Of course, the fact that Congress has raised a mandatory minimum sentence for a particular offense is something that the Sentencing Commission must consider, along with all other relevant factors, in exercising its expert judgment on what an appropriate sentence for an offense might be. In raising a mandatory minimum, Congress may be signaling its view that existing guidelines have, at least in some cases, produced sentences that were too low. It is also frequently the case that in raising a mandatory minimum sentence, Congress will have held hearings or published reports explaining the seriousness of a particular offense. These materials will often provide useful information to the Sentencing Commission in reviewing Guideline levels and should be given careful consideration.

Accordingly, the Committee recommends that the Commission should make an assessment of the adequacy of the existing guidelines, independent of any potentially applicable mandatory minimums and adjust the guidelines as the Commission deems appropriate. If the resulting guideline is less than any potentially applicable mandatory minimum sentence, §5G1.1(b) should be utilized to allow for imposition of that statutorily-required sentence.

We appreciate the opportunity to present our views. If you need additional information, please feel free to contact me at (801) 524-3005, or Judge Reggie B. Walton at (202) 354-3290.

Sincerely,

Paul Cassell

# PUBLIC COMMENT

# JANUARY 30, 2007

*to*

# MARCH 30, 2007

# (COCAINE SENTENCING)

*Ken Cohen*
*General Counsel*

JEFF SESSIONS
ALABAMA

COMMITTEE
ARMED SERVICES
BUDGET
ENERGY AND NATURAL RESOURCES
RULES

# United States Senate

WASHINGTON, DC 20510-0104

March 15, 2007

Dear Colleague,

On January 30, 2007, the U.S. Sentencing Commission ("Sentencing Commission") will accept public comments on its November 2006 hearing on Federal Cocaine Sentencing Policy, specifically the 100 to 1 disparity between crack and powder cocaine penalties. Many recommendations were discussed during the November hearing by government agencies ranging from the Department of Justice to Drug Enforcement Agency as well as local law enforcement representatives. The Sentencing Commission is looking for guidance on recommendations to Congress. Please support my on going efforts to address this disparity in federal law by signing on to comments that will be submitted to Sentencing Commission to urge them to reduce the 100 to 1 disparity.

As you know, I was the lead sponsor of the Drug Sentencing Reform Act of 2006 in the 109th Congress and identical legislation in 2001, both of which would have reduced the disparity for crack and powder cocaine from 100-to-1 to 20-to-1 by reducing the penalty for crack cocaine and increasing the penalty for powder cocaine. The underlying goal of the bill fairness – was treating similar drugs more equally when it comes to sentencing. Senators Cornyn, Pryor and Salazar co-sponsored this legislation in a bi-partisan effort to address this inequity in federal law.

In 1986, Congress passed statutory mandatory minimum sentences for various illegal drugs, including a 5-year mandatory minimum sentence for trafficking 500 grams of powder cocaine or 5 grams of crack and a 10-year mandatory minimum for trafficking 5,000 grams of powder or 50 grams of crack. The 100-to-1 ratio of crack to powder cocaine was enacted largely to prevent the spread of crack cocaine across America, especially into minority neighborhoods. Despite that goal, crack cocaine has spread across the country and into minority neighborhoods. A recent U.S. Sentencing Commission report said that 83% percent of offenders sentenced for crack violations were African Americans. And a Bureau of Prisons study revealed that weapons use and violence are more accurate indicators of recidivism than drug use.

In three separate reports to Congress, in 1995, 1997, and 2002, the Sentencing Commission has urged Congress to reconsider the statutory penalties for crack cocaine.

The Commission is once again considering recommendations to Congress on the federal cocaine disparity. Join my efforts to address the 100 to 1 disparity by signing on to comments to the Commission expressing your support for a reduction in the disparity between crack and powder cocaine penalties in federal law. Thanks for your support.

Very truly yours,

Jeff Sessions
United States Senator

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

March 30, 2007

The Honorable Ricardo H. Hinojosa
Chair
U.S. Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Dear Judge Hinojosa:

We appreciate the important work of the U.S. Sentencing Commission in preparing its 2007 report to Congress on Crack Cocaine and Federal Sentencing Policy and we look forward to your report next month.

Last year marked the twentieth anniversary of the passage of the law mandating disparate treatment for crack and powder cocaine offenders. In 1986, Congress enacted the Anti-Drug Abuse Act, which established much tougher sentences for crack cocaine offenses than for powder cocaine. As a result, it takes 100 times more powder cocaine than crack cocaine to trigger the 5- and 10-year mandatory minimum sentences.

Two decades ago, our nation knew little about crack other than the fear that it was more dangerous than the powder form and would greatly increase drug-related violence. Since that time, the matter has been studied extensively by the Commission.

The Commission now has another opportunity to work with Congress to eliminate or reduce this disparity, as well as the disparate impact on minorities that can result. We welcome the Commission's guidance and recommendations that could improve the fairness of federal sentencing. We hope that the 2007 report will assist Congress by continuing to update the scientific literature on the issue. Please help us by including recommendations that cover statutory and non-statutory remedies, such as the promulgation of a Guideline Amendment in the current amendment cycle, that can assist us in eliminating or reducing the crack-powder disparity without further delay.

Sincerely,

PATRICK LEAHY
Chairman

EDWARD M. KENNEDY
Senator

JOSEPH R. BIDEN, Jr.
Senator

DIANNE FEINSTEIN
Senator

RICHARD J. DURBIN
Senator

# 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

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

Sheila Jackson-Lee
Member of Congress

Bobby L. Rush
Member of Congress

William J. Jefferson
Member of Congress

Keith Ellison
Member of Congress

Donald M. Payne
Member of Congress

Maxine Waters
Member of Congress

Julia Carson
Member of Congress

Wm. Lacy Clay
Member of Congress

Yvette D. Clarke
Member of Congress

JEFF SESSIONS
ALABAMA

[illegible]

# United States Senate

WASHINGTON, DC 20510-0104

March 30, 2007

The Honorable Ricardo H. Hinojosa
Chair
U.S. Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Dear Judge Hinojosa:

I appreciate the hard work both you and the U.S. Sentencing Commission have devoted to the issue of Federal sentencing policy regarding crack and cocaine. I look forward to the Commission's report to Congress on Crack Cocaine and Federal Sentencing Policy next month.

As you know, I was the lead sponsor of the Drug Sentencing Reform Act of 2006 in the 109th Congress and identical legislation in 2001, both of which would have reduced the disparity for crack and powder cocaine from 100-to-1 to 20-to-1 by reducing the mandatory penalty for crack cocaine and increasing the mandatory penalty for powder cocaine. The underlying goal of the bill was fairness - treating similar drugs more equally when it comes to sentencing. Senators Cornyn, Pryor and Salazar co-sponsored this legislation in a bi-partisan effort to address this inequity in federal law.

In 1986, Congress passed statutory mandatory minimum sentences for various illegal drugs, including a 5-year mandatory minimum sentence for trafficking 500 grams of powder cocaine or 5 grams of crack and a 10-year mandatory minimum for trafficking 5,000 grams of powder or 50 grams of crack. The 100-to-1 ratio of crack to powder cocaine was enacted largely to prevent the spread of crack cocaine across America, especially into minority neighborhoods. Despite that goal, crack cocaine has spread across the country and into minority neighborhoods. A recent U.S. Sentencing Commission report said that 83% percent of offenders sentenced for crack violations were African Americans. And a Bureau of Prisons study revealed that weapons use and violence are more accurate indicators of recidivism than drug use.

In three separate reports to Congress, in 1995, 1997, and 2002, the Sentencing Commission has urged Congress to reconsider the statutory penalties for crack cocaine. Once again, the Commission has an opportunity to work with Congress and help improve these statutory mandatory minimums by reducing the harsh disparity that currently exists. By reducing the disparity, we can strengthen the criminal justice system, reduce judicial manipulation, and restore confidence in the system's fairness.

It is my hope that the Commission's 2007 report will include an update to its 2002 Report on Federal Cocaine Sentencing Policy, specifically its data, literature review, and medical chapters. Furthermore, I would also like to see a specific recommendation to Congress about how it should amend the 100:1 statutory ratio that governs cocaine sentencing. Legislation I introduced would reduce this ratio to 20:1, and I believe that to be a sound and justified ratio based on the nature and disparate impact of crack and cocaine. This legislation is directly in line with the Commission's 2002 recommendation that the statutory ratio be no more than 20:1.

I believe these recommendations would provide a measured and balanced approach to improving the statutory and guidelines system that governs the sentencing of federal drug offenders. A more dramatic change that results in a substantial reduction in drug sentences is not consistent with sound public policy and could jeopardize the bi-partisan effort that is now underway. I believe the time has come for Congress to exercise a legislative change in this area, and I look forward to working with the Commission to get this accomplished.

Very Truly Yours,

Jeff Sessions
United States Senator

Equal & retroactive

March 30, 2007

**VIA EMAIL**
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500
Washington, DC 20002-8002
Attention: Public Affairs
Dear Commissioners:

**Re: USSC Federal Register request for public comment, January 30, 2007**

I'm writing the Commission today with the hope that you will do something about one of the most notorious injustices in this country's criminal justice system - - - the crack cocaine laws. My name is Karen Garrison and I am writing on behalf of my twin sons Lawrence and Lamont Garrison who were indicted on April 7, 1998 along with 13 others charging them with Conspiracy to distribute Cocaine and Cocaine Base in violation of 21 U.S.C. §841 *et. al.* On October 16, 1998, the Court of Eastern District of Virginia sentenced my sons Lawrence to 15.67 years and Lamont to 19.58 years. Lamont received the enhanced sentence because he testified that he was not a crack dealer, but was in fact found guilty. Their sentence was also higher because the court was allowed to convert powder cocaine to crack cocaine at sentencing via "the preponderance of evidence." If the drugs had remained cocaine quantities of powder Lawrence would have received a sentence of 121-151 months according to the guidelines. His brother Lamont's sentence would have been 151-188 months with that 2-point enhancement.

Now I must add that I am not here to debate the guilt or innocence of my sons, but I am here to call into question the harsh sentences that they received.

The experience hearing a guilty verdict being handed down was traumatic enough for me, but the sentencing was heart wrenching. My sons were first time non-violent offenders. I could not believe that this could happen to anyone, let alone our family. Neither Lawrence nor Lamont had ever been in trouble before in school growing up or in college. They never even stayed out all night. My boys made the honor roll, were tracked into gifted and talented programs, and had nearly perfect school attendance. I taught them faith as I had learned from my grandmother.

After seven years of college, my twin sons were in the final stretch of their bachelor's degrees and anticipating their graduation from Howard University was so exciting for me. At that time their conviction seemed all so new and unjust, but now I have found that it is normal. I now know for sure that Lawrence and Lamont Garrison are casualties of an

unjust and racial war on drugs.

We had no money for attorneys. My sons had court appointed lawyers for the trial. However, Lawrence and Lamont believed that justice would prevail. The court appointed lawyers said they would get no more than 10 years, which still seemed terrible. The trial lasted for three days. Prior to the indictment, there was no search warrant issued, no drugs, nor guns found in our house. In addition, both of my sons took drug tests that came back negative. The jury was never given this information.

After the trial a local news stations interviewed the jurors. One of the jurors said he thought that they would just get "a slap on the hand." Another juror cried after seeing it on the news. I could not believe that this could be happening to our family.

How do you fight an unjust justice system? I felt scared at every turn, but I could not let my sons sense it. It was a whirlwind. I fell out in the courtroom when the judge read "guilty." I could not be strong. I think my heart stopped. I could not stop crying. I felt lost and alone.

It is also my hope that as you consider equalizing the crack to cocaine ratio, you also consider making the law retroactive, so that Lawrence and Lamont have an opportunity to once again become contributing members of society. I hope that you will not stand to see another young person's potential destroyed and change this law so that crack is treated the same as powder cocaine. Thank your for your time and attention to this matter.

Sincerely,
Karen Garrison

NCLR
NATIONAL COUNCIL OF LA RAZA

MALDEF

- 1:1 - upping crack to powder
- Don't touch powder
- Alternatives for 1.1. Offenders under 3553(c)
- any new thresholds be scientifically & medically justified

March 20, 2007

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

Attention: Public Affairs Officer

On behalf of the National Council of La Raza[1] (NCLR), and the Mexican American Legal Defense and Educational Fund[2] (MALDEF), we are respectfully submitting public comments to the U.S. Sentencing Commission (USSC) on federal sentencing laws for crack and powder cocaine offenses.

NCLR and MALDEF believe that the elimination of the threshold differential that exists between crack and powder sentences is the only fair solution to eradicating the disparity. This should be achieved by raising the crack threshold to the levels of powder. Current federal law punishes crack cocaine offenders much more severely than any other drug offenders. This subjects low-level participants, like lookouts, to the same or more severe sentences as major dealers. Current federal law has had a disproportionate impact on communities of color and low-income communities.

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

Numerous studies have documented that the 100:1 powder-crack sentencing ratio directly contributes to persistent racial imbalances in the justice system, affecting mainly African Americans but increasingly Latinos.[3] Although the spirit of the law was to go after the

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[1] NCLR is the largest national Latino civil rights and advocacy organization in the U.S. Through its network of nearly 300 affiliated community-based organizations (CBOs), NCLR reaches millions of Hispanics each year in 41 states, Puerto Rico, and the District of Columbia. NCLR conducts applied research, policy analysis, and advocacy, providing a Latino perspective in five key areas – assets/investments, civil rights/immigration, education, employment and economic status, and health.
[2]Founded in 1968, MALDEF, the nation's leading Latino legal organization, promotes and protects the rights of Latinos through advocacy, litigation, community education and outreach, leadership development, and higher education scholarships.

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

"big ring leaders," what we know now is that prisons are filled with low-level, mostly nonviolent drug offenders. Furthermore, the drug use rates per capita among minorities and White Americans has consistently been remarkably similar over the years.[4]

## DISPARATE IMPACT OF DRUG LAWS ON LATINOS

In 2000, Latinos constituted 12.5% of the population in the United States, according to the 2000 Census. Yet, according to Sentencing Commission data, Hispanics accounted for 43.4% of the total drug offenders that year; of those, 50.8% were convicted for possession or trafficking of powder cocaine, and 9% for crack cocaine. This is a significant increase from the 1992 figures, which show that 39.8% of Hispanic drug offenders were convicted for possession or trafficking of powder cocaine, and 5.3% for crack cocaine.[5]

Contrary to popular belief and as stated above, the fact that Latinos and other racial and ethnic minorities are disproportionately disadvantaged by sentencing policies is not because minorities commit more drug crimes, or use drugs at a higher rate, than Anglos. Rather, the disproportionate number of Latino drug offenders appears to be the result of a combination of factors, beginning with the phenomenon now widely known as "racial profiling." NCLR's 2004 study,[6] as well as a host of other studies, demonstrates that from the moment of arrest to the pretrial detention phase and the charging and plea bargain decisions of prosecutors, through the adjudication process, the determination of a sentence, and the availability of drug treatment, Latinos encounter significant inequalities in the U.S. criminal justice system.

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

Contrary to the popular stereotype, the overwhelming majority of incarcerated Latinos have been convicted of relatively minor nonviolent offenses, are first-time offenders, or both. Over the past decade, public opinion research reveals that a large majority of the public is prepared to support more rational sentences, including substance abuse treatment, for low-level drug offenders. The costs of excessive incarceration to the

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

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

[6] *Lost Opportunities: The Reality of Latinos in the Federal Criminal Justices System,* National Council of La Raza, October 2004.

groups affected, and to the broader American society – in terms of reduced current economic productivity, barriers to future employment, inhibited civic participation, and growing racial/ethnic societal inequalities – are extremely high. MALDEF and NCLR believe that this Commission can play a critical role in reducing unnecessary and excessive incarceration rates of Latinos in the U.S., as discussed below.

## RECOMMENDATIONS

In three separate reports to Congress, in 1995, 1997, and 2002, the U.S. Sentencing Commission (USSC) urged Congress to reconsider the statutory penalties for crack cocaine. Judges, federal prosecutors, medical professionals, and other experts have all joined the USSC in calling for a reassessment of the current standards. The elimination of the threshold differential that exists between crack and powder sentences must be equalized as much as possible by raising the crack triggers to the level of powder. Given that crack is derived from powder cocaine, and that crack and powder cocaine have exactly the same physiological and pharmacological effects on the human brain,[7] equalizing the ratio to 1:1 is the only fair solution to eradicating the disparity. NCLR and MALDEF urge the U.S. Sentencing Commission to consider the following recommendations as the Commission prepares its report to Congress.

1. **Substantially redress the crack-powder ratio disparity by raising the crack thresholds and maintaining the powder thresholds.** Over the past 20 years, it has been proven that the 100:1 powder-crack sentencing ratio has a negative impact mainly on African Americans but increasingly on Latinos as well. Therefore, we call for closing the gap between crack and powder sentences, so that five grams of crack triggers the same exact sentence as five grams of powder.

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

3. **Make more widely available alternative methods of punishment for low-level, nonviolent drug offenders.** Under 18 USC Section 3553(a), penalties should not

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

be more severe than necessary and should correspond to the culpability of the defendant. Where current law prevents judges from imposing just sentences for such offenders, the Commission should recommend that Congress enact appropriate reforms.

4. **DEA agents and federal prosecutors should concentrate upon deterring the importation of millions of tons of powder cocaine and prosecuting ring leaders with the fullest weight of the law.** Even at the current highest levels for crack (50 grams) and powder (5,000 grams), which trigger the maximum mandatory minimum sentence (ten years), it is a relatively insignificant measure to deter drug trafficking and promote community safety. These low-level actors are easily replaceable by high-level drug kingpins. In the spirit of the 1986 law, the Act should be renewed by investing in training and resources and reserving prison beds for high-level kingpins.

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

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

Sincerely,

Janet Murguia
President and CEO
NCLR

Peter Zamora
Regional Counsel
MALDEF

- Tell Congress to address
- Incorporate 1:1 in FSGs

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.

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.

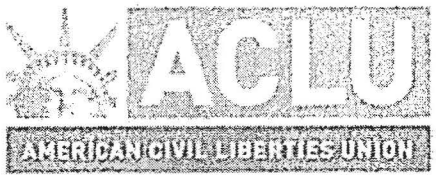
The severe crack cocaine penalties also divert limited resources into the prison system. Funds devoted to the prosecution and incarceration of crack cocaine defendants reduces the potential for investments in education, urban renewal, economic development, and health care. Finally, mandatory minimum 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

WASHINGTON
LEGISLATIVE OFFICE




March 16, 2007

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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.

## 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
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Jesselyn McCurdy
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[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 Reinarman & 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 Reinarman & 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;

(3) the kinds of sentence and the sentencing range established by the United

States Sentencing Guidelines (attached Guideline table);

(4) any pertinent policy statements issued by the United States Sentencing Commission;

(5) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(6) the need to provide restitution to any victims of the offense.

The current wide disparity between crack and powder cocaine sentencing is substantially inconsistent with these purposes of sentencing and the policy goals underlying specific sentencing guidelines. Unfortunately, not even one of these sentencing principles is being advanced by the current statutory scheme governing crack cocaine. In fact several of the purposes and factors are directly at odds with current laws governing penalties for crack offenses. For example, in considering the "history and characteristics of the defendant", crack penalties reveal a powerful and obvious racial result, if not racial bias – this is certainly not the intended, nor a permissible type of personal characteristic to be factored into a sentence. The current sentencing disparity fails to reflect a difference in the seriousness of the crime, it fails to provide greater deterrence, it fails to enhance public safety, and fails to support any legitimate sentencing policy. In fact, considering "the need to avoid unnecessary sentencing disparities", the current policy represents a massive abrogation of that purpose of sentencing.

The current statutory penalties equate one unit of crack to 100 units of powder cocaine for purposes of sentencing. For example 5 grams of crack (the weight of two pennies) and 500 grams of powder cocaine will result in the same mandatory 5-year sentence (with a maximum of 20 years). Possession of 50 grams of crack (the weight of a candy bar) results in a mandatory 10-year sentence. Congress may have believed, in 1986 and 1988, that there were justifications for such a disparity. However, twenty years later, we know that the facts don't support that policy; we now have evidence that the policy has been counterproductive. Today, it is known that Congress relied on incorrect factual assumptions when it adopted the 100: 1 ratio.

The Commission should recommend immediate action to eliminate the sentencing disparity that has been based on the false assumptions leading to the discrepancy between crack and powder offense sentencing. These sentencing disparities have resulted in a host of social and economic harms, rather than addressing crack offenses in a manner that would adhere to the ameliorative purposes of the federal penal statutes and sentencing guidelines.

**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 quantities[1]. 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 cocaine[2]. 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 policy[3].

## 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 brain[4]. 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 unjustifiably harsh impact on minority populations. Given that the majority of crack

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[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

users are white, while the overwhelming burden of harsh crack sentences have fallen on African Americans, the current penalties violate principles of equal protection. This Commission has already reported that 84% of federal crack defendants have been black. In 1991, this Commission also found that, under the drug laws enacted in 1986 and 1988, non-whites were much more likely to receive mandatory minimum sentences and that the sentences were being applied in a discriminatory manner. This Commission then recognized the irony that the sentencing guidelines and the new mandatory minimum sentences were creating wide disparities in sentencing instead of furthering the stated goal of more consistency in sentencing. Even worse, the disparity was no longer a function of differering judicial inclinations – rather, it became a de facto function of race.

The statistics are disturbing: while the majority (66%) of crack users are white or Hispanic, African Americans constitute the vast majority of those convicted of crack offenses (80% African American compared to 7.8% white). At the same time, the majority of those convicted for powder cocaine offenses are white. Data demonstrates that African Americans make up 15% of the nation's drug users, yet 37% of those arrested for drug offenses, 59% of those convicted, and 74% of those sentenced to prison for a drug offense[6]. These results are completely unacceptable in a just society and suggest the need for immediate reform. Harsh crack sentencing has also caused an explosion in the incarceration rates of African American and Hispanic women, with obvious concomitant harm to children and families.

**Current Sentencing Laws Squander Limited Resources By Failing to Target Major Traffickers, as Intended by Congress, Rather than Users of Small Quantities of Crack**

Unduly harsh crack sentences, and especially, the mandatory minimum sentences associated therewith, have resulted in low-level participants being subject to the same penalties as major dealers in a drug organization[7]. In some cases, conspiracy convictions have resulted in long sentences for individuals who did not actually use or distribute drugs. Unfair and excessive crack offense sentences have also led to the absurd result that non-violent African American crack offenders spend about as much time in prison as do *violent* white offenders. Crack offenders spend an average of 3.5 more years in prison than powder cocaine offenders.

These results of our failed drug policies have caused an explosion in the population of U.S. prisons at great expense to the American taxpayer. Undoubtedly, prison conditions have deteriorated as a result of harsh federal penalties resulting in the warehousing of thousands of non-violent offenders. Of no less importance, harsh crack penalties have caused the unnecessary suffering of non-violent crack offenders who are serving unjustifiably long sentences. Finally, the large increase in the incarceration

[6] See Interfaith Drug Policy Initiative, Mandatory Minimum Sentencing Fact Sheet, http://idpi.us/dpr/factsheets/mm_factsheet.htm

[7] Susan Boyd, From Witches to Crack Moms, Women, Drug Law and Policy, 208-09 (2004)

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

**DRUG POLICY ALLIANCE**

**Reason. Compassion. Justice.**

[redacted]han A. Nadelmann

Ira Glasser

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 <u>each</u> 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

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

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[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.

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# DRUG POLICY ALLIANCE
## OFFICE OF NATIONAL AFFAIRS

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**U.S. Department of Justice**
Criminal Division

*Office of the Assistant Attorney General* *Washington, DC 20530-0001*

March 30, 2007

The Honorable Ricardo H. Hinojosa
Chair, U.S. Sentencing Commission
One Columbus Circle, NE
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Dear Judge Hinojosa:

On behalf of the Department of Justice, I submit the following comments regarding the proposed amendments to the federal sentencing guidelines and issues for comment published in the Federal Register in January 2007. We thank the Commissioners and Commission staff for addressing these important issues in addition to the valuable work the Commission has already done in providing updated information on cases decided since the Supreme Court's decision in United States v. Booker as well the eleventh edition of the United States Sentencing Commission's *Sourcebook of Federal Sentencing Statistics* containing all of the data for fiscal year 2006. We look forward to continuing to work with the Commission on these issues to ensure a fair sentencing guidelines system that serves justice and the American people.

## 1. Transportation

***Issue for Comment 1 - USSG § 2Q1.2 (49 U.S.C. § 5124):*** 49 U.S.C. § 5124 (Transportation of Hazardous Material) was amended to provide a new aggravated felony with a 10-year statutory maximum term of imprisonment for cases involving a release of a hazardous material that results in death or bodily injury. The Department recommends adding specific offense characteristics to the applicable guideline, USSG § 2Q1.2, to enhance the penalty for violations of 49 U.S.C. § 5124 in which death or injury results. USSG § 2Q1.2 already provides an enhancement of 9 levels if there was a substantial likelihood that death or serious bodily injury would result from the offense. Although Application Note 6 states that an upward departure would be warranted in any case in which death or serious bodily injury results, it would be logical to provide a greater offense level when death or srious bodily injury actually results if a substantial likelihood of the same is already a specific offense characteristic. Such a structure would be consistent with other guidelines for crimes presenting risks of death or serious bodily injury. *See, e.g.*, USSG § 2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien) (including specific offense characteristics for substantial risk of death or serious bodily injury; for actual

bodily injury; for death; and using a cross-reference to murder guideline); § 2A4.1 (Kidnapping, Abduction, Unlawful Restraint) (including specific offense characteristic for injury; using cross-reference for murder); *but see* § 2K1.4 (Arson; Property Damage by Use of Explosives) (relying on Chapter Five, Part K departure in case of bodily injury and on cross-reference for death). Such an enhancement could be in intervals proportional to the enhancements at USSG § 2L1.1 for death or serious bodily injury.

The Commission has also proposed the option of increasing the already-existing two-level enhancement that applies under USSG § 2Q1.2 for violations of 49 U.S.C. § 5124. Such an across-the-board enhancement for 49 U.S.C. § 5124 sentences, however, would not address a need for greater sentences in the case of actual injury or death. The Commission also proposes providing a minimum offense level for 49 U.S.C. § 5124 offenses resulting in death or serious bodily injury. The Department has no objection to appropriate minimum offense levels for offenses resulting in death or serious bodily injury.

***Issue for Comment 2 - USSG § 2B2.3 (18 U.S.C. § 1036):*** 18 U.S.C. § 1036 (Entry by False Pretenses to Any Real Property, Vessel, or Aircraft of the United States or Secure Area of Any Airport) was amended to add seaports to the list of covered locations and to increase the statutory maximum term of imprisonment from 5 years to 10 years. The statute is referenced to USSG § 2B2.3 (Trespass), which provides a cross-reference in subsection (c) if the offense was committed with the intent to commit a felony offense. The Department recommends keeping the guideline as it is, rather than adding a specific offense characteristic with a fixed increase for all 18 U.S.C. § 1036 crimes committed with the intent to commit another felony. Cross-referencing the relevant underlying felony allows the sentence to be correlated to the gravity of potential underlying crimes, ranging from a relatively minor theft of goods to a bombing of a port. A general specific offense characteristic would not achieve the same proportionality with the seriousness of the intended offense.

***Issue for Comment 3 - USSG § 2C1.1 (18 U.S.C. § 226):*** The Commission has proposed referring the new statute against bribery affecting port security, 18 U.S.C. § 226, to USSG § 2C1.1, which addresses, among other things, bribery. The Department agrees with that reference because Section 2C1.1 most closely addresses the statute's conduct. The guideline provides a cross-reference if the offense was committed for the purpose of facilitating the commission of another criminal offense, *see* USSG § 2C1.1(c)(1). The Commission proposes, as an alternative to that cross-reference, a specific offense characteristic for bribery cases involving an intent to commit an act of domestic or international terrorism; the specific offense characteristic would result in an offense level similar to that used for material support (USSG § 2M5.3, which has a base offense level of 26). In the Department's view, the cross-reference is the better option because it offers the advantage of providing a penalty correlated to the gravity of the plotted offense. The cross-reference to the underlying offense would also allow an adequate sentence for some cases that endanger security without necessarily meeting a terrorism intent definition. However, the Department would not object to adding to the guideline a material-support-like specific offense characteristic, in addition to (rather than in place of) the cross-reference to the

underlying criminal offense. Alternatively, a cross-reference to USSG § 2M5.3 would achieve the same result as incorporating a new specific offense characteristic into USSG § 2C1.1, and the Department would not object to a cross-reference to USSG § 2M5.3 if it is in addition to the cross-reference already existing at USSG § 2C1.1(c)(1). The Department does not support the proposal by the Practitioners Advisory Group to state that §3A1.4 would not apply if there were an enhancement added at USSG § 2C1.1. If the sentence increases were not to apply together, it is USSG § 3A1.4 that should apply. *See* USSG § 2J1.2, comment. n.2(B) (applying USSG § 3A1.4 adjustment but not specific offense characteristic relating to terrorism).

***Issue for Comment 4 - USSG § 2A5.2:*** The Department favors in USSG § 2A5.2 (Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Operation, or Maintenance of Mass Transportation Vehicle or Ferry) using the term "mass transportation" instead of "public transportation." "Mass transportation" is the term used in 18 U.S.C. § 1992, which is referenced to USSG § 2A5.2, and the term is defined in that statute to include school bus, charter, and sightseeing transportation and passenger vessels. "Public transportation" excludes school bus, charter bus, intercity bus, and intercity passenger rail transportation. The guideline would be most useful if it correlated to the crimes defined in the statute. Differing coverage between the statute and the guideline could lead to confusion at sentencing.

## 2. Sex Offenses

***Proposed § 2A3.5 (18 U.S.C. § 2250):*** We believe it is appropriate to amend the specific offense characteristic for an offense against a minor to track the Congressional directive, which is not limited to sex offenses against a minor. Accordingly, "committed a sex offense against a minor" should be changed to, "committed an offense against a minor".

Additionally, this guideline should reflect the ten year maximum penalty for this offense by providing a guideline sentence that would encompass ten years' imprisonment for an aggravated offense. For example, assuming an offender was in criminal history category III, was required to register for a Tier III offense, and committed an offense against a minor while not registered, that offender should face a guideline range encompassing 120 months before acceptance of responsibility. We believe this can be accomplished by increasing the specific offense characteristic for a defendant, who was required to be registered for a Tier III offense and committed an offense against a minor, to12 levels which would mean a total offense level of 28, with a range of 97-121 months.

Moreover, we recommend that the specific offense characteristic for an offender who committed a sex offense while not registered should be 8 levels, not 6. If this change were made, a criminal history category III offender whose registration was for a Tier III offense and who committed a sex offense while not registered would be at level 24 before acceptance, with a range of 63-78 months.

In proposed § 2A3.5(b)(1), we recommend that the Commission adopt Option 1, applying the enhancements in cases where the defendant committed the specified offenses while unregistered, because that language tracks the Congressional directive at Section 141(b) of the Walsh Act. That directive states that the Commission "shall consider .... whether the person committed [a specified offense] in connection with, or during, the period for which the person failed to register." *See* Section 141(b)(1) and (2) of the Walsh Act. In contrast, Option 2, which would apply the enhancements only in cases where the defendant was convicted of the specified offenses, would be inconsistent with that directive. Simply put, Option 2 would unnecessarily limit the enhancement to cases where the offender had been convicted of a specified offense while unregistered, whereas Congress indicated the real issue for application of the enhancement should be whether the offender committed a specified offense while unregistered.

The most recent proposal has two options for addressing an offender's voluntary attempt to correct a failure to register, in response to the Congressional directive in Section 141(b)(3) of the Walsh Act. In considering these options, the Commission should first recognize the affirmative defense at 18 U.S.C. § 2250(b), which in our opinion would prevent the vast majority of cases where offenders voluntarily attempted to comply with registration requirements from ever reaching the sentencing phase. The Commission should also recognize that the underlying purpose of this legislation is to provide an incentive for sex offenders to register as required by establishing a meaningful consequence for their failure to do so. Finally, it should also be noted that whether an offender voluntarily attempted to correct a failure to register offense is an issue only in cases where the offender knowingly committed that offense. Accordingly, as a completed offense has already occurred, arguably the base offense level would be an appropriate range for a case where, having committed the offense, the offender later attempts to correct his failure to register.

That said, of the two options under consideration we recommend Option 1 with a two level decrease. Option 2, which would allow for a downward departure, is not limited to cases where the offender does not commit a specified offense while unregistered. Accordingly, it would potentially provide a windfall reduction to offenders who commit specified offenses while unregistered, precisely those who least merit a sentence reduction. In contrast, Option 1 rightly would deny this reduction to offenders who committed specified offenses while unregistered.

Under our recommendation, an aggravated offender, such as one whose registration was for a Tier III offense and who committed an offense against a minor while unregistered, would face a guidelines sentence encompassing the maximum statutory penalty, assuming criminal history category III. At the other extreme, a criminal history category III offender whose registration was for a Tier I offense, who did not commit a qualifying offense while unregistered, and who voluntarily attempted to correct his failure to register would be at level 10 (10-16 months) before acceptance. In the middle, still assuming the offender is in criminal history category III, an offender who did not commit a qualifying offense while unregistered and whose registration was for a Tier II offense would be at level 14 before acceptance, or 21-27 months. We believe our suggestion appropriately creates a sentencing scheme where aggravated offenders will

face sentences encompassing the statutory maximum while also taking into account the relative severity of different types of violations and the mitigating factor of an offender's voluntarily attempting to correct the failure to register before being informed of the violation by law enforcement.

***Proposed § 2A3.6 (18 U.S.C. §§ 2250(c) and 2260A):*** As drafted, the current proposal would simply state that the guideline sentence is that required by statute for violations of 18 U.S.C. § 2260A, and that the guideline sentence is the minimum term required by statute for violations of 18 U.S.C. § 2250(c). This is an appropriate guideline for § 2260A, as the sentence for that offense is set at 10 years in addition and consecutive to the penalty for the underlying offense. However, it is not appropriate for § 2250(c), because the statutory sentence has such a broad range – between 5 and 30 years in addition and consecutive to the underlying § 2250(a) offense. Simply put, the current proposal ignores Congress's decision to set a minimum and maximum term for a § 2250(c) offense.

In order to account for the significantly dissimilar penalties under the two statutes, we recommend that this proposed guideline be revised to read as follows:

§2A3.6. **Aggravated Offenses Relating to Registration as a Sex Offender**

(a) If the defendant was convicted under 18 U.S.C. § 2260A, the guideline sentence is the term of imprisonment required by statute. Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) shall not apply to that count of conviction.

(b) If the defendant was convicted under 18 U.S.C. § 2250(c):

(1) Base Offense Level: 25

(2) Specific Offense Characteristics:

(i) If the offense that gave rise to the requirement to register was a (A) Tier II offense, increase by 2 levels; or (B) Tier III offense, increase by 4 levels.

(ii) If the offender committed a crime of violence against a minor while not registered, increase by 6 levels; if the minor sustained bodily injury as a result, increase by 9 levels; if the minor sustained serious bodily injury as a result, increase by 12 levels.

(iii) If the offender committed a sex offense against someone other than a minor while not registered, increase by 10 levels.