that plagues communities in his district. Despite this contention, he was unable to identify a single instance in which the federal crack cocaine laws were used to target high-level sellers or traffickers.

Harsh punishments already exist for drug offenses in which a weapon is present and were obviously intended by Congress for just this scenario – violent drug gangs. Claims by the Department of Justice that it needs tough crack cocaine laws to break up violent drug gangs ignore the reality that the current approach overreaches the population for whom it is intended to target. Because the current penalty structure for crack cocaine presumes a link between the drug and violent behavior, and has internalized this presumption into the penalty itself, both perpetrators of violence and drug sales *as well as* low-level users with no associated violent conduct are subject to the same punishment for the narcotics element of their charge. The result is the absence of proportionality in the penalty structure.

In the case of violent drug activity, 21 §841(b)(1)(A-B) and 18 U.S.C. §924(c) should be used in concert with one another to ensure that the enhanced penalties are only applied to deserving individuals. Increasing the crack cocaine weight thresholds in 21 U.S.C. §841(b)(1)(A-B) will not undermine law enforcement or prosecutorial efforts to combat violent drug activity because stiff penalty enhancements already reside in 18 U.S.C. §924(c). Thus, the Commission should call upon Congress to repeal the 100-to-1 statutory weight ratio and equalize the penalty triggers for both types of cocaine at the current powder level. Subsequently, the Commission should drop the floor of the guideline range for crack cocaine offenses to the level of the reformed statutory minimum.

Crack Cocaine Penalties and the African American Community

An additional area of concern that emerged in the November hearings was the impact of the crack cocaine penalty scheme as it pertains to the African American community. This is an issue of paramount importance considering that 8 in 10 of the persons convicted in federal court each year for a crack cocaine offense are African American. Some proponents of the current structure argue that the consequences of the drug sales that occur in the African American community are the very reason for the harsh penalties, and as a result, there is a net benefit for these neighborhoods. However, a review of the history and impact of these policies demonstrates that the severe penalties are both unnecessary for law enforcement purposes and are counterproductive for police-community relations.

While there are higher rates of victimization in the African American community, leaders in the black community have repeatedly called not for harsh punishments but rather for fair and effective law enforcement and social service interventions. Drug policies in general, and the crack penalties in particular, have resulted in an erosion of legitimacy for law enforcement agents in many affected neighborhoods and a lack of confidence in many institutions of governance. This can manifest itself in a disruption of law enforcement efforts to investigate other types of crime and a hampering of court procedures, such as jury selection.

In his November 2006 testimony, United States District Judge Reggie Walton stated that he has had conversations with practitioners who bemoan the impact that the crack cocaine sentencing disparity has had on the ability to adjudicate cases fairly. “[P]eople in the community are astute enough to know about the disparity, and they bring concerns into the courtroom as potential jurors and, as a result of that, many times will say they can’t serve as jurors in these cases and many times will serve with the intent of not convicting . . .” Judge Walton reflected on conversations with individuals in those communities most acutely affected by crack cocaine laws, and noted that the impact has left many residents “feel[ing] that the system of justice in America is racist.” There is little more serious threat to a system of justice than a population which perceives that laws are illegitimate and their implementation unjust.

The federal crack cocaine laws pervert the court process in other ways as well. Overly punitive mandatory minimum sentences are frequently used to compel defendants to accept offers of a plea bargain. The threat of a mandatory minimum sentence deters the pursuit of the constitutional right to have a case heard before a jury of one’s peers by establishing a “trial penalty.” The choice many defendants face is to either take a plea or take a chance before the court and face a harsher penalty. For many, this is a gamble that is simply not worth taking. We can only speculate in regard to how many cases of misconduct, illegal search and interrogation, misidentification, or absolute innocence have gone unaired before a court of law because of the specter of a mandatory minimum sentence hanging in the balance? As noted above, all of these concerns fall disproportionately upon the African American community.

Judge Walton also observed the catastrophic impact of these harsh mandatory laws on the younger generation of African American men and their families. Walton cautioned that “as long as we continue to lock up the number of young black men that we continue to lock up, we’re going to leave many of our boys and girls without fathers, and without fathers, I think, children end up having significant problems.” Walton’s concerns are evidenced by the fact that 1 in 14 African American children has a parent in prison. For many families, generational involvement in the criminal justice system is a stark reality, and there is little question that the punitiveness of the federal crack cocaine laws has contributed to this problem.

The severe crack cocaine penalties also divert limited resources into the prison system. Funds devoted to the prosecution and incarceration of crack cocaine defendants reduces the potential for investments in education, urban renewal, economic development, and health care. Finally, mandatory minimum sentences for low-level drug users, such as those targeted by federal crack cocaine laws, conflict with efforts to expand drug treatment options. Despite a wealth of empirical evidence supporting the efficacy of drug treatment and the substantial savings it offers over incarceration, mandatory minimum sentences continue to incarcerate thousands of persons suffering from drug addiction while offering little in terms of services to address their underlying illness. In the African American community, this misallocation of resources magnifies other failures in the provision of social services and subverts efforts to overcome the consequences of drug abuse.

In light of inherent disproportionalities present in current federal cocaine sentencing laws, as well as the particularly harmful impact that they have had in the African American community, we strongly urge the Commission to call upon Congress to repeal the 100-to-1 statutory weight ratio between powder and crack cocaine, while also adjusting the guidelines to reflect an equalization between the two substances at the current level for powder cocaine. The Sentencing Project appreciates this opportunity to address the Commission and would welcome a future conversation to discuss any of the points raised in this letter in additional detail.

Sincerely,



Marc Mauer
Executive Director



Families Against Mandatory Minimums

March 30, 2007

Honorable Ricardo H. Hinojosa
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
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Re: Issue for Comment: Cocaine Sentencing Policy

Dear Judge Hinojosa:

We write on behalf of the board and members of Families Against Mandatory Minimums (FAMM). For twenty years the 100:1 ratio has punished low-level crack offenders, many of whom are first-time offenders, far more severely than their wholesale drug suppliers who provide the powdered cocaine from which crack is produced. Of all drug defendants, crack defendants are most likely to receive a sentence of imprisonment as well as the longest average period of incarceration. The Commission has reported that local street-level crack offenders receive average sentences comparable to intrastate and interstate powder cocaine dealers, and both intra- and interstate crack sellers receive average sentences longer than international powder cocaine traffickers¹. Despite the enormous cost to taxpayers and society, the crack-powder ratio has resulted in no appreciable impact on the cocaine trade. Results such as these are surely not what The Sentencing Reform Act of 1984 intended to stem the tide of crack cocaine abuse.

We recognize that two decades ago little was known about crack other than vague perceptions 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 that time, copious documentation and analysis by the Commission have revealed that many assertions were not supported by sound data and, in retrospect, were exaggerated or simply incorrect. Four previous inquiries, reaching back to 1995, produced research and findings from diverse fields. You have heard, repeatedly and most recently in November 2006, from psychologists, criminologists, law enforcement personnel, pharmacologists, treatment providers, defense and prosecuting attorneys, prisoners' families, and interest groups such as ours. For the most part they do not support the current penalty structure. Your reports, most recently the 2002 Report to Congress: Cocaine and Federal Sentencing Policy, exhaustively detail their findings and in all your reports you have reached the same conclusion "the harms associated with crack cocaine do not justify its substantially harsher treatment compared to powder cocaine."²

¹ U.S. Sentencing Commission, 104th Congress, 2nd Session, Special Report to Congress: Cocaine and Federal Sentencing Policy (1995) at 175-77 (Figures 10 & 11).

² U.S. Sentencing Commission, Fifteen Years of Guideline Sentencing 132 (2004).

The documentation could not be more complete. That opposition to the unbalanced penalty structure for crack cocaine is widespread and unsurprising; your work has done so much to demonstrate that the penalty structure is unconscionable, unsupportable and its demise is years overdue.

And yet, year after year, the Commission and all of us who struggle to dismantle the crack penalty structure, have failed. We have failed because ultimately, amending the crack guideline rests in the hands of Congress. The Sentencing Reform Act of 1984 provided that amendments sent it by the Commission would become law unless disapproved by an Act of Congress.³ In 1995 the Commission proposed to raise the crack penalty triggers to correspond with those for powder cocaine. Congress exercised its §994(p) option and disapproved the amendment.⁴ In that Act, Congress directed the Commission to report on the crack cocaine penalty and address a series of considerations. The ensuing research resulted in the April 1997 report to Congress that included recommendations in lieu of a proposed amendment.⁵ That report and the one from 2002 were met by a deafening silence on the Hill.

But today, it might have a chance. The new leaders of the House and Senate Judiciary Committees oppose mandatory minimum sentences. You have built an impressive battery of evidence to support an amendment. And, we believe you could gain bi-partisan support for amending the crack penalty. We are not naïve enough to think that a Congress controlled by Democrats is the panacea for a broken sentencing system. We do believe however that there is a fresh opportunity to develop bi-partisan support on the Hill for a new look at one of the most broken penalty structures. And we think the Commission is best suited to lead off with a proposed guideline.

FAMM supports an end to the sentencing disparity between crack and powder cocaine. We believe that the penalty structure for crack cocaine should not differ from the penalty structure for powder cocaine. The overwhelming impact of the evidence points to the correctness of parity indexed at the current powder cocaine penalty structure.

We urge you to propose an amendment that promises genuine relief, promotes justice and brings an end to the unconscionable results produced by the current penalty structure. If you do so, you will not be alone going to the Hill. Given the right amendment, you could be joined by many of the groups that have written and testified and conducted research and come to Commission meetings and sat through congressional debates year after year.

Thank you for considering our views.

³ 28 U.S.C. § 994(p).

⁴ See Pub. L. No. 104-38, 109 Stat. 334 (Oct. 30, 1995).

⁵ See Special Report to Congress: Cocaine and Federal Sentencing Policy – April 29, 1997.

Honorable Ricardo H. Hinojosa

March 30, 2007

Page 3

Sincerely,

Julie Stewart
President

Mary Price
Vice President and General Counsel

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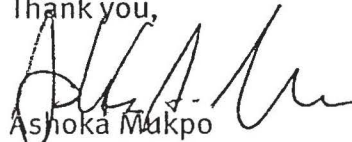
March 20, 2007

Judge Ricardo H. Hinojosa
Chair, United States Sentencing Commission
One Columbus Circle, N.E.
Washington, DC 20002-8002

Dear Judge Hinojosa:

Please replace the enclosed letter with the one that was inadvertently sent to you last week. Unfortunately, due to a processing error that version had not been fully proofed and finalized. Please accept my apologies.

Thank you,


Ashoka Mukpo
Associate, US Program

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De Saunders, *Deputy Program Director*
Gilder Talyer, *Legal and Policy Director*
Diane Olson, *Chair, Board of Directors*

March 14, 2007

Judge Ricardo H. Hinojosa
Chair, United States Sentencing Commission
One Columbus Circle, N.E.
Washington, DC 20002-8002

Dear Judge Hinojosa:

We welcome the Commission's continued efforts to eliminate the current disparities in sentences for crack cocaine and powder cocaine offenses. As the Commission's prior reports have revealed and as testimony at the Commission's November 2006 hearings on federal cocaine sentences reaffirmed, there is no empirical or principled basis for the far harsher sentences for crack cocaine offenders than for powder cocaine offenders. Arbitrarily severe sanctions cannot be justified. The unjustifiable becomes unconscionable when, as is the case here, the sentences disproportionately burden a racial minority.

Human Rights Watch acknowledges the public's legitimate interest in curtailing the sale and use of dangerous drugs. But the importance of drug control should not be permitted to override fundamental principles of justice and equality. These universally accepted principles are affirmed in international human rights treaties to which the United States is a party, including the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination.

By seeking to eliminate the sentencing disparity between crack and powder cocaine offenses, the Commission upholds the US commitment to protect fundamental human rights.

2008

Arbitrarily and Disproportionately Severe Sentences.

Imprisonment is a legitimate sanction for violent or dangerous conduct. Yet, prison sentences that are arbitrarily severe and disproportionate to the gravity of the offender's specific conduct and his or her personal culpability are inconsistent with respect for the inherent dignity of the individual, the right to be free of cruel, inhuman or degrading punishment, and the right to liberty.

Federal crack offenders face sentences that are far more severe than those levied on persons convicted of federal powder cocaine offenses, drug offenders sentenced for cocaine offenses under state law, and drug offenders convicted in other constitutional democracies. In 2006, the average sentence for a powder cocaine offender was 84.7 months, while the average sentence for a crack cocaine offender was 121.5 months, or 43% percent higher.¹ The sentencing disparity is particularly egregious for the low level offenders, street level dealers and couriers, who constitute the preponderance of crack cocaine (68.9%) and powder cocaine (59.9%) offenders.² For example, the average sentence of a street-level dealer of crack cocaine is 104 months, almost double the 56 months that the average powder cocaine dealer received.³ Yet they are engaged in the same activity—selling illicit and addictive substances to individuals for their own consumption. Similarly, although crack cocaine and powder cocaine couriers perform the same basic transportation function, the average sentence for a crack cocaine courier/mule is 107 months, again just about double the 55 months for a powder cocaine courier.⁴

Federal sentences for low level crack cocaine offenders are also much longer than those given equivalent offenders sentenced in state courts. The average maximum prison sentence length for offenders convicted of drug trafficking in state courts is 55 months.⁵ Among European countries, the average length of sentences for persons convicted of drug trafficking is 33 months.⁶

Congress established the 100-to-one sentencing ratio for crack and powder cocaine in the Anti-Drug Abuse Act of 1986. That legislation established five- and ten-year mandatory minimum sentences for cocaine offenses in which it took one hundred times as much powder cocaine to trigger the same sentence as for crack cocaine.

¹ United States Sentencing Commission (USSC), "2006 Sourcebook of Federal Sentencing Statistics," March 2007, <http://www.ussc.gov/ANNRPT/2006/figj.pdf> (accessed March 14, 2007), Fig. J.

² United States Sentencing Commission, "Report to Congress – Cocaine and Federal Sentencing Policy," May 2002, http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm (accessed March 14, 2007), p.39, Fig. 6.

³ Ibid, p.43, Fig. 9.

⁴ Ibid.

⁵ Bureau of Justice Statistics (BJS), "2002 Felony Sentences in State Courts," December 2004, <http://www.ojp.usdoj.gov/bjs/pub/pdf/fssc02.pdf> (accessed March 14, 2007), p.4, Table 3.

⁶ Martin Killias et al., "Sentencing in Switzerland in 2000," *Overcrowded Times* vol. 10, no. 6 (1999), p. 1, 18-19, citing figures from the Council of Europe's 1990 *Bulletin d'informacion Pénologique*, no. 15.

The Commission then used this 100-to-one ratio to develop sentencing guidelines for the full range of other powder and crack cocaine offenses. By all accounts, Congress simply picked the 100-one ratio out of the air, and it is this ratio which is the prime cause of the far more severe sentences crack offenders receive.

Supporters of current cocaine sentences claim that crack poses uniquely serious harms compared to powder cocaine; that long prison sentences for low level crack offenders offer prosecutors necessary leverage for securing their cooperation in the investigation of higher level offenders; and that the sentences deter prospective offenders and enhance community safety and well being. Yet, as evidenced during testimony at the November 2006 hearings, supporters of the status quo are unable to marshal much empirical evidence to support their claims.⁷ To the contrary, as witnesses at the hearings pointed out and as the Commission has itself noted in its reports,⁸ there is an abundance of empirical data showing that the inherent pharmacological dangers of crack are not dramatically different from those of powder cocaine, that many of the alleged dangers of crack—e.g. crack babies—turn out to be myths, and that harsh federal sentences have had little impact on the demand for or the availability of the drug. In addition, the drug gang violence that accompanied the emergence of distribution and marketing of crack in the 1980s as well as the number of new crack users have dramatically declined. This decline is not the result of the sentencing differential, but of stabilization in the crack distribution markets and the inherent rise and fall in demand that is characteristic of new illicit drugs. Even if concerns about violence and increased use of crack cocaine had warranted sentencing differentials two decades ago, the changed realities have undermined any basis for those differentials now.⁹

The principle difference between the two forms of cocaine is that they are used by different socio-economic groups. Powder cocaine is relatively expensive. In contrast, crack cocaine (which is produced from powder cocaine) is sold in “rocks” that can be bought in small, cheap quantities. While people with financial resources can and do use crack as well as powder cocaine, people with limited funds who want to use cocaine can only afford it in the form of crack. Crack’s low price thus contributed to the rapid rise in its use in the 1980s.

⁷ United States Sentencing Commission, “Written Statements of Witnesses and Hearing Transcript: Hearing on Cocaine and Federal Sentencing Policy,” November 2006, http://www.ussc.gov/hearings/11_15_06/testimony.pdf (accessed March 14, 2007).

⁸ United States Sentencing Commission, “Report to Congress – Cocaine and Federal Sentencing Policy,” May 2002, http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm (accessed March 14, 2007); United States Sentencing Commission, “Special Report to the Congress: Cocaine and Federal Sentencing Policy,” April 1997, http://www.ussc.gov/r_congress/NEWCRACK.PDF (accessed March 14, 2007); United States Sentencing Commission, “Special Report to the Congress: Cocaine and Federal Sentencing Policy,” February 1995, <http://www.ussc.gov/crack/exec.htm> (accessed March 14, 2007).

⁹ USSC, “Transcript: Hearing on Cocaine,” November 2006.

In essence, federal law penalizes the sale of a substance to poor people more than the sale of the equivalent substance to the affluent. It is the equivalent, were alcohol illegal, of imposing higher punishments on the sale of jug wine than on the sale of chateau neuf du pape. Similarly, by dictating far higher sentences for the possession of crack than for the possession of powder, the law penalizes more severely the poor who acquire the affordable form of a drug than the affluent who acquire the same drug in a more expensive form.

The Commission has correctly concluded in the past that there is no justification for subjecting offenders who deal in or possess crack to dramatically higher sentences than offenders who deal in or possess powder cocaine and it has recommended elimination of the 100-one ratio.¹⁰ Nothing that has happened in the five years since the Commission's last report changes that conclusion.

The Racially Discriminatory Impact of Crack Sentences.

Arbitrarily severe sentences should have no place in federal sentencing structures. But they are particularly objectionable when they are imposed primarily on a racial minority. According to the Commission's 2006 statistics, 81 percent of the men and women convicted of federal crack cocaine offenses are African American, a proportion that has not varied significantly over the past decade.¹¹

The discriminatory impact of crack sentences cannot be squared with international treaty obligations of the United States. The International Convention on the Elimination of All Forms of Racial Discrimination (CERD), which the United States has signed and ratified, prohibits conduct that has the "*purpose or effect*" of restricting fundamental rights on the basis of race.¹² That is, laws that are racially neutral on their face will constitute prohibited racial discrimination if they have an unwarranted disparate impact upon a group distinguished by race, even in the absence of any discriminatory intent. In the case of federal cocaine sentences, the racially disproportionate burden of longer sentences on African Americans is utterly unwarranted.

¹⁰ USSC, "Report to Congress on Cocaine," May 2002; USSC, "Special Report to Congress on Cocaine," April 1997; USSC, "Special Report to Congress on Cocaine," February 1995.

¹¹ USSC, "2006 Sourcebook," March 2007, Table 34.

¹² International Convention on the Elimination of All Forms of Racial Discrimination (CERD), adopted December 21, 1965, G.A. Res. 2106 (XX), annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, entered into force January 4, 1969. Article 1 (1) states:

In this convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

If most of the people who sell and use crack cocaine in the United States were African American, it would be more understandable that most crack defendants are African American. Yet contrary to public assumptions, the average crack offender is white not black. According to federal data for 2005, an estimated 1,392,000 African Americans have used crack cocaine at least once in their lifetime, and 218,000 have used it in the past month. In contrast, an estimated 5,210,000 whites have used crack at least once in their lifetime, and 358,000 used it in the past month.¹³ There is no national data on the racial breakdown of dealers and distributors of crack cocaine, but the limited data that does exist suggests whites constitute a preponderance of crack dealers as they do of crack users. For example, researchers have found that drug users identify their main drug sources as members of the same racial or ethnic background as they are. In addition, a large study conducted in the Miami, Florida metropolitan area of powder and crack cocaine users revealed that over 96 percent of users in each ethnic/racial category were also involved in street-level drug dealing—which also suggests a racial profile of sellers that is comparable to users.¹⁴

In short, differences among the racial groups in drug offending do not account for the marked racial disparities in drug offender arrests and ultimately imprisonment. Instead, most criminal justice analysts believe black crack cocaine offenders are more likely to be arrested than their white counterparts because people buying, using and selling drugs in poor, primarily minority, urban communities are more likely to be arrested than people buying, using and selling drugs in more affluent and predominantly white neighborhoods.¹⁵

We do not believe any honest observer of the public response to crack, including that of federal legislators, can ignore the role of race. Inner city minority neighborhoods did suffer because of the increased drug dealing on the streets, increased crimes by addicts seeking to finance their addiction, and violence by competing drug gangs that came with the advent of crack. But the dismay of local residents was more than matched by the censure, outrage, and concern from outsiders fanned by incessant and sensationalist media stories, by politicians seeking electoral advantage by being “tough on crime,” and by some politicians who were—consciously or otherwise—playing the “race card” in advocating harsh responses to crack. When crack spread throughout low-income minority

¹³ US Department of Health and Human Services Substance Abuse and Mental Health Statistics Agency (SAMHSA), “2005 National Survey on Drug Use & Health,” September 2006, <http://oas.samhsa.gov/NSDUH/2k5NSDUH/tabs/Sect1peTabs1to66.htm#Tab1.47A> (accessed on March 14, 2007), Table 1.47A. A somewhat higher percentage of African Americans than whites have used crack at least once in their lifetime—5.6 percent compared to 3.4 percent; *Ibid.* Table 1.47B.

¹⁴ Dorothy Lockwood, Anne E. Pottieger, and James A. Inciardi, “Crack Use, Crime by Crack Users, and Ethnicity,” in Darnel F. Hawkins, ed., *Ethnicity, Race and Crime* (New York: State University of New York Press, 1995), p. 21.

¹⁵ Human Rights Watch, *United States – Punishment and Prejudice: Racial Disparities in the War on Drugs* (and sources cited therein), Vol. 12, No. 2 (G), May 2000, <http://www.hrw.org/reports/2000/usa/>.

neighborhoods that white Americans already saw as dangerous and threatening, it galvanized a complicated set of racial, class, political, social, and moral dynamics that resulted in extensive drug law enforcement in those neighborhoods as well as uniquely punitive federal sentences for crack offenders.

The greater number of black crack defendants and Congress's choice of harsher sentences for crack offenders may be explained. But explanation is not justification. Congress has many ways to protect minority communities and address drug abuse besides dictating uniquely severe penalties for crimes that are prosecuted disproportionately against African Americans.

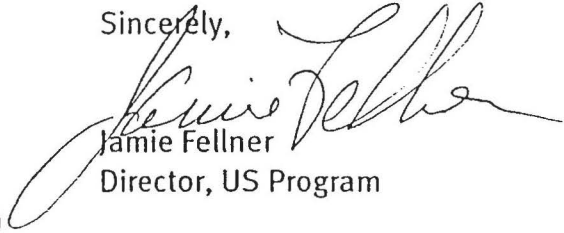
By seeking to eliminate the crack/powder sentencing differential, the Commission affirms the principles of justice and equal protection of the laws that should be the bedrock of US law. As the Commission has recognized in the past and as witnesses at the November 2006 hearing also acknowledged, the crack/powder cocaine sentencing disparities reinforce the perception in African American communities that the US criminal justice system is biased and unfair. Absent change, federal crack sentences will continue to deepen the country's racial fault lines and to belie the nation's commitment to equal justice for all.

Human Rights Watch believes the disparities in the guidelines and legislation should be eliminated by increasing the threshold quantities of crack required for a given sentence to those required for powder cocaine offenses. The disparity should not be eliminated by reducing the quantity of powder cocaine required, which would have the effect of increasing powder cocaine sentences. No one argues that federal sentences for powder cocaine offenses are too low. The injustice caused by the current 100-to-one ratio should not be cured by an arbitrary change to powder cocaine sentences.

Conclusion.

We urge the Commission to seek to restore proportionality to federal cocaine sentences and to reduce their racially disparate impact by submitting to Congress amended guidelines that eliminate the 100-one ratio in the quantities of crack and powder cocaine required to trigger equivalent sentences. We also urge the Commission to recommend to Congress that it eliminate crack and powder cocaine sentencing disparities in existing mandatory minimum sentencing legislation.

Sincerely,


Jamie Fellner
Director, US Program

[273]



April 2, 2007

Member Organizations

National Bar Association
Association of
Black Psychologists
National Association of
Black Social Workers, Inc.
Howard University
School of Law
Congressional Black Caucus
Foundation, Inc.
National Dental Association
National Black Caucus of
State Legislators
Association of
Black Sociologists
National Black Nurses
Association, Inc.
National Organization of
Black Law Enforcement
Executives
National Association of
Blacks in Criminal Justice
National Black Alcoholism &
Addictions Council, Inc.
Black Administrators in
Child Welfare, Inc.
Association of
Black Health-System
Pharmacists
National Medical Association
National Black Police
Association
National Alliance of Black
School Educators
National Institute for Law and
Equity
National Conference of Black
Political Scientists
Black Psychiatrists of
America, Inc.
National Black Prosecutors
Association
National Organization of
African Americans in
Housing
Thurgood Marshall Action
Coalition

Honorable Ricardo Hinojosa
Chairman, United States Sentencing Commission
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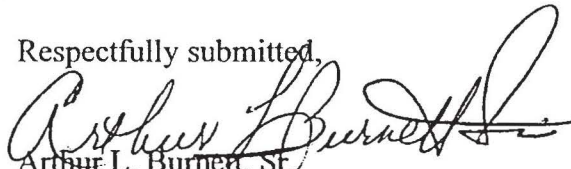
Dear Mr. Chairman:

On behalf of the National African-American Drug Policy Coalition, Inc. I submit this letter in further support of the views expressed in the Written Statement we submitted for the Record in connection with the Public Hearing held on November 14, 2006 on the issue of obtaining parity in sentencing for crack cocaine and powder cocaine, by lowering the sentence levels for a quantity of crack cocaine to the same level as for an equivalent quantity of powder cocaine. With that Written Statement we submitted also a copy of the Report and Recommendations of our Blue Ribbon Commission on Racial Disparities in Substance Abuse Policies which had been released September 8, 2006.

We now wish to advise you and all of the Commissioners of the United States Sentencing Commission that both our Board of Directors and our Advisory Board of Directors from our twenty-three (23) member organizations met at Howard University School of Law on Thursday, March 29, 2007 and reviewed the contents of the letter recently submitted by Deborah Peterson Small on behalf of Break the Chains: Communities of Color and the War on Drugs, copy enclosed, and unanimously adopted the views stated therein as the views and position of the National African American Drug Policy Coalition, Inc. These views are fully consistent with and supportive of the views we expressed in our initial submission and provide further support and elaboration for those views.

Accordingly, we fully join in the views and comments set forth in the enclosed statement and adopt them also as the views and comments of the National African American Drug Policy Coalition, Inc.

Respectfully submitted,



Arthur L. Burnett, Sr.

National Executive Director

Enclosure

Justice Delayed is Justice Denied:
A Plea to Reform Federal Cocaine Sentencing Laws
Submitted by Break the Chains: Communities of Color and the War on Drugs

Office of Public Affairs
United States Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002
pubaffairs@ussc.gov

Dear Commissioners:

Twenty-years ago, in response to what appeared at the time to be a serious epidemic of crack cocaine abuse, Congress enacted laws singling out offenses involving crack cocaine for more severe penalties than other drug crimes including a mandatory five year minimum for sale of as little as 5 grams of crack cocaine. Under these provisions crack cocaine offenses are punished 100 times more severely than crimes involving powder cocaine, consequently the threshold amount that would trigger a five year mandatory sentence for powder cocaine is 500 grams. Congress further singled out crack cocaine for special punishment when it required a mandatory minimum sentence of five (5) years for a first offense of mere *possession* of five grams or more of crack cocaine.¹ There is no federal mandatory minimum sentence for first time possession of powder cocaine or any other currently illicit drug.

In the years since the passage of these laws, there has been a growing chorus of criticism regarding their impact, particularly on African-American defendants and the continuing validity of the 100:1 sentencing disparity. In 1986, before mandatory minimums for crack cocaine offenses became effective, the average federal sentence for black drug offenders was 11% higher than for whites. Four years following the implementation of the crack-powder cocaine sentencing disparity, the average federal sentences for black drug offenders was 49% higher than for whites.² According to the Sentencing Project, between 1994 and 2002, the average time served by African Americans for a drug offense increased by 73%, compared to an increase of 28% for white drug offenders.³ The stiff sentences imposed by these laws were ostensibly intended to provide incentive for federal prosecutors to target major drug traffickers that manage large scale operations moving large amounts of drugs. However, their implementation has had the opposite effect. Because the threshold level quantity of crack cocaine needed to trigger a 5 or 10-year mandatory sentence is so low, prosecutions have focused disproportionately on low-level crack cocaine cases. Between 1995 and 2000 the percentage of federal crack cocaine convictions of street-level dealers rose from almost half (48.4%) to more than two thirds (66.5%).⁴

¹Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 and Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181.

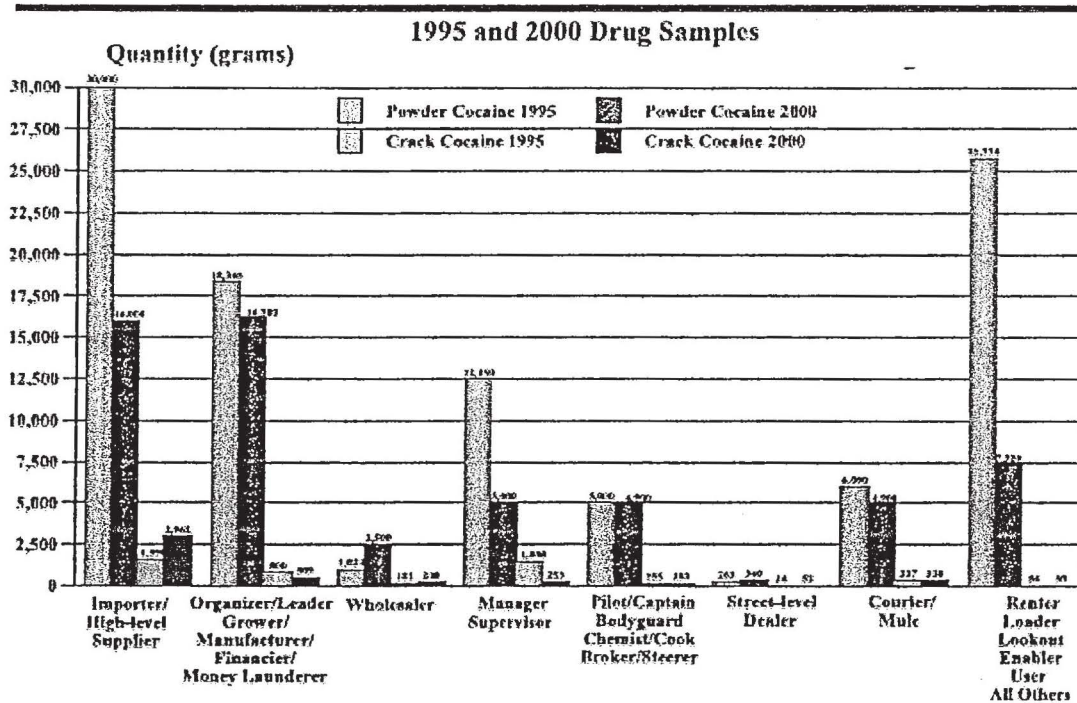
²Mierhoefer, Barbara S., *The General Effect of Mandatory Minimum Prison Terms: A Longitudinal Study of Federal Sentences Imposed* (Washington DC: Federal Judicial Center, 1992).

³The Federal Prison Population: A Statistical Analysis, The Sentencing Project, January 2006,
<http://www.sentencingproject.org/PublicationDetails.aspx?PublicationID=502>

⁴USSC Report to Congress Cocaine Sentencing Policy, May 2002, p. 53.
http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm

Because crack cocaine sentences are based primarily on the amount of drugs involved, the 100:1 disparity affects not only street level offenders but also those prosecuted as major distributors or traffickers. The following chart illustrates the disparity in the median amount of drugs involved in various levels of federal cocaine prosecutions.

Median Drug Quantity by Offender Function in Powder Cocaine and Crack Cocaine Cases



SOURCE: U. S. Sentencing Commission, 1995 and 2000 Drug Samples.

As the chart above clearly shows, the 5 grams of crack cocaine threshold set by Congress as the trigger for a five-year mandatory sentence is not a quantity associated with mid-level, much less “serious” drug traffickers. The median crack cocaine street level dealer was arrested holding 52 grams of crack cocaine enough to trigger a 10-year mandatory sentence. For powder cocaine, the median street level dealer is charged with holding 340 grams of powder cocaine, not enough even to trigger the 5-year mandatory sentence.⁵ In its 2002 Report to Congress, the Commission recognized the adverse effects of the 100:1 sentencing disparity for crack cocaine offenses – “it has resulted in severely long prison terms for low-level crack cocaine offenders and because sentences are based primarily on the quantity of drugs involved, defendants with different levels of culpability are lumped together.” No where is this effect more pronounced and injurious than in the case of women who are prosecuted as mules or co-conspirators. The problem has become so pervasive that it’s known colloquially as “the girlfriend problem”.

Federal sentencing laws punish not just those who sell drugs, but also a wide range of people who help or merely associate with those who sell drugs. A woman charged with conspiracy in a drug crime is held legally responsible for the total amount of drugs possessed or sold by

⁵ Coyle, Michael, Race and Class Penalties in Crack Cocaine Sentencing, the Sentencing Project, March, 2006.

everyone in the operation rendering her vulnerable to extremely long mandatory sentences. As a result, even when they have minimal or no involvement whatsoever in the drug trade, women are punished for the act of remaining with a boyfriend or husband engaged in drug activity. The experience of Sandra Lavonne Rucker is illustrative:

At the time of her arrest Sandra was in relationship with a man who ran a drug operation, and allegedly brought a weapon into Sandra's apartment. Although the testimony of a codefendant established that Sandra was not a principal organizer of the operation and she provided credible testimony that she had never sold drugs and was just the man's girlfriend, she was nevertheless convicted of involvement in the drug conspiracy and was held liable for the total amount of drugs involved in the operation – in this case 50 grams or more of crack cocaine – Sandra received a sentence of life imprisonment.⁶

The impact of federal drug sentencing policy on women has been dramatic. Women are now the fastest growing segment of the prison population. Women are now six times more likely to spend time in prison than they were before the passage of mandatory minimum drug sentencing. As a result of federal mandatory minimum drug sentences including the crack-powder sentencing disparity, African-American women are entering prison at rates that are 2 ½ times higher than Hispanic women and 4 ½ times higher than white women.

Sentences for crack cocaine offenses are grossly disproportionate when compared with sentences for other crimes that don't have mandatory minimums. Five grams of crack cocaine is worth about \$400 and represents one fifty-millionth of annual U.S. cocaine consumption, or about two weeks supply for the average user. Compare the five year mandatory sentence for possession of five grams of crack cocaine with the national average time served for homicide of about five years and four months.⁷

Accumulating evidence demonstrates that the punitive sentencing structure enacted two decades ago to combat crack cocaine abuse has not produced benefits commensurate with the harms it is inflicting. Extensive ethnographic and governmental evidence show that despite increased law enforcement focus on cocaine, the street prices of crack and powder cocaine have remained the same over the past decade. Moreover, cocaine purities are as high as they were at the height of the crack era which demonstrates that the strenuous efforts to target street level crack cocaine dealing has had little impact on supply and overall distribution.⁸

In 1994, Congress directed the Commission to study the impact of the crack-powder disparity in federal cocaine sentencing. In 1995 the Commission recommended a revision of the crack-powder 100:1 sentencing disparity, based on its finding the differential was not justified by any differences between the two forms of the drug and implementation of the laws was having a severely disparate effect on African-American cocaine offenders. The Commission

⁶ Hameefah Jackson, *When Love is a Crime: Why the Drug Prosecutions and Punishments of Female Non-Conspirators Cannot Be Justified by Retributive Principles*, 46 How.L.J. 517, 520-521 (2003); *United States v. Riley*, 215 F.3d 1323 (4th Cir. 2000).

⁷ Caulkins, Jonathan P., Reuter, Peter, *Reorienting U.S. Drug Policy*, Issues in Science and Technology, Fall 2006 www.issues.org/23.1/caulkins.html

⁸ Johnson, B., Dunlap, E., *Crack Distribution and Abuse in New York* (Monsey, NY: Criminal Justice Press) Crime Prevention Studies, Vol. 11, 2000.

recommended that Congress equalize the ratio to 1:1 based on the quantities set to trigger mandatory sentences for powder cocaine offenses and repeal the 5 year mandatory sentence for possession of crack cocaine. The Commission suggested that Congress could accomplish its goal of punishing violent crime related to crack cocaine distribution more severely by using criteria other than drug type or amount to enhance sentences based on specific behavior (e.g. use of weapon; sales to minors or use of minors in transactions; gang-related drug activity). For the first time in the Commission's history, Congress rejected its recommendation in its entirety and refused to consider any changes to the penalties.⁹

In 1997 the Commission again recommended that Congress reduce the crack-powder sentencing disparity, again by changing the weight amounts that would trigger a mandatory sentence except this time the Commission provided a ratio range of 2:1 – 15:1 to choose from. However, again Congress refused to act on the recommendation. The issue came up again in 2002. This time the Commission recommended reducing the crack-powder disparity ratio to 20:1. Each time the Commission also recommended that Congress repeal the mandatory minimum for simple possession of crack cocaine. Once again, Congress refused to act on the recommendation.

Which brings us to the present. Once again the Commission is holding hearings on the crack-powder sentencing disparity and again experts from the judiciary, academia, criminal defense and prosecution as well as drug treatment and drug policy reform advocates have testified in favor of reforming these laws. Much has already been said regarding the racially disparate impact of these laws. Government surveys have consistently shown that drug use rates are similar among all racial and ethnic groups. For crack cocaine, two-thirds of users in the U.S. are white or Hispanic.¹⁰ Research demonstrates that the majority of drug users purchase their drugs from people who are of the same racial or ethnic background as they are which means that the majority of crack cocaine sellers in the U.S. are white.¹¹ Despite these well known facts African-Americans continue to comprise the bulk of federal crack cocaine defendants. Indeed in 2005, 82.3% of federal crack cocaine defendants were African-American. If these numbers were referencing prosecutions for murder, arson, burglary or car theft, there would be no question of racially skewed law enforcement as there is broad acknowledgment that these crimes cut equally across racial, ethnic and class groupings but when it comes to drug crimes – especially crack cocaine - we are all too willing to accept a racialized view of who the offenders are.

Supporters of the current laws claim that crack cocaine offenses are deserving of harsher penalties because there is greater criminality and violence associated with crack cocaine than with powder cocaine. Furthermore, they argue that crack cocaine sellers tend to congregate in poor inner-city communities, turning neighborhoods into war zones that drive businesses away and leave residents in fear.

Testimony the Commission received in November 2006, from experts in drug addiction treatment, criminology and ethnographic research made it clear that whatever validity that position may have had in 1986, it no longer holds today. Dr. Nora Volkow, Director of NIDA testified that there is "*no evidence that crack [cocaine] is associated with more violent behavior than intravenous drug use [of cocaine].*" "*Now can cocaine produce violent behavior?.....yes,*

⁹ Coyle, Michael, Race and Class Penalties in Crack Cocaine Sentencing, the Sentencing Project, March, 2006.

¹⁰ Substance Abuse and Mental Health Services Administration, 2004 National Survey on Drug Use and Health, Population Estimates 1995 (Washington, DC: Sept. 2005), Table 1.43a.

¹¹ Dorothy Lockwood, Anne E. Pottinger, and James Inciardi, "Crack Use, Crime by Crack Users, and Ethnicity," in Darnell F. Hawkins, ed. Ethnicity, Race and Crime, New York: State University of New York Press, 1995. p. 21.

cocaine can be associated with violence very much in part driven by the fact that it can induce paranoid thinking in the individual taking the drug. That occurs whether you inject or you smoke, and it even occurs with snorting. The more repeatedly you are doing it, the more likely you are to become paranoid from cocaine."¹²

Dr. Bruce Johnson of NDRI testified that inner-city African-American youth – especially males - have voluntarily eschewed crack cocaine use which has become heavily stigmatized. He also testified that only a small minority of crack cocaine users in New York City carried guns or used weapons during the past six years. They also had very low incidences of aggravated assault or otherwise caused physical harm to people. It is our belief that similar studies in other jurisdictions would demonstrate the same findings. Another study of criminal activity among heavy or regular crack cocaine users found that their illegal income generating activities were sporadic and tended to be crimes of opportunity as opposed to crimes that involved planning or organized action.¹³

The claim by law enforcement that stronger penalties against crack cocaine are warranted because higher levels of violence are associated with the crack cocaine trade is belied by the available evidence. Two recent studies are of particular note:

In Seattle, Washington, African-Americans account for about 8% of the population but comprised 57% of those arrested for drug crimes in the city. A report analyzing the reasons for such dramatic racial disparities in arrests reached the following conclusions¹⁴:

1. Drug enforcement practices focus on visible street-level markets, which tend to disproportionately involve persons of color, but are not necessarily reflective of all drug markets or even the majority of drug markets.
2. Crime and other ancillary effects are related to all drugs, including those that fall outside the radar of local police. While drug enforcement since the crack epidemic is often characterized as targeting the violence associated with drug markets, it appears that the violence associated with the crack trade has declined significantly and the focus of local policing is more on the quality of life effects of public drug use and markets.
3. Police often claim that they are responding to community complaints and concerns, but the geographic distribution of formal narcotics complaints did not necessarily reflect the concentration of drug arrests – while only 12.5% of drug complaints emanated from the predominantly African-American section of the city, more than 50% of all drug arrests took place there.

Another report by Drs. Bruce Johnson and John C. Cross begins with the following provocative hypothetical:

"Two young men are selling on the sidewalk on a street in upper Manhattan. Both are hoping to make a sale soon so that they can use the money for something they need. Both are selling a product that they purchased from someone with whom they have a personal

¹² U.S.S.C. Public Hearing on Cocaine Sentencing Policy, Tuesday, November 16, 2006, p. 193.

¹³ Cross, J. et al., *Supporting the habit: income generation activities of frequent crack users compared with frequent users of other hard drugs*, Drug and Alcohol Dependence 64 (2000) 191-201.

¹⁴ Beckett, Kathleen. et al. *A Window of Opportunity: Addressing the Complexities of the Relationship Between Drug Enforcement and Racial Disparity in Seattle*, John F. Kennedy School of Government, Harvard University April 2001. <http://www.defender.org/projects/rdp/>

relation. Neither one has a license or a permit to sell products on the street, nor has any plans to pay taxes on their earnings. Both keep an eye out for the police. Despite all these similarities, however, there is a world of difference in the type of product they are selling. One is selling sweaters imported from Peru and if he is caught he will probably be placed under administrative arrest for a few hours and fined. The other is selling crack cocaine: if he is caught he could face from five to ten years in prison.”¹⁵

The report ends with the following conclusions:

“In many ways our research on crack [cocaine] dealers showed that they behaved in ways very similar to informal street vendors. Both had marginal skills for primary sector jobs (low social capital); both put in long hours in public locations during which it was often not clear whether they were working or socializing; both used social networks to further their selling repertoire; and in other ways both used similar techniques for risk management used in the legal informal sector.

While illegality may be for some people a form of entrepreneurship, most of the persons immersed in the illegal drug trade did not and could not squeeze a profit out of the commodity they sold. Rather, most were victims of many forms of exploitation by others in the market.....While people make choices about their actions, the available choices are radically different for different members of our society. Moreover, those choices are structured by our very legal system. For those who have been excluded from the legal formal economic system, the rules of formality and legality create two disparate paths, fraught with the risk of capture but open with the semblance of opportunity. Thus choices deemed to be negative by society are actually made valuable to these marginal populations by the very legal system itself. If crack were a legal drug, very few people currently involved in its production, distribution and sales would be employed by it”.¹⁶

The disparate focus of drug law enforcement on poor inner-city communities and particularly on young men in those communities only exacerbates the endemic problems of poor performing schools, high unemployment, dysfunctional families and persistent poverty. One recent study of crack cocaine sellers found that “the vast majority of respondents engaged in crack [cocaine] selling were raised in severely distressed households. Their career ‘choices’ and their major life changes largely result from, and are coextensive with, their background and the disturbed family systems in which they were raised and/or currently reside.”¹⁷ A fundamental problem facing American society is how to develop appropriate social responses and supports for a whole generation of inner-city youth from severely distressed families and communities who have “said no” to heroin injection and crack smoking but will still find integration into mainstream society impossible. From their vantage point, they have no opportunities or supports to gain access to decent jobs or conventional roles. Locking up an ever larger number of young black male residents of inner-city neighborhoods constitutes a cost to society, and this cost must be placed alongside the alleged benefits of the policy to determine its effectiveness. The fact that inner-city drug sellers are not choirboys does not mean that imprisoning them at ever increasing rates for long periods of time is an effective way to deal with the drug problem.

¹⁵ Cross, J., Johnson, B. et al. *Expanding Dual Labor Market Theory: Crack Dealers and the Informal Sector*, *International Journal of Sociology and Social Policy*, Vol. 20 November 1/ 2 2000, P. 96-133.

¹⁶ Id.

¹⁷ Johnson, B., Dunlap, E., *Crack Distribution and Abuse in New York* (Monsey, NY: Criminal Justice Press) Crime Prevention Studies, Vol. 11, 2000.