
UNITED STATES SENTENCING COMMISSION



WRITTEN TESTIMONY

PUBLIC HEARING
February 25, 2002

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Public Hearing



February 25–26, 2002

Judicial Conference Center
Washington, DC

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PUBLIC HEARING AGENDA

DAY ONE: MONDAY, FEBRUARY 25, 2002, 3:00 P.M. – 5:00 P.M.

DAY TWO: TUESDAY, FEBRUARY 26, 2002, 9:30 A.M. – 11:30 A.M.

THURGOOD MARSHALL FEDERAL JUDICIARY BUILDING
WASHINGTON, DC

FEBRUARY 25, 2002

INTRODUCTION

Judge Diana E. Murphy
Commission Chair

AMENDMENT 8 (DRUG PENALTIES)

PANEL ONE: Medical/Academic Community

(See Feb. 25, Binder Tab 1)

Glen Hanson, D.D.S.
Acting Director
National Institute on Drug Abuse

Q&A

Deborah Frank, M.D.
Professor of Pediatrics
Boston University School of Medicine

Q&A

Ira J. Chasnoff, M.D.
President
Children's Research Triangle

Q&A

Alfred Blumstein, Ph.D.
Professor of Urban Systems and Operations Research
Carnegie Mellon University

Q&A

PANEL TWO: Community Representatives/Interested Parties (See Feb. 25, Binder Tab 2)

Wade Henderson
Executive Director
Leadership Conference on Civil Rights

Q&A

Charles Kamasaki
Senior Vice President
Office of Research, Advocacy, and Legislation
National Council of La Raza

Q&A

AMENDMENT 7 (TERRORISM)

PANEL THREE: Law Enforcement

(See Feb. 25, Binder Tab 3)

James F. Jarboe
Section Chief, Domestic Terrorism
Counterterrorism Planning Section
Federal Bureau of Investigation

Q&A

Cathleen Corken
Deputy Chief for Terrorism
Department of Justice

Q&A

ADJOURN



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United States Sentencing Commission
Commission Public Hearing

Summary of Statement by Glen R. Hanson, Ph.D., D.D.S.
National Institute on Drug Abuse, National Institutes of Health
February 25, 2002

- NIDA-supported research has found cocaine to be a powerfully addictive stimulant that directly affects the brain. Like other central nervous system stimulants, such as amphetamine and methamphetamine, cocaine increases levels of the neurotransmitter dopamine and produces alertness and heightens energy. Heroin belongs to a different category of drugs and causes relaxation and CNS depression.
- Stimulants continue to be dominant drugs of abuse in this country. Although marijuana remains the most commonly used illicit drug in the country, according to the Substance Abuse and Mental Health Services Administration's National Household Survey on Drug Abuse (NHSDA) 1.2 million Americans were current cocaine users in 2000. This represents 0.5 percent of the population aged 12 and older.
- There are two chemical forms of cocaine: the hydrochloride salt and the "freebase." The hydrochloride salt, or powdered form of cocaine, dissolves in water and, when abused, can be administered intravenously (by vein) or intranasally (in the nose). Freebase refers to a substance prepared by neutralizing cocaine hydrochloride with an alkaline substance to form a volatile form of cocaine that is smokable. "Crack" is the street name given to the freebase form of cocaine that has been processed from the powdered cocaine hydrochloride form to a smokable substance.
- Cocaine, in any form, produces the same effects once it reaches the brain. It produces similar physiological and psychological effects, but the onset, intensity and duration of its effects are related directly to the method of use and how rapidly cocaine enters the brain. The principal routes of administration for cocaine are oral, intranasal, intravenous, and inhalation. Cocaine inhalation produces the quickest and highest peak blood levels in the brain without the risks attendant to IV use. Repeated cocaine use by any route of administration can produce addiction and other adverse health consequences, especially to the cardiovascular system.
- Babies born to mothers who abused drugs during pregnancy often are prematurely delivered, have low birth weights, smaller head circumferences, and are often shorter in length. Estimating the full extent of the consequences of maternal drug abuse is difficult. Through the use of sophisticated instruments and approaches, researchers have found the effects not to be as devastating as originally believed, especially for children up to six years of age. There does appear to be an association between prenatal cocaine exposure and some developmental outcomes (e.g. attention and emotional regulation) that needs to be further explored.



Testimony

**Glen R. Hanson, Ph.D., D.D.S.
Acting Director,
National Institute on Drug Abuse
National Institutes of Health
U.S. Department of Health and Human Services**

**United States Sentencing Commission
Commission Public Hearing**

**February 25, 2002
Thurgood Marshall Judiciary Building**

Thank you for allowing science to have an important role in this discussion. I am Dr. Glen Hanson, the Acting Director of the National Institute on Drug Abuse (NIDA), a component of the National Institutes of Health. As the World's leading supporter of research on the health aspects of all drugs of abuse, NIDA's research has taught us much about what drugs can do to the brain and how best to use science to approach the complex problems of drug abuse and addiction.

My comments today will focus on what science has revealed about some of the stimulants and opiates that are to be addressed during this public hearing. Although the stimulant cocaine will be the focus of my attention today, I will also provide some brief comments for the record about methamphetamine and heroin.

Research supported by NIDA has found cocaine to be a powerfully addictive stimulant that directly affects the brain. Like other Central Nervous System (CNS) stimulants, such as nicotine, amphetamine and methamphetamine, the drug increases levels of the neurotransmitter dopamine and produces alertness and heightens energy. Heroin, on the other hand, belongs to a class of drugs known as opioids which were developed because of their pain relieving properties. This group of drugs tends to cause relaxation and CNS depression.

Stimulants, such as cocaine and methamphetamine, continue to be dominant drugs of abuse in this country, despite the known detrimental consequences. Although marijuana remains the most commonly used illicit drug in the country, according to the Substance Abuse and Mental Health Services Administration's National Household Survey on Drug Abuse (NHSDA) 1.2 million Americans were current cocaine users in 2000. This represents 0.5 percent of the population aged 12 and older. Although changes to the survey limit our ability to make trend comparisons, this figure of 0.5 percent for 2000 is well below the estimate in 1985, when 3.0 percent of the population 12 and older reported current use of cocaine. The estimated number of current crack users in 2000 was 265,000 (0.1 percent of the population). Crack was first added to the NHSDA in 1988 and over successive years of the survey, estimates of past month use of the substance have never exceeded 0.3 percent of the population 12 and older.

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Two of the monitoring mechanisms that NIDA supports, the Community Epidemiology Work Group, a network of epidemiologists and researchers from 21 U.S. metropolitan areas who monitor community-level trends in drug use and abuse, and the Monitoring the Future (MTF) study, which provides data about high school drug use trends, have detected declines in recent years. The MTF Reports that cocaine use, including both cocaine powder and crack, decreased from 2000 to 2001 among 10th graders. Lifetime use of cocaine in any form declined from 6.9 percent to 5.7 percent in this group, lifetime use of crack decreased from 3.7 percent to 3.1 percent, and past year use of cocaine powder declined from 3.8 percent to 3.0 percent. This follows declines in cocaine use among 12th graders between 1999 and 2000 and reductions in the use of crack among 8th graders between 1998 and 1999.

about the same

There also appears to be a decline in the number of people admitted for treatment for cocaine addiction, according to Treatment Episode Data Set (TEDS). Primary cocaine admissions have decreased from approximately 292,000 in 1994 (18 percent of all admissions reported that year) to around 228,000 (14 percent) in 1999. Smoked cocaine (crack) represented 73 percent of all primary cocaine admissions in 1999, a proportion that has remained stable over the five-year period.

The Pharmacology of the Two Forms of Cocaine

There are basically two chemical forms of cocaine: the hydrochloride salt and the "freebase." The hydrochloride salt, or powdered form of cocaine, dissolves in water and, when abused, can be administered intravenously (by vein) or intranasally (in the nose). Freebase refers to a substance prepared by neutralizing cocaine hydrochloride with an alkaline substance to form a volatile form of cocaine that is smokable.

"Crack" is the street name given to the freebase form of cocaine that has been processed from the powdered cocaine hydrochloride form to a smokable substance. Because crack is smoked, the user experiences a rapid, intense high. This rather immediate, euphoric effect is one of the reasons that crack became enormously popular in the mid-1980s.

Cocaine, in any form, produces the same effects once it reaches the brain. It produces similar physiological and psychological effects, but the onset, intensity and duration of its effects are related directly to the method of use and how rapidly cocaine enters the brain. The difference in the ways that powdered cocaine and crack are prepared have a huge impact on how they are introduced into the body. The principal routes of administration for cocaine are oral, intranasal, intravenous, and inhalation (**SEE GRAPHIC**)

Oral absorption is the slowest form of administration exerting an effect within 45-60 minutes. It passes through the digestive tract until the drug reaches the stomach and intestine where they are absorbed into the bloodstream.

Intranasal use, or snorting, is the process of inhaling cocaine powder through the nostrils, where it is absorbed into the blood stream through the nasal tissues. The onset of activity after intranasal administration is within 3-5 minutes and the blood level peaks at 10-20 minutes fading in 45-60 minutes.

Intravenous use, or injection, introduces the drug directly into the bloodstream and heightens the intensity of its effects because it reaches the brain faster than oral administration.

The onset of the IV cocaine “rush” is within 30-45 seconds and the drug’s effects last for 10-20 minutes.

Cocaine inhalation became popular because it produces the quickest and highest peak blood levels in the brain without the risks attendant to IV use such as exposure to HIV from contaminated needles. Inhalation or smoking involves the inhalation of cocaine vapor or smoke into the lungs, where absorption into the bloodstream is as rapid as by injection. It is delivered to the pulmonary vascular bed and is pumped by the heart directly into the brain. It requires only 8-10 seconds until the user experiences the “high.”

Repeated cocaine use by any route of administration can produce addiction and other adverse health consequences.

Acute Effects of Cocaine

Cocaine's stimulant effects appear almost immediately after a single dose, and disappear within a few minutes or hours. Taken in small amounts (up to 100 mg), cocaine usually makes the user feel euphoric, energetic, talkative, and mentally alert, especially to the sensations of sight, sound, and touch. It can also temporarily decrease the perceived need for food and sleep. Some users find that the drug helps them to perform simple physical and intellectual tasks more quickly, while others can experience the opposite effect.

The short-term physiological effects of cocaine include constricted blood vessels; dilated pupils; and increased temperature, heart rate, and blood pressure. Large amounts (several hundred milligrams or more) intensify the user's high, but may also lead to bizarre, erratic, psychotic and even violent behavior. These users may experience tremors, vertigo, muscle twitches, paranoia, or, with repeated doses, a toxic reaction closely resembling amphetamine poisoning. Some users of cocaine report feelings of restlessness, irritability, and anxiety. In rare instances, sudden death can occur on the first use of cocaine or unexpectedly thereafter.

Cocaine-related deaths are often a result of cardiac arrest or seizures followed by respiratory arrest.

Medical Consequences of Cocaine

There are significant medical complications associated with cocaine use. Some of the most frequent complications are cardiovascular effects, including disturbances in heart rhythm and heart attacks; such respiratory effects as chest pain and respiratory failure; neurological effects, including strokes, seizure, and headaches; and gastrointestinal complications, including abdominal pain and nausea. Different routes of cocaine administration can produce different adverse effects.

Research has revealed a potentially dangerous interaction between cocaine and alcohol. Taken in combination, the two drugs are converted by the body to cocaethylene. Cocaethylene has a longer duration of action in the brain and is more toxic than either drug alone.

Cocaine abusers, especially those who inject, are also at increased risk for contracting such infectious diseases as human immunodeficiency virus (HIV/AIDS) and hepatitis. Use and abuse of illicit drugs, including crack cocaine, is one of the leading risk factors for new cases of HIV. Drug abuse-related spread of HIV can result from direct transmission of the virus through the sharing of contaminated needles and paraphernalia among injecting drug users or through other high risk drug using or sexual behaviors. It can also result from indirect transmission, such as an HIV-infected mother transmitting the virus perinatally to her child. This is particularly alarming, given that more than 60 percent of new AIDS cases are women. Research has also shown that drug use can interfere with judgement about risk-taking behavior, and can potentially lead to reduced precautions about having sex, the sharing of needles and injection paraphernalia, and the trading of sex for drugs, by both men and women. Additionally, hepatitis C has spread rapidly among injection drug users; studies indicate infection rates of 65 to 90 percent in populations of intravenous drug users. New cases of infection are associated with high frequency cocaine injection and needle sharing.

Prenatal Exposure to Drugs of Abuse

NIDA estimates that about 5.5 percent, or 221,000 women, used an illicit drug at least once during pregnancy, and thus 221,000 babies were born drug exposed. Cocaine was used during pregnancy by 1.1 percent or 45,000 women.

Babies born to mothers who abused drugs during pregnancy often are prematurely delivered, have low birth weights, smaller head circumferences, and are often shorter in length. Estimating the full extent of the consequences of maternal drug abuse is difficult, and determining the specific hazard of a particular drug to the fetus and newborn is even more problematic given that most drug users use more than one substance. Factors such as the amount and number of all drugs used, inadequate prenatal care, socio-economic status, poor maternal nutrition, other health problems, and exposure to sexually transmitted diseases are just some examples of why it is difficult to determine the exact effects of prenatal drug exposure. Sorting out these confounding factors is extremely difficult. This is one of the reasons why we must be cautious in drawing causal relationships in this area, especially with a drug like cocaine.

Drug use during pregnancy, particularly the use of cocaine, has received significant attention in recent years as a serious threat to public health. Through the use of sophisticated instruments and approaches, researchers have found the effects not to be as devastating as originally believed, especially for children up to six years of age. There does appear to be an association between prenatal cocaine exposure and some developmental outcomes (e.g. attention and emotional regulation) that needs to be further explored. More research is needed to understand this relationship and to determine if there are any other subtle, not so subtle, short or long-term outcomes that can be attributed to prenatal cocaine exposure.

Drugs and Violence

There is very little research on the role that drugs of abuse, such as stimulants like cocaine or amphetamine actually play in violence. Research has not been able to validate a causal link between drug use and violence. There appears to be no one single drugs-crime relationship. Rather there are drugs-crime relationships, most of which are complex and difficult to sort out.

Violence that is associated with drug use, can be thought of in three categories. The violence can be psychopharmacologically induced, referring to how people may react to certain drugs: it can be economic compulsive, meaning the individuals get aggressive or violent to get drugs; or it can be more systemic, where the violence results from living in the drug culture.

There does appear to be a correlation between youth illicit drug use and violence as reported by SAMHSA. According to the 1999 NHSDA, youths who participated in violent behaviors during the past year were more likely to use alcohol and illicit drugs than youths who did not participate in violent behaviors during this time period. For example, 18 percent of youths who had participated in a serious fight at school or work during the past year reported past month use of illicit drugs compared with 7 percent of youths who had not participated in a serious fight at school or work during the past year.

Methamphetamine

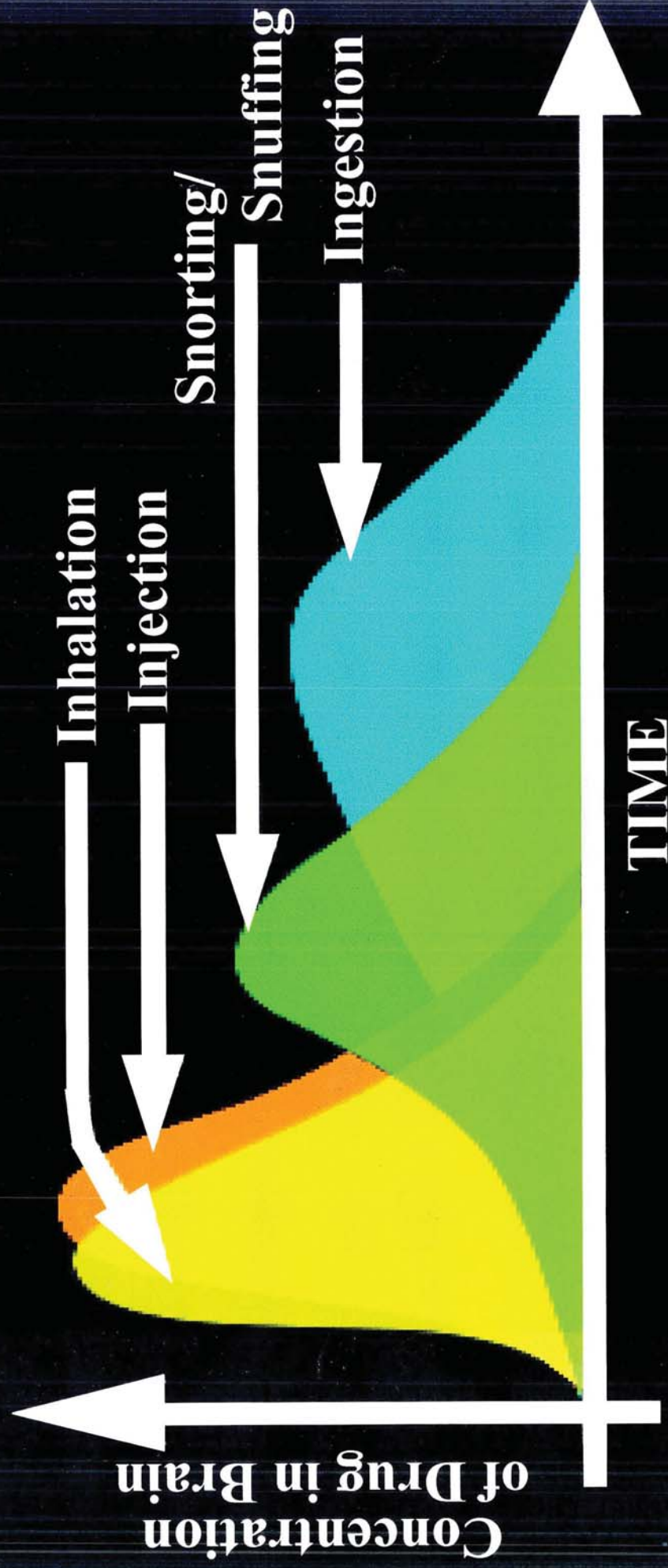
Methamphetamine, like cocaine and crack, is a powerfully addictive stimulant that dramatically affects the central nervous system. The drug is made easily in clandestine laboratories with relatively inexpensive over-the-counter ingredients. Methamphetamine's chemical structure is similar to that of amphetamine. Like amphetamine, it causes increased activity, decreased appetite, and a general sense of well-being. The effects of methamphetamine can last 6 to 8 hours typically longer than the effects of the cocaine. After the initial "rush," there is usually a state of high agitation that in some individuals can lead to dangerous behavior.

Heroin

Heroin belongs to a completely different category of drug than stimulants such as methamphetamine, amphetamine, crack and cocaine. Heroin is both the most frequently abused and the most rapidly acting of the opiates. It is processed from morphine, the naturally occurring substance extracted from the seedpod of certain varieties of poppy plants. Because of its chemical structure heroin is able to very rapidly enter the brain where it is actually converted into morphine. In the brain, morphine attaches to the natural opioid receptors (natural targets of endorphins) where it can initiate its multiple physiological effects, including pain reduction, depression of heart rate and the slowing of respiration. It is usually sold as a white or brownish powder, or in some regions of the country as a black sticky substance known on the street as “black tar heroin.” Heroin can be injected, sniffed/snorted or smoked. Like cocaine, regardless of how the drug is taken it is extremely addictive and can lead to other detrimental consequences as well.

Thank you for inviting me to participate in this important public hearing. I will be happy to respond to any questions you may have.

Time Course for Drug Distribution in Brain Based on Route of Drug Administration






**TESTIMONY OF DEBORAH A. FRANK, M.D.
BEFORE THE UNITED STATES SENTENCING COMMISSION**

FEBRUARY 25, 2002

Judge Murphy and members of the Commission, thank you for giving me the opportunity to speak with you today. I am a Professor of Pediatrics at Boston University School of Medicine, a pediatric clinician at Boston Medical Center, and a Principal Investigator of a National Institute on Drug Abuse research project (DA06532) which for the past 10 years has followed the developmental and behavioral outcomes of a cohort of inner city children with and without in utero cocaine/crack exposure. I say cocaine/crack as a single phrase advisedly, since there are no physiologic indicators that show to which form of the drug the newborn was exposed. The biologic thumbprints of exposure to these two substances in utero are identical.




My co-authors and I, as pediatricians and researchers in inner city Boston, are on the front lines witnessing the negative impact of addictive disorders on families, children, and the community. In response to this experience, in addition to our own research we have conducted a number of systematic reviews of the published medical/psychological data regarding the effects of prenatal cocaine/crack exposure, the most recent of which, focusing on long-term outcome after the newborn period, was published in March 2001 in the Journal of the American Medical Association, a reprint of which has been submitted to the Commission. In brief, we conclude that there are small but identifiable effects of prenatal cocaine/crack exposure on certain newborn outcomes, very similar to those associated with prenatal tobacco exposure. There is less consistent evidence of negative long-term effects up to the age of six years, which is the oldest age for which published information is available. There are no long-term studies, which identify any specific effects of "crack" compared to cocaine on children's development. Based on years of careful research, we conclude the "crack baby" is a grotesque media stereotype, not a scientific diagnosis. You may recall the initial predictions of catastrophic effects of prenatal cocaine or crack exposure on newborns — including inevitable prematurity, multiple birth defects, "agonizing withdrawal with catlike cry," early death and profound long term disabilities for the survivors. The actual data are quite different.

NEONATAL OUTCOMES

Prematurity, Smaller Size at Birth, Birth Defects

Risk of preterm delivery due to prenatal cocaine or crack exposure is significantly decreased if mothers receive prenatal care, even if they do not become fully abstinent from drug use. The majority of exposed infants are not born prematurely in any event, but prenatal care decreases the risk of prematurity to approximately that of other infants from the same impoverished backgrounds.



After taking into account other factors that often co-occur with cocaine exposure in pregnancy (such as poverty, tobacco and alcohol use, poor nutrition, and inadequate prenatal care) the most consistently observed effects of prenatal cocaine/crack exposure are small but statistically significant decreases in birth weight, length, or head circumference. These deficits

are similar in magnitude to those seen after exposure to 1 pack of cigarettes a day during pregnancy. In contrast to the effects of heavy prenatal alcohol exposure, there is no convincing evidence that prenatal cocaine/crack exposure is associated with any increased risk of birth defects. In other words, while there are detectable newborn effects of prenatal exposure to cocaine or crack, they are not different from and certainly not worse than the effects of far more common exposures to legal drugs.

Drug Withdrawal and Neonatal Behavior

Unlike prenatal exposure to heroin, methadone, barbiturates, or benzodiazepines (such as valium), prenatal cocaine exposure does not cause a recognizable withdrawal syndrome in the newborn. Nor does prenatal cocaine/crack exposure require prolonged hospitalization for pharmacologic treatment. While some investigators have found that heavy prenatal cocaine/crack exposure is associated with subtle differences in newborn behavior on detailed research assessments, these effects are usually not clinically obvious. In other words, an experienced pediatrician can walk into any nursery and identify from across the room an infant withdrawing from opiates, but an infant exposed to cocaine or crack without opiate exposure will be clinically indistinguishable from the other infants.

Sudden Infant Death Syndrome (SIDS)

Unlike prenatal tobacco or opiate exposure, prenatal cocaine or crack exposure has not been shown to be an independent risk factor for Sudden Infant Death Syndrome, or for increased risk of death in the first two years of life.

Cocaine and Pregnancy—Time to Look at the Evidence

Wendy Chavkin, MD, MPH

IN THIS ISSUE OF THE JOURNAL, FRANK AND COLLEAGUES¹ present a systematic review of studies assessing possible relationships between maternal cocaine use during pregnancy and several childhood outcomes. The authors are thoughtful and rigorous in their approach and carefully evaluate the physiological plausibility of the outcomes under question and the methodological strengths and constraints of the studies reviewed. They considered 36 studies worthy of review; these reported on 17 prospectively recruited cohorts with examiners blinded to cocaine exposure status.

At the end of their effort, Frank et al conclude that crack/cocaine exposure in utero has not been demonstrated to affect physical growth; that it does not appear to independently affect developmental scores in the first 6 years (although there are insufficient data to assess this for infants born preterm); that findings are mixed regarding early motor development but any effect appears to be transient and may, in fact, reflect tobacco exposure; and that exposure may be associated with modest alterations of certain physiological responses to behavioral stimuli that are of unknown clinical importance. In sum, the data are not persuasive that in utero exposure to cocaine has major adverse developmental consequences in early childhood—and certainly not ones separable from those associated with other exposures and environmental risks. Since many cocaine users also use other illegal drugs, drink alcohol, and smoke cigarettes, it is methodologically daunting to sort out consequences attributable to cocaine alone. Frank et al conclude that even those studies best designed to tackle this challenge fail to demonstrate that cocaine use by pregnant women leads to childhood devastation.

The authors acknowledge limitations to their approach: data on postnatal sequelae must be considered preliminary, any differential attrition could bias results, and classification of exposure based on interview may be imprecise. Moreover, the studies in the meta-analysis do not include follow-up into middle school years and adolescence. However, even if future research reveals cocaine-related harm to the fetus, the modest and inconsistent nature of the find-

ings to date suggest that these harms are unlikely to be the magnitude of those associated with in utero exposure to the legal drugs tobacco and alcohol.

Why then all the hullabaloo about crack babies? Why the prosecution of 200 women who used cocaine while pregnant?² Why was a program established to pay \$200 to crack using women as an incentive to become sterilized?² What is going on? The answer, perhaps, is 2-fold. The "crack baby" became the poster child for 1 side in each of 2 heated controversies in the United States: the war on drugs and the struggle over abortion.

The war on drugs focused on individual moral failings rather than social circumstance, and comprised several basic approaches: an emphasis on drug law enforcement; an increase in severity of criminal justice penalties, including mandatory minimum sentences; and a comparative de-emphasis on treatment of drug addiction. The escalation of the war occurred during the Reagan Administration, coincident with the rise of unemployment, homelessness, and urban poverty that fueled the crack epidemic.² While cocaine inhalation form had been a popular drug for the upper middle class in the 1970s, it did not draw the same moral or political attention or severity of criminal justice response as did crack smoking by inner-city youth.³

There have been dramatic consequences of the war on drugs. The number of incarcerated individuals in the United States has more than tripled, resulting in the United States having the second highest incarceration rate in the world. Average length of sentence for drug offenders has tripled as well, while the proportion of inmates receiving treatment for substance abuse disorders has more than halved. While men still predominate within the incarcerated population, the proportion of women has increased sharply; at nearly double the rate for men.⁵ This increase has been most dramatic for minority women. From 1986 to 1991, the number of women incarcerated in state prisons for drug offenses increased by 828% for black women, by 328% for Hispanic women, and by 241% for white women.²

There have also been important public health consequences. Research regarding the physiological and behavioral components of addiction and development of tr-

See also p 1613.

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approaches has been underfunded and has languished. Rates of a criminal justice approach to substance abuse expressed frustration with the usefulness of drug treatment pointing to relapse as evidence of lack of efficacy. While it is true that treatment for drug addiction needs more research, its efficacy compares with that of commonly used medical treatments for other chronic relapsing conditions such as type 2 diabetes mellitus, hypertension, and asthma.⁶ The choice of a criminal justice rather than a public health approach to drug addiction has also limited implementation of efforts (such as needle exchange programs) to curb the spread of human immunodeficiency virus among drug users and has resulted in a concentration of the epidemic among users and their sexual partners.

"Crack baby" has become a convenient symbol for the aggressive war on drug users because of the implication of a parent who is selfish enough to irreparably damage an innocent child for the sake of a quick high deserves retribution. This image, promoted by the mass media, makes it difficult to advocate a simplistic punitive response than to address the complex causes of drug use.

The "crack baby" also has served as a potent symbol in the ongoing struggle over abortion in the United States. Those arguing against abortion generally have done so in the name of fetal personhood. This same assertion underlies the charges brought against women who used drugs while pregnant: child neglect, homicide, and delivery of drugs to a minor. In the 30 states where such charges have been brought against new mothers, convictions have been overturned on appeal. However, in the 30th state, South Carolina, the state Supreme Court has departed from the prevailing legal tradition and has contradicted US Supreme Court precedent by declaring that viable fetuses are "persons" and are covered by the state's criminal child abuse law.² A case, *Ferguson v South Carolina*, is now before the US Supreme Court.⁷

The concept of fetal personhood that derives from the ongoing debate has led to the depiction of the pregnant woman as one whose selfish negligence or hostility toward her innocent fetus must be constrained by the outside forces of the criminal justice system. These prosecutions have not been deterred by evidence from medical research that many pregnant addicted women are very concerned about the consequences of their drug use for their children and are eager for treatment, even though treatment is difficult to access generally, and often unavailable for pregnant women and for the incarcerated.

The war on drugs and the struggle over abortion are multifaceted political controversies. Medical and public health experts can try to temper these heated debates by presenting scientifically garnered data, clinical evidence, and information on the importance of therapy. Since medicine usually considers addiction to be a compulsive disorder

in need of treatment,⁹ many medical organizations (American Medical Association, South Carolina Medical Association, American College of Obstetricians and Gynecologists, American Medical Women's Association and more than 20 others) have filed amici briefs in many of these cases, asserting that addiction is a disease; that maternal and fetal interests are intertwined and that the pregnant woman speaks for those interests; that it is in the medical and public health interest to provide treatment and not punishment; and that criminal punishment is not therapeutic and is likely to deter frightened women from seeking needed care.¹⁰

This next period is likely to bring its own set of complications. There have been recent signs of abatement in the war on drugs. In New York, the governor and legislators have proposed modification of the Rockefeller drug laws to reduce mandatory sentences, offer treatment alternatives, and return discretion in sentencing to judges.¹¹ Proposition 36, which passed in California this past November, which substitutes treatment for prison for many nonviolent drug possession offenders, and former President Clinton has called for reconsideration of mandatory sentences for federal drug offenses.¹²

However, the situation for poor addicted women has not abated as treatment opportunities for them have been further compromised by recent changes in welfare policy. Since passage of the Personal Responsibility and Work Opportunity Reconciliation Act in 1996,¹³ states can exclude individuals with previous drug felony convictions from receiving cash assistance, and attendance at drug treatment programs does not count toward meeting the work requirement on which receipt of cash assistance is now conditioned. Further, drug and alcohol dependence no longer renders one eligible for Supplemental Security Income (SSI), with the resulting loss of such income for approximately 108 000 SSI recipients and 31 000 Disability Insurance recipients as of December 1997.¹³⁻¹⁵ Disagreement over abortion shows no sign of lessening, and there will likely be efforts to further limit access to abortion for the young and the poor.

Although the image of the crack baby has stirred partisan passions, the review of the evidence in the meta-analysis by Frank et al indicates that these images are not based on fact. As citizens, we may fall on different sides of these debates on abortion and drug addiction. Yet, as physicians and public health advocates, we can follow the example of Frank et al and raise a calm steady voice for science and therapy.

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Screening Mothers for Intimate Partner Abuse at Well-Baby Care Visits

The Right Thing to Do

Robert S. Thompson, MD
Richard Krugman, MD

IN THIS ISSUE OF THE JOURNAL, MARTIN ET AL¹ REPORT ON the prevalence of physical abuse before, during, and after pregnancy as determined from a random sample of North Carolina women (1997-1998). Women were surveyed by mail and telephone approximately 3.6 months after they delivered live infants. Reported physical abuse before and during pregnancy exceeded 6% and was 3.2% in the postpartum period. Abuse in an earlier period was strongly associated with further abuse in subsequent periods. Mothers reported a mean of 3 well-baby care visits during the first 3.6 postnatal months.

The findings from this study suggest that intimate partner abuse (also termed intimate partner violence or domestic violence) is occurring in the immediate postnatal period, and an opportunity exists for pediatric health care practitioners to identify this abuse. The American Academy of Pediatrics (AAP) issued a policy statement in June 1998 stating, "Pediatricians are in a position to recognize abused women in pediatric settings. Intervening on behalf of battered women is an active form of child abuse prevention. Knowledge of local resources and state laws for reporting abuse are emphasized."² This recommendation could apply to all who provide postnatal child care.

Martin et al suggest that abused mothers may have as many as 3 opportunities to be identified at well-baby care visits in the first 3½ months of their new infants' lives. The AAP recommends 3 visits in the first 3 months and 6 visits in the first 12 months of infancy. Utilization data from Group Health Cooperative (Seattle, Wash) indicate that the mean

number of encounters for well-baby care in the first 3½ months is 2.5 and that in the first 12 months of life, there are 4.2 such visits (Virginia Immanuel, MPH, written communication, February 21, 2001). Using data provided by Martin et al,¹ the number of women who would have to be screened to detect 1 abused mother would be 14.5 before pregnancy, 16.3 during pregnancy, and 31 during the first 3½ months postpartum.

It is possible to implement this screening opportunity by building some questions into the standard forms used as a routine part of well-baby care. For instance, Group Health Cooperative includes a question about "family history of physical abuse or sexual abuse" on routine questionnaires for neonates or new child family members. Clearly, more in-depth questions are needed, but this example is a start, and previous work in family violence demonstrated that written questionnaires increased abuse screening by 14.3%.³

The second part of the AAP recommendation states that "intervening on behalf of battered women is an active form of child abuse prevention." The literature contains solid links between domestic violence and child abuse, and suggests that the link is approximately 50% in either direction.⁴⁻⁶ Information on the long-term adverse effects of child abuse is also well documented.⁷⁻⁹ Despite these links, the US Preventive Services Task Force concluded in 1996 that there was "insufficient evidence to recommend for or against the use of specific screening instruments"¹⁰ for detecting intimate partner abuse. Insufficiency issues boil down to instruments for detection of intimate partner abuse, modes

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Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure

A Systematic Review

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RECENTLY, THE US SUPREME Court considered *Ferguson et al v City of Charleston*, a Fourth Amendment case (unreasonable search and seizure).¹ This case addresses a policy of the Medical University of South Carolina whereby health professionals, in cooperation with the local prosecutor, selectively screened the urine of medically indigent obstetric patients for cocaine metabolites.¹⁻³ Medical personnel reported positive results to the police, who would then come to the hospital to arrest prenatal and postpartum patients for possession of an illegal drug, delivery of drugs to a minor, or child abuse.^{3,4} In the popular press, *People* magazine reported on C.R.A.C.K. (Children Requiring a Caring Community), a controversial charity that raises money to give mothers with a history of illegal drug use financial incentives to accept long-acting contraception, or, in most cases, sterilization.⁵ This charity and the policies at issue in *Ferguson v City of Charleston* reflect popular belief that women who use cocaine while pregnant inflict severe, persis-

See also p 1626.

Context Despite recent studies that failed to show catastrophic effects of prenatal cocaine exposure, popular attitudes and public policies still reflect the belief that cocaine is a uniquely dangerous teratogen.

Objective To critically review outcomes in early childhood after prenatal cocaine exposure in 5 domains: physical growth; cognition; language skills; motor skills; and behavior, attention, affect, and neurophysiology.

Data Sources Search of MEDLINE and *Psychological Abstracts* from 1984 to October 2000.

Study Selection Studies selected for detailed review (1) were published in a peer-reviewed English-language journal; (2) included a comparison group; (3) recruited samples prospectively in the perinatal period; (4) used masked assessment; and (5) did not include a substantial proportion of subjects exposed in utero to opiates, amphetamines, phencyclidine, or maternal human immunodeficiency virus infection.

Data Extraction Thirty-six of 74 articles met criteria and were reviewed by 3 authors. Disagreements were resolved by consensus.

Data Synthesis After controlling for confounders, there was no consistent negative association between prenatal cocaine exposure and physical growth, developmental test scores, or receptive or expressive language. Less optimal motor scores have been found up to age 7 months but not thereafter, and may reflect heavy tobacco exposure. No independent cocaine effects have been shown on standardized parent and teacher reports of child behavior scored by accepted criteria. Experimental paradigms and novel statistical manipulations of standard instruments suggest an association between prenatal cocaine exposure and decreased attentiveness and emotional expressivity, as well as differences on neurophysiologic and attentional/affective findings.

Conclusions Among children aged 6 years or younger, there is no convincing evidence that prenatal cocaine exposure is associated with developmental toxic effects that are different in severity, scope, or kind from the sequelae of multiple other risk factors. Many findings once thought to be specific effects of in utero cocaine exposure are correlated with other factors, including prenatal exposure to tobacco, marijuana, or alcohol, and the quality of the child's environment. Further replication is required of preliminary neurologic findings.

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tent, and unusual impairments on their unborn children, recently described by a newspaper columnist as "blighted by a chemical assault in the womb."⁶

Public expectations of "blighted" children fuel controversial punitive poli-

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cies directed toward addicted mothers.⁷ Since 1985, more than 200 women in 30 states have faced criminal prosecution for using cocaine and other psychoactive substances during pregnancy.⁷ Scholars and professional organizations have condemned efforts to sterilize or criminally prosecute addicted mothers as ethically and legally flawed, racially discriminatory, and an impediment to providing appropriate medical care to these women and their children.^{3,4,7-9}

Recent reviews¹⁰⁻¹⁵ and articles¹⁶⁻¹⁸ show that most initial predictions of catastrophic effects of prenatal cocaine exposure upon newborns were exaggerated. After controlling for confounders, the most consistent effects of prenatal cocaine exposure are small but statistically significant decrements in 1 or more parameters of fetal growth for gestational age^{12,13} and less optimal neonatal state regulation and motor performance.^{10,11,14} Clinically silent findings on neonatal cranial ultrasounds following prenatal exposure have been found in some studies,^{10,16} but not others.¹⁷ Prenatal cocaine exposure without concurrent opiate exposure has not been shown to be an independent risk factor for sudden infant death syndrome.^{15,18}

Despite the neonatal data, beliefs about cocaine's teratogenicity impose a stigma on cocaine-exposed infants^{19,20} and children at school age.²¹ Teachers fear that "crack kids" will be too developmentally delayed or disruptive to be taught in traditional classrooms.²²

Given the current public concern, health professionals need a critical synthesis of studies of postneonatal outcomes of children exposed to cocaine in utero in 5 domains: (1) physical growth; (2) cognition; (3) language skills; (4) motor skills; and (5) behavior, attention, affect, and neurophysiology.

METHODS

Data Sources

MEDLINE and *Psychological Abstracts* were searched for all human studies published in English from 1984 until October 2000 that included the words *cocaine*, *crack/cocaine*, *crack*, *pregnancy*, *prenatal exposure*, *delayed effects*, *children*, and

related disorders. Even if cited in MEDLINE, abstracts or nonreviewed proceedings of scientific meetings²³ were excluded. Seventy-four published articles were identified.²⁴⁻⁹⁷

Study Selection

We first applied selection criteria used by others⁹⁸: all selected studies presented original research published in a refereed English-language journal, used human subjects, and used a control or comparison group. Detailed review was then restricted to studies that also met 3 criteria: (1) samples were prospectively recruited; (2) examiners of the children were masked to their cocaine exposure status; and (3) the cocaine-exposed cohort did not include a substantial proportion of children also exposed in utero to opiates, amphetamines, or phencyclidine, or whose mothers were known to be infected with the human immunodeficiency virus (HIV).

Justification of Selection Criteria

Studies were classified as prospectively recruited if the samples of cocaine-exposed and unexposed mother-infant dyads were identified and enrolled either during pregnancy or immediately after birth. Prospective recruitment obviates recall bias, when caregivers of a child who has experienced an adverse outcome are likely to recall prenatal exposure in greater detail, and selection bias, when caregivers are more likely to enroll children with already suspected developmental impairments. Such biases in retrospective samples can produce an overestimate of the risk of negative developmental outcomes.⁹⁹

In behavioral research, examiners' bias may unconsciously distort measurement of developmental/behavioral outcomes.⁹⁹⁻¹⁰¹ Investigators have shown that evaluators were more likely to code children's videotaped behavior as abnormal if the children were labeled as "crack kids" than if they were not.^{19,20}

Lower developmental test scores in infancy and less adaptive behavior at school age have been linked to prenatal opiate exposure.¹⁰² In samples where most cocaine-exposed children are also

opiate-exposed, the independent effect of cocaine on outcome cannot be clearly delineated. For the same reason, samples where cocaine exposure was largely confounded with exposure to methamphetamines or phencyclidine were also excluded. Exposure to HIV in utero is correlated with poor developmental outcome not only among infected infants, but also among those who serorevert.¹⁰³ If most cocaine-exposed children in a sample are also offspring of HIV-infected mothers, it cannot be determined whether effects are due to cocaine or HIV exposure.

Procedures

Two developmental/behavioral pediatricians (D.A.F., M.A.) and a neuropsychologist (W.G.K.) reviewed all articles. After excluding 38 articles according to the above criteria, the same 3 authors abstracted the data from the remaining 36 articles in detail. If a single article covered outcomes in more than 1 domain (eg, cognitive test scores and behavior), each domain was addressed separately. If there was uncertainty, contact was made with the corresponding author of the article to clarify interpretation of data. Disagreements were resolved by consensus.

Of the excluded studies, 20* failed to mask investigators to children's cocaine exposure status. Seven^{24,27,28,36,39,40,53} had no control group. Twenty-six† did not use prospective recruitment for some or all of their subjects. Thirteen‡ primarily recruited children with in utero exposure to opiates, methamphetamines, or phencyclidine. Two^{32,44} reported samples predominantly composed of children of HIV-positive mothers.

Data Extraction

The conceptual framework for data extraction was provided by recent theoretical advances in human behavioral teratology^{104,105} delineating the implications of various methods of characteriz-

*References 24, 27, 30, 31, 33-37, 41, 42, 48, 49, 52, 53, 55-57, 60, 61.

†References 24-27, 29, 30, 33-38, 40-44, 46-49, 51, 54, 58, 59, 61.

‡References 28, 30, 32, 34, 41, 42, 49, 50, 54, 55-57, 59.

ing exposure to possible toxicants and of controlling for potential confounders. Many cocaine-exposed newborns are clinically indistinguishable from their unexposed peers,^{18,106} so identification of exposed infants depends on maternal report or measurement of cocaine metabolites in biological matrices. Dose response is a critical issue in the study of all potential teratogens¹⁰⁵ but is difficult to ascertain for cocaine in human studies. Recently, infants' meconium and maternal hair have emerged as useful biological markers for estimating the dose of prenatal cocaine exposure.^{97,107-111} However, at the time most cohorts available for study in the postneonatal period were recruited, assays of urine from mother or infant for benzoylecognine were the only biological indicators readily available. Urine assays do not reflect cumulative fetal drug exposure. Thus, researchers who address dose response rely on maternal interviews to classify levels of prenatal cocaine exposure, usually classifying 2 or more days a week during pregnancy as "heavier use."^{63,66,85} For this review, we classified levels of prenatal cocaine exposure as heavier/lighter or as exposed/unexposed.

Even when their mothers do not use opiates, amphetamines, or phencyclidine, most cocaine-exposed infants are also exposed in utero to varying combinations of tobacco, alcohol, and marijuana.¹¹² The heaviest prenatal cocaine users are often the heaviest users of these other substances.¹⁰⁹ If prenatal exposure to tobacco, alcohol, and marijuana is not analytically controlled, their effects on neurodevelopment^{74,84,113} may be misattributed to cocaine. If these substances are statistically controlled for without regard to the level of use, residual confounding may occur because of overaggregation of light and heavy exposure.^{104,114} For this review, we considered whether prenatal tobacco, alcohol, and marijuana exposure are reported or not, are controlled analytically as dichotomous variables (exposed/not exposed), or are statistically controlled in a dose-related manner. However, statistical control in a dose-controlled manner offers the greatest as-

surance that effects of heavy tobacco, marijuana, or alcohol exposure will not be spuriously attributed to cocaine.

Interpreting cocaine effects is further complicated because the samples studied are, with a few exceptions,^{77,90,93,97} drawn from economically disadvantaged, medically at-risk populations, whose characteristics are associated with high developmental risk without any psychoactive substance exposure. The number of environmental and medical variables, the accuracy of their measurement, and their distribution within the sample may influence the estimation of cocaine effects.¹⁰⁴

The data were derived from 17 independent cohorts from 14 cities. Some cohorts were the subject of multiple articles, either at different ages or with differing analyses of the same data from a single age. Mutually exclusive samples were identified by author and city. For each article, a number of parameters were coded, including number of cocaine unexposed and exposed subjects and the number at varying levels of cocaine exposure if such data were available; how pregnancy exposure to tobacco, alcohol, and marijuana was addressed analytically and whether this exposure was significantly related to outcomes; what other covariates were matched, used as selection criteria, or controlled for statistically; which of these covariates influenced outcomes; and what, if any, statistically significant ($P < .05$, 2-tailed unless otherwise specified) cocaine effects were identified. Of the included articles, 4 do not report attrition.^{66,77,78,87} In the others, sample retention from birth to the oldest age reported for the cohort ranges from 39%⁷⁰ to 94%.⁶² Of these, 14 articles* from 11 cohorts document the characteristics of those retained compared with those lost to follow-up.

RESULTS

Physical Growth

If level of exposure to other substances is not controlled, prenatal cocaine exposure appears to be associated in 2 co-

horts with postneonatal decrements in weight or occipitofrontal head circumference,^{64,70,78,79} but not in another⁸⁹ (TABLE 1). However, in 2 cohorts that did control for dose of prenatal exposure to tobacco and alcohol^{84,93} no negative cocaine effect was noted on the children's weight, length, or head circumference. In 1 cohort, full-term unexposed children were longer than exposed or unexposed preterm children and their exposed full-term counterparts.⁷¹

Standardized Cognitive Assessment

There is little impact of prenatal cocaine exposure on children's scores on nationally normed assessments of cognitive development (TABLE 2). Findings of cocaine effects depend on contextual factors, such as the child's history of prematurity, age at time of assessment, and the effects of prenatal exposure to other substances. Of the 9 studies evaluating prenatal cocaine effects on developmental test scores in infants, 5 found no effect,^{71,77,79,85,89} including 1 that classified infants according to level of prenatal exposure to cocaine, tobacco, and alcohol.⁸⁵ Chasnoff et al⁷⁰ found that the 6-month-old infants whose mothers used cocaine, alcohol, and marijuana attained mean scores lower than infants of controls, but identical to those of infants whose mothers had used alcohol/marijuana without cocaine, suggesting no incremental impact of cocaine use. Mayes et al⁹¹ reported bivariate association of lower psychomotor scores at 3 months with prenatal cocaine exposure, but not after statistical control for potential confounders. Alessandri et al⁶³ found no main effects of level of prenatal cocaine exposure on test scores at 8 or 18 months, but on post hoc comparisons children with the highest level of cocaine exposure in pregnancy (2 or more days a week) obtained significantly lower mental development scores at age 18 months than unexposed infants.

In very low-birth-weight infants, Singer et al⁹⁶ reported a negative association between prenatal cocaine exposure and developmental scores at 16 months corrected age, but in utero ex-

*References 64, 65, 67, 73, 74, 81, 83, 85, 89, 91-93, 96, 97.

posure to other psychoactive substances was not analytically controlled.

Six reports from 4 cohorts evaluated the association of prenatal cocaine exposure with cognitive test scores in children between the ages of 3 and 6 years.^{64,78,82,83,89,93} Two articles presented results in a single cohort of 3-year-olds. In one, Azuma and Chasnoff⁶⁴ reported that children whose mothers only used alcohol and marijuana during pregnancy achieved mean IQ scores that were identical to those of children whose mothers had also used cocaine. In a second report of post hoc comparisons from the same cohort, Griffith et al⁷⁸ found that children exposed to cocaine in addition to other substances scored significantly lower than unexposed controls on a verbal reasoning scale of the IQ test. However, these scores were not lower than the scores of children who had been exposed to the other substances but not cocaine and were not statistically controlled for tobacco exposure. Another study found no cocaine effect on IQ.⁸⁹ In the cohort studied by Hurt et al^{82,83} there was no impact of prenatal cocaine exposure on children's cognitive test scores at 48 months. In the old-

est prospectively recruited cohort studied to date, Richardson et al⁹³ found no effect of prenatal cocaine exposure on any IQ scales at age 6 years, including verbal reasoning, and no association with children's academic skills.

The literature on prenatal exposure to cocaine has not shown consistent effects on cognitive or psychomotor development. However, 7 studies show that environmental factors such as caregiver (biological mothers vs kinship care or foster parents),^{79,89} whether or not that caregiver received case management or home visiting services,^{78,89} quality of the home environment,^{63,64,78,83} and maternal IQ⁷⁷ were statistically significant correlates of test scores.

Language Skills

Three studies of toddlers^{69,81,89} showed no association between prenatal cocaine exposure and receptive or expressive language scores on standardized measures (TABLE 3). Using a naturalistic language sample, Bland-Stewart et al⁶⁹ found that cocaine-exposed children produced different semantic categories than matched unexposed children. However, there were too few subjects to permit confounder control.

Motor Skills

Of 6 studies, 3 from 2 cohorts found less optimal motor scores in the first 7 months of life following prenatal cocaine exposure (TABLE 4).^{75,76,97} No prospective study has identified a cocaine effect on motor development after age 7 months.^{75,76,89} Dempsey et al⁷⁴ found mothers' prenatal tobacco use (quantified by urine assays of cotinine rather than by self-report), but not cocaine use (quantified by benzoylecgonine levels in meconium), was the major predictor of abnormalities in infant muscle tone at 6 weeks. No other prospective study of motor outcome^{75,76,79,89,97} following cocaine exposure used biological markers to measure tobacco exposure. It is not yet clear whether previously reported positive associations between prenatal cocaine exposure and less optimal early motor development may be a misattribution of tobacco effects.

Behavior, Attention, Affect, and Neurophysiology

Heterogeneous techniques used to evaluate behavior, attention, affect, and neurophysiology following prenatal cocaine exposure are not readily comparable across studies (TABLE 5). In the first year of life, visual habituation (an

Table 1. Physical Growth*

Study	No.	Cocaine Effect	Outcome Measures	Assessment Ages	Tobacco Use
Azuma and Chasnoff, ⁶⁴ 1993	92 + 25 poly 45 -	Both cocaine and polydrug exposed groups had lower OFC	Weight, height, OFC	3 years	R
Chasnoff et al, ⁷⁰ 1992	106 + 45 poly 81 -	Both cocaine and polydrug exposed had lower OFC than unexposed at all ages measured	Weight, height, OFC	3, 6, 12, 18, and 24 months	R
Coles et al, ⁷¹ 1999	25 preterm + 32 full term + 22 preterm - 26 full term -	Full-term negatives longer; otherwise, no cocaine effect	Weight, length, OFC	8 weeks corrected for prematurity	R
Hurt et al, ⁷⁹ 1995	101 + 118 -	Cocaine associated with lower weight and OFC at all ages	Weight, OFC	6, 12, 18, 24, and 30 months	R
Jacobson et al, ⁸⁴ 1994	86H 48L 330 -	Cocaine exposure associated with faster postnatal weight gain in first 13 months, no effect on length or OFC	Weight, length, OFC	6.5 and 13 months	DC Correlated with faster postnatal weight gain
Kilbride et al, ⁸⁹ 2000	111 + 41 -	No cocaine effect	Weight, length, OFC	2, 12, 24, 36 months	C
Richardson et al, ⁹³ 1996	28 + 523 -	No cocaine effect	Weight, height, OFC	6 years	DC

*Across tables, abbreviations are explained at first mention only. Plus (+) indicates exposed to cocaine; poly, exposed to multiple drugs; minus (-), not exposed to cocaine; OFC, occipitofrontal head circumference; R, reported; C, controlled; IVH, intraventricular hemorrhage; H, heavier; L, lighter; DC, dose controlled; and NICU, neonatal intensive care unit.

indicator of recognition memory and learning) was negatively associated with higher levels of cocaine exposure in 1 cohort⁸⁵ but not in 3 others.^{63,88,91} No cocaine effect was found on toddler play⁸⁰ or on observations of behavioral style during an infant motor assessment.⁶⁸ Problem-solving abilities did not differ between cocaine-exposed and unexposed preschoolers.⁶⁷

Differences in affective expression have been correlated with prenatal exposure to cocaine in 4 studies from 3 cohorts of infants younger than age 2 years. Alessandri et al⁶² found that 4- to 8-month-old cocaine-exposed children showed less arousal, interest, joy, or sadness during the learning task. In the same cohort, Bendersky and Lewis⁶⁶ reported no differences in maternal behaviors, but less joy and more negativity among 4-month-old infants with heavy cocaine exposure following a perturbation of the face-to-face interaction between mother and infant. Roumell et al⁹⁴ reported a bivariate association between prenatal cocaine exposure and decreased facial emotion after immunization, uncontrolled for other prenatal exposures. In studies of face-to-face interaction between mothers and infants, Mayes et al⁹² found heavy prenatal cocaine use correlated with less

optimal maternal behavior and with decreased readiness for interaction among infants at age 6 months but not 3 months.

Diverse techniques have been used to assess neurophysiology in cocaine-exposed and unexposed infants aged 13 months and younger. Cocaine-exposed infants showed lower basal cortisol levels, but normal cortisol increase in response to the stress of venipuncture and no difference in amount of observed crying.⁸⁶ On electroencephalographic sleep studies at 12 months, cocaine-exposed children did not differ from unexposed children in sleep architecture, but infants whose mothers continued to use cocaine into the third trimester showed subtle reductions in spectral energies.⁹⁵ In 2 reports from a single cohort, assessments of heart and respiratory response to auditory, visual, and social stimulation at age 8 weeks found that cocaine-exposed children showed increased heart rate to social stimulation and a higher baseline respiratory rate, but were not more dysregulated in arousal modulation or observed behavioral state.^{65,71} Full-term cocaine-exposed infants showed better arousal modulation than their unexposed counterparts.⁶⁵

Prenatal cocaine exposure, independent of exposure to alcohol, has not been found to be associated with levels of behavioral disturbances detectable by standard scoring of epidemiologic and clinical report measures by parents and teachers.^{64,72,73,77,78,87,93} However, 2 studies in 1 cohort (1 study using a study-specific measure⁷² and the other⁷³ using a new and as-yet unreplicated method of scoring the Teacher Report Form of the Child Behavior Problem Checklist¹¹⁵) found less-optimal scores among cocaine-exposed children. Another research group^{90,93} found, after covariate control, an association between prenatal cocaine exposure and increased errors of omission, but not commission, on a continuous performance task.

COMMENT

Before summarizing our findings, we must acknowledge the limitations of our approach. Studies that meet our methodologic criteria may still lead to overestimation or underestimation of cocaine's impact. Prospective studies may yield biased results if there is differential attrition.⁹⁹ Less dysfunctional caregivers may be more likely to sustain study participation, creating differential retention of children with more

Alcohol Use	Marijuana Use	Selection/Matching Criteria	Controlled Variables	Other Effects
C	Analyzed as single category	All drug users in prenatal care by 15 weeks and in drug treatment		
C	Analyzed as single category	All drug users in prenatal care by 15 weeks and in drug treatment	Sex, gestational age	
R	R	Maternal age ≥19, English speaking, singleton or first-born twin, no O ₂ >28 days, no seizures, no grade III or IV IVH, not breastfed		
R	R	Medicaid, all >34 weeks' gestation		
DC	DC	All black, low socioeconomic status, at least 2 prenatal visits, >32 weeks' gestation	Maternal age, welfare, education, parity, prepregnancy weight, birth weight, height, breastfed, prenatal visits, infant age, sex, gestational age	Breastfeeding associated with faster postpartum growth
C	R	All from same ZIP code, 36 weeks' gestation, no NICU care, women referred for drug treatment excluded	Placement, gestational age, maternal age and education, OFC at birth, birth weight	
DC	DC	All in prenatal care by 5 months of pregnancy	Age, sex, height, ethnicity, current drug/alcohol use	

favorable outcomes. Alternatively, caregivers of children with obvious impairments may be more willing to return for repeated assessments, leading to an overestimation of risk for poor outcomes.

Reliance on interviews alone to classify exposure, which was the state of the art when the cohorts reported here were

recruited, entails unavoidable imprecision.¹⁴ In the absence of cumulative biological markers some cocaine-exposed children may have been misclassified as unexposed. Conversely, women who do admit cocaine use in interviews tend to be heavier users than those who deny use but whose use is detected by hair assays.¹¹¹ Generalization from atypical

cases at the highest levels of exposure will lead to overestimation of the impact of prenatal cocaine exposure in the broader population of users. However, if a sample contains very few infants heavily exposed to cocaine,^{77,93} possible effects of heavier use may be statistically "diluted" by over-aggregation of various levels of exposure into a single category.¹¹⁴

Table 2. Standardized Cognitive Assessments*

Study	No.	Cocaine Effect	Outcome Measures	Assessment Ages	Tobacco Use
Alessandri et al, ⁶³ 1998	15H 19L 78 -	No cocaine dose effect on PDI, no cocaine main effect on MDI, but interaction of heavy cocaine with age associated with lower MDI	BSID-II	8 and 18 months	DC
Azuma and Chasnoff, ⁶⁴ 1993	92 + 25 poly 45 -	No cocaine effect	SBIS	3 years	R
Chasnoff et al, ⁷⁰ 1992	106 + 45 poly 81 -	Cocaine exposed not different from other drugs, but lower on MDI and PDI at 6 months than unexposed	BSID	3, 6, 12, 18, and 24 months	R
Coles et al, ⁷¹ 1999	25 preterm + 32 full-term + 22 preterm - 26 full-term -	No cocaine effect	BSID	8 weeks corrected for prematurity	R
Graham et al, ⁷⁷ 1992	30 + 20 poly 30 -	No cocaine effect	BSID	19.7 months	R
Griffith et al, ⁷⁸ 1994	93 + 24 poly 25 -	Cocaine-exposed lower than controls on verbal reasoning	SBIS	3 years	R
Hurt et al, ⁷⁹ 1995	101 + 118 -	No cocaine effect	BSID	6, 12, 18, 24, and 30 months	C
Hurt et al, ⁸² 1997	71 + 78 -	No cocaine effect	WPPSI-R	4 years	C
Hurt et al, ⁸³ 1998	72 + 78 -	Neither prenatal nor concurrent maternal cocaine use associated with full-scale IQ ≤90	WPPSI-R	4 years	C Negative association with performance IQ
Jacobson et al, ⁸⁵ 1996	86H 48L 330 -	No cocaine effect	BSID	13 months	DC
Kilbride et al, ⁸⁹ 2000	111+ 41 -	No cocaine effect	BSID, SBIS	6, 12, and 24 months (BSID); 36 months (SBIS)	C
Mayes et al, ⁹¹ 1995	61 + 47 -	Cocaine univariately associated with PDI, but not after multivariate control	BSID	3 months	C
Richardson et al, ⁹³ 1996	28 + 523 -	No cocaine effect	SBIS, WRAT-R	6 years	DC
Singer et al, ⁹⁶ 1994	41 + 41 -	Lower MDI and PDI among cocaine exposed	BSID	16 months corrected for prematurity	R

*PDI indicates Psychomotor Development Index; MDI, Mental Development Index; BSID-II, Bayley Scales of Infant Development, 2nd ed; SBIS, Stanford Binet Intelligence Scale; HSQ, Home Screening Questionnaire; CBCL, Child Behavior Checklist; BSID, Bayley Scales of Infant Development; WPPSI-R, Wechsler Preschool and Primary Scale of Intelligence-Revised; HOME, Home Observation for Measurement of the Environment; PCIS, Parent Caregiver Involvement Scale; OCS, Obstetrical Complication Scale; WRAT-R, Wide Range Achievement Test-Revised; AFDC, Aid for Families of Dependent Children; BPD, bronchopulmonary dysplasia; and VLBW, very low birth weight.

Four studies with positive^{69,75,76,94} and 1 with negative⁶⁸ findings have small sample sizes and must be interpreted with particular caution since they may overestimate cocaine effects due to the impact of a few outliers or underestimate effects because of insufficient power or sampling variation.

While acknowledging these limita-

tions, we conclude that after control for exposure to tobacco and alcohol, effects of prenatal cocaine on physical growth are not shown.^{64,70,71,79,84,89,93} Researchers have not found a negative association of prenatal cocaine exposure, independent of environmental risk and exposure to other psychoactive substances, with developmental scores

from infancy to age 6 years.* However, sufficient information is not available to elucidate whether there are specific cocaine effects on developmental scores in the context of prematurity.⁹⁶

Prospective data in the language and motor domains are only available for

*References 63, 64, 70, 71, 77-79, 82, 83, 85, 89, 91, 93.

Alcohol Use	Marijuana Use	Selection/Matching Criteria	Controlled Variables	Other Effects
DC	DC	All with biological mothers	Environmental risk, neonatal medical risk, sex	Among lightly exposed, increased environmental risk associated with decreased MDI
C	Analyzed as single category	All drug users in prenatal care by 15 weeks and in drug treatment	OFC, HSQ, perseverance, CBCL	Poor HSQ and poor perseverance associated with lower IQ
C	Analyzed as single category	All drug users in prenatal care by 15 weeks and in drug treatment	Sex, OFC	Smaller OFC correlated with MDI at 12, 18, and 24 months, OFC at birth associated with PDI at 6 months and MDI at 24 months
R	R	Maternal age ≥19, English speaking, singleton or first-born twin, no O ₂ >28 days, no seizures, no grade III or IV IVH, not breastfed		
R	C	Tobacco, marital status, obstetric history, ethnicity, self-referred to Mother Risk Counseling	Maternal IQ	Maternal IQ associated with MDI
C	Analyzed as single category; associated with decreased abstract reasoning	All drug users in prenatal care by 15 weeks and in drug treatment	Caregiver, child's sex, OFC, CBCL, and Summative Attention Scale of SBIS	Drug-free environment associated with better scores on verbal reasoning among cocaine-exposed
C	C	Medicaid, all >34 weeks' gestation, cocaine use in at least 2 trimesters	Congenital syphilis, maternal age and education, foster care	Foster care associated with lower MDI at 18 months
C	C	Medicaid	Maternal age and education, gravidity, parity, prenatal care, sex, foster care	
C	C	Medicaid	HOME, PCIS, sex, child age, foster care, day care/Head Start attendance, parental education, gravidity, parity, prenatal care, current cocaine use	Higher HOME scores and better PCIS associated with full-scale IQs above 90
DC	R	All black, all received prenatal care	Maternal age, depression, prenatal visits, HOME, parity, examiner, sex, age at test, continued maternal drug use	
C	R	All from same ZIP code, 36 weeks' gestation, no NICU care, women referred for drug treatment excluded	Placement, gestational age, maternal age and education, OFC at birth, birth weight	Birth weight associated with MDI at 12 months; with case management, children cared for by biological mothers have higher SBIS verbal scores; children in care of relatives have highest overall scores
C	C	All with biological mothers	Maternal age and education, OCS, prenatal care, birth weight, birth length, and OFC at birth	
DC	DC	All in prenatal care by 5 months	Maternal ethnicity, IQ, current maternal alcohol/drug use, self-esteem, HSQ, child's grade	
R	R	All black, all receiving AFDC, severity of BPD, all VLBW	Chronological age at testing, IVH, foster placement	

children up to age 3 years.^{69,74-76,78,79,81} No effects on standardized language measures have been shown. Less-optimal motor development before age 7 months but not thereafter has been found by some investigators^{75,76,97} but not others.^{74,79,89} Recent research suggests that motor findings attributed to cocaine may in fact reflect heavy prenatal tobacco exposure.⁷⁴

Except for the work of 1 investigator,^{72,73} prenatal cocaine exposure independent of exposure to alcohol has not yet been found to be associated with levels of behavioral disturbance that are readily detected by standard scoring of epidemiologic and clinical report measures from parents and teachers.^{64,72,77,78,87,93} However, sophisticated experimental and physiological paradigms of uncertain clinical impor-

ance have detected possible effects of prenatal cocaine exposure. Of these, only the finding of decreased emotional expressiveness has been replicated in more than 1 study.^{62,66,92,94}

The differences between our conclusions and those of others show how methodologic rigor influences understanding of prenatal cocaine exposure. For instance, a respected research group recently concluded from a meta-analysis of 6 studies that prenatal cocaine exposure is associated with decreased competence in expressive and receptive language.⁹⁸ However, 5 of these studies^{29,37,43,46,51} were retrospective; 2 did not use masked assessors.^{37,57} In 2 samples, the majority of cocaine-exposed children were also exposed to opiates and methamphetamines.^{37,57} Furthermore, none of these studies analytically con-

trolled for the possible effects of prenatal tobacco exposure, an established correlate of language impairment.¹¹³ Nevertheless, newspaper articles used the conclusions of the meta-analysis to declare that "because of cocaine-related receptive language impairments," "crack babies" would cost taxpayers an additional \$42 to \$352 million per year in special education services.¹¹⁶

When prenatal cocaine and tobacco exposure are compared dispassionately, it becomes clear how sociopolitical forces shape discrepant interpretations of similar scientific data. The mechanisms of nicotine and cocaine effects on the developing brain are similar, involving vasoconstriction, hypoxia, and perturbations of neurotransmitter networks.¹¹⁷ Prenatal tobacco exposure has been associated with in-

Table 3. Language Skills*

Study	No.	Cocaine Effect	Outcome Measures	Assessment Ages	Tobacco Use	Alcohol Use	Marijuana Use
Bland-Stewart et al, ⁶⁹ 1998	11 + 11 -	Delays in early semantic development, no effect on SICD-R score	SICD-R language sample	24 months	NR	NR	NR
Hurt et al, ⁸¹ 1997	76 + 81 -	No cocaine effect	PLS	2.5 years	NR	NR	NR
Kilbride et al, ⁸⁹ 2000	111 + 41 -	No cocaine effect	REEL, SICD-R	6, 12, 24 months (REEL), 36 months (SICD-R)	C	C	R

*SICD-R indicates Sequenced Inventory of Communicative Development-Revised; NR, not reported; PLS, preschool language; and REEL, Receptive Expressive Emergent Language Scale.

Table 4. Motor Skills

Study	No.	Cocaine Effect	Outcome Measures	Assessment Ages	Tobacco Use
Dempsey et al, ⁷⁴ 2000	40 + 56 -	No cocaine effect	Neurologic examination	6 weeks	DC High doses associated with hypertonia
Fetters and Tronick, ⁷⁵ 1996	28 + 22 -	Higher total risk on the MAI at 7 months, lower mean percentile on AIMS at 7 months	AIMS, MAI, PDMS	1, 4, 7, and 15 months	C
Fetters and Tronick, ⁷⁶ 1998	28 + 22 -	No difference on PDMS, significant differences on prone and standing subscores of AIMS and primitive reflex score of MAI at 7 months	AIMS, MAI, PDMS	1, 4, 7, and 15 months	C
Hurt et al, ⁷⁹ 1995	101 + 118 -	No cocaine effect	Tone and reflexes	6 and 12 months	C
Kilbride et al, ⁸⁹ 2000	111 + 41 -	No cocaine effect	PDMS	6, 12, 24, and 36 months	C
Swanson et al, ⁹⁷ 1999	48 + COC3 72 + COC12 186 -	Higher full-scale MAI total risk, COC3 associated with less optimal volitional movement than COC12, COC3 at higher risk for neuromotor dysfunction than unexposed but COC12 is not	MAI	4 months	DC

*MAI indicates Movement Assessment of Infants; AIMS, Alberta Infant Motor Scales; PDMS, Peabody Development Motor Scales; COC3, cocaine use in third trimester; and COC12, discontinued cocaine use before third trimester.

ant mortality,¹¹⁸ moderate impairment of cognitive functioning,¹¹⁹ and a range of behavioral problems (which, unlike those associated with cocaine exposure, are detectable on relatively insensitive epidemiologic measures).¹²⁰ It has been calculated that low birth weight attributable to maternal smoking annually costs \$263 million (1995 dollars) in excess direct medical costs for neonatal care alone.¹²¹ Despite increased health care costs imposed by their tobacco use, there are no sterilization campaigns for mothers who use tobacco. No pregnant women have been charged with child abuse for tobacco use in pregnancy. Teachers do not dread having a "tobacco kid" assigned to their class.

We have focused on cocaine as a suspected behavioral teratogen, since exaggerated views of its teratogenicity have

provided the rationale for selectively targeting pregnant women who use cocaine for sanctions even more punitive than those imposed on women who use other illicit substances.^{3,8,122} Our focus omits 2 important considerations beyond the scope of this review. First, even if cocaine were as hazardous to a child's development as some claim, established teratogenicity (eg, that of heavy alcohol use) does not justify policies that violate the usual canons of medical ethics and civil liberties.³ Second, health providers should not ignore that cocaine use in pregnancy is often a marker for a mother-child dyad at risk for poor health and impaired caregiving due to factors ranging from infectious diseases to domestic violence. Addiction to any intoxicant may so impair parents that they abuse or neglect a child.¹²³ However, pre-

sumptive punitive sanctions imposed in pregnancy or at birth do not reduce these risks to the child. On the contrary, fear of prosecution may discourage pregnant and parenting women from seeking prenatal care and drug treatment,^{8,124} which have been shown to optimize infant outcome.¹²⁵ Stigma and negative expectations generalized from mothers to their children may in themselves impede the children's academic progress.¹⁰¹ Care of families affected by substance abuse should be comprehensive and not irrationally shaped by social prejudices that demonize some drugs and drug users and not others.¹²³

Much is still unknown about the effects of prenatal cocaine exposure. Research on prenatal marijuana and tobacco exposure suggests that, even if no drug effects are found between the ages of 6 months and 6 years, the increasing cognitive demands and social expectations of school or puberty may unmask sequelae of exposure not previously identified.^{126,127} Cumulative environmental risk and protective factors may also exacerbate or moderate negative cognitive and behavioral outcomes as children mature.¹²⁸ However, among children up to 6 years of age, there is no convincing evidence that prenatal cocaine exposure is associated with any

Selection/Matching Criteria	Controlled Variables	Other Effects
Age, sex, foster care, maternal age and education		
Medicaid		
All from same ZIP code, 36 weeks' gestation, no NICU care, women referred for drug treatment excluded	Placement, gestational age, maternal age and education, OFC at birth, birth weight	Case management of children cared for by biological mothers associated with higher SICD-R scores

Alcohol Use	Marijuana Use	Selection/Matching Criteria	Controlled Variables	Other Effects
C	C	Birth weight >2000 g, English speaking, maternal age >18, no NICU care	Ethnicity, adequacy of prenatal care, OFC, gestational age, homelessness	
C	R	Maternal education, maternal age >18, health insurance, ethnicity, birth weight >2000 g, no NICU care	Hobel score, cumulative risk index, child hospitalization and poor health, maternal education, ethnicity	
C	R	Maternal education, maternal age >18, health insurance, ethnicity, birth weight >2000 g, no NICU care		
C	C	Medicaid, all >34 weeks' gestation, cocaine use in at least 2 trimesters	Congenital syphilis, maternal age and education, foster care	
C	R	All from same ZIP code, 36 weeks' gestation, no NICU care, women referred for drug treatment excluded	Placement, gestational age, maternal age and education, OFC at birth, birth weight	
DC	DC	Maternal age >17, gestational age ≥37 weeks	Prenatal visits, infant sex and age, parity, ethnicity, maternal age and education, marital status, income	Prenatal care decreased association between cocaine exposure and primitive reflexes and volitional movement to nonsignificant

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Table 5. Behavior, Attention, Affect, Neurophysiology*

Study	No.	Cocaine Effect	Outcome Measures	Assessment Ages	Tobacco Use
Alessandri et al, ⁶² 1993	36 + 36 -	Cocaine associated with fewer positive emotions, less arousal, and less instrumental responding	Instrumental responses and facial expressions during learning	4, 6, or 8 months	R
Alessandri et al, ⁶³ 1998	37H 30L 169 -	No cocaine effect	Habituation	8 months	DC
Azuma and Chasnoff, ⁶⁴ 1993	92+ 25 poly 45 -	No cocaine effect	CBCL externalizing scale	3 years	R
Bard et al, ⁶⁵ 2000	27 preterm + 39 full-term + 23 preterm - 29 full-term -	None on behavioral state or heart rate; higher baseline respiratory rate and better arousal modulation in full-term infants, and poorer arousal modulation in preterm infants; preterm exposed are no more dysregulated than full-term unexposed	Arousal and arousal modulation in heart rate and respiratory rate	8 weeks corrected for prematurity	DC Associated with arousal modulation of heart rate
Bendersky and Lewis, ⁶⁶ 1998	24H 17L 66 -	Heavily exposed showed less joy and more negative expressions during reengagement	Still face paradigm	4 months	DC
Betancourt et al, ⁶⁷ 1999	7 + 81 -	No cocaine effect	Goodman Lockbox	3.5 and 4.5 years	C
Blanchard et al, ⁶⁸ 1998	26 + 23 -	No cocaine effect	Qualitative behavioral ratings during motor testing	1, 4, and 7 months	C
Coles et al, ⁷¹ 1999	25 preterm + 32 full-term + 22 preterm - 26 full-term -	Increased heart rate to social stimulation	Heart rate response to auditory, visual, and social stimulation	8 weeks corrected for prematurity	C
Delaney-Black et al, ⁷² 1998	27 + 75 -	1-Tailed cocaine effect on problem behaviors and daydreaming, but no effect on Conners Scale total	Conners Teachers Rating Scale and Problem Behavior Scale	72-90 months (6-7.5 years)	C
Delaney-Black et al, ⁷³ 2000	201 + 270 -	None with standard scoring method, but higher Externalizing-Internalizing Difference Score in cocaine exposed	Teacher Report Form of CBCL	6 years	DC
Graham et al, ⁷⁷ 1992	30 + 20 marijuana 30 -	No cocaine effect	Vineland Social Maturity	18 months	R
Griffith et al, ⁷⁸ 1994	93 + 24 poly 25 -	Similar to polydrug effects, but both show more aggressive and destructive behavior	CBCL	3 years	R
Hurt et al, ⁸⁰ 1996	83 + 93 -	No cocaine effect	Free play	18 and 24 months	C
Jacobson et al, ⁸⁵ 1996	86H 48L 330 -	Heavy cocaine exposure associated with poor visual memory on Fagan Test at 6 and 12 months and faster responsiveness on Visual Expectancy at 6 months	Fagan Test of Infant Intelligence; Visual Expectancy Paradigm	6 and 12 months	DC
Jacobson et al, ⁸⁶ 1999	29 + 57 -	Cocaine exposed had lower basal cortisol prestress, but not poststress level	Cortisol levels before and after venipuncture	13 months	DC
Johnson et al, ⁸⁷ 1999	53 + 37 -	No cocaine effect	CBCL	24 months	NR
Karmel et al, ⁸⁸ 1996	46 + 147 - 162 - with CNS injury	No cocaine effect	Arousal modulated visual attention	4 months corrected for prematurity	NR
Leech et al, ⁹⁰ 1999	26 + 582 -	Cocaine associated with increased errors of omission	CPT	6 years	DC Associated with more errors of omission
Mayes et al, ⁹¹ 1995	61 + 47 -	No effect on visual habituation, more cocaine-exposed too irritable to start procedure	Visual habituation	3 months	C
Mayes et al, ⁹² 1997	43 + 17 poly 21 -	Less readiness for interaction at 6 months	Face-to-face interaction	3 and 6 months	C
Richardson et al, ⁹³ 1996	28 + 523 -	No cocaine effect	Teacher Report Form of CBCL	6 years	DC
Roumell et al, ⁹⁴ 1997	14 + 16 -	Cocaine associated with less facial emotion	Facial expression coding after inoculation	18 months	R
Scher et al, ⁹⁵ 2000	37 + 34 -	Third-trimester exposure associated with reduced spectral θ energies; no sleep effects	Quantitative EEG	Day 2, 1 year	DC Increased indeterminate sleep, increased arousal

*CNS indicates central nervous system; BAER, brainstem auditory evoked responses; CPT, Continuous Performance Test; EEG, electroencephalogram; and REM, rapid eye movement.

Alcohol Use	Marijuana Use	Selection/Matching Criteria	Controlled Variables	Other Effects
R	NR	Sex, birth order, maternal age, all with biological mothers, all receiving AFDC, all black, all with ≤high school	Beck Depression Inventory and Life Events Survey	
DC	DC	All with biological mothers		
C	C	All drug users in prenatal care by 15 weeks and in drug treatment		Smaller OFC associated with more externalizing behavior
DC	DC	Maternal age ≥19, English speaking, singleton or first-born twin, no O ₂ >28 days, no seizures, no grade III or IV IVH, not breastfed	Quality of caregiving, maternal psychosocial resources, term status	Term status associated with higher arousal and with arousal modulation of respiratory rate and arousal of heart rate
DC	DC	All with biological mothers	Maternal vocalization, maternal sensitivity, Environmental Risk Score, Contingent Responsivity Score, neonatal medical complications	Maternal sensitivity associated with both joy and negative expression; neonatal medical risk and maternal vocalization associated with joy
C	C	Medicaid, all >34 weeks' gestation	Gestational age, birth weight, IQ, preschool experience	
C	C	Maternal education, maternal age >18, health insurance, ethnicity, birth weight >2000 g, no NICU care	Maternal age, parity	Child age associated with examiner's persistence and maternal parity with interruptions
C	C	Maternal age ≥19, English speaking, singleton or first-born twin, no O ₂ >28 days, no seizures, no grade III or IV IVH, not breastfed	Caregiving potential, quality of caregiving	Caregiving instability explained more variance than cocaine exposure, preterm drug-exposed had least optimal response
DC	NR	All black	Child's sex	
DC Associated with higher total score, increased attention problems, more delinquent behavior	C	All black, all with prenatal care, children with mental retardation excluded	Child's sex, custody changes, exposure to violence, current lead level, current caregiver drug use, socioeconomic status, marital status	Child's sex male, current lead level, exposure to violence, older age, custody change, caregiver marital status, and current caregiver drug use associated with less optimal scores
R	C	Marital status, obstetric history, ethnicity, self-referred to Mother Risk Counseling	Maternal IQ	
C Analyzed as single category, associated with aggression		All drug users in prenatal care by 15 weeks and in drug treatment	Child's sex, drug-free caregiver	
C	C	Medicaid	NICU admission, age at testing, foster care	
DC	R	All black, all received prenatal care	Maternal age, depression, prenatal visits, HOME, parity, examiner, infant's sex, age at test	
DC Related to higher basal cortisol, heavy exposure to poststress elevation	DC	All black, all received prenatal care	Milk, teething, pacifier, birth size, maternal verbal ability, age at test, postpartum drug use, ego maturity, caregiver depression	New teeth, maternal depression, AFDC associated with higher basal cortisol; age at visit, maternal verbal ability with poststress cortisol
NR	NR	All Hispanic or black	Ethnicity, maternal stress and social support, maternal depression, child's sex	Maternal stress and social support associated with total internalizing and externalizing behavior; depression with externalizing behavior problems
NR	NR	Cocaine-exposed had normal BAER and cranial ultrasounds	Arousal condition	CNS injury associated with neonatal pattern of attention
DC	DC Associated with more errors of commission, fewer of omission	All in prenatal care by 5 months	Ethnicity, child's sex, illnesses, hospitalizations, SBIS IQ, HSQ, maternal work status, life events, hostility, maternal age, male in household, current caregiver alcohol/drug use	Omission predicted by lower child SBIS IQ and age, and mother more hostile and not working; commission predicted by child's male sex, male in household, and lower SBIS IQ
C	C	All with biological mothers	Maternal age, education, OCS, prenatal care, birth weight, length, OFC	
C	C	All with biological mothers	Maternal age and education, infant's sex, OCS, infant size at birth	
DC	DC	All in prenatal care by 5 months	Ethnicity, child's IQ and grade, current maternal alcohol/drug use	
R	R	Hospital payment, maternal education, all black		
DC Decreased indeterminate sleep and δ energies, increased REM and spectral correlation	DC Increased arousal, decreased β energies	Full-term, Apgar score >5, mother in prenatal care by 5 months, no general anesthesia	Child's sex and age, ethnicity, number of hospitalizations, maternal age	

developmental toxicity different in severity, scope, or kind from the sequelae of many other risk factors. Many findings once thought to be specific effects of in utero cocaine exposure can be explained in whole or in part by other factors, including prenatal exposure to tobacco, marijuana, or alcohol* and the quality of the child's environment.†

*References 64, 65, 70, 74, 78, 84, 86, 90, 95
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Executive Summary
Testimony before the U.S. Senate Sentencing Commission

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kids who've been exposed to prenatal substance abuse

Prenatal exposure to maternal substances of abuse can have a devastating effect on the long-term outcome of children. However, given that the physiology of cocaine and crack is the same, that changes in the fetal brain are similar whether the mother used cocaine or crack, and that substance abuse is a polydrug phenomenon, it is impossible to differentiate the detrimental effects of any one specific drug from that of any other. In this light, it is vital that we understand that the home environment is the critical determinant of the child's ultimate outcome. Thus, our efforts must be turned toward eliminating drug policy and sentencing guidelines that are not based in science and rather work to unify and coordinate public health, public law, and child welfare approaches that will serve the best interests of the children and families of our nation.

Testimony before the U.S. Senate Sentencing Commission

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A child's development is a dynamic process, involving both social and biological factors that contribute to success or failure. From day one, children interact with the environment around them and seek the nurturing support that will help them achieve their full potential for health and development. However, a woman's use of alcohol, tobacco, cocaine, crack or any other substance during pregnancy is recognized as one of the most significant barriers to a child's healthy outcome, impeding the child's ultimate growth and development through both biological and environmental influences. Compounding this problem, many children from substance abusing homes end up in the child welfare system, often undergoing a series of placement changes that interfere with the child's ability to develop an enduring relationship with a primary caretaker.

In 1993, I had the opportunity to testify before this sentencing commission as it deliberated sentencing guidelines for drug possession and use. The question before the commission was the relative impact of cocaine vs. crack on the unborn child. To begin this discussion today, I would like to quote from my testimony in 1993:

“(O)ur longitudinal research has shown without any doubt that the single most important factor affecting the life of a child is the environment of the home in which that child is being raised.”

This statement remains true today, and as we revisit sentencing guidelines for cocaine vs. crack possession, I would like to summarize new information that has evolved since I last appeared before you that lends even further credence to that statement.

National data reveal that over 1 million children per year are born into a substance abusing home. Children born to substance abusing women face two key risk factors: the biological effects of alcohol or illicit drugs on the developing fetal brain and early separation from their families due to endangerment from the substance abusing environment.

The areas of the brain vital to cognitive functioning and behavioral regulation appear to be the most vulnerable to prenatal exposure to alcohol and other drugs. Fetal Alcohol Syndrome is the most common cause of diagnosable mental retardation in the United States and a leading cause of behavior problems and learning disabilities in children. Illicit drugs such as cocaine have a direct impact on the dopamine receptor system of the developing fetal brain. In this context, it is important to note some important points:

1. The physiology of cocaine and crack are the same, and changes in the dopamine receptors in the fetal brain are the same whether the mother used cocaine or

crack.

2. Substance abuse is a polydrug phenomenon. It is impossible to differentiate the detrimental effects of any one specific drug from that of any other and foolhardy to try to protect the unborn child from any one drug. Our prevention and treatment efforts must turn attention to substance abuse, not specifically alcohol, cocaine, crack, amphetamines, or any other drug trend.
3. Long term, children exposed to maternal substances of abuse, no matter what these substances are, may suffer a wide range of mild to severe physical and behavioral problems, including poor growth, significant eating and sleeping problems, hyperirritability, and hypersensitivity to touch, movement and eye contact. By school age, prenatally exposed children have high rates of off-task behavior, distractibility, short attention span, impulsive behavior, and aggressive behavior.
4. In this light, it is vital that we understand that the home environment is the critical determinant of the child's ultimate outcome. Children depend on their parents to guide and nurture their development. The drug-exposed child most often comes from a neglectful family lifestyle filled with factors that interfere with the parents' attempts at effective child rearing and participation in the growth and development of their children. These factors are present to some extent in all women who abuse drugs at a high level, regardless of economic status. Further, the social environment of many addicted women is one of chaos and instability, which has an even greater negative impact on children.
5. Addicted women frequently have poor family and social support networks, thereby increasing their vulnerability to physical and sexual abuse. In turn, children of substance-abusing women are at greater risk for neglect and sexual, physical, and psychological harm. These difficulties are magnified in children living in poverty, because their mothers frequently lack the social and economic supports that could help alleviate some of the social isolation as well as the biological impact of prenatal drug exposure.
6. Significant psychiatric problems, such as a personality disorder or depression, are not uncommon in women who use drugs or abuse alcohol. These factors almost invariably hinder parenting capabilities further and lessen the chance for a normal developmental course for the child. Even in depressed women who do not use drugs or alcohol, there is less involvement with their children, poor communication among family members, increased friction, lack of affection, and an increase in guilt and resentment toward the child. To further complicate the picture, children of depressed mothers are much more likely to be depressed themselves, and the cycle of depression and drug use continues across the generations.
7. Women's attempts to seek services for themselves and their children often are hindered by the fragmentation that exists in the services community. Most frequently, families are referred to a variety of providers through categorical programs addressing a single need. These categorical programs most often are most often established by the Federal government, focusing on a specific drug or a specific condition of eligibility.

As we now turn our attention to the question at hand, we must ask ourselves how to develop policies and guidelines that serve the best interests of the child. These best interests are not served by automatically removing a child from its mother's care. They are not served by meting out sentences that are based on false assumptions that one drug is "worse" than another. Every legal or illegal drug one can name has a pharmacologic basis through which it exerts its effects on the fetus and on the pregnancy. In the final pathway, neither scientists, clinicians, or a judge and jury will be able to tell you what harm was done by the crack a woman used versus what harm was done by the cocaine, by the alcohol, or by any other substance she took in.

We have an opportunity today to discard laws that have no basis in science or common sense, laws that allow us to express moral outrage but do not affect or change the complex realities of substance abuse. We have an opportunity instead to view substance abuse for the non-categorical problem that it is and turn to unification of public health, public law, and child welfare approaches that will serve the best interests of the children and families of our nation.

Testimony of

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before the

United States Sentencing Commission

on

Sentencing Guidelines for Crack and Powder Cocaine

February 21, 2002

Elwood - crack users twice as likely to have a gun.

Abstract

In my testimony, I focus on the most distressing and embarrassing 100:1 disparity in the sentencing guidelines for crack compared to powder cocaine. Because crack markets are operated predominantly by blacks, this difference conveys a strong sense of racial discrimination and is a profound challenge to the legitimacy of the criminal justice system. Since the rationale for the original disparity may have been attributed to differences in the violence associated with the respective drugs, I discuss why those differences may have occurred as a result of the nature of the markets much more than as a result of any pharmacological differences between the drugs. The evolution of the crack markets has resulted in a significantly lower level of violence today than that which characterized their early years. Also, it seems much more rational to use sentencing enhancements to punish those individuals who use violence regardless of the drug they are dealing with than to base the sentencing difference on the chemical itself. Similarly, enhancements should be considered to account for an offender's role in the distribution hierarchy. If that were done, then Federal crack offenders would be treated even more leniently than powder-cocaine offenders. Thus, with appropriate use of enhancements for those aspects of drug markets that are of particular concern, I see no clear reason why there should be any difference in sentencing guidelines between crack and powder. If the Commission feels it necessary to create a difference even in the presence of an appropriate array of enhancements, then it should negotiate for the smallest difference that would be accepted.

So many of these problems derive from the constraints put on sentencing policies by the passions that are reflected in mandatory-minimum sentences. I would hope that the Commission could capitalize on the growing national enlightenment on drug policy (e.g., Proposition 36 in California mandating treatment instead of incarceration) to urge the Congress to at least sunset its drug-related mandatory-minimum sentencing laws if it is unwilling to repeal them outright. I am confident that such an action would lead to enthusiastic cheers throughout the nation's judiciary.

Testimony of Alfred Blumstein

Judge Murphy and Members of the Commission:

Thank you for inviting me. I am honored by the opportunity to appear before you today as you consider the various issues involved in the important question of sentencing guidelines for drugs.

As background to my own involvement in this issue, I have engaged in a variety of criminological research since my involvement as Director of Science and Technology for the President's Commission on Law Enforcement and Administration of Justice in 1966. I have been involved in practical policy matters as a member of the Pennsylvania Sentencing Commission for ten years between 1987 and 1997, and I served as the chairman for over eleven years of the Pennsylvania Commission on Crime and Delinquency, the state's criminal justice planning agency, which manages Federal criminal justice funds in Pennsylvania. Attached to my testimony is a short biographical statement for your information.

Some Background on Sentencing and the Drug Problem

I began to think hard about sentencing policy when I chaired a National Academy of Sciences Panel on Sentencing Research, which recommended the development of sentencing guidelines¹. I thought particularly hard about sentencing for drug offenses in my Presidential Address² to the American Society of Criminology in 1992 when I came to recognize that prisons were filling up with drug offenders in the mid-1980s (see Figure 1 for a clear indication of this growth)³, but that growth was not likely to have much effect on drug markets because the resilient drug markets were quite able to recruit new sellers to replace those sent to prison and even those deterred from drug selling because of the draconian sentences being imposed. As a result, drug transactions would continue to respond to the articulated demand, and the number averted through incarceration would be negligibly small as long as the demand persists.

It was only subsequently that I came to appreciate that the massive incarceration was not only ineffective, but was seriously counter-productive. The young people recruited as replacements in the crack markets were primarily African-American youth drawn from inner-city areas who had little opportunity in the legitimate economy at the time. This recruitment is indicated in Figure 2, which displays the ratio of arrests of non-whites compared to those of whites; here, we see that the ratio for adults began to climb in the early 1980s, whereas that for juveniles didn't begin to climb until 1985 (as the prisons were filling with the older sellers) and reached a peak of four times that of whites from 1989 until 1992, and then began a sharp decline as the demand for crack by new users dried up in the early 1990s⁴. Since these were street markets, these youths had to carry handguns to protect themselves against street robbers, and these young folks were far more volatile with their guns than the older people they replaced. Not only were these replacements a violence problem, but because of the tight networking among young people (remember the sneakers epidemics of the 1970s), we saw a major diffusion of handguns from these recruits to their friends, and on out into the larger community⁵. That was the major factor contributing to the rise of violence that began in about 1985, reached a peak in 1993, and has been declining since. The entire rise in homicide from 1985 to 1993 was attributable to young people with handguns⁶.

The Infamous Crack-Powder Disparity

With this background, I would like to address what I consider the most blatant embarrassment of the current guidelines and sentencing statutes – the 100:1 disparity between the 5 grams of crack and the 500 grams of powder warranting a 5-year mandatory-minimum sentence. Because crack is dealt primarily by blacks (85% of Federal crack offenders are black), whereas powder cocaine is dealt with primarily by whites (18%) and Hispanics (48%) (data from DB, Figure 27)⁷. This disparity associated with race is so extreme and is far more egregious than the relatively minor differences in

Figure 1

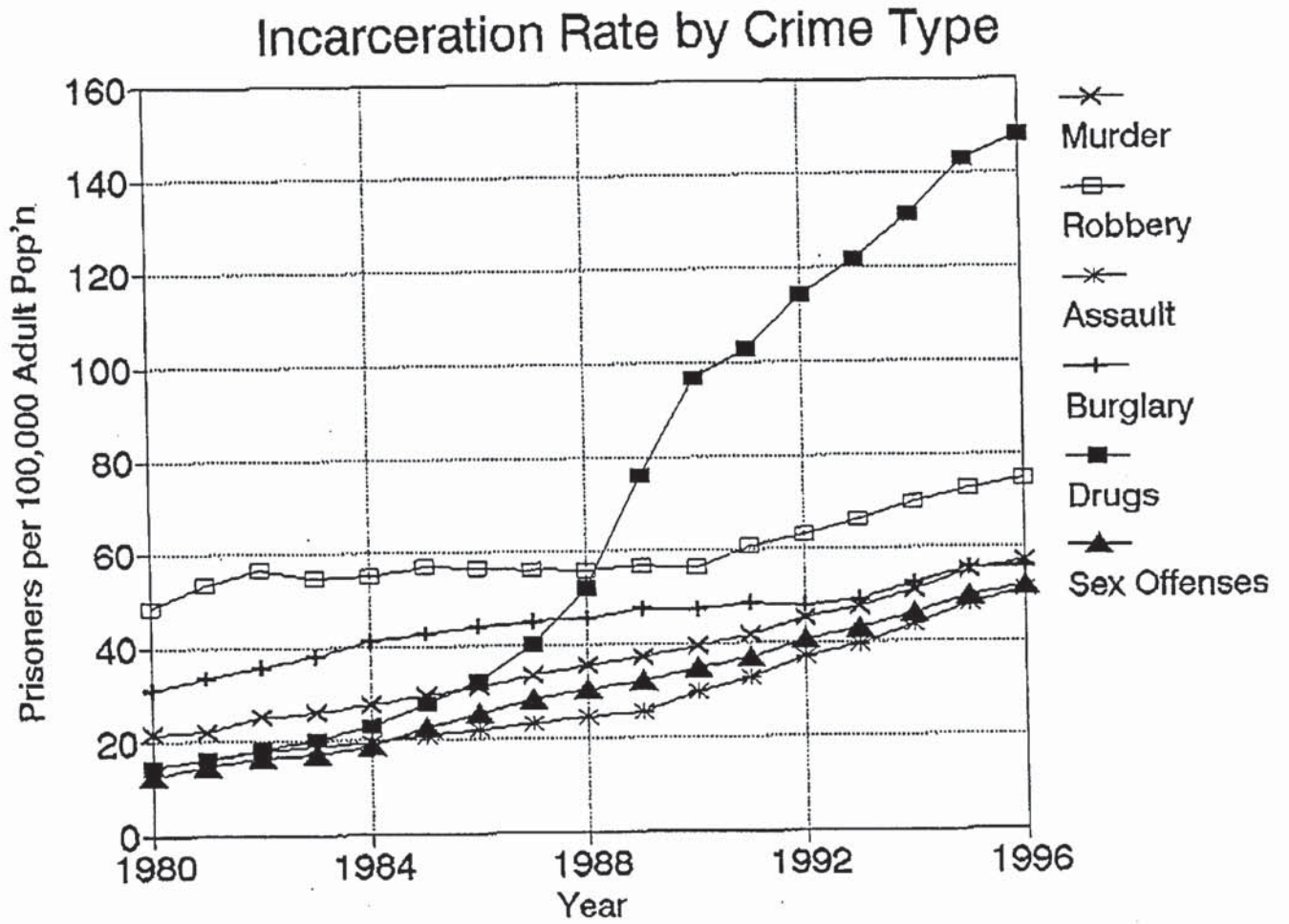
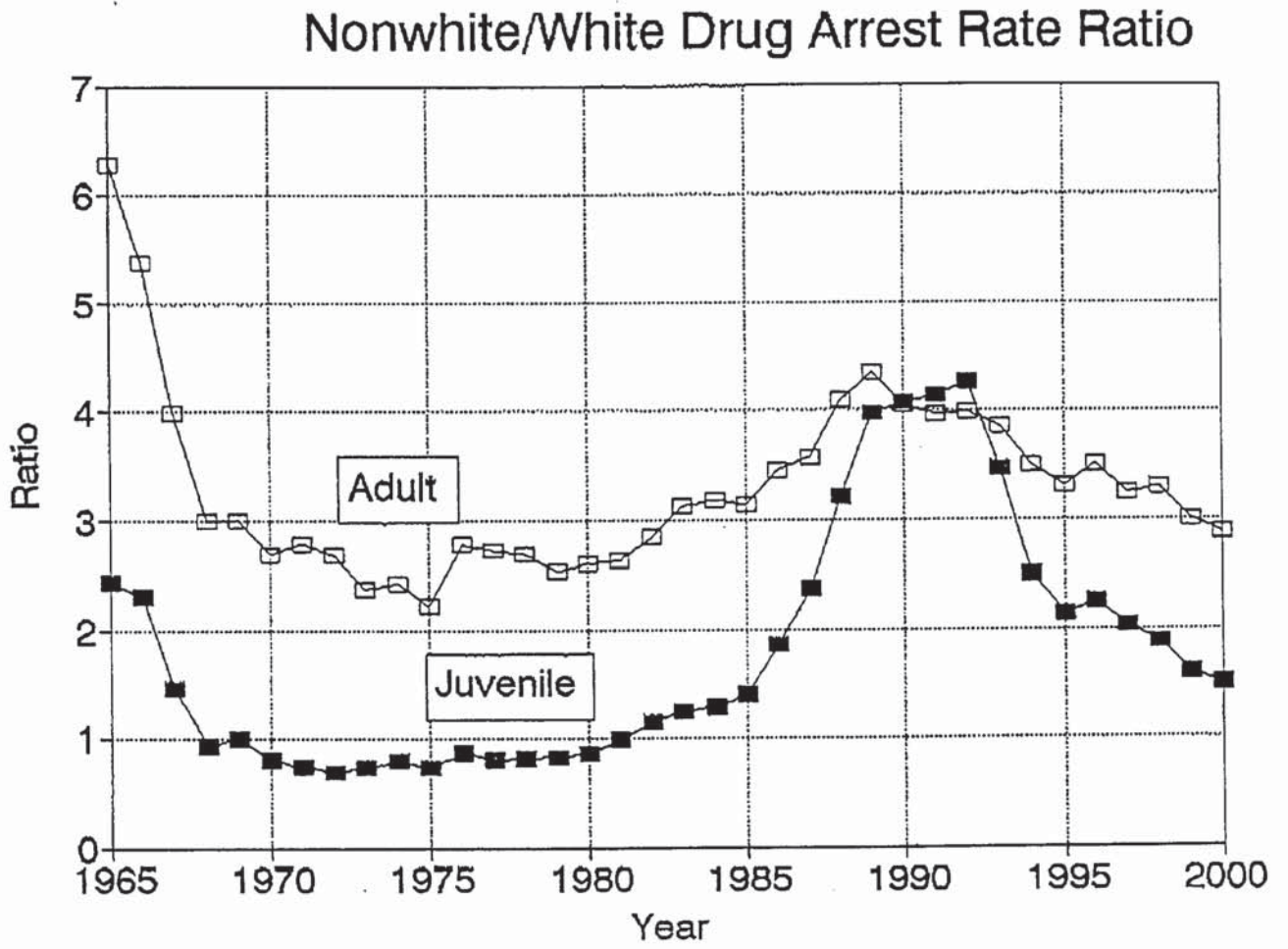


Figure 2



includes possession as well as trafficking

stops claimed to be racial profiling (differences in the order of factors of two to five, nowhere near 100). The vigorous challenges against racial profiling have been widely responded to in most quarters.

The 100:1 disparity is widely seen as blatant proof of racial discrimination by the criminal justice system⁸, and thereby contributes in important ways to serious challenge to the legitimacy of that system. It is crying for careful reconsideration, at a minimum because of the powerful symbolic import of that difference. That reconsideration should focus on issues of culpability of people arrested for drug offenses, their level in the distribution hierarchy (particularly the degree to which they are the “king-pins” against whom the rhetoric surrounding severe sentences are almost always focused), and especially the societal harm associated with their involvement

Societal Harm and Violence

The first and probably most important basis for reconsideration relates to the issue of societal harm, specifically the violence associated with the marketing of crack, especially at the time the Congress introduced the original 100:1 disparity. But, as with all illegal drugs, that difference in violence is far less associated with the pharmacological nature of crack and its behavioral effects than with the nature of its market. We have to understand that market, both in its initial years and how it has changed in recent years.

Crack came on the scene in the early 1980s as an important technological innovation that made the “pleasures” of cocaine available to a stratum of society that could afford a hit-at-a-time purchase of crack but did not have the capital to buy powder in its minimum available quantities. That innovation started initially in the coasts, particularly New York City and Los Angeles, and worked its way into the center of the country⁹. As with any innovation that significantly expands the size of the market, there was vigorous competition for a share of that growing market. However, as with all illegal markets that are denied access to civil dispute-resolution mechanisms, that competition often shows itself in the use of violence against competitors.

Also, the means and locus of distribution contributed to the growth of violence. First, the aggressive marketing of crack, particularly to the new customers, typically took place in street markets, typically in the poorest neighborhoods of the city, neighborhoods where violence is much more common than in the more affluent neighborhoods where powder would be more likely to be sold. Also, the participants in street drug markets need their own protection against street robbers, who might see these markets as prime targets because their victims would not be likely to call for help from the police. Thus, those in the street markets were likely to carry a handgun for self-protection, and the presence of these handguns inevitably escalated the level of violence in any disputes.

Finally, the phenomenon discussed in the Background section became a major factor in the late 1980s and early 1990s: recruitment of young people as replacements for the crack dealers sent to prison, arming of these volatile individuals, and diffusion of guns to their friends, and resort to the traditional mode of teen-age dispute resolution – fighting – but with much more lethal consequences because of the nature of the weapons that had suddenly appeared.

Recent Developments in Violence

Thus, for all these reasons, we saw considerably more violence associated with crack during its early years, and that difference may well have provided the rationale behind the disparity in the mandatory minimums. But that situation has changed considerably. The nation’s violence rates are now well down, lower than they have been for over 35 years. The rates of violence by young people are down to or below the level they started at in 1985. The crack markets have matured with the absence of new users, and so there is no longer a need for the young participants (see the decline after 1993 in Figure 2), it is much easier to sell to established customers, sellers’ market shares have largely stabilized, and police have been effective in getting the guns out of the hands of the kids

Taking Account of Differences in Violence in Different Drug Markets

Thus, while there may still be somewhat more violence associated with crack markets, it seems to make little sense to associate the penalty with the chemical composition of the drug. It seems so much more appropriate to associate the penalty with the violent behavior itself. Thus, the Commission's proposal to provide sentencing enhancements for gun carrying – and especially for gun use – seems to carry out that concern with a principle that is so much more appropriate than associating it with the drug involved.

Role of Offenders in the Distribution Network

The principle of culpability would seem to apply much more strongly to those high in the distribution hierarchy and whose distribution scope is national as opposed to local. The Drug Briefing provides some striking data reflecting on this issue. Fully two-thirds of the Federal crack offenders are street-level dealers compared to 29% of the powder cocaine offenders (Figure 12). Also, the street-level dealers for both crack and powder are the functionaries with by far the lowest median quantity of drugs in their possession (Figure 18). Furthermore, the crack offenses are predominantly confined within a city or neighborhood (75% are neighborhood or local compared to 37% for powder cocaine). Thus, based on this consideration alone, the sanction for powder should be higher than for crack. But, as with violence, any such distinctions should be based on the role and behavior of the individual offender through sentencing enhancements rather than through the chemistry of the drug.

Mandatory Minimums

The fundamental principle underlying the creation of sentencing commissions is that they provide a means for giving careful deliberation to the level of sentence that is most appropriate for a particular class of offense and offender broadly defined, and that they provide enough slack to the individual judge dealing with a particular case to address those relevant factors not incorporated in the guidelines. Indeed, many state legislatures created their sentencing commissions in the 1980s as a blocking action against the then faddish mandatory minimums. In their calmer moments, they realized the inappropriateness of the political passions that so often drive sentencing decisions by a legislative body. This can happen after a particularly heinous crime has captured the headlines. It can also happen when the public becomes sufficiently concerned about some crime problem that it demands the political system “do something”; if there is nothing obvious to do, then the legislature can always resort to passing a mandatory-minimum sentencing law. Regardless of whether it does any good in addressing the crime problem, it has indeed seemed to work in at least temporarily satiating the public's demands. This has certainly been the case with the drug mandatories. When the early two-year mandatories didn't work, then they were cranked up to five years, and then to ten years, never with any clear or careful assessment of what good – or harm in terms of the replacements recruited – they did.

I think it is fair to say that the political passions that fueled the passage of many mandatories – especially in the drug area – have cooled considerably. This is reflected in the passage in California of Proposition 36 calling for community treatment in preference to incarceration for drug offenders. Similar moves are under way in a number of other states. The pressure to make such changes results from a combination of fiscal problems faced by the states and a growing recognition of the ineffectiveness – often pure futility – of the often-draconian mandatory-minimum sentencing laws. I have for a long time advocated sunseting mandatory-minimum sentencing laws because I have been skeptical that legislatures would be willing to risk being labeled “soft on crime” by repealing any of them. At least, with sunseting, the law would have to be reconsidered after some period of time, and the ineffective ones left to disappear quietly in the absence of a strong reason to extend them.

I believe the time may well have come for the Commission to urge to Congress to at least sunset its mandatory drug laws to enable the Commission to emerge with a careful and rational structure in a deliberative way.

Summary

In these few pages, I have tried to highlight the concern about the most distressing and embarrassing 100:1 disparity in the sentencing guidelines for crack compared to powder cocaine. Since the rationale for the original disparity may have been attributed to differences in the violence associated with the respective drugs, I have discussed why those differences may have occurred as a result of the nature of the markets much more than as a result of any pharmacological differences between the drugs. The evolution of the crack markets has significantly lowered the level of violence that characterized their early years. Also, it seems much more rational to use sentencing enhancements to punish those who use violence regardless of the drug they are dealing with than to base the sentencing difference on the chemical itself. Similarly, enhancements should be considered to account for an offender's role in the distribution hierarchy. If that were done, it becomes apparent that Federal powder cocaine offenders should fare even worse than crack offenders. Thus, with appropriate use of enhancements for those aspects of drug markets that are of particular concern, I see no clear reason why there should be any difference in sentencing guidelines between crack and powder. If the Commission feels it necessary to create a difference even when an appropriate set of enhancements is in place, then it should negotiate for the smallest difference that would be accepted.

So many of these problems derive from the constraints put on sentencing policies by the passions reflected in mandatory-minimum sentences. I would hope that the Commission could capitalize on the growing national enlightenment on drug policy to urge the Congress to at least sunset its drug-related mandatory-minimum sentencing laws if it is unwilling to repeal them outright. I am confident that such an action would lead to vigorous cheering throughout the nation's judiciary.

Notes

¹ See Blumstein, Alfred, Jacqueline Cohen, Susan Martin, and Michael Tonry (eds.), *Research on Sentencing: The Search for Reform* (2 volumes) (1983). Report of the National Academy of Sciences Panel on Research on Sentencing, National Academy Press, Washington, D.C.

² See Blumstein, Alfred "Making Rationality Relevant - The American Society of Criminology Presidential Address" (1993), *Criminology*, Vol. 31, No. 1, pp. 1-16.

³ Figure 1 is taken from Blumstein, Alfred, and Allen J. Beck, "Population Growth in U.S. Prisons, 1980-1996" (1999) in *Prisons*, vol. 26 of *Crime and Justice*, (Michael Tonry and Joan Petersilia, eds.), University of Chicago Press, Chicago, IL, pp. 17-61. It depicts the growth of incarceration rate by crime type in state prisons, a ten-fold increase from 1980 to 1986. Drug offenders comprise over 20 percent of state prisoners and over 60 percent of Federal prisoners.

⁴ See Johnson, Bruce, Andrew Golub, and Eloise Dunlap, "The Rise and Decline of Hard Drugs, Drug Markets, and Violence in Inner-City New York", Chapter 5 in Blumstein, Alfred, and Joel Wallman (eds.), *The Crime Drop in America*, (2000), Cambridge University Press, Cambridge, England.

⁵ These issues were introduced in Blumstein, Alfred, "Youth Violence, Guns, and the Illicit-Drug Industry" (1995) *Journal of Criminal Law and Criminology* Volume 86, No. 4, pp 10-36.

⁶ These issues are developed in Blumstein and Wallman, *op cit.*, See especially Chapter 2, "Disaggregating the Violence Trends"

⁷ Data from the Drug Briefing (hereafter referred to as DB), January, 2002, prepared by the staff of the Sentencing Commission, available on the Commission's Web site.

⁸ It is important to recognize that the 100:1 disparity is not necessarily reflected in empirical reality of sentences imposed. DB (Figure 3) shows that Federal crack offenders get sentences that are only about 50% higher than cocaine offenders. But those sentences are complex aggregates of cases that differ in many ways, and it is difficult to discern how the sentences of comparable offenders would compare.

⁹ See Cork, Daniel, Examining space-time interaction in city-level homicide data: Crack markets and the diffusion of guns among youth. *Journal of Quantitative Criminology* (December 1999) 15(4): 379-406.



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TESTIMONY OF

WADE HENDERSON
EXECUTIVE DIRECTOR
LEADERSHIP CONFERENCE ON CIVIL RIGHTS

BEFORE THE

U.S. SENTENCING COMMISSION

ON

***RACIAL DISPARITIES IN
FEDERAL DRUG SENTENCING***

FEBRUARY 25, 2002

Good afternoon. I am Wade Henderson, Executive Director of the Leadership Conference on Civil Rights. I am pleased to appear before you today on behalf of the Leadership Conference to urge that the Sentencing Commission take aggressive action to remedy racial disparities in federal drug sentencing.

The Leadership Conference on Civil Rights (LCCR) is the nation's oldest and most diverse coalition of civil rights organizations. Founded in 1950 by Arnold Aronson, A. Philip Randolph, and Roy Wilkins, LCCR works in support of policies that further the goal of equality under law. Today the LCCR consists of over 180 organizations representing persons of color, women, children, organized labor, persons with disabilities, the elderly, gays and lesbians, and major religious groups. It is a privilege to represent the civil and human rights community in addressing the Commission today.

The Commission has sought public input on a number of proposed guideline amendments, and has also posed several "Issues for Comment." My testimony will address one of these issues: whether the threshold quantities of crack cocaine and powder cocaine that trigger longer sentences under the guidelines and statutes should be revised. This matter touches on civil rights concerns of paramount importance to our coalition.

The well-known 100-to-1 crack-powder ratio in federal law is one of the most visible manifestations of racial disparity in the criminal justice system. The civil rights community was bitterly disappointed by Congress' rejection of the Commission's 1995 proposal to eliminate the disparity, and we have grown increasingly frustrated by the failure of federal authorities to address the subject since.

Recent statistics compiled by the Sentencing Commission show that the problem relates not just to the unjustified differences between crack and powder cocaine penalties. Rather, *minorities are now disproportionately subject to the harsh penalties for both types of cocaine.* The issue is no longer just the "ratio" between crack and powder, although that remains a serious concern. The issue is that minorities are almost exclusively targeted for all federal cocaine arrests, and then find themselves in a mechanical sentencing system that results in unacceptably high minority incarceration rates.

In my testimony today I will briefly explain the civil rights context in which this issue arises. I will then turn to the specific issue of federal cocaine penalties and strongly urge the Commission to adopt significant changes to the relevant sentencing guidelines and to propose similar changes to the corresponding statutes.

I. RACIAL DISPARITIES IN STATE AND FEDERAL CRIMINAL JUSTICE SYSTEMS

The federal sentencing rules for crack and powder cocaine do not exist in a vacuum. Instead, this glaring inequity is part of a pattern of disparities that threatens the credibility of the criminal justice system in minority communities.

Two years ago LCCR, in conjunction with the Leadership Conference Education Fund, released a policy report entitled Justice on Trial: Racial Disparities in the American Criminal Justice System.^{*} The Report examined inequities in the enforcement of state and federal criminal laws, and devoted substantial attention to the issue of drug sentencing. We concluded that the criminal justice system is beset by massive unfairness, and that both the reality and the perception of this unfairness have disastrous consequences for minority communities and for the criminal justice system itself.

The report detailed how unequal treatment of minorities characterizes every stage of the process. Black and Hispanic Americans, and other minority groups as well, are victimized by disproportionate targeting and unfair treatment by police and other front-line law enforcement agents; by racially skewed charging and plea bargaining decisions of prosecutors; by harsh mandatory sentencing laws; and by the failure of judges, elected officials and other criminal justice policy makers to redress these problems.

These disparities are unjustified. The vast majority of blacks and Hispanics are law-abiding citizens and law enforcement tactics that assume otherwise are unfair and intolerable. As Representative John Lewis (D-GA) says in the foreword to Justice on Trial:

“...the unequal treatment of minorities at every stage of the criminal justice system perpetuates the stereotype that minorities commit more crimes. This perception helps fuel racial profiling and a vicious cycle that affects both innocent white and minority citizens. The reality is that the majority of crimes are not committed by minorities and most minorities are not criminals.”

Our report discussed the consequences of these policies in detail. Consider the following:

* The text of the report is available at www.civilrights.org.

- Almost one in three black males aged 20-29 on any given day is under some form of criminal supervision – either in prison or jail, or on probation or parole.
- A black male born in 1991 has a one in three chance of spending time in prison at some point in his life. A Hispanic male born in 1991 has a one in six chance of spending time in prison.
- There are more young black men under criminal supervision than there are in college. For every one black male who graduates from college, 100 black males are arrested.

In particular, the mandatory sentencing laws enacted by Congress in the mid-1980's have led to racial injustice. These laws deprive judges of their traditional discretion to tailor a sentence based on the culpability of the defendant and the seriousness of the crime. Mandatory minimum sentencing laws are not truly mandatory because they provide opportunities for prosecutors to grant exceptions to them. Prosecutors can choose to charge particular defendants with offenses that do not carry mandatory penalties or they can agree to a plea agreement in which the charges carrying mandatory penalties will be dismissed. And under federal law, only the prosecutor may grant a departure from mandatory penalties by certifying that the defendant has provided "substantial assistance" to law enforcement.

Mandatory minimums embody a dangerous combination. They provide the government with unreviewable discretion to target particular defendants or classes of defendants for harsh punishment. But they provide no opportunity for judges to exercise discretion on behalf of defendants in order to check prosecutorial discretion. In effect, they transfer the sentencing decision from impartial judges to adversarial prosecutors, many of whom lack the experience that comes from years on the bench.

I should note that some civil rights groups originally supported mandatory sentencing as an antidote to racial disparities in sentencing. But the evidence is clear that minorities fare worse under mandatory sentencing laws than they did under a system with more judicial discretion. By depriving judges of the ultimate authority to impose fair sentences, mandatory sentencing laws put sentencing on auto-pilot. Discretionary decisions of law enforcement agents and prosecutors engaged in what Justice Cardozo called "the competitive enterprise of ferreting out crime" are more likely to disadvantage minorities than judicial discretion.

The effect of current sentencing policies, including mandatory minimum sentencing laws, has been dramatic. In 1972, the populations of federal and state prisons combined were approximately 200,000. By 1997 the prison population had increased 500 percent to 1.2 million. Similar developments at the local level led to an

increase in the jail population from 130,000 to 567,000. There are now some two million people in federal and state prisons and local jails.

This undue reliance on imprisonment results in serious racial disparities. Incarceration rates for minorities are far out of proportion to their percentage of the U.S. population.

As the overall prison population has increased, so too has the percentage of minority Americans as a proportion of the overall prison population. From 1970 to 1984, whites comprised about 60 percent of those admitted to state and federal facilities, and blacks around 40 percent. By 1991, these ratios had reversed, with blacks comprising 54 of prison admissions versus 42 percent for whites. Other minority groups have also been affected by this trend: Hispanics represent the fastest growing category of prisoners, having grown 219 percent between 1985 and 1995.

The increase in minority incarceration is attributable almost exclusively to drug law enforcement. While blacks constitute about 12 percent of the population, they constitute 38 percent of all drug arrestees. Much of this discrepancy can be traced to practices such as racial profiling. The assumption that minorities are more likely to commit drug crimes and that most minorities commit such crimes prompts a disproportionate number of minority arrests. Drug arrests are easier to accomplish in impoverished inner-city neighborhoods than in stable middle-class neighborhoods. Whites commit drug crimes too, but police enforcement strategies do not focus on the settings where those crimes occur.

The fact that minorities are disproportionately disadvantaged by drug sentencing policies is not because minorities commit more drug crimes, or use drugs at a higher rate, than whites. According to federal health statistics, drug use rates per capita among minority and white Americans are similar. Given the Nation's demographics, this means that many more whites use drugs than do minorities. Moreover, studies suggest that drug users tend to purchase their drugs from sellers of their own race.

Blacks are not only targeted for drug arrests. They are also 59 percent of those convicted of drug offenses and, because they are less likely to strike a favorable plea bargain with a prosecutor, 74 percent of those sentenced to prison for a drug offense. Thus, blacks are disproportionately subject to the drug sentencing regimes adopted by Congress and state legislatures. And these sentencing regimes, across all levels of government, increasingly provide for more and longer prison sentences for drug offenders. Mandatory minimum sentencing laws result in the extended incarceration of non-violent offenders who, in many cases, are merely drug addicts or low-level functionaries in the drug trade.

In the Justice on Trial report, we urged that mandatory minimum sentencing laws be repealed. These laws are engines of racial injustice, and their repeal would be a significant step toward restoring balance and racial fairness to a criminal justice system that has increasingly come to view incarceration as an end in itself. We also urged that the crack/powder cocaine disparity be eliminated. Few policies have contributed more to minority cynicism about the war on drugs, for reasons I will now explain.

II. CRACK COCAINE AND POWDER COCAINE

Much of the racial discrepancy at the federal level is the result of mandatory sentencing laws for drug offenses, and the drug sentencing guidelines that track the mandatory minimums. These laws were mostly enacted by Congress in 1986 in a wave of racially-tinged media hysteria. We do not contend that Congress was motivated by racial animus in enacting these laws, but race was a subtext of the congressional debate, especially in the uniquely harsh penalties assigned to crack cocaine.

While Congress has dictated lengthy mandatory imprisonment for most drug crimes, crack cocaine was unjustifiably singled out for special rules. As the Commission well knows, federal law imposes a mandatory 5-year federal prison sentence on anyone convicted of selling 5 grams or more of crack cocaine, and a 10-year mandatory sentence for selling 50 grams or more of crack. But in order to receive the same mandatory 5- and 10-year sentences for selling powder cocaine, a defendant must be convicted of selling 500 and 5000 grams of powder cocaine.

There is no scientific or pharmacological evidence to justify treating crack as though it were 100 times more dangerous than powder cocaine. The Commission found as much in 1995 and the updated scientific testimony before the Commission today confirms this fact. I incorporate by reference my June 29, 1995 statement before the House Crime Subcommittee on this subject which catalogued the scientific evidence against a 100-to-1 ratio.

Nor is there anything special about the crack cocaine market to justify these differences. Rates of crack use, which have never exceeded rates of powder cocaine use, have remained stable for over a decade. At the same time, the number of street level crack dealers charged in federal court has climbed from 48% to 66% of all crack defendants while the number of importers, leaders and supervisors has fallen; federal agents catch smaller fish these days. And according to Commission statistics the crack market is decidedly less violent than it was several years ago – well less than half of the crack cases involved a weapon and only 8% of the cases involved actual violence.

So whatever anecdotes and stereotypes caused Congress to treat crack cases so harshly in 1986 are no longer valid, if they ever were. Violent crack dealers should be punished for their violence; non-violent crack dealers should not be punished on the false assumption that all crack dealers are violent.

Blacks and whites convicted of federal powder cocaine offenses go to jail for approximately the same length of time; so too do blacks and whites convicted of crack cocaine offenses. The problem is that few whites are prosecuted for crack or powder offenses in federal court, and are instead prosecuted in state systems that mostly do not impose separately calibrated penalties for crack offenses.

The Commission's most recent statistics on this subject are illuminating. In fiscal year 2000, *93.7% of those convicted for federal crack distribution offenses were black or Hispanic and only 5.6% were white.* That shocking figure has not changed much over the past decade.

But the racial makeup of powder cocaine defendants has shifted in recent years. In 1992, almost one third (32%) of those convicted of federal powder cocaine distribution offenses were white, while 27% were black and 39% were Hispanic. By 2000 the percentage of whites powder cocaine defendants had dropped to 17.8% while the percentage of black powder cocaine defendants had increased to 30.5% and the percentage of Hispanic powder cocaine defendants had increased to 50.8%. In sum, *81% of the federal powder cocaine defendants were minorities.*

Thus, the problem of racial disparity has worsened and become more deeply ingrained since the early 1990's. The unjustifiably harsh penalties for crack offenses still fall disproportionately – indeed almost exclusively – on black defendants. But now, unlike ten years ago, the somewhat more moderate but still very harsh penalties for powder cocaine offenses fall disproportionately on minority defendants (both black and Hispanic) as well. So the massive weight of federal enforcement against cocaine distribution falls almost exclusively on minorities: *93% of all crack defendants and 81% of all powder defendants.*

Returning to the more general points I made earlier about drug law enforcement, such an imbalanced focus on minorities is not justified by what we know about the racial make-up of cocaine users or cocaine sellers. Instead, these disturbing statistics appear to result from racially disparate enforcement strategies and charging decisions in cocaine cases. Minorities are disproportionately arrested for cocaine offenses, disproportionately charged in federal court and then sentenced under especially harsh statutes and guidelines for these offenses.

Three policy imperatives emerge from these statistics. First, *the threshold quantities for crack cocaine should be raised substantially*. Crack sentences must be brought into line. While powder cocaine sentences are themselves too harsh and mechanical, there is certainly no reason why crack cocaine sentences should automatically be so much higher than powder cocaine sentences.

Second, *powder cocaine sentences should under no circumstances be raised*. Now that defendants charged with powder cocaine offenses are predominantly (over 80%) minorities as well, it would only exacerbate overall racial disparity further if powder sentences were raised. At a moment when the Commission is seeking to moderate the sentences for lower-level drug offenders, there is no reason to lower the threshold quantities for powder cocaine or any other drug, since doing so simply expands the scope of the penalty to include lower level dealers.

Third, *with the Commission's assistance Congress should immediately review the interaction of mandatory minimum drug sentencing laws and the tactics and priorities of federal law enforcement agencies*. In tandem, these policies result in catastrophically unhealthy rates of minority incarceration with untold adverse consequences for minority communities.

In 1995, the Commission recommended to Congress that the drug statutes and sentencing guidelines be altered to eliminate the differences in crack and cocaine sentencing thresholds. We were proud to support the Commission's proposal and we regret that Congress rejected it. We continue to believe that the threshold quantities for these two drugs should be equalized. We will continue to urge Congress to adopt that change.

But we understand that in the law rejected the 1995 proposal, Congress limited the Commission's ability to propose a 1-to-1 ratio. *We therefore urge the Commission to adjust the crack threshold so that it is as close to the powder threshold as feasible, consistent with scientific evidence, without raising the powder threshold*.

The failure of Congress to adopt the Commission's recommendations or otherwise address this subject results in perpetuation of a sentencing structure that every observer believes is irrational, and that many minorities view as racist. Few policies have contributed more to minority cynicism about law enforcement. If anti-drug efforts are to have any credibility, especially in minority communities, these penalties must be significantly revised.

Such a change in federal law would be a significant step toward restoring balance and racial fairness to a criminal justice system that has increasingly come to view incarceration as an end in itself.

CONCLUSION

The Leadership Conference on Civil Rights would welcome the opportunity to work with this Commission to rationalize drug sentencing laws and practices. Such criminal justice reforms are a civil rights challenge that can no longer be ignored.

Testimony on
Drug Sentencing and its Effects on the
Latino Community

Presented by:

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Before the:

United States Sentencing Commission

February 25, 2002

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SUMMARY
Testimony on Drug Sentencing and its Effects on the Latino Community
Charles Kamasaki, Vice President, National Council of La Raza
February 25, 2001

The U.S Sentencing Commission has requested comments concerning the sentencing of defendants convicted of crack cocaine and powder cocaine under the sentencing guidelines. Currently, a conviction for possessing five grams of crack cocaine triggers 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 10-year mandatory minimum sentence, the law requires possession of 5,000 grams of powder cocaine to trigger the same sentence. NCLR shares concerns expressed by numerous commentators regarding the blatant discriminatory effect of this 100-1, powder-crack sentencing disparity.

However, we would oppose any attempt to reduce such disparities by increasing penalties on powder cocaine users. As the Commission's own data demonstrate, Latinos are significantly over-represented among those convicted of powder cocaine offenses (Figure 27).^{*} Furthermore, lowering powder thresholds would increase average sentences by at least 14 months, with the inevitable increase in incarceration rates, (Figure 26).⁺ In our judgment, the real-world, tangible harm produced by lowering the powder thresholds would far outweigh the abstract, symbolic value of reducing statutory sentencing ratios.

Specifically, NCLR urges the U.S. Sentencing Commission to:

- **Substantially redress the crack/powder ratio disparity by raising the crack thresholds and maintaining the powder thresholds.** NCLR commends the Commission's 1995 recommendations to Congress that called for the elimination of the difference in crack and powder sentence thresholds. We recognize that current law constrains the Commission from resubmitting this recommendation; in this context we urge that the ratio be equalized as much as possible by raising to the greatest allowable extent the level that triggers penalties for crack cocaine.
- **Resist proposals that would lower the powder thresholds.** NCLR believes that the only proper way of equalizing the ratio is by raising the crack threshold, and not by lowering the powder threshold. We note that reducing the powder threshold would have a disproportionate, negative impact in the Latino community, according to the Commission's data. We note further that although this action might be perceived as reducing sentencing inequalities, it would have the perverse effect of substantially increasing incarceration levels.
- **Make more widely available alternative methods of punishment for first-time, non-violent, low-level drug offenders.** Under 18 USC Section 3553(a), penalties should not be more severe than necessary and should correspond to the culpability of the defendant. Where current law prevents judges from imposing just sentences for such offenders, the Commission

^{*} *Drug Briefing*, January 2002, United States Sentencing Commission.

⁺ *Drug Briefing*, op. cit.

should recommend that Congress enact appropriate reforms.

NCLR urges that any new thresholds be scientifically- and medically-justified, and be correlated directly to the impact of penalties on both the defendant and the larger society. The current massive disparities in the criminal justice system and the resulting excessive rates of incarceration of racial and ethnic minorities offend the nation's commitment to the principle of equality under the law. For Latinos and other minorities, they 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 first-time, nonviolent, low-level offenders.

I. INTRODUCTION

Chairwoman Murphy, Vice Chairs Castillo, Sessions, and Steer, and the other commissioners, on behalf of the National Council of La Raza (NCLR), I thank you for holding this hearing on an issue that is very important to the Latino¹ community in the United States. NCLR is the largest national Latino civil rights institution, serving as an “umbrella organization” for more than 270 local affiliate community-based organizations (CBOs) and 30,000 individual associate members. In addition to providing capacity-building assistance to our affiliates and essential information to our individual associates, NCLR serves as a voice in public policy debates on behalf of all Hispanic subgroups in all regions of the country.

I appreciate the opportunity to testify in support of a thorough revision of the guidelines regarding drug sentencing practices in the United States. First, this statement begins with a brief overview of NCLR’s work on criminal justice issues. Second, I will highlight the disparate impact of existing drug laws on the Latino community. Finally, my testimony concludes with recommendations to promote drug sentencing policies and practices that are fair and equitable to all Americans.

II. BACKGROUND

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

In recent years, however, numerous reports from credible sources have documented severe racial and ethnic disparities in the criminal justice system. Many of those reports now include at least some Latino data, which almost uniformly substantiate patterns of discrimination against Hispanics at every stage of the system. As more evidence of such disparities is published, and as more Hispanic families are affected by growing incarceration rates, there appears to be greater Latino grassroots support for sentencing reform proposals to address such disparities. In part as a result, over the last several years NCLR has begun to “ratchet up” its work on criminal justice and related issues; activity to-date has included:

- Publishing, in 1999, *The Mainstreaming of Hate*, a major report on hate crimes, racial profiling, and law enforcement abuse.

¹ The terms “Latino” and “Hispanic” are used interchangeably to refer collectively to Mexicans, Puerto Ricans, Cubans, Central and South Americans, and others of Spanish and Latin American descent. Hispanics can be of any race.

- Investing substantial staff resources in the issue of “racial profiling,” which among other things resulted in the inclusion of federal agencies such as the INS, the Drug Enforcement Administration, and the Customs Service in an Executive Order issued in November 1999, and in proposed legislation introduced last year to address the issue. NCLR has also testified on this issue before Congress.
- Serving in a coalition of civil rights organizations that conceived and developed the Law Enforcement Trust and Integrity Act – major legislation, introduced in March 2000, designed to reduce law enforcement abuse and improve police-community relations.
- Contributing to the production of *Justice on Trial*, an important Leadership Conference on Civil Rights (LCCR) report on racial and ethnic disparities in the criminal justice system, released in May 2000.
- Participating in a series of planning activities over the last year pursuant to the formation of The Criminal Justice Alliance, a new, broad-based coalition whose aim is to reduce over-incarceration and promote other criminal justice system reforms.

In August 2000, the Executive Committee of the Board of Directors of the National Council of La Raza authorized the establishment of a new criminal justice policy project, charged with the task of working to reduce disparities in the criminal justice system. It is in this context that I appear before you today.

III. DISPARATE IMPACT OF DRUG LAWS ON LATINOS

The 2000 Census shows that Latinos constitute 12.5% of the population in the United States, yet according to the Sentencing Commission’s own data, Hispanics accounted for 43.4% of the total drug offenders in 2000; 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 that show that 39.8% of Hispanic drug offenders were convicted for possession or trafficking of powder cocaine, and 5.3% for crack cocaine (Figure 27).^{*} Contrary to popular belief, the fact that Latinos and other racial and ethnic minorities are disproportionately disadvantaged by sentencing policies is not because minorities commit more drug crimes, or use drugs at a higher rate, than Whites. According to federal health statistics, drug use rates per capita among minorities and White Americans are remarkably similar.

Instead, 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 1999 report, and a series of other studies, demonstrates that the Hispanic community is often targeted by law enforcement based on ethnicity alone.

Furthermore, the evidence strongly suggests that, from the moment of arrest, to the pretrial

^{*} *Drug Briefing*, January 2002, United States Sentencing Commission.

detention phase, to the charging and plea bargain decisions of prosecutors, through the adjudication process, the determination of a sentence, and the availability of drug treatment, Latinos encounter a criminal justice system plagued with prejudice and discrimination. For example, a forthcoming NCLR analysis of federal data shows that:^{*}

- **Hispanic and Black federal defendants were more likely than White defendants to be charged for drug offenses.** In 1996, 46.3% of Hispanic defendants and 47.9% of Black defendants were charged with drug offenses in U.S. district courts, compared to 29.4% of White defendants (FPR&D).
- **Hispanic defendants are about one-third as likely as non-Hispanic⁴ defendants to be released before trial.** In 1999, 22.7% of Hispanic defendants were released before trial, compared to 63.1% of non-Hispanic defendants (CFJS), suggesting disparate treatment at this stage of the system.
- **Of prisoners released by standard methods for drug offenses, Hispanics served similar sentences as Whites imprisoned for the same offenses.** In 1999, ethnic data show that Hispanics served an average of 34.7 months for drug offenses versus 35.9 months for Whites (CFJS). However, this apparent equality is undermined after taking into account the individual characteristics of these groups as the following points indicate.
- **Hispanic defendants had less extensive criminal histories than White defendants.** In 1996, 56.6% of Hispanic defendants, compared to 60.5% of White defendants, had been arrested on at least one prior occasion (FPR&D).
- **In 1997 half of Hispanic federal prison inmates had no previous criminal history record.** In 1997, 52.5% of Hispanics had no previous sentence imposed, while 28.8% of Blacks and 37.8% of Whites had not been sentenced previously (CP).
- **Approximately three out of 100 Hispanic men in the 25- to 29-year-old age range were sentenced to prison, three times as many Hispanic men as White men.** There were 2,701 per 100,000 male Hispanics sentenced to prison under state or federal jurisdiction in 1997 who were between the ages of 25 and 29 years old. By contrast, 867 per 100,000 White males in that age range were sentenced to prison that year (CP).
- **Hispanics accounted for approximately one in four of the federal inmate population in 1997.** Racial/ethnic data show that Hispanics accounted for 27.3% of federal inmates in 1997, a rate that is twice as high as this group's percentage of the population (CP).

^{*} All the data in this section are attributed to the following sources: *Compendium of Federal Justice Statistics, 1999*, Washington, D.C.: U.S. Department of Justice, May 2000 (CFJS), *Correctional Populations in the United States, 1997*, Washington, D.C.: U.S. Department of Justice, November 2000 (CP), and *Federal Pretrial Release and Detention, 1996*, Washington, D.C.: U.S. Department of Justice, February 1999 (FPR&D).

⁴ "Non-Hispanics" may be Black, White, or Asian individuals who are not of Hispanic descent.

- **Hispanic federal prison inmates in 1997 were the least likely of all racial/ethnic groups to receive any type of substance abuse treatment.** Only 36.4% of Hispanic federal prison inmates received any substance abuse treatment or program during 1997, while 53.7% of Whites and 48.4% of Blacks received some type of treatment or program to address their substance abuse dependency (CP).

In sum, despite the fact that Latinos are no more likely than other groups to use illegal drugs, Hispanics are more likely to be arrested and charged with drug offenses, and less likely to be given pre-trial release. Once convicted, Latinos do not receive lighter sentences, even though the majority of Hispanic offenders have no criminal history. As a result, Hispanics are severely overrepresented in the prison system, and once in prison, are the least likely to receive any substance abuse treatment.

That these sobering statistics are largely the result of irregularities in drug enforcement is largely beyond dispute. For example, as seen in the table below, nearly three-quarters of Latino federal prison inmates are incarcerated for drug offenses, the largest proportion of any group. Moreover, Latinos are the least likely of any major group to be incarcerated for violent offenses.

Offenses of federal prison inmates by race and ethnicity, 1997

Current offense	Federal Prison Inmates			
	White	Black	Hispanic	Other
Violent offenses	18.6%	15.3%	6.8%	32.8%
Property offenses	13.0%	4.3%	2.6%	11.4%
Drug offenses	49.4%	67.2%	74.0%	42.7%
Public-order offenses	8.0%	12.2%	15.5%	10.8%

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

IV. RECOMMENDATIONS

The U.S Sentencing Commission has requested comments concerning the sentencing of defendants convicted of crack cocaine and powder cocaine under the sentencing guidelines. Currently, a conviction for possessing five grams of crack cocaine triggers 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 10-year mandatory minimum sentence, the law requires possession of 5,000 grams of powder cocaine to trigger the same sentence. NCLR shares concerns expressed by numerous commentators regarding the blatant discriminatory effect of this 100-1, powder-crack sentencing disparity.

However, we would oppose any attempt to reduce such disparities by increasing penalties on powder cocaine users. As the Commission's own data demonstrate, Latinos are significantly over-represented among those convicted of powder cocaine offenses (Figure 27).^{*} Furthermore, lowering powder thresholds would increase average sentences by at least 14 months, with the inevitable increase in incarceration rates, (Figure 26).⁺ In our judgment, the real-world, tangible harm produced by lowering the powder thresholds would far outweigh the abstract, symbolic value of reducing statutory sentencing ratios.

Specifically, NCLR urges the U.S. Sentencing Commission to:

- **Substantially redress the crack/powder ratio disparity by raising the crack thresholds and maintaining the powder thresholds.** NCLR commends the Commission's 1995 recommendations to Congress that called for the elimination of the difference in crack and powder sentence thresholds. We recognize that current law constrains the Commission from resubmitting this recommendation; in this context we urge that the ratio be equalized as much as possible by raising to the greatest allowable extent the level that triggers penalties for crack cocaine.
- **Resist proposals that would lower the powder thresholds.** NCLR believes that the only proper way of equalizing the ratio is by raising the crack threshold, and not by lowering the powder threshold. We note that reducing the powder threshold would have a disproportionate, negative impact in the Latino community, according to the Commission's data. We note further that although this action might be perceived as reducing sentencing inequalities, it would have the perverse effect of substantially increasing incarceration levels.
- **Make more widely available alternative methods of punishment for first-time, non-violent, low-level drug offenders.** Under 18 USC Section 3553(a), penalties should not be more severe than necessary and should correspond to the culpability of the defendant. Where current law prevents judges from imposing just sentences for such offenders, the Commission should recommend that Congress enact appropriate reforms.

^{*} *Drug Briefing*, January 2002, United States Sentencing Commission.

⁺ *Drug Briefing*, op. cit.

NCLR urges that any new thresholds be scientifically- and medically-justified, and be correlated directly to the impact of penalties on both the defendant and the larger society. The current massive disparities in the criminal justice system and the resulting excessive rates of incarceration of racial and ethnic minorities offend the nation's commitment to the principle of equality under the law. For Latinos and other minorities, they 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 first-time, nonviolent, low-level offenders.



**STATEMENT OF JAMES F. JARBOE, CHIEF,
DOMESTIC TERRORISM/COUNTERTERRORISM PLANNING SECTION
FEDERAL BUREAU OF INVESTIGATION**

BEFORE THE UNITED STATES SENTENCING COMMISSION

FEBRUARY 25, 2002

Introduction

The Federal Bureau of Investigation welcomes the efforts by the United States Sentencing Commission to promulgate and assign appropriate Sentencing Guidelines for terrorism offenses. I am going to leave any detailed discussion of specific Guidelines to the written comments that the Department intends to submit. In my testimony today, I would like to briefly address several specific areas of importance to the Bureau. I hope to provide you with a practical, law enforcement perspective on the need for effective guidelines that will deter and appropriately punish terrorism offenses, together with some examples of real world cases investigated by the FBI.

Threats and Hoaxes

Let me begin with threats and hoaxes. Threats to commit terrorist acts and hoaxes falsely reporting terrorist acts are serious offenses and should be penalized accordingly. Terrorist threats frequently involve a threat of death or serious physical injury to many people. They can cause great psychological harm and trigger significant disruption. And investigative agencies like the FBI are keenly aware of the need to evaluate and respond to such threats so as to prevent the threatened conduct from occurring. The drain on our resources can be significant.

Similarly, hoaxes and false reporting of terrorist acts can cause great psychological harm and significant disruption. As was done before September 11, both victims and law enforcement

agencies must take such reports seriously until they are disproved. Moreover, the FBI and other law enforcement agencies need to devote their resources to investigating real threats to the United States and its citizens. Terrorist hoaxes undermine our ability to do so.

Let me tell you about an actual threat case. A disgruntled employee threatened to blow up an oil refinery unless he was paid a significant amount of money. The employee threatened to place the explosives at a vulnerable place in the refinery, and talked about the possibility of mass casualties from the explosion, as well as monetary loss to the refinery. The FBI was alerted, and eventually discovered a large cache of weapons and ammunition, together with technical documents on the structure of explosive devices. Clearly, this type of case warrants substantial punishment. But even if we had not discovered the weapons and documents, a threat of this type has to be taken seriously by the object of the threat and by the FBI and warrants appropriate punishment. Resources used to verify the threat as credible or non-credible are the same.

New Offenses for Unlawful Possession of Biological Agents

As you know, the USA Patriot Act created two new felonies relating to biological agents. First, the Act made it a crime to possess a biological agent of a type or in a quantity that is not reasonably justified by a peaceful purpose. Second, the Act made it a crime for people like felons and fugitives to possess or ship "select agents," which are extremely dangerous substances like anthrax or botulinum toxins.

From our perspective, these felonies are serious crimes and warrant appropriate penalties. The entire country has experienced what can happen when select agents such as anthrax fall into the wrong hands. Any future attacks involving such agents could be far more virulent and deadly than the anthrax attacks that panicked the nation last fall. Thus, it is imperative that select agents

be possessed only by those people who lawfully have the right to possess them.

Similarly, the FBI takes very seriously the possession of biological agents or toxins that is not reasonably justified by a peaceful purpose. Absent a reasonable justification, such possession raises serious concerns about public safety. It too should be appropriately punished.

Providing Material Support to Terrorists or to Designated Foreign Terrorist Organizations

We applaud the Commission's efforts to assign appropriate guidelines to 18 U.S.C. 2339A (providing material support to terrorists) and 18 U.S.C. 2339B (providing material support to designated foreign terrorist organizations). Here, too, let me share with you the FBI's perspective on these offenses.

With regard to section 2339A, our view is that a defendant who provides material support to a terrorist, knowing or intending that the support be used to commit a terrorist act, is no better than the terrorist himself, and should be punished accordingly.

As for section 2339B, that statute blocks the provision of material support to foreign terrorist organizations that the Secretary of State has specifically designated because of the threat they pose to the national security of the United States or to the security of U.S. nationals. We do not need to look past September 11 to see the extraordinary harm that foreign terrorist organizations can cause the United States. And al-Qaida is far from the only foreign terrorist organization that has killed Americans or that poses a threat to American interests. Anyone who provides such organizations with the resources they need to operate commits a serious offense.

Furthermore, material support that directly facilitates the recipient organization's violence and terrorist capabilities is particularly deserving of harsh punishment. In one pending case, the defendants are charged with conspiring to provide various physical assets, including explosives, to

a designated foreign terrorist group in order to facilitate its violent attacks. This type of alleged behavior is particularly dangerous.

Attacks on Infrastructure

Let me turn to the issue of attacks on infrastructure. The FBI believes that attacks on infrastructure facilities pose unique risks and harms. Whether or not an infrastructure facility is publicly owned, its destruction or disabling may affect thousands or even millions of people who rely on the facility for basic services. And the destruction of facilities such as natural gas pipelines may pose a direct threat to public health and safety through the potential release of toxic substances.

Consider, for example, the threat case I discussed earlier, and imagine what might have happened if the employee had actually blown up the refinery. Or consider the Alaska Pipeline case, in which a defendant has been charged in connection with an alleged plot to blow up several sections of the Alaskan Pipeline. The pipeline supplies one fifth of domestic U.S. crude production, and the defendant allegedly intended to profit from the resultant disruption in oil and gas supplies. As these cases illustrate, attacks on infrastructure facilities pose unique risks and harms to the United States.

Terrorist Conspiracies

Another issue under consideration by the Commission is how to punish terrorist conspiracies. In our view, the punishment for conspiracies to commit terrorist acts should mirror the punishment for the completed offenses, at least where Congress has provided for the same penalties. Terrorists are typically fanatical zealots who do not voluntarily withdraw from conspiracies. If their conspiracies are aborted before completion, that will typically be the result

of law enforcement work or of other factors beyond the conspirators' control. We see no reason why factors such as these should lead to any lesser punishment.

Consider the case of Ramzi Yousef, mastermind of the 1993 World Trade Center bombing, who went to the Philippines and planned a number of additional terrorist attacks, including a plot to simultaneously bomb 12 American passenger planes in flight over the Pacific in January, 1995. There were thousands of passengers aboard the targeted jets.

This massive scheme was foiled when Yousef started a fire in the kitchen of his Manila apartment while mixing explosive chemicals. Should it matter, in sentencing someone like Yousef, that an accident foiled his plans? I don't believe it should.

Terrorism Adjustment under Section 3A1.4

The Commission has also requested comment on the terrorism adjustment in section 3A1.4. The FBI strongly supports an appropriate adjustment for terrorist crimes, commensurate with the harm they cause and the threat they pose, and we completely agree with the points made by Ms. Corken in her testimony pertaining to this adjustment. Let me single out, in particular, the need for severe punishment for persons who lie to FBI agents, falsify documents, or otherwise obstruct the investigation or prosecution of a terrorist offense. Offenders who engage in this type of behavior are accomplices to terrorism and undermine our efforts to prevent and punish terrorist attacks. They should be treated accordingly.

Supervised Release

Finally, turning to the issue of supervised release, we would point out that a lengthy term of supervised release, possibly including life, may be appropriate in at least some terrorism cases. As noted above, terrorists tend to be fanatical zealots, and their support for terrorism will not

necessarily dissipate in prison. The risk of recidivism is therefore quite high. Thus, it may be appropriate to impose an especially lengthy term of supervised release in some cases.

Conclusion

Thank you for the opportunity to testify today. I would be pleased to answer any questions.

James F. Jarboe

James F. Jarboe was born in Evansville, Indiana. He graduated from the University of Evansville in 1970 with a Bachelor of Arts Degree in Political Science.

Mr. Jarboe entered the United States Navy in 1970 and served as a Naval Flight Officer in an A-6 Attack Squadron based aboard the Aircraft Carrier U.S.S. Constellation. He achieved the rank of Lieutenant in the military.

After completing his military service, Mr. Jarboe obtained a Bachelor of Science Degree with an Accounting Major in 1977. He received his certificate as a Certified Public Accountant (CPA) in 1980 from the State of Missouri.

Mr. Jarboe entered on duty with the FBI in 1980 and served as an investigator in the St. Louis and Los Angeles Offices, working violent crime and white collar crime investigations. In 1988, he was promoted to a Supervisor and transferred to FBI Headquarters, Washington, DC., to coordinate background investigations and security checks for White House employees and Presidential appointments. In 1990, he was transferred to the Memphis, Tennessee Division of the FBI as a Field Supervisor. He supervised the Drug Program, Civil Rights Program, and Violent Crimes Program.

In October, 1998, Mr. Jarboe was appointed as the Assistant Special Agent in Charge of the FBI's Salt Lake City Field Office.

In August, 2000, Mr. Jarboe was promoted to Section Chief, Counterterrorism Division, Domestic Terrorism/Counterterrorism Planning Section, FBI Headquarters, Washington. DC.

Mr. Jarboe is married to the former Jacqueline Gamer, and they have a son, Charles.

**TESTIMONY OF CATHLEEN CORKEN, DEPUTY CHIEF FOR TERRORISM,
TERRORISM AND VIOLENT CRIME SECTION
U.S. DEPARTMENT OF JUSTICE**

BEFORE THE UNITED STATES SENTENCING COMMISSION

FEBRUARY 25, 2002

Introduction

I am pleased to be here today to discuss the Sentencing Commission's proposed amendments to guidelines for offenses involving terrorism. Let me say at the outset how appreciative we are of the significant efforts you and your staff have devoted to this important matter. We appreciate the opportunity to participate in the process of ensuring appropriate sentences for terrorism offenses and hope to continue to work with you toward that important objective.

As you know, the Department of Justice will be submitting detailed comments on the Commission's proposals. Let me today focus on the more significant areas for proposed amendment.

Threats, Conveying False Information/Hoaxes

I would like to discuss first the Sentencing Commission's request for comment regarding the Guidelines' treatment of 1) certain offenses involving threats and the conveying of false information, and 2) hoaxes generally in the terrorism context. An issue for comment common to these types of offenses is, should the offense levels for these offenses mirror those applicable to the underlying substantive offenses.

In our view, the Guidelines should recognize some distinction, reflective of the relative

dangerousness, between the actual commission of a terrorist act, and threats, conveying false information and hoaxes of a terrorist nature. Reduced offense levels for the latter type of offenses are appropriate and reflect the reduced penalties frequently provided by Congress for those type of offenses.

At the same time, we think it critical to recognize, and for the Guidelines to reflect, the peculiar gravity of threats, conveying false information and hoaxes of a terrorist nature. Focusing on threats for a moment, the Guidelines currently treat most threat offenses by reference to the generic guideline for threats in §2A6.1, a guideline which embraces a particularly wide range of conduct, including threats to commit nonviolent acts. In our view, the base offense level of 12 provided in §2A6.1, which under some circumstances can be reduced to 8, does not adequately reflect the seriousness of threatened terrorism offenses, and needs to be bolstered by appropriate specific offense characteristics.

Unfortunately, most of the specific offense characteristics of §2A6.1 are not germane to terrorism cases (for instance, violation of a court order or the number of threats). While we believe that terrorist threats could be referred to §2A6.1, it would be appropriate to do so only if that guideline is modified to reflect the factors that typically cause terrorist threats to be more serious than other threats. We, therefore, suggest that the Commission consider adding specific offense characteristics to §2A6.1. Enhancements reflective of the heartland of terrorist threats would include: 1) an enhancement for offenses that involve an express or implied threat of death or bodily injury; 2) an enhancement for conduct evidencing an intent or apparent ability to commit the offense; 3) an enhancement for offenses that involve multiple victims; and 4) an enhancement for offenses that result in substantial disruption of public services or substantial

expenditure of funds to respond to the offense. Threats considered terrorist in nature are typically directed at targets such as city and federal government facilities (courthouses, the FBI, DoD entities) or infrastructure or public transportation. In general, terrorist threats impact upon a significant number of people, cause evacuations and displacements of many individuals, lead to significant disruptions in governmental and other services, and require emergency and special response by police and other first responders. Moreover, responding to terrorist threat offenses draws governmental resources away from investigating and preventing other possible attacks.

In our view, there are substantial benefits to modifying §2A6.1 in the manner we suggest. There are offenses of a non-terrorist nature which are prosecuted under statutes applicable to terrorist acts. This approach would provide a means of grading the seriousness of the threat offense based on the presence of dangerous or harmful circumstances as reflected in specific offense characteristics.

Finally, we believe that the guidelines should treat threats and offenses involving the intentional conveying of false information and hoaxes in a similar manner. In general, these offenses are similar (and we consider conveying false information and hoaxes as essentially the same) in that they involve conduct or information which by its nature serves to elicit the same response – by victims, the government, first responders – as would occur in response to an actual or genuine terrorist act. Further, we see no meaningful distinction in culpability between individuals who issue threats and those who commit hoaxes or convey false information.

New Offenses Relating To Biological Agents

The USA Patriot Act added two new offenses involving the unlawful possession of biological agents. Under 18 U.S.C. §175(b), it is a crime punishable by up to 10 years

imprisonment to knowingly possess a biological agent, toxin, or delivery system of a type or in a quantity that is not reasonably justified by a peaceful purpose. Under 18 U.S.C. §175b, it is a crime punishable by up to 10 years imprisonment for specified classes of people, including felons, fugitives, and illegal aliens, to knowingly ship or possess select biological agents. Select biological agents are extremely dangerous substances like ebola, anthrax, and the like, that have the potential to pose a severe threat to public health and safety.

We support the Commission's proposal to assign these offenses to 2M6.1, the guideline that applies to offenses involving biological agents, toxins, or delivery systems. The Commission has requested input on the proper base offense level for these offenses and on whether certain specific offense characteristics should apply to them.

The Commission has suggested that it is considering a base offense level of between 14 and 22 for these offenses. After considering the matter, we believe that 22 would be the most appropriate base offense level for both offenses.

We think that both offenses are more serious than an empty threat to use a biological agent, which is punishable by a base offense level of 20 under §2M6.1(a)(3). Indeed, both offenses involve serious offense conduct that needs to be appropriately deterred and punished.

The possession of biological substances that is not reasonably justified by a peaceful purpose is threatening to society at large. The defendant has the means at his disposal to cause potentially significant harm, and no reasonable explanation for his conduct. And the possession of select biological agents such as anthrax by persons that Congress has determined are unfit to possess them similarly poses grave potential risks to society. Moreover, in both cases, Congress provided for a significant, 10 year statutory maximum. In our view, a base offense level of 22

captures the seriousness of the offense conduct without being draconian.

In addition, we believe that the specific offense characteristics already set forth in the guideline at §§2M6.1(b)(1) and (b)(3) should be applicable to these offenses, as well. Section 2M6.1(b)(1) adds two levels for an offense involving select biological agents. This enhancement is clearly appropriate with regard to a §175(b) offense, and would reflect the increased gravity of the conduct and greater potential harm when it involves agents such as ebola. As for section 175b offenses, the enhancement would apply automatically to every case, since the offense by definition involves select agents. The resulting offense level of 24 is a reasonable offense level for that offense.

Finally, existing section 2M6.1(b)(3) provides for an enhancement if the offense resulted in substantial disruption of public, governmental, or business functions, or a substantial expenditure of funds to respond to the offense. These factors are just as worthy of consideration in the context of these offenses as they are in the context of other offenses to which §2M6.1 applies, and thus this enhancement should be applicable to these new offenses where the facts support it.

Assignment of Guidelines to 18 U.S.C. §§ 2339A & 2339B

We strongly support the assignment of appropriate guidelines to 18 U.S.C. §§ 2339A and 2339B. Section 2339A criminalizes the provision of material support to terrorists, and section 2339B criminalizes the provision of material support to terrorist organizations. We think it will be helpful for courts to have guidelines explicitly assigned to these offenses.

We also think that the two offenses should be treated separately for purposes of the Guidelines. The section 2339A offense criminalizes the provision of material support which the

defendant knows or intends will be used in connection with a specific enumerated offense, such as aircraft piracy, aircraft sabotage, or the use of a weapon of mass destruction. We believe that the most appropriate way to punish the section 2339A offense is by reference to the underlying offense that the defendant was supporting. This can be accomplished through referencing section 2339A to two existing guidelines.

The aiding and abetting guideline (§2X2.1) would apply when the defendant's conduct is akin to aiding and abetting, i.e., when the defendant provides the material support in advance of or during the commission of the predicate offense. For example, the defendant who sells bomb components to a terrorist, knowing that the terrorist intends to use it to blow up a building, would be treated the same as the terrorist himself under Chapter Two of the Guidelines.

When the section 2339A defendant provides the material support subsequent to the commission of the predicate offense, that is, in connection with concealment of the offense or escape from it, then the defendant is essentially acting as an accessory after the fact, and the appropriate guideline would be §2X3.1. In that situation, the defendant's Chapter Two offense level would be linked to, but lower than, the offense level for the underlying offense.

In our view, there are reasons to treat section 2339B cases differently. Section 2339B offenses are not tied to specific predicate offenses. Rather, those offenses are based on the dangerous nature of the recipient, a designated foreign terrorist organization. Congress has found that any material support provided to such an entity facilitates its terrorist activity, regardless of whether the material support is directly or explicitly tied to a specific terrorist act.

There is an existing guideline that appears to be applicable by analogy to section 2339B cases. Section 2M5.1(a)(1) applies to the evasion of national security controls under the Export

Administration Act. This Guideline seems analogous to section 2339B, which could be described as a kind of national security export control. That said, it would nevertheless be appropriate for the Commission to enact a new Guideline that is specific to section 2339B, including specific offense characteristics appropriate to such offenses that are not found in section 2M5.1.

In its published draft amendments, the Commission set forth two possible base offense levels for a section 2339B violation, either 26 or 32. In our view, a base offense level of 26 is adequate, provided that it is coupled with two specific offense characteristics. One of these would enhance the base offense level if the material support involved the provision of weapons, explosives, or lethal substances. The rationale for this is obvious: such materials are inherently dangerous and facilitate the recipient organization's terrorist activity in a very direct and substantial way. The other specific offense characteristic would include an increase in the offense level if the offense resulted in the death of any person. This specific offense characteristic would be responsive to the USA Patriot Act, which amended section 2339B to increase the statutory maximum to life imprisonment if death results from the offense.

weapon

death.

Infrastructure Facilities

The Commission has proposed certain guideline references for offenses involving the violation of 49 U.S.C. § 60123(b), relating to damaging or destroying an interstate gas or hazardous liquid pipeline facility. Infrastructure facilities of this kind are attractive targets for terrorists, primarily because acts against such inherently hazardous facilities could result in extensive casualties, damage and disruption. It is, therefore, important to ensure that the Guidelines reflect the seriousness of these offenses.

For the most part, the Guidelines reference offenses involving infrastructure facilities to §2B1.1 and §2K1.4, as the Commission is suggesting for 49 U.S.C. § 60123(b) offenses. We see two weaknesses in the application of these guidelines to this type of offense. First, §2K1.4, which would apply where the offense involved arson or explosives, has different base offense levels, and lacks specific guidance for offenses against infrastructure facilities. In our view, intentional acts involving explosives or arson against infrastructure facilities should in all cases be referenced to the highest offense level under §2K1.4. We suggest that a specific subparagraph be added to (a)(1) which would refer to offenses involving infrastructure facilities. Thus, in all cases, the defendant would receive the highest base offense level possible, under either (a)(1) or (a)(3).

Our second concern relates to §2B1.1, a guideline which would apply to offenses involving infrastructure, in general, when §2K1.4 does not. That guideline, in essence, provides for a two-level increase in the offense level and a floor of 14 where the offense involved a conscious or reckless risk of death or serious bodily injury. We have significant question as to whether that increase in offense level adequately reflects the gravity of offenses that involve infrastructure facilities and pose a risk of serious bodily injury or death.

Conspiracies and Attempts

Turning to penalties for terrorist conspiracies (Part (D) in the proposed amendments), we strongly support a modification to the Guidelines that would apply the same penalties to both terrorist conspiracies and the substantive offenses where the statutes treat them the same. Such a modification, in our view, would appropriately reflect the expressed will of Congress in providing that a conspiracy to commit the terrorism offense shall be subject to the same penalties

point to terrorism

prescribed for the substantive offense. In such cases, Congress has clearly indicated that the lesser penalty provided in the general conspiracy statute, 18 U.S.C. § 371, is insufficient to reflect the seriousness of the offense. Terrorist conspiracies, and attempts as well, are generally viewed as being of equal gravity to the commission of the substantive offense. Although the issue for comment does not address attempts, we believe that the same rule should apply to attempts. If the terrorism statute treats an attempt the same as the substantive offense, then so should the Guidelines.

We note that §2X1.1 recognizes this general principle with respect to solicitation offenses. Subsection (b)(3)(B) of that Guideline provides that if the statute treats solicitation of the substantive offense identically with the substantive offense, the offense level for solicitation is the same as that for the substantive offense. We believe that it is highly desirable to include a similar provision with respect to both conspiracies and attempts.

The Terrorism Adjustment in Section 3A1.4

Currently, Chapter 3 of the Guidelines provides a significant enhancement if the offense was a felony that involved, or was intended to promote, a federal crime of terrorism. After September 11 in particular, no one could reasonably question the rationale behind such an enhancement: terrorists and terrorist offenses pose a unique threat to the United States. We think that there are important steps the Commission should take to strengthen that enhancement.

In its published draft amendments, the Commission notes that the current enhancement is tied to the statutory definition of a "federal crime of terrorism," and suggests an upward departure where the offense involved or was intended to promote a terrorist offense that arguably does not fit under the existing statutory definition of a "federal crime of terrorism." We strongly support

that proposal, which is narrowly tailored to reach those offenses that involve or were intended to promote conduct that Congress has explicitly defined as terrorist under other statutory definitions. It makes sense for judges to be invited to apply an upward departure in these terrorist cases.

In addition, the Commission has also requested comment on whether it should amend the existing enhancement to clarify that it can apply to offenses that occur after the commission of the federal crime of terrorism. We strongly support such a clarification. Because terrorists and terrorist offenses constitute such a unique threat to the United States, an offender who, for instance, helps a terrorist flee the U.S. after the commission of the terrorist act, or who lies to an FBI agent or to a court in order to help the terrorist escape apprehension or conviction, ought to be treated far more harshly than if he or she had acted in a non-terrorist context. Thus, the terrorism enhancement should be applicable in such a case. Indeed, as the word "clarify" implies, the best reading of the current Guideline is that the enhancement already is applicable to such cases; but a clarification is nevertheless advisable so as to remove any question.

These two changes would strengthen the existing Guideline and make it more useful from a counterterrorism perspective.

Supervised Release

Finally, I would like to briefly discuss the issue for comment relating to the length of the term of supervised release for offenses listed in 18 U.S.C. § 2332b(g)(5)(B), the commission of which resulted in, or created a foreseeable risk of, death or serious bodily injury to another person. The Commission's proposed amendment is in response to section 812 of the USA Patriot Act which authorizes supervised release for any term of years or life for such offenses.

The Commission has asked whether the applicable term should be 1) not less than three years, or 2) life.

In our view, the Guidelines should delineate a range for the term of supervised release for these offenses, similar to the existing approach reflected in §5D1.2(a)(1) and (2), the guideline relating to terms of supervised release. In light of Congress' judgement that a life term of supervised release should be an option available to courts, we suggest that the upper end of the range be life. As for the appropriate minimum term of supervised release, we believe that five years, the maximum term for other offenses, is appropriate given the serious nature of these offenses.

Although this is a wide range, we note that offenses falling within this provision may or may not have a terrorist motive. It is also worth noting that if a court were initially to impose a lengthy term of supervised release, pursuant to 18 U.S.C. § 3583(e), the court could subsequently modify or terminate the term of supervised release if appropriate.

Conclusion

Thank you for the opportunity to testify before you today about the proposed amendments to terrorism-related sentencing guidelines. I am happy to answer any questions you may have.

February 26

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PUBLIC HEARING AGENDA

DAY ONE: MONDAY, FEBRUARY 25, 2002, 3:00 P.M. – 5:00 P.M.

DAY TWO: TUESDAY, FEBRUARY 26, 2002, 9:30 A.M. – 11:30 A.M.

THURGOOD MARSHALL FEDERAL JUDICIARY BUILDING
WASHINGTON, DC

FEBRUARY 26, 2002

INTRODUCTION

Judge Diana E. Murphy
Commission Chair

AMENDMENT 8 (DRUG PENALTIES)

PANEL ONE: Law Enforcement/ABA Representative (See Feb. 26, Binder Tab 1)

Bridget Brennan
Special Narcotics Prosecutor
Office of the Special Narcotics Prosecutor for the City of New York

Q&A

William Nolan
Chair, National Legislation Committee
Fraternal Order of Police

Q&A

Ronald H. Weich
Zuckerman Spaeder LLP
On Behalf of the American Bar Association

Q&A

PANEL TWO: Member of the Federal Judiciary (See Feb. 26, Binder Tab 2)

Richard P. Conaboy
Senior District Judge
Middle District of Pennsylvania

Q&A

PANEL THREE: Community Representatives/Interested Parties (See Feb. 26, Binder Tab 3)

Julie Stewart
President
Families Against Mandatory Minimums (FAMM)

Q&A

Jamie Fellner
U.S. Program Director and Associate General Counsel
Human Rights Watch

Q&A

AMENDMENT 1 (CULTURAL HERITAGE)

PANEL FOUR: Law Enforcement/Defense Bar (See Feb. 26, Binder Tab 4)

Paul M. Warner
United States Attorney
District of Utah

John Fryar
Criminal Investigator
U.S. Department of Interior

Q&A

ADJOURN



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**Testimony
of
Bridget G. Brennan
Special Narcotics Prosecutor
for the City of New York**

**Before the
United States Sentencing Commission**

February 26, 2002

Summary of Testimony

As you review the federal sentencing structure for cocaine and crack crimes, you want to assure that there is a rational correlation between the culpability of a particular defendant, the impact of his crime on the community, and his punishment. I am happy to share the insights I have developed, particularly during my time in the Office of Special Narcotics, which is the only one in the country exclusively dedicated to narcotics prosecution.

Specifically, I will be speaking about:

- New York State laws governing the prosecution of crack and cocaine cases;
- The impact of cocaine and crack on New York and particularly, the effect of crack trafficking on our neighborhoods;
- The impact the federal sentencing regulations regarding crack have on local prosecutions; and finally,
- The challenges we face today.

Under New York State law, we do not treat powder cocaine and crack cocaine differently. There is no sentencing distinction. However, I must point out that our penal law and sentencing structure are entirely different from the federal statutory scheme, and, for the most part, our sentences for narcotics crimes are more severe. The New York and federal sentencing structures are similar to the extent that both have mandatory minimum sentences for narcotics offenses. I have appended a chart outlining critical New York State narcotics statutes to my testimony.

For example, under New York State law:

- If a defendant is convicted of selling 5 grams of cocaine or 5 grams of crack cocaine, he faces a minimum sentence of 1-3 years; in fact, a defendant faces 1 to 3 years for selling any amount of crack or cocaine;
- However, if a defendant is convicted of selling 56 grams of powder cocaine or crack, he faces a mandatory fifteen to life minimum sentence.

In addition, a New York State prosecutor is statutorily prohibited from plea bargaining top narcotics charges down to a level where a defendant receives no prison sentence, except when a defendant has provided substantial cooperation in an investigation.

One of the concerns expressed by the Commission in its April 1997 *Report on Cocaine and Federal Sentencing Policy*, was that the sentencing guidelines could result in federal and local authorities targeting the same drug offenders. This in turn would lead to a duplication of effort and drain already limited resources.

I have not seen this to be the case in New York City. In the past several years, I did see an increase in federal prosecutions focused on violent street level drug gangs, and many of these prosecutions have been very effective. This, in my view, reflects a change in focus rather than a change fostered by the disparity in the crack and powder cocaine sentences.

**Testimony
of
Bridget G. Brennan
Special Narcotics Prosecutor for the City of New York
Before the
United States Sentencing Commission**

February 26, 2002

..... Judge Murphy, Judge Johnson, members of the Commission, thank you for the opportunity to address you this morning

..... I am Bridget Brennan, the Special Narcotics Prosecutor for New York City. As many of you know, Judge Sterling Johnson was the head of my agency for many years and, to this day, his name is still synonymous with the Office of Special Narcotics

..... I want to thank you for inviting me to testify and share my experience as a prosecutor working under the New York State narcotics laws. As an assistant district attorney in Manhattan for eight years, and with the Office of Special Narcotics for a decade, I have spent considerable time assessing the drug trade and the violence that inevitably accompanies it. Although I have no specific experience working with the federal mandatory minimums, or with the federal sentencing guidelines, I realize that, as you review the federal sentencing structure for cocaine and crack crimes, you want to assure that there is a rational correlation between the culpability of a particular defendant, the impact of his crime on the community, and his punishment. I am happy to share the insights I have developed, particularly during my time in the Office of Special Narcotics, which is the only one in the country exclusively dedicated to narcotics prosecution.

..... Moreover, New York City provides a unique window on the narcotics trade. It is a major importation site for cocaine and heroin, and a center for domestic distribution throughout the East Coast and Midwest. In addition, New York City has its own local neighborhood narcotics organizations – entrenched gangs which reap hundreds of thousands of dollars annually, create misery in the communities they plague, and supply drugs to thousands of addicts in our metropolitan area.

Specifically, I will be speaking about:

- New York State laws governing the prosecution of crack and cocaine cases;
- The impact of cocaine and crack on New York and particularly, the effect of crack trafficking on our neighborhoods;
- The impact the federal sentencing regulations regarding crack have on local prosecutions; and finally,
- The challenges we face today.

..... My Office was established in 1972, as part of a package of reforms intended to address the tremendous problem of heroin trafficking, heroin addiction and the resulting upsurge in violent crime in New York. New York City is actually comprised of five counties, each with an elected district attorney. Until the creation of my agency, narcotics prosecutions in New York City had been hampered by jurisdictional issues. Recognizing the fluid nature of narcotics offenses, my agency was granted citywide jurisdiction to prosecute serious drug crimes.

..... I think we all realize that, when faced with a crisis of mounting violence and drug addiction, as New York was in the seventies and this nation was in the eighties, legislative bodies are under pressure to respond quickly and decisively. Sometimes, new laws turn out to be an appropriate and effective response. Sometimes, upon reflection, we see that even when the laws are effective, they can create unforeseen problems. And then there are times when new laws entirely fail to address the original issue.

When the state legislature created my agency, it was far sighted in fashioning an effective response – in

time, we have fostered unique working relationships with both federal and local drug enforcement. These relationships have been crucial in dismantling major international narcotics organizations as well neighborhood drug gangs.

I know your interest is focused on penalties under federal law for crimes involving crack and powder cocaine. Under New York State law, we do not treat powder cocaine and crack cocaine differently. There is no sentencing distinction. However, I must point out that our penal law and sentencing structure are entirely different from the federal statutory scheme, and, for the most part, our sentences for narcotics crimes are more severe.

The New York and federal sentencing structures are similar to the extent that both have mandatory minimum sentences for narcotics offenses. I have appended a chart outlining critical New York State narcotics statutes to my testimony.

For example, under New York State law:

- If a defendant is convicted of selling 5 grams of cocaine or 5 grams of crack cocaine, he faces a minimum sentence of 1-3 years; in fact, a defendant faces 1 to 3 years for selling any amount of crack or cocaine;
- However, if a defendant is convicted of selling 56 grams of powder cocaine or crack, he faces a mandatory fifteen to life minimum sentence.

In addition, a New York State prosecutor is statutorily prohibited from plea bargaining top narcotics charges down to a level where a defendant receives no prison sentence, except when a defendant has provided substantial cooperation in an investigation.

One of the concerns expressed by the Commission in its April 1997 *Report on Cocaine and Federal Sentencing Policy*, was that the sentencing guidelines could result in federal and local authorities targeting the same drug offenders. This in turn would lead to a duplication of effort and drain already limited resources.

I have not seen this to be the case in New York City. In the past several years, I did see an increase in federal prosecutions focused on violent street level drug gangs, and many of these prosecutions have been very effective. This, in my view, reflects a change in focus rather than a change fostered by the disparity in the crack and powder cocaine sentences.

We have worked on successful joint investigations with federal prosecutors, during which we evaluated which set of laws would allow us to most appropriately prosecute and punish violent drug dealers. Probably the most compelling example of an effective federal prosecution of a local drug dealer involved crack kingpin Pappy Mason who sent assassins to kill young New York City Patrolman Eddie Byrnes, as he sat in a marked patrol car guarding the home of a cooperating witness ready to testify against Mason in a local case.

There are many cases where we have sat down with our federal counterparts to develop a strategy to dismantle a violent gang that resisted all prior law enforcement efforts. We determined who were the most culpable targets and decided to prosecute them, as Judge Johnson used to say “where we got the most bang for the buck” – in whichever jurisdiction the penalties would be most appropriate.

For example, we prosecuted the Netas—a gang like the Latin Kings that began in prisons, and which has been linked to narcotics and arms trafficking. The Federal Bureau of Investigation, the Bureau of Alcohol, Tobacco and Firearms, the New York City Police Department, the United States Attorney’s Office for the Southern District of New York, and my office all participated in the investigation which dismantled the Netas heroin and crack operation in upper Manhattan. The cases ended in both federal and state indictments; interstate transportation of firearms charges, for example, went to the United States Attorney’s office, as did major crack distributors against whom we were only able to bring low level state charges. We prosecuted numerous crack and heroin offenses. Not every crack case went to federal prosecutors – only the narcotics cases against the most violent gang members.

..... Ironically, our most successful joint efforts with federal prosecutors have been directed against low-level—albeit extremely violent—drug gangs. Using our own New York State laws, we have been very effective against international drug traffickers. In the last two years alone, we seized over 12,500 pounds of cocaine during investigations with federal drug enforcement agencies, and all defendants were charged in state court, where we were confident they would receive lifetime sentences. These narcotics investigations continue to yield truckloads of cocaine destined for distribution throughout New York and the Eastern Seaboard.

..... The impact of cases like the ones I have described is that the drug operations are much more covert. Along with this, the rampant violence of the nineties has substantially declined.

..... Despite this, today's crack gangs are still a big problem. Crack dealing is highly lucrative, but only when it is a high volume business. Five grams of cocaine can be converted into enough crack to fill 100 to 150 ten-dollar vials. Street level gangs recruit youngsters, addicts, prostitutes and the homeless to sell on the street while the bosses remain safely tucked away behind closed doors, counting their loot and avoiding arrest. They cultivate a spot to traffic their product, so their loyal clientele will know where to find them, and the unfortunate people who live nearby are prisoners in their own homes, fearful of the dealers, their customers and the violence still associated with the trade. Crack dealing still creates unique problems for a neighborhood and for law enforcement.

..... We recently shut down a violent crack gang that had been entrenched on a block in Manhattan for over a decade. They were netting about 70,000 dollars per week – that translates into 14,000 five dollar crack vials weekly. The head of the group did not handle narcotics transactions. He was so organized that he paid other gang members regular salaries to recruit and supervise homeless individuals, addicts and prostitutes to sell crack on the street. The sellers were forced to sell crack for 12 hours at a time from a partitioned space in the basement of an abandoned building.

..... Tough sentencing laws have been critical in eradicating these violent drug organizations. However, so have law enforcement approaches and strategies which have changed and improved tremendously over the years. Where in the past we relied primarily on drug sweeps and arrest of dozens of drug dealers, we now focus on targeting the leaders of drug groups and seek to root out narcotics operations from top to bottom. The effort does not end there, we bring in other agencies and resources to help residents rebuild their now-drug-free neighborhoods.

..... Certainly, there is always room for improving our laws. We are not facing the same crisis now that we faced fifteen years ago. The legislative efforts of my office have been directed at changing the laws to look at not just at the weight of narcotics but at the defendant's role in the drug organization. Through our investigations, we have been successful in establishing conspiracy in many cases against the leaders of neighborhood drug gangs. We are seeking greater legislative support in these efforts. We are concentrating on enhanced penalties for armed drug dealers, those who use children in the narcotics trade, and drug kingpins.

..... We also support treatment opportunities for addicted drug offenders and believe they should be expanded. We have run alternative sentencing programs for more than ten years and can attest to proven regimens that can effectively break the cycle of addiction. Experience has taught us that most drug addicted criminal defendants will not successfully complete treatment unless they are facing incarceration. The threat of imprisonment is a critical component of our most successful programs.

..... Unfortunately, drugs are still very much a problem in New York City. We face the recurrent problems of cocaine and heroin and are now seeing a spiraling increase in the use of trendy “designer drugs”-- with names like Ecstasy, Special K and Ice. We are currently developing new strategies and have proposed new statutes to address these emerging challenges.

..... Drugs will always be attractive to some – thrill seekers ... people with serious troubles... those who do not know the misery their drug use will cause. Our challenge is to restrict the availability of drugs and

effectively punish those who profit from that misery.

NEW YORK

STATE NARCOTIC OFFENSES¹ (COCAINE and HEROIN)

CLASS OF CRIME	PENAL LAW SECTION	OFFENSE	SENTENCE ²	SENTENCE FOR SECOND FELONY OFFENDER ³	GRAM CONVERSION
A-I	220.43(1)	Sale of 2 ounces or more of an aggregate weight of a narcotic drug	Minimum 15-life Maximum 25-life	Minimum 15-life Maximum 25-life	2 ounces = 56 grams
	220.21(1)	Possession of an aggregate weight of 4 ounces or more of a narcotic drug	Minimum 15-life Maximum 25-life	Minimum 15-life Maximum 25-life	4 ounces = 113.4 grams

1 "Narcotic Drug means any drug listed in NY CLS Public Health Law § 3306 schedule I(b), I(c), II(b), or II(c) other than methadone." See, NYS Penal Law §220.00(7)
The definition includes *heroin* and "coca leaves and any salt, compound, derivative, or preparation of coca leaves, and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances including *cocaine* and *ecgonine*, their salts, isomers, and salts of isomers, except that the substances shall not include decocainized coca leaves or extraction of coca leaves, which extractions do not contain cocaine or ecgonine."

2 In New York State, "a sentence of imprisonment for a felony shall be an indeterminate sentence...when such a sentence is imposed, the court shall impose a maximum term...and...minimum period of imprisonment." See, NYS Penal Law §70.00 (1)

3 "A **second felony offender** is a person...who stands convicted of a felony...other than a class A-I felony, after having previously been subjected to one or more predicate felony convictions." See, NYS Penal Law §70.06 (1)

A-II	220.41(1)	Sale of ½ ounce or more of an aggregate weight of a narcotic drug	Minimum 3-life Maximum 8 1/3-life	Minimum 6-life Maximum 12 ½-life	½ ounce = 14.7 grams
	220.18(1)	Possession of an aggregate weight of 2 ounces or more of a narcotic drug	Minimum 3-life Maximum 8 1/3-life	Minimum 6-life Maximum 12 ½-life	2 ounces = 56 grams
CLASS OF CRIME	PENAL LAW SECTION	OFFENSE	SENTENCE	SENTENCE FOR SECOND FELONY OFFENDER	GRAM CONVERSION
B	220.39(1)	Sale of any amount of a narcotic drug	Minimum 1-3 Maximum 8 1/3-25	Minimum 4 ½ -9 Maximum 12 ½ -25	
	220.44(2)	Sale of any amount of a narcotic drug within 1000 feet on or near school grounds	Minimum 2-6 Maximum 8 1/3-25	Minimum 4 ½ -9 Maximum 12 ½ -25	
	220.16(1)	Possession of any amount of a controlled substance with intent to sell	Minimum 1-3 Maximum 8 1/3-25	Minimum 4 ½ -9 Maximum 12 ½ -25	
	220.16(12)	Possession of a ½ ounce or more of an aggregate weight of a narcotic drug	Minimum 1-3 Maximum 8 1/3-25	Minimum 4 ½ -9 Maximum 12 ½ -25	½ ounce = 14.7 grams

C	220.09(1)	Possession of an 1/8 ounce or more of an aggregate weight of a narcotic drug	Minimum No jail Maximum 5-15	Minimum 3-6 Maximum 7 ½ -15	1/8 ounces = 3.5 grams
D	220.06(5)	Possession of cocaine that weighs 500 milligrams or more	Minimum No jail Maximum 2 1/3 -7	Minimum 2-4 Maximum 3 ½ - 7	500 milligrams = .5 gram

**SUMMARY: Statement of William J. Nolan, Fraternal Order of Police
26 February 2002**

The Fraternal Order of Police does not oppose addressing the disparate penalties associated with crack and powder cocaine offenses, or across drug type. We are, however, greatly concerned with the manner in which any such changes are put into effect. Despite the progress we have made, the problem of both powder and crack cocaine have not vanished from our streets. It is for this reason and many others that we recognize the urgent need to maintain the tough standards set forth in current law for the sentencing of those convicted of cocaine-related offenses.

The current penalty structure for crack and powder cocaine offenses is based primarily on the quantity of the drug in the possession of the defendant at the time of his arrest. This priority given to quantity in determining a defendant's role in the offense and the final sentence of the offender is as important today as it was in the 1980s. While other factors such as aggravating conduct are essential to the determination of a final sentence, these and other enhancements should continue to be in addition to a minimum sentence that is based first and foremost on the quantity of the controlled substance as provided for under current law.

With regard to the 100:1 drug quantity ratio for crack cocaine and powder cocaine offenses, the Fraternal Order of Police supports increasing the penalties for offenses involving powder cocaine through a reduction in the quantity of powder necessary to trigger the 5- and 10-year mandatory minimum sentences. This would decrease the gap between the two similar offenses, address the concerns of those who question the current ratio, and would provide law enforcement with the tools they need to further restrict the possession, use, and sale of powder cocaine. Regardless of whether or not the concerns of those who question the current ratio are well founded, the appropriate response is not to *decrease* the penalties for engaging in one type of illicit behavior over another. Indeed this approach would seem to be at variance with common sense, and does not adequately take into consideration the impact that both crack and powder cocaine have on our communities. Meeting in the middle, or toughening the sentences for powder while weakening those for crack, is also not a feasible solution. While it would definitely affect a lower drug quantity ratio, any measure that decreases penalties for crack offenders would harm the overall effort to keep drugs off the street and violence out of our communities.

The dangers associated with both crack and powder cocaine have not completely disappeared since the current tough sentences for these crimes were enacted; and although our nation has seen across the board reductions in crime rates in recent years, it is still true that illegal drugs have a devastating impact on society as a whole. That is why the Fraternal Order of Police supports tough penalties for all drug-related offenses. It is also evident that the Federal government, which has the available resources and policies in place to effectively investigate, apprehend, and punish drug offenders, must continue to take the lead in providing harsh penalties for drug-related offenses.



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TESTIMONY

Of

**William J. Nolan
Chairman, National Legislative Committee
Grand Lodge, Fraternal Order of Police**

On

**The Issues for Comment Following Proposed
Amendment No. 8 To the Sentencing Guidelines**

Before the

**United States Sentencing Commission
26 February 2002**



Good morning Chair Murphy, Vice Chair Castillo, Vice Chair Sessions, Vice Chair Steer, and Members of the United States Sentencing Commission. My name is Bill Nolan and I am the Chairman of the National Legislative Committee of the Grand Lodge, Fraternal Order of Police. I am here today on behalf of National President Steve Young and the membership of our organization to offer the views of the F.O.P. on several issues related to the sentences for crack and powder cocaine offenses under the U.S. Sentencing Guidelines. Let me just say at the outset that I believe this is the first time that the Fraternal Order of Police has had the opportunity to appear before the Commission, and we greatly appreciate your invitation to do so here today.

In addition to serving the FOP on the National level, I am also the current president of local lodge #7 in Chicago, Illinois. Like many major metropolitan areas across the nation, our city has long been plagued by the scourge of drugs, and experienced a rising trend in the crime and violence that is all too often associated with these offenses. As I know you are already well aware, our larger cities and the nation as a whole witnessed an explosion in cocaine-related drug use and violence during the 1980s, especially due to the emergence of crack cocaine. The rapid ascension of this new drug caught many of us in the law enforcement community by surprise, due to the rapidity of its spread into our major cities and the unmerciful psychological and physiological effects it caused on its victims. Thankfully, America's lawmakers moved quickly to stem the tide, enacting sweeping new laws and penalties for those who would bring their poison into our neighborhoods and communities. Measures such as the Anti-Drug Abuse Acts of 1986 and 1988 gave us in the law enforcement community the tools we needed to appropriately punish these often violent offenders. Despite the progress we have made, the problem of both powder and crack cocaine have not vanished from our streets, and we in Chicago are still coping with this as well as the use of other illicit drugs. In 1999, for example, the Arrestee Drug Abuse Monitoring Program reported that over forty-one percent of adult males in our city tested positive for cocaine at the time of their arrest, posing a dangerous situation for the brave men and women of my department. It is for this reason and many others that I recognize the urgent need to maintain the tough standards set forth in current law for the sentencing of those convicted of cocaine-related offenses.

The Commission has asked our organization to testify regarding the issues for comment following proposed amendment number eight to the Sentencing Guidelines; specifically, on several questions regarding the sentencing of defendants convicted of cocaine-related offenses. Let me begin by telling you that the Fraternal Order of Police does not oppose addressing the disparate penalties associated with crack and powder cocaine offenses, or across drug type. Even though various drugs or even two variations of the same drug may have different physiological effects on their users, their general

effect on society is the same. We are, however, greatly concerned with the manner in which any such changes are put into effect.

As I mentioned before, in the 1980s Congress recognized the need for tougher penalties to counter the rising trends in drug use and violent crime with passage of the Anti-Drug Abuse Acts, establishing mandatory minimum penalties for persons convicted of offenses involving a given amount of a variety of controlled substances. Mandatory sentences are an important tool for law enforcement in their fight against career criminals and as a deterrent for those who are considering a life of crime. Project Exile, which relies on the federal prosecution of illegal gun offenses, is one example of their effectiveness in action. Begun in Richmond, Virginia in 1997, Project Exile is an extremely successful model of Federal, State and local law enforcement participating in a cooperative effort to reduce crime through tough enforcement of the gun laws and the imposition of harsh sentences for convicted offenders. Through these tougher penalties, Project Exile has helped to reduce gun violence in Richmond by over 40 percent and has been expanded to cities across the country.

The current penalty structure for crack and powder cocaine offenses is based primarily on the quantity of the drug in the possession of the defendant at the time of his arrest. The quantities which trigger the law's mandatory minimum penalties differ for various drugs, and in some cases, for different forms of the same drug, including for powder and crack cocaine offenses. Under this law, a person convicted of distributing 500 grams of powder cocaine or 5 grams of crack cocaine receives a mandatory 5-year sentence, and a 10-year sentence for those convicted of distributing 5,000 grams of powder or 50 grams of crack. In the Anti-Drug Abuse Act of 1988, Congress further set enhanced penalties by establishing a 5-year mandatory minimum sentence for the possession of 5-grams of crack cocaine. This priority given to the quantity of illegal drugs in determining a defendant's role in the offense and the final sentence of the offender is as important today as it was in the 1980s.

That being said, is there also a need for penalties that are tougher for crack than for powder cocaine offenses, or for one type of drug over another? Several sources would support such a conclusion. In a report to Congress in 1997 required by Public Law 104 – 38, a prior Commission recognized that some drugs “have more attendant harms than others and that those who traffic in more dangerous drugs ought to be sentenced more severely than those who traffic in less dangerous drugs.” There is also evidence to support the fact that crack cocaine does greater harm to both the user and to the well being of communities across the nation. The Commission's findings in the 1997 report also stated that crack cocaine is more often associated with systemic crime, is more widely available on the street, is particularly accessible to the most vulnerable members of our society, produces more intense physiological and psychotropic effects than snorting powder cocaine; and that Federal sentencing policy must reflect the greater dangers associated with crack. As a former police officer in one of America's largest cities, one who has witnessed first-hand the devastating impact that crack has had on my community, I agree completely with this assessment. And I believe that anyone who has ever seen a child or adult addicted to crack, or talked to the families who are forced to

live locked inside their own homes for fear of the crack dealers who rule their streets, would also agree with this statement.

There are, however, other factors which should go into the sentencing of those convicted of crack-powder cocaine offenses. The Commission notes that some have suggested that proportionality in drug sentences could be better served by providing enhancements that target offenders who engage in aggravating conduct, and by reducing the penalties based solely on the quantity of crack cocaine to the extent that the Drug Quantity Table already takes aggravating conduct into account. For example, possession of 5 grams of crack is currently assigned a base offense level of 26, which translates into a sentence of between 63 and 78 months for individuals with 0 to 1 Criminal History Points. The Commission's current proposed amendment addresses this issue by, among other things, making an appropriate differentiation regarding the use and possession of firearms in drug-related offenses, and providing sentencing enhancements for the distribution of drugs at a protected location or to underage or pregnant individuals. We applaud the Commission for working to include additional aggravating factors in the determination of a final sentence under the Guidelines, however, these and other enhancements should continue to be in addition to a minimum sentence that is based first and foremost on the quantity of the controlled substance as provided for under current law.

We also appreciate the Commission's concerns regarding the 100:1 drug quantity ratio for crack cocaine and powder cocaine offenses. As I mentioned before, current law requires a 5-year mandatory sentence for distributing 500 grams of powder cocaine or 5 grams of crack cocaine, a 10-year sentence for those convicted of distributing 5,000 grams of powder or 50 grams of crack, and a 5-year sentence for the possession of crack cocaine. We further understand that some are concerned with the disparate impact of this ratio, particularly those who have expressed concern about its impact on minority communities. Regardless of whether or not these concerns are well founded, the appropriate response is not to *decrease* the penalties for engaging in one type of illicit behavior over another. Indeed this approach would seem to be at variance with common sense, and does not adequately take into consideration the impact that both crack and powder cocaine have on our communities. And although we support sentencing guidelines which are fair and just, we strongly disagree with the assumption that 5- and 10-year mandatory sentences should be targeted only at the most serious drug offenders. The so-called "low level dealer", who traffics in small amounts of either powder or crack cocaine, is no less of a danger to the community than an individual at the manufacturing or wholesale level. Despite the fact that these individuals may represent the bottom of the drug distribution chain, that does not necessarily translate into a decrease in the risk of violence that all too often accompanies these offenses, or in the serious threat they pose to the safety of our children and the quality of life in America's communities. The Fraternal Order of Police supports *increasing* the penalties for offenses involving powder cocaine through a reduction in the quantity of powder necessary to trigger the 5- and 10-year mandatory minimum sentences. This would decrease the gap between the two similar offenses, address the concerns of those who question the current ratio, and would

provide law enforcement with the tools they need to further restrict the possession, use, and sale of powder cocaine.

There are other reasons to support an increase in the penalties associated with cocaine-related offenses. In its 1995 report on "Cocaine and Federal Sentencing Policy," the Commission wrote that the Drug Enforcement Administration noted that in prior years some wholesale distributors who initially handled crack cocaine were moving to distribute powder cocaine to avoid the "harsh Federal sentencing guidelines that apply to higher-volume crack sales." Meeting in the middle, or toughening the sentences for powder while weakening those for crack, is also not a feasible solution. While it would definitely affect a lower drug quantity ratio, any measure that decreases penalties for crack offenders would harm the overall effort to keep drugs off the street and violence out of our communities.

The dangers associated with both crack and powder cocaine have not completely disappeared since the current tough sentences for these crimes were enacted. A Report published by the DEA in September 1999 highlighted this fact, noting that "the primary U.S. drug threat is cocaine, particularly in its smokeable form known as 'crack cocaine,'" and that "cocaine traffickers continue to attract most of the nation's drug law enforcement assets." There is also evidence that the use and relative ease of obtaining cocaine remains unacceptably high. A University of Michigan study entitled "Monitoring the Future" found that powder cocaine use by high school seniors doubled from 3.1 percent in 1992 to 6.2 percent in 1999. And although cocaine usage among 12th graders declined to 4.8 percent in 2001, this is still higher than the percentage of those who reported using crack. In addition, the percentage of those respondents who say that it is "fairly easy" or "very easy" to get cocaine remains at a level of over 40 percent. Finally, despite the fact that in 2000 there was a slight decrease in seizures of cocaine reported to the Federal Drug Seizure System (from 135 metric tons in 1999 to 103 metric tons in 2000), this does not signal a decline in cocaine production. Indeed, the DEA reported in its 2001 "Drug Trafficking in the United States" study that the decline in cocaine seizures "is primarily attributed to the decrease in the size of the average load transiting the Southwest border and an increase in the number of drug loads moving between ports of entry."

The Fraternal Order of Police supports tough penalties for all drug-related offenses. Each illegal drug carries with it different effects on their users, as well as different problems associated with their manufacture and distribution. One thing is clear, however: that although our nation has seen across the board reductions in crime rates in recent years, it is still true that illegal drugs have a devastating impact on individuals and society as a whole. In a September 2001 study entitled "The Economic Costs of Drug Abuse in the United States," the Office of National Drug Control Policy (ONDCP) reported that the overall cost of drug abuse to our nation was over \$143 Billion in 1998, and represented an annual increase of nearly 6 percent from 1992 to that year. It is also clear that the Federal government, which has the available resources and policies in place to effectively investigate, apprehend, and punish drug offenders, must continue to take the lead in providing harsh penalties for drug-related offenses. The Administration,

Congress and the Commission must continue to send the message to drug dealers and traffickers that the Federal government will fiercely protect the most vulnerable members of our society and will severely punish those who seek to exploit them.

The question of appropriate sentences for crack and powder cocaine offenses has received a great deal of attention in recent years from a variety of sources. Unfortunately, there has been far too much demagoguery and too little rational deliberation on this issue. That is why we believe that today's hearing is an important step in the right direction. Our organization looks forward to the continuing discussion on the appropriate penalty levels for drug-related offenses, and welcomes the opportunity to participate in an ongoing dialogue with the Commission and others interested in this issue. On behalf of the membership of the Fraternal Order of Police, let me thank you again, Chair Murphy, for the opportunity to appear before you here today.

I would be pleased to answer any questions you may have at this time.



AMERICAN BAR ASSOCIATION

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Testimony of

RONALD WEICH

on behalf of

THE AMERICAN BAR ASSOCIATION

before the

UNITED STATES SENTENCING COMMISSION

on

**Proposed Amendments to the Sentencing Guidelines
and Issues for Comment published in the Federal Register at
66 Fed. Reg. 59330-59340 (11/27/01)
and 67 Fed. Reg. 2456-2475 (1/17/02)**

February 26, 2002

Judge Murphy and Members of the Commission: My name is Ronald Weich and I am a partner in the law firm of Zuckerman Spaeder LLP. I appreciate the opportunity to offer comments on proposed amendments to the federal sentencing guidelines on behalf of the American Bar Association. I serve as Vice-Chair for Government Relations of the ABA Criminal Justice Section, and am a member of the ABA Individual Rights and Responsibilities Section. Both Sections have a strong interest in the subject of this hearing.

While I appear today on behalf of the ABA, I bring several other relevant professional perspectives to this hearing. I began my legal career as an Assistant District Attorney in New York County. From 1987 to 1989 I served as Special Counsel to this Commission. I then held several staff positions in the U.S. Senate and was Chief Counsel to Senator Kennedy at the time that Congress considered the Commission's 1995 recommendations on cocaine penalties. Now in private practice, I serve as an advisor to several organizations interested in sentencing issues, including the Leadership Conference on Civil Rights whose Executive Director you heard from yesterday. I want to emphasize, however, that the views expressed in this testimony are solely those of the American Bar Association.

The 400,000 members of the ABA comprise a broad spectrum of the profession. Our membership includes judges, prosecutors, defense attorneys, law professors, corrections administrators and other justice system professionals. The principal source of the ABA's views on this topic is the Sentencing Chapter of the ABA Standards for Criminal Justice, 3d edition. In addition, the Association has adopted specific policy resolutions against mandatory minimum sentencing laws and in support of the Commission's 1995 recommendations to Congress regarding cocaine sentences.

These ABA policies speak directly to the principal subject of this hearing, Amendment 8 of the Proposed Amendments to the Sentencing Guidelines. In my testimony today I will explain why the current system for sentencing federal drug offenders is inconsistent with key principles of the ABA Sentencing Standards and why Proposed Amendment 8 would, on balance, bring federal drug sentencing somewhat closer to the principles embodied in our Standards. I will then

address several of the Issues for Comment that accompany Amendment 8 and will strongly urge that the Commission once again seek to remedy the intolerable disparity between crack and powder cocaine sentences. Finally, I will address a small number of other proposed amendments and one related issue.

I. CURRENT FEDERAL DRUG SENTENCING RULES DEVIATE SUBSTANTIALLY FROM THE ABA SENTENCING STANDARDS.

A. The ABA Standards

Judge Frankel famously labeled a system of unfettered judicial discretion as “lawless.” But at the other end of the continuum, a system of legislatively mandated penalties is lawless in its own way because it is arbitrary and can be easily manipulated by prosecutors. In between these two extremes is a flexible sentencing guidelines system in which an expert body develops general rules to govern ordinary cases, but in which judges may depart from the rules in cases that vary from the norm, subject to appellate review. This is the system endorsed in the third edition of the ABA Sentencing Standards.

The Standards acknowledge the inevitable tension between the twin goals of standardized sentencing and individualized sentencing, and advocate a balanced system that guides judicial discretion but does not eliminate it. Thus, the ABA flatly opposes mandatory sentencing laws.¹ Instead, the Standards encourage legislatures to establish permanent agencies or commissions to “transform legislative policy choices into more particularized sentencing provisions that guide sentencing courts.”²

¹ ABA Standards for Criminal Justice: Sentencing (3d ed. 1994) (hereinafter “Standards”), sections 18-3.11(c) and 18-3.21. The ABA expressed its opposition to mandatory sentencing laws thirty five years ago in the original Standards Relating to Sentencing Alternatives and Procedures, sections 2.1(b); 2.1(c). The policy was reaffirmed in 1973, 1980 and 1994.

² Standard 18-1.3(a).

Judicial discretion remains indispensable under the Standards. Notwithstanding the existence of rules to guide judicial discretion, “[t]he legislature should authorize sentencing courts to exercise substantial discretion to determine sentences in accordance with the gravity of offenses and the degree of culpability of particular offenders.”³ The Commission might identify aggravating or mitigating circumstances for the sentencing court to consider, but the court retains ultimate authority to weigh those factors in imposing a just sentence,⁴ subject to appellate review.⁵

Of special significance to today’s hearing, the Standards endorse the normative principle, also found in 18 U.S.C. § 3553(a), that sentences “should be no more severe than necessary to achieve the societal purposes for which they are authorized.”⁶ And the Standards require that “unwarranted and inequitable disparities in sentences [be] avoided.”⁷

By the time the third edition of the Standards was adopted in 1994, there was sufficient experience under the federal sentencing guideline system for the authors of the Standards to contrast their ideal system with the federal system. Notably, they found the federal guidelines to be too mechanical and faulted the federal system for allowing “significantly less room for the role of judicial discretion” than called for in the Standards.⁸ In fairness to the Commission, the rigidity of the federal sentencing system is partly attributable to choices imposed on the Commission by Congress in the Sentencing Reform Act of 1984 and subsequently enacted laws.

³ Standard 18-2.6(a).

⁴ Standards 18-3.2; 18-3.3; 18-3.4.

⁵ Standard 18, Part VIII.

⁶ Standard 18-2.4.

⁷ Standard 18-2.5(b).

⁸ Introduction to Standards at xxv. The commentary accompanying the Standards notes that the federal guidelines often preclude consideration of the “personal characteristics of offenders.... There was great concern among the drafters that the federal guidelines were too rigid, not only in structure, but in limiting the ‘human’ factors permitted to influence sentencing decisions.” *Id.* at xxvi-xxvii.

Even so, we believe there are steps this Commission can take to enhance the flexibility and fairness of the system, both by amending the guidelines and by recommending statutory changes to Congress. We understand that the current members of the Commission are committed to improving the operation of the guidelines and the ABA looks forward to working with you to this end.

B. Measuring Federal Drug Sentencing Rules Against the Standards

One of the promises of the model guideline system endorsed in the ABA Standards is that the legislatively created commission will be empowered to simplify and rationalize sentencing policy in the guidelines it develops and by recommending statutory changes to the legislature. Plainly that has not happened in the federal system, at least not with respect to drug sentences.

Largely as a result of mandatory minimum sentencing laws and other congressional directives, federal drug sentencing today is far more confusing and arbitrary today than it was on the day Congress established this Commission.²

Most glaring are the complex and idiosyncratic provisions of 21 U.S.C. §§ 841 – 843 which prohibit the manufacture and distribution of controlled substances. Occupying some 15

² A useful illustration of the problems with federal drug sentencing can be found at 21 U.S.C. § 844, the rarely used statute making it illegal to possess a controlled substance. This law, a copy of which is appended to my testimony, consists of a complex hodgepodge of various maximum terms of imprisonment depending on the type of drug possessed, various mandatory minimum terms of imprisonment depending on the type and quantity of drug possessed, enhancements based on the defendant's prior record for some drugs but not others, mandatory fines, mandatory costs, exceptions to the mandatory costs, cross references to drug scheduling tables and regulatory provisions appearing elsewhere in the Code, as well as cross references to other titles of the 1970 statute from which this provision derives. A defendant convicted of violating this law who happens not to be subject to one of the mandatory minimum terms set forth in the statute is then sentenced under section 2D2.1 of the sentencing guidelines, which itself contains three alternative base offense levels, two cross references to other guidelines, an application note and two paragraphs of background commentary. All this for a law intended to inform drug addicts of the penalty for possessing drugs and hopefully deter them from doing so.

columns of single-spaced text in the West compilation, studded by a dizzying array of mandatory penalties, enhancements and fines, these laws dictate highly specific punishments based almost exclusively on the type and quantity of drug for which the defendant is found legally accountable. The statutes, in turn, correspond to a seven-and-a-half page drug quantity table that determines a defendant's base offense level and then dozens of cross references and specific offense characteristics that generally serve to increase sentence length.

For some defendants the mandatory minimum statute dictates the sentence and for others the guidelines apply, depending solely on the quantity of drugs. Sometimes the statute trumps the guidelines; sometimes the guideline sentence exceeds the statutory penalty. Meanwhile, in a well-intentioned effort to moderate penalties, Congress enacted an additional layer of complexity in 1994: a safety valve provision with its own finely nuanced criteria that allows some defendants to avoid the statutory minimum penalty and instead be sentenced under the guidelines.¹⁰ And of course the entire hydra-headed beast can be circumvented if an Assistant United States Attorney attests that the defendant has substantially assisted authorities.

The complexity of federal drug sentencing laws and guidelines is only one of at least five other ways in which the current rules deviate from the ABA Standards.

First, Congress' extensive reliance on mandatory minimum sentencing provisions in the drug laws is contrary to three decades of ABA policy. Mandatory sentencing laws are obsolete in an age of guideline sentencing; both mandatories and guidelines seek to limit judicial discretion, but guidelines do so in a more balanced, less blunt fashion. Guidelines preserve some needed judicial discretion, while mandatory minimums transfer the power to sentence from judge to prosecutor. Mandatory minimums are especially unjustified in federal law ten years after this Commission reported to Congress that these laws cause unwarranted racial disparity.¹¹

¹⁰ 18 U.S.C 3553(f).

¹¹ U.S. Sentencing Commission, *Mandatory Minimum Penalties in the Federal Criminal Justice System* (August 1991).

Second, federal drug sentences are determined to a considerable extent by a single factor: drug quantity. The mandatory minimums are triggered by drug quantity, and even when the statutes do not apply, the guideline sentence is driven by drug quantity. Federal sentencing rules do not authorize judges “to exercise substantial discretion to determine sentences in accordance with the gravity of offenses and the degree of culpability of particular offenders” as the Standards urge.¹²

Third, federal drug sentencing today is not the product of empirical, scientific evidence as the Standards envision.¹³ The legislative process that produced the mandatory minimum threshold levels in 1986 was notoriously devoid of scientific analysis.¹⁴ The Commission, in contrast, undertook a rigorous empirical analysis of cocaine penalties in its 1995 report to Congress, taking into account pharmacological, sociological, economic and other scientific evidence. The guideline amendments that resulted from that review were promptly rejected by Congress.

¹² Standard 18-2.6(a).

¹³ In carrying out this “intermediate function,” the sentencing commission should “collect, analyze and disseminate information on the nature and effects of sentences imposed” and “develop means to monitor, evaluate, and predict patterns of sentencing, including levels of severity....” Standard 18-4.1(b). The commission’s “empirical research capacity,” is to be “given highest priority” because the sentencing rules will emerge from the research. Standard 18-4.2(d).

¹⁴ The Commission’s 1995 cocaine report observes that in formulating the 1986 law which codified the 100 to 1 ratio, “Congress dispensed with much of the typical deliberative legislative process, including committee hearings...the legislative history does not include any discussion of the 100-to-1 powder cocaine/crack quantity ration *per se*.” U.S. Sentencing Commission, *Cocaine and Federal Sentencing Policy* (February 1995). The House Crime Subcommittee developed an early version of the law, but according to then-Committee Counsel Eric Sterling “the subcommittee failed to develop a harmfulness equivalent among drugs so that quantities of drugs subject to the same level of punishment would reflect an equivalent measure of social harm or transgression.” Sterling, *The Sentencing Boomerang: Drug Prohibition Politics and Reform*, 40 Villanova Law Rev. 383, 409-410 (1995).

Fourth, there is widespread evidence that federal drug sentences are, contrary to the Standards, “more severe than necessary to achieve the societal purposes for which they are authorized.” Bureau of Prisons Director Kathy Hawk Sawyer has testified before Congress that “70-some percent of our female population are low-level, nonviolent offenders. The fact that they even have to come into prison is a question mark for me. I think it has been an unintended consequence of the sentencing guidelines and the mandatory minimums.”¹⁵ In an extraordinary letter to Congress, 27 federal judges who previously served as United States Attorneys complained that crack cocaine sentences are unjust and do not serve society’s interest.¹⁶ And at the end of his term President Clinton commuted the sentences of about 20 low-level, non-violent federal drug offenders, but thousands of similarly situated defendants remain incarcerated.

Fifth, mandatory sentencing laws and quantity-driven guidelines, exacerbated by the particularly harsh treatment of crack cocaine in both the statutes and the guidelines, result in the “unwarranted and inequitable disparities” that the Standards said must be avoided. This Commission found as much in its 1991 report to Congress on mandatory sentencing laws and its 1995 study of cocaine penalties. At the time of the latter report, a unanimous Sentencing Commission, virtually the entire membership of the House and Senate Judiciary Committees and the Attorney General of the United States all acknowledged that the federal cocaine penalty structure is unfair and unjustified, but even so these rules have remained impervious to improvement – until perhaps now.

II. PROPOSED AMENDMENT 8 WOULD IMPROVE FEDERAL DRUG SENTENCING.

In Amendment 8, the Commission proposes to amend the drug guideline to limit the sentences imposed on minor or minimal participants but enhance sentences based on violence

¹⁵ Testimony of Kathy Hawk Sawyer, House Appropriations Committee, *Hearings on Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 2001*, at 698 (2000).

¹⁶ Letter to the House and Senate Judiciary Committees from Judge John S. Martin, Jr. and 26 other judges, September 16, 1997.

and other aggravating factors. We read the Amendment in conjunction with the first Issue for Comment and assume that the Commission will not add enhancements to the guideline until it also raises the threshold quantities for crack cocaine, which now reflect overbroad assumptions about violence and harmfulness.

Proposed Amendment 8 revives the moribund effort to make federal drug sentencing rules more fair and rational. The ABA applauds the Commission for doing so. We do not agree with every aspect of proposed Amendment 8, and there are many aspects of the proposal on which we have no institutional position. But in broad strokes, we support the Commission's efforts to reduce the dominant role that drug quantity plays in federal drug sentencing and permit sentencing judges to take greater account of the relative culpability of different defendants.

Drug quantity is a particularly unsatisfying sentencing factor because it is a variable subject to manipulation by law enforcement officers, especially in undercover drug cases and in observation cases where the police may consciously wait to arrest the defendant, permitting drug sales to accumulate until a triggering quantity of drugs has been sold. Drug quantity is also a poor proxy for culpability in conspiracy cases and under the Relevant Conduct guideline, because a defendant with relatively lower culpability may be legally accountable for a large quantity of drugs.

The Commission's proposal to restrain the sentences of defendants who qualify for a mitigating role adjustment seems like a sensible effort to restore a measure of proportionality to drug sentencing and reduce sentences that are currently more severe than is necessary to carry out the purposes of punishment. These goals are consistent with the ABA Standards, and we therefore see no reason to limit the scope of this mechanism to defendants who qualify for only some mitigating role adjustments. In general, only defendants found to be organizers, managers or leaders of a drug enterprise should receive the extremely lengthy sentences that await defendants at the upper levels of the Sentencing Table.

The enhancements proposed for violence and for the location and related circumstances of the offense make sense only if adopted in conjunction with a substantial increase in the

threshold quantities for crack cocaine as the Commission contemplates in the first “Issue for Comment.” The primary explanation offered for the current threshold levels is that the crack market is inherently more violent than other drug markets. The Commission did not find that explanation persuasive in 1995 and the ABA endorsed your conclusions; current Commission data also calls it into question. But to the extent that the current thresholds are based on that (invalid) assumption, it would constitute unwarranted “double-counting” to add violence-related enhancements to the guideline without a corresponding adjustment in the base offense levels in crack cases. We address this subject further in the following section.

We have practical concerns about the proposals to incorporate in the drug guideline aggravating and mitigating factors relating to the defendant’s criminal history. As the Commission notes in the explanatory material accompanying the proposal, Chapter Four of the guidelines operates generally to provide increased punishment for past criminal conduct and includes a number of particular provisions often applicable in drug trafficking cases. To add criminal history-related adjustments to the Chapter Two guideline seems to inject unnecessary complexity into the structure of the guidelines and once again constitutes unwarranted double-counting. The idea of a no-prior-record adjustment may have merit, but it should be incorporated in Chapter 4 so that it applies to drug and non-drug cases alike.

Adoption of certain elements of proposed Amendment 8 would move the drug guidelines somewhat close to the principles articulated in the ABA Sentencing Standards. There would still be major differences between the relatively rigid guidelines and the more flexible discretionary system envisioned by the Standards. But Amendment 8 is, on balance, a step in the right direction.

III. THE DISPARITY BETWEEN CRACK AND POWDER COCAINE SENTENCES SHOULD BE ELIMINATED OR SUBSTANTIALLY REDUCED.

In 1995 the ABA squarely endorsed the Commission’s proposal to equalize the quantity thresholds for crack and powder cocaine. The report accompanying that resolution, while not formal ABA policy, suggests two grounds for our position.

First, we observed that the different treatment of crack and powder cocaine offenses has “a clearly discriminatory effect on minority defendants convicted of crack offenses.” The report cited studies showing that minorities are disproportionately charged in federal court for crack-related offenses, and that a disproportionate number of crack defendants are street-level dealers from minority communities. The report declared these disparities to be “a major instance of the appearance of race discrimination in the administration of justice” and urged that it be remedied.

Second, the report placed great weight on the fact that the equalization proposal was based on the empirical conclusions of the expert body established by Congress to rationalize sentencing policy. The ABA Standards envision that a sentencing agency, in carrying out its intermediate function, will base its policies on precisely the kind of rigorous, empirical, apolitical analysis that this Commission undertook in its 1995 Special Report to Congress.

We know of no empirical evidence that has developed since 1995 to call into question the Commission’s conclusions. Were the Commission to repromulgate its 1995 recommendations to Congress, the ABA would again endorse that proposal.

But we are mindful of Public Law 104-38, by which Congress rejected the Commission’s 1995 proposal. Essentially that Act directs the Commission to try again. In section 2(a)(2) of the Act, Congress instructed the Commission to propose a “revision of the drug quantity ratio of crack cocaine to powder cocaine under the relevant statutes and guidelines...” Section 2(a)(1) lists the considerations that are to govern the revision, one of which is that “the sentence imposed for trafficking in a quantity of crack cocaine should generally exceed the sentence imposed for trafficking in a like quantity of powder cocaine.” A fair reading of the law is that the Commission should return to Congress with a ratio between the discredited 100-to-1 in current law and the rejected 1-to-1 in the earlier proposal.¹⁷

¹⁷ We are aware that in 1997 the Commission submitted a report to Congress that did not formally propose guideline amendments but did discuss a range of possible revisions to cocaine thresholds, including proposals to lower the threshold quantity for powder. We regard such suggestions as ill-advised and not supported by empirical evidence.

Consistent with the reasoning that informed our 1995 resolution, we urge that the Commission now review the empirical and scientific evidence regarding the different types of cocaine. If, as we suspect, there remains a strong empirical basis for substantially reducing the disparity between the threshold quantities thereby redressing the resulting racial disparities, we urge the Commission to propose a ratio as close as possible to the previous 1-to-1 proposal.

In proposing statutory and guideline revisions, the Commission should not propose to lower the threshold quantity that triggers longer powder cocaine penalties. First, there is no empirical or scientific evidence of which we are aware to justify such increased penalties. Second, lowering the threshold would necessarily bring more defendants within the reach of mandatory minimum sentencing laws, which the ABA opposes. Third, lowering the quantity threshold would necessarily increase sentences for defendants with lesser culpability in that they are legally responsible for a lower quantity of drugs. As Judge Martin and his colleagues wrote in 1997, “[t]he penalties for powder cocaine, both mandatory minimum and guideline sentences, are severe and should not be increased...[t]he disparity should be remedied only by raising the amount of crack cocaine that would trigger the application of the mandatory minimum.”¹⁸

In fact, the time seems right for the Commission to make a fairly ambitious proposal on this subject to Congress. In the years since Congress rejected the equalization proposal, there has been growing awareness of the unfairness of the current structure and growing statistical evidence that crack distribution is not as inherently violent as previously thought. In addition, there is movement away from mandatory sentencing laws in a number of states in the face of budget constraints. The introduction of S. 1874 by Senators Sessions and Hatch is an important signal that even members of Congress who were hostile to the Commission’s 1995 proposal are willing to entertain positive changes to the crack / powder ratio and to take other steps that reduce the federal system’s overreliance on the single sentencing factor of drug quantity.

We understand that questions have been raised about (1) the Commission’s legal authority to propose guideline amendments in this area in light of Public Law 104-38; and (2) the

¹⁸ Martin letter, *supra*, at 2-3.

wisdom of the Commission proposing guideline amendments before Congress amends the thresholds in the mandatory sentencing laws.

The first concern is easily overcome. While Public Law 104-38 directed the Commission to propose “recommendations” with respect to cocaine sentencing, it in no way limited the Commission’s organic authority under 28 U.S.C. § 994 to promulgate guideline amendments on this subject. In contrast to subsection 2(b) of the Act, which requested a “study” of money laundering, subsection 2(a) contemplates that the Commission will take action in light of congressionally enumerated factors. Guideline amendments can be characterized as “recommendations” since Congress retains authority to block them within six months of submission. Finally, there are numerous non-statutory indications that Congress is ready to address this subject again, and concrete amendments from the Commission will frame the matter for congressional resolution in this session.

The question of whether the Commission *should* move forward or continue to defer to Congress is a straightforward proposition for the ABA, which strongly favors change. It is now seven years since Congress blocked the Commission’s proposed solution to the crack / powder conundrum amid widespread acknowledgment that the cocaine penalty structure is facially unfair, especially to minorities who comprise over 93% of all crack defendants. The Sentencing Reform Act establishes an independent Commission in the judicial branch to establish sentencing policies that, *inter alia*, “provide certainty and fairness,” avoid “unwarranted sentencing disparities,” and reflect “advancement in knowledge of human behavior as it relates to the criminal justice process.”¹⁹ Ultimately the Commission has an obligation to act, and should do so after appropriate consultation with all stakeholders.

Even were the Commission to make a very bold proposal with respect to the crack threshold and if it were to adopt aspects of Amendment 8, the system by which drug offenders are sentenced in the federal courts would remain far from the ideal guideline system expressed in

¹⁹ 28 U.S.C. § 991(b)(1).

the ABA Standards. But such changes would be an important foundation on which to build comprehensive improvements.

IV. OTHER ISSUES.

While we have been asked to focus primarily on proposed Amendment 8, there are two other proposed amendments that warrant comment.

Proposed Amendment 9 would increase sentencing alternatives in Zone C of the Sentencing Table. Consistent with the Standards previously cited, the ABA supports efforts to increase judicial discretion at sentencing. The Standards specifically encourage the availability of non-incarcerative sentences in appropriate cases.²⁰ Of the three options set forth in Amendment 9, Option One appears to provide the most discretion by combining Zones B and C in the current Table. Indeed, it would be preferable for the Commission to consider expanding the zones in the Sentencing Table in order to maximize the court's authority to impose non-incarcerative sentences in appropriate cases.

The ABA opposes Amendment 5, which proposes to delete section 3E1.1(b)(1) of the guidelines. This change would further limit a sentencing court's already cramped authority to recognize and reward a defendant's cooperation with the government. Deletion of the first subsection leaves the guideline as an explicit reward for a defendant to plead guilty. ABA policy on this question is clear: "The fact that a defendant has entered a plea of guilty or nolo contendere should not, by itself alone, be considered by the court as a mitigating factor in imposing sentence."²¹ Rather the guilty plea should be treated as one indication of a defendant's contrition and acceptance of responsibility. (Of course a defendant may not be penalized for asserting his right to trial and a not-guilty plea should never preclude a finding of acceptance of responsibility.)

²⁰ Standard 18-3.11.

²¹ Standard 14-1.8.

Finally, on a subject not addressed in the Proposed Amendments, I note that on several recent occasions the ABA has urged that the Commission promulgate a policy statement to guide the reduction of a sentence when there is an extraordinary and compelling reason for such reduction. Under 18 USC § 3582(c)(1)(A), the Bureau of Prisons is authorized to move for such sentence reductions “consistent with applicable policy statements issued by the Sentencing Commission.” 28 U.S.C. § 994(t) directs the Commission to issue such policy statements, but it has never done so. The absence of such policy statements appears to have discouraged the Bureau from making use of its statutory authority. We again urge the Commission to take action in this regard.

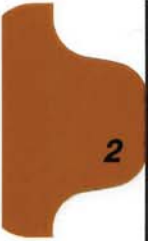
Appendix: 21 USCS § 844 (2001) [see footnote 9]

§ 844. Penalty for simple possession

(a) Unlawful acts; penalties. It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this title or title III. It shall be unlawful for any person knowingly or intentionally to possess any list I chemical obtained pursuant to or under authority of a registration issued to that person under section 303 of this title or section 1008 of title III if that registration has been revoked or suspended, if that registration has expired, or if the registrant has ceased to do business in the manner contemplated by his registration. Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of \$ 1,000, or both, except that if he commits such offense after a prior conviction under this title or title III, or a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State, has become final, he shall be sentenced to a term of imprisonment for not less than 15 days but not more than 2 years, and shall be fined a minimum of \$ 2,500, except, further, that if he commits such offense after two or more prior convictions under this title or title III, or two or more prior convictions for any drug, narcotic, or chemical offense chargeable under the law of any State, or a combination of two or more such offenses have become final, he shall be sentenced to a term of imprisonment for not less than 90 days but not more than 3 years, and shall be fined a minimum of \$ 5,000. Notwithstanding the preceding sentence, a person convicted under this subsection for the possession of a mixture or substance which contains cocaine base shall be imprisoned not less than 5 years and not more than 20 years, and fined a minimum of \$ 1,000, if the conviction is a first conviction under this subsection and the amount of the mixture or substance exceeds 5 grams, if the conviction is after a prior conviction for the possession of such a mixture or substance under this subsection becomes final and the amount of the mixture or substance exceeds 3 grams, or if the conviction is after 2 or more prior convictions for the possession of such a mixture or substance under this subsection become final and the amount of the mixture or substance exceeds 1 gram. Notwithstanding any penalty provided in this subsection, any person convicted under this subsection for the possession of flunitrazepam shall be imprisoned for not more than 3 years, shall be fined as otherwise provided in this section, or both. The imposition or execution of a minimum sentence required to be imposed under this subsection shall not be suspended or deferred. Further, upon conviction, a person who violates this subsection shall be fined the reasonable costs of the investigation and prosecution of the offense, including the costs of prosecution of an offense as defined in sections 1918 and 1920 of title 28, United States Code, except that this sentence shall not apply and a fine under this section need not be imposed if the court determines under the provision of title 18 that the defendant lacks the ability to pay.

(b) [Repealed]

(c) "Drug or narcotic offense" defined. As used in this section, the term " drug, narcotic, or chemical offense" means any offense which proscribes the possession, distribution, manufacture, cultivation, sale, transfer, or the attempt or conspiracy to possess, distribute, manufacture, cultivate, sell or transfer any substance the possession of which is prohibited under this title.



PANEL TWO: Community Representatives/Interested Parties

very effective

Wade Henderson
Executive Director
Leadership Conference on Civil Rights

Q&A

Charles Kamasaki
Senior Vice President
Office of Research, Advocacy, and Legislation
National Council of La Raza

Q&A

- minorities targeted for fed. arrests
- credibility of justice system is at risk
- reality & perception of unfairness
- urged repeal of mand. min.
- endorse of system
- urge crack/powder disparity elimination
- 1986 racially-tinged media hysteria
- no pharmacological reason
- crack market less violent now

AMENDMENT 7 (TERRORISM) less than half involve weapon ...
87% have violence

PANEL THREE: Law Enforcement

James F. Jarboe
Section Chief, Domestic Terrorism
Counterterrorism Planning Section
Federal Bureau of Investigation

Q&A

Cathleen Corken
Deputy Chief for Terrorism
Department of Justice

Q&A

- 93% black or hispanic - crack
- 34 ↓ 17% white - powder
- black ↑ 30%
- hispanic ↑ 51%
- ① raise threshold for crack
- ② don't raise powder !!
- ③ Cong → review mand. laws & tactics of fed. prosecutions
- adjust crack/powder as close as possible w/o raising powder
- Restore balance & racial fairness

ADJOURN



PUBLIC HEARING AGENDA

DAY ONE: MONDAY, FEBRUARY 25, 2002, 3:00 P.M. – 5:00 P.M.
DAY TWO: TUESDAY, FEBRUARY 26, 2002, 9:30 A.M. – 11:30 A.M.

THURGOOD MARSHALL FEDERAL JUDICIARY BUILDING
WASHINGTON, DC

FEBRUARY 25, 2002

INTRODUCTION

Judge Diana E. Murphy
Commission Chair

AMENDMENT 8 (DRUG PENALTIES)

PANEL ONE: Medical/Academic Community

Glen Hanson, D.D.S.
Acting Director
National Institute on Drug Abuse

◦ potency = concentration in blood
stimulates heart, constricts
vessels, can cause stroke

Q&A

Deborah Frank, M.D.
Professor of Pediatrics
Boston University School of Medicine

Q&A

Ira J. Chasnoff, M.D.
President
Children's Research Triangle

Q&A

Alfred Blumstein, Ph.D.
Professor of Urban Systems and Operations Research
Carnegie Mellon University

Q&A

- Congress does not make a corresponding change to the mandatory minimum.

Special Report to the Congress:

Cocaine and Federal Sentencing Policy

(as directed by section two of Public Law 104-38)



UNITED STATES SENTENCING COMMISSION

April 1997

COCAINE AND FEDERAL SENTENCING POLICY (as directed by section two of Public Law 104-38)

I. Introduction

Federal sentencing policy for cocaine offenses has come under extensive criticism during the past few years. Public officials, private citizens, criminal justice practitioners, researchers, and interest groups have all challenged the fairness and efficacy of the current approach to sentencing cocaine offenses. Critics have focused on the differences in federal penalty levels between the two principal forms of cocaine — powder (cocaine hydrochloride) and crack (cocaine base) — and on the disproportionate impact the more severe crack penalties have had on African-American defendants.

In 1994, these concerns led Congress, in the Violent Crime Control and Law Enforcement Act of 1994, to direct the Sentencing Commission to issue a report and recommendations on cocaine and federal sentencing policy. On February 28, 1995, the Commission issued a comprehensive report to Congress in which it unanimously recommended that changes be made to the current cocaine sentencing scheme, including a reduction in the 100-to-1 quantity ratio between powder cocaine and crack cocaine. The report indicated that the Commission would investigate ways to account for the harms associated with cocaine offenses in the sentencing guidelines and would then recommend appropriate enhancements and adjustments in the quantity ratio.

On May 1, 1995, by a 4-3 vote, the Commission sent to Congress proposed changes to the sentencing guidelines for cocaine offenses. The changes proposed by the majority would have made the starting point for determining sentences for powder and crack offenders the same by adopting a 1-to-1 quantity ratio at the powder cocaine level and would have provided sentencing enhancements for violence and other harms disproportionately associated with crack cocaine. *See* 60 Fed. Reg. 25074. The minority dissented based on an assessment that the recommended enhancements could not sufficiently account for the added harms associated with crack cocaine and thus did not warrant the total elimination of a differential between base sentences.

Pursuant to 28 U.S.C. § 994(p), Congress passed and the President signed legislation rejecting the Commission's proposed guideline changes. *See* Pub.L. No. 104-38, 109 Stat. 334 (Oct. 30, 1995). In the legislation, Congress effectively returned the issue to the Commission for further consideration and directed the Commission to submit to Congress new recommendations regarding changes to the statutes and sentencing guidelines for the unlawful manufacturing, importing,

exporting, and trafficking of cocaine. We submit this report in compliance with the 1995 congressional directive that "the sentence imposed for trafficking in a quantity of crack cocaine should generally exceed the sentence imposed for trafficking in a like quantity of powder cocaine."

In response to that directive, the Commission again has deliberated carefully over federal cocaine sentencing policy and has assessed the concerns raised by Congress, conducted new research, consulted with law enforcement and substance abuse experts, and reviewed all of the Commission's prior research and analysis. The Commission has accumulated a vast array of information about both powder and crack cocaine and about the changing markets for these drugs. Based on this work, the Commission is unanimous in reiterating its original core finding, outlined in its February 1995 report to Congress that, although research and public policy may support somewhat higher penalties for crack than for powder cocaine, a 100-to-1 quantity ratio cannot be justified. The Commission is firmly and unanimously in agreement that the current penalty differential for federal powder and crack cocaine cases should be reduced by changing the quantity levels that trigger mandatory minimum penalties for both powder and crack cocaine. Therefore, for powder cocaine, the Commission recommends that Congress reduce the current 500-gram trigger for the five-year mandatory minimum sentence to a level between 125 and 375 grams, and for crack cocaine, that Congress increase the current five-gram trigger to between 25 and 75 grams.

In Part II of this report, we summarize the current federal sentencing law for cocaine offenses. In Part III, we discuss the goals of federal drug sentencing policy adopted by Congress, recent administrations, and the Commission. We then evaluate current cocaine sentencing policy against these goals. Finally, in Part IV, we set forth our conclusions and recommendations for modifying federal cocaine sentencing policy.

II. The Current Law

The current sentencing structure for cocaine offenses is primarily the result of the Anti-Drug Abuse Act of 1986. The Act established mandatory minimum penalties for persons convicted of trafficking in a variety of controlled substances. The 1986 Act pegged the mandatory minimums to specific quantities of drugs distributed (based on a mixture or substance containing a detectable amount of the drug). The quantities triggering the Act's mandatory minimum penalties differed for various drugs and in some cases for different forms of the same drug. The Act treated powder cocaine differently than crack cocaine by establishing what has come to be known as the 100-to-1 quantity ratio between the two forms of cocaine. In other words, it takes one hundred times as much powder cocaine as crack cocaine to trigger the same mandatory penalties. Thus, a person convicted of selling 500

grams of powder cocaine is subject to the same five-year mandatory minimum sentences as a person selling 5 grams of crack cocaine, while a person convicted of selling 5,000 grams (5 kilograms) of powder is subject to the same ten-year mandatory minimum sentence as a person who sells 50 grams of crack.

In 1987, the Sentencing Commission used the drug quantity levels designated by Congress — including the quantity levels for cocaine offenses based on the 100-to-1 quantity ratio — in developing sentencing guidelines for drug offenses. Using the mandatory minimum statutes, which list only the quantities corresponding to the five- and ten-year mandatory minimum sentences, the sentencing guidelines set proportionate sentences for the full range of other powder and crack cocaine quantities.

Congress also distinguished crack cocaine from both powder cocaine and other controlled substances in the Anti-Drug Abuse Act of 1988 by creating a mandatory minimum penalty for its simple possession. This is the only federal mandatory minimum for a first offense of simple possession of a controlled substance. Under this law, possession of more than five grams of crack cocaine is punishable by a minimum five years in prison. Simple possession (without the intent to distribute) of any quantity of powder cocaine by first-time offenders is a misdemeanor punishable by no more than one year in prison.

III. The Goals of Federal Drug Sentencing Policy

In response to the 1995 legislative directive, the Commission has carefully considered each factor listed in the directive and has evaluated current federal cocaine sentencing policy in relation to congressional and administration goals for drug offense sentencing generally. These goals have been articulated in debates surrounding the Anti Drug Abuse Act of 1986 and other legislation, expressed in statements by officials of several administrations, and embraced generally by the Sentencing Commission. As we discuss below, these goals suggest that those who traffic in either powder or crack cocaine should be sentenced severely, but that the current penalty differential between powder and crack cocaine should be reduced.

A. Sentences Should Be Commensurate With the Dangers Associated With A Given Drug

Regardless of the quantity of drug involved, distributing any of the primary domestic illegal drugs — heroin, cocaine (powder or crack), methamphetamine, PCP, LSD, or marijuana — is a serious crime. All of these drugs cause great harm to individuals and to society at large, and the stern punishments meted out under federal law for drug distribution reflect congressional, executive, and Sentencing

Commission judgment about the gravity of these offenses and the menace caused by these drugs.

Congress and the Commission have also concluded, however, that some of these drugs have more attendant harms than others and that those who traffic in more dangerous drugs ought to be sentenced more severely than those who traffic in less dangerous drugs. This policy is meant both to discourage the trafficking of more serious drugs and to punish those who do more harm to society by distributing these drugs. The policy is embodied, for example, in the federal schedules of controlled substances, 21 U.S.C. § 812, that differentiate the more dangerous controlled substances from those that are less dangerous, as well as in the different penalty levels associated with trafficking in the various scheduled substances, 21 U.S.C. § 841.

The Commission's research, detailed at great length in its 1995 report, found significant dangers associated with both crack and powder cocaine trafficking and use. The Commission also found, however, that many of these dangers are associated to a greater degree with crack cocaine than with powder cocaine. For example, crack cocaine is more often associated with systemic crime — crime related to its marketing and distribution — particularly the type of violent street crime so often connected with gangs, guns, serious injury, and death. In addition, because it is easy to manufacture and use and relatively inexpensive, crack is more widely available on the street and is particularly appealing and accessible to the most vulnerable members of our society. Unfortunately, the purveyors of crack worked hard to design a method to distribute the drug at a cheap price, making it appealing to the most economically disadvantaged of our society. Finally, because crack is smoked rather than snorted, it produces more intense physiological and psychotropic effects than snorting powder cocaine, and so the crack user is more vulnerable to addiction than the typical powder user, though we note that injecting powder cocaine into the bloodstream produces effects similar to smoking crack and hence creates a similar vulnerability to addiction. Based upon these findings, the Commission reiterates the conclusion from its 1995 report that federal sentencing policy must reflect the greater dangers associated with crack.

B. Five- and Ten-Year Mandatory Sentences Should Be Targeted At Serious Traffickers

Since 1986, federal drug sentencing policy has been based in part on the principle that the quantity of drug involved in an offense reflects both the harm to society as well as the offender's culpability. Accordingly, Congress countenanced in the Anti-Drug Abuse Act of 1986 that any drug trafficker accountable for a quantity of drug indicative of a "mid-level" or "serious" trafficker ought to receive, with very few exceptions, at least a five-year prison sentence. To determine the quantity of drugs indicative of mid-level or serious traffickers, Congress consulted with drug

enforcement experts to gather information about drug markets at the time and set quantity triggers based on this information.

In reexamining current cocaine sentencing policy, the Commission has used this same approach based on updated market information. In 1986, the crack cocaine market was just emerging, and since that time, much more has been learned about the marketing of both powder and crack cocaine. Recently, the Commission requested and obtained information from the Drug Enforcement Administration ("DEA"), the Office of National Drug Control Policy, the National Institute on Drug Abuse, and the Substance Abuse and Mental Health Administration to reevaluate the quantity levels of drug associated with mid-level or serious traffickers. Following these consultations and based on the Commission's own data — including data that have become available since the Commission's 1995 report — the Commission concludes that the five-gram trigger for crack cocaine is over inclusive because it reaches below the level of mid-level or serious traffickers who deserve the five-year statutory penalty.

Five grams of crack cocaine is indicative of a retail or street-level dealer rather than a mid-level dealer. Accordingly, the Commission concludes that the five-gram trigger should be increased to better target mid-level dealers. This is not to say that all street-level cocaine dealers should receive sentences of less than five-years imprisonment. If a street-level dealer possesses a gun, is involved in violence or other aggravating conduct, uses juveniles, or is involved in unusually large quantities of drugs, a more severe sentence would be warranted. Both the guidelines and other laws provide for such enhancements. But based solely on quantity, our analysis suggests that an appropriate trigger for the five-year mandatory sentence for crack offenses should be higher than five grams.

For powder cocaine, the information and data suggest that some decrease in the quantity trigger may be warranted. Because nearly all cocaine is initially distributed in powder form until some later time in the distribution chain when some is then converted to crack, the Commission believes that it is appropriate to increase penalty levels for trafficking in powder cocaine to partially reflect the greater harms associated with crack and to reduce unwarranted sentencing disparity between powder and crack cocaine traffickers. In addition, the ease with which powder cocaine is converted to crack cocaine also suggests that some increase in powder cocaine penalties may be appropriate. For these reasons, the Commission concludes that a more appropriate quantity trigger for the five-year mandatory sentence for powder cocaine would be less than 500 grams.

It is important to note that, although changes in the quantity triggers for crack and powder cocaine would change the starting point for determining sentences under the guidelines, ultimate sentences are based on more than simply drug quantity. In contrast to a penalty structure that relies exclusively or primarily

on a quantity ratio to distinguish among offenders, the guidelines approach allows for the more refined and individualized sentencing that Congress envisioned under the Sentencing Reform Act as well as the most efficient and effective use of scarce federal prison resources. The Commission reiterates its 1995 conclusion that, when applicable, guideline enhancements should be used to account for harms related to crack and powder cocaine offenses with less reliance put on drug quantity. For example, any cocaine trafficker who possesses or uses a firearm or other dangerous weapon during a drug crime ought to receive a substantially enhanced sentence. Other factors — such as the use of juveniles in a drug trafficking offense, a defendant's prior drug trafficking convictions, a defendant's role in the offense, and the other factors listed in the 1995 congressional directive — are all important in determining an appropriate drug sentence. The enhancements in the guidelines system can account for these and other important factors related to a defendant's criminal culpability and should be relied on to the greatest extent possible.

C. Cocaine Sentencing Policy Should Advance the Federal Government's Role in the National Drug Control Effort and Rationalize Priorities for the Use of State and Federal Resources in Targeting Drug Use and Trafficking

The federal government and state governments share a common interest in developing an effective drug control policy that allocates responsibility for prosecution, adjudication, sentencing, and imprisonment in such a way that these functions are carried out in the most efficient, effective, and constitutionally appropriate manner. Sentencing policy plays an important role in the allocation of resources among federal, state, and local government entities. Thus, the Commission is increasingly convinced that federal sentencing policy must be designed in coordination with a larger national effort that recognizes and takes into account the appropriate allocation of drug enforcement and drug control efforts at all levels of government.

National drug control policy over the last decade has, for appropriate reasons, relied upon extensive coordination and cooperation among federal, state, and local governmental entities. The result has been that both the federal government and state and local governments are targeting many of the same offenders and the same criminal activity in an effort to root out perpetrators of drug-related criminal activity. Stated another way, in most instances, the same offenders and the same criminal activity can jurisdictionally be prosecuted, adjudicated, sentenced, and imprisoned in either the state or federal system. The choice about whether to proceed under state or federal law has, to some extent, been driven by comparisons of these overlapping sentencing policies.

The resources available at all levels of government are limited and will, in the foreseeable future, be increasingly stretched. This is particularly true in the area of

law enforcement, judicial resources, and prison resources. Thus, in the sentencing context, as well as many other contexts inherent in the criminal justice system, we support national efforts to rationalize and target, in an efficient and effective way, the manner in which criminal justice resources are deployed to take into account the appropriate roles of the federal government as compared with state and local governments, and to focus the use of criminal justice resources in such a way that the effectiveness of the resources is maximized and the appropriate roles of each level of government are recognized. The constitutional principles of federalism are no less imperative in the criminal law context than they are in other areas of constitutional inquiry. See *United States v. Lopez*, 514 U.S. 549 (1995). Although this goal of rationalizing and allocating the respective roles of federal and state and local governments is an issue far bigger than sentencing policy, the Sentencing Commission recognizes and takes as one of its goals the effort to try to draw appropriate thresholds for federal sentencing that will take into account the regional variations and preferences of state and local governments that should be respected in the criminal law context.

To this end, it is our view that federal sentencing policy should reflect federal priorities by targeting the most serious offenders in order to curb interstate and international drug trafficking and violent crime. Consistent with general constitutional principles of interstate commerce and the appropriate roles of the federal government, it is our view that an effort to rationalize federal sentencing policy would attempt to identify those components of the criminal element in drug trafficking that are most appropriate for federal concern and reserve to the states those criminal activities and defendants that state resources could most effectively target and consider in their own sentencing schemes. Though most of the overlapping jurisdiction between the state and federal governments in national crime control policy may be authorized by the Constitution, it does not necessarily follow that such overlapping jurisdiction is either the most effective or the most efficient use of the combined resources of the federal and state governments. For example, it is clear in looking at state sentencing schemes that states have historically made a wide variety of choices about the sentencing of persons who are deemed low-level offenders or who are apprehended with street-level amounts of drugs. These choices reflect traditional state responsibility for addressing public health, safety, and welfare issues related to addicts, street-level crime, and persons low in local distribution chains. States may be able to address these issues more economically and with more locally-focused penal and social goals than can be achieved by the federal government.

Federal cocaine sentencing policy is an excellent example of a place to start rationalizing federal and state priorities with respect to drug control. It is the view of the Sentencing Commission that current federal cocaine policy inappropriately targets limited federal resources by placing the quantity triggers for the five-year mandatory minimum penalty for crack cocaine too low. The use of federal

sentencing policy as the machine to drive enforcement, adjudication, and imprisonment choices does not reflect a thoughtful and considered choice about the most effective use of public resources at all levels. This debate about the proper role of the respective levels of government goes far beyond federal cocaine policy. We are convinced, however, that adjusting the powder and crack five-year quantity triggers to target serious dealers will begin the process of adjusting national drug policy in a way that effectively and efficiently directs resources at all levels.

D. Cocaine Sentencing Policy and Practice Must Be Perceived By the Public As Fair

One of the issues of greatest concern surrounding federal cocaine sentencing policy is the perception of disparate and unfair treatment for defendants convicted of either possession or distribution of crack cocaine. Critics argue that the 100-to-1 quantity ratio is not consistent with the policy, goal, and mission of federal sentencing — that is to be effective, uniform, and just. While there is no evidence of racial bias behind the promulgation of this federal sentencing law, nearly 90 percent of the offenders convicted in federal court for crack cocaine distribution are African-American while the majority of crack cocaine users is white. Thus, sentences appear to be harsher and more severe for racial minorities than others as a result of this law. The current penalty structure results in a perception of unfairness and inconsistency.

Designing sentencing policy to properly focus federal resources on the most violent and dangerous offenders will also help alleviate concerns that have been raised with the Commission about prosecutorial and investigative sentencing manipulation. For example, because powder cocaine is easily converted into crack cocaine and because the penalties for crack cocaine offenses are significantly higher than for similar quantity powder cocaine offenses, law enforcement and prosecutorial decisions to wait until powder has been converted into crack can have a dramatic impact on a defendant's final sentence. To the extent that the differential is reduced, the potential for this practice will also diminish.

IV. Conclusions and Recommendations

A. Penalties for Cocaine Trafficking

In reassessing penalties for cocaine trafficking, the Commission has moved step-by-step through an evaluative process that examined all of the factors listed by Congress in the 1995 legislation and the goals set forth above. In arriving at recommended changes to current policy, the Commission has balanced conflicting goals. The Sentencing Commission shares congressional and public concern about the harms associated with both forms of cocaine — both to users and to the society as a whole — including the violence associated with its distribution, its use by juveniles, the involvement of juveniles in its distribution, and its addictive potential. However, as the Commission reported in 1995, we again conclude unanimously that congressional objectives can be achieved more effectively without relying on the current federal sentencing scheme for cocaine offenses that includes the 100-to-1 quantity ratio.

The Sentencing Commission thereby recommends that Congress revise the federal statutory penalty scheme for both crack and powder cocaine offenses. Selecting the appropriate threshold for triggering the five-year mandatory minimum penalties is not a precise undertaking, but based on the best available research and the goals detailed above, the Commission recommends for Congress's consideration a range of alternative quantity triggers for both powder and crack cocaine offenses. For powder cocaine, the Commission concludes that the current 500-gram trigger for the five-year mandatory minimum sentence should be reduced to a level between 125 and 375 grams, and for crack cocaine, the five-gram trigger should be increased to between 25 and 75 grams.

We urge Congress to adopt a ratio within the quantity ranges we have recommended to address the problem as soon as possible, as hundreds of people will continue to be sentenced each month under the current law. After Congress has evaluated our recommendations and expressed its views, the Commission will amend the guidelines to reflect congressional intent. Consistent with the principles of the Sentencing Reform Act of 1984, the Commission believes that better sentencing policy — for cocaine as well as for other offenses — is developed through Commission research and expertise together with regular and ongoing consultation with Congress and the Executive Branch. We intend to continue to work closely with Congress and senior administration officials as pertinent legislation is developed. By doing so, we believe a fairer and more effective cocaine sentencing policy — one that better targets serious and upper-level dealers and the most violent and dangerous drug offenders — can be created.

The Commission is mindful that these and other related sentencing changes could have a substantial impact on the federal prison population, thus changing the

resources available for other drug control strategies. The President, the Attorney General, the Congress, and the Office of National Drug Control Strategy have repeatedly indicated that an effective drug control strategy requires a balanced approach of domestic and international law enforcement, interdiction, prevention, and treatment. The impact of policy changes on drug control resources must be considered seriously before making any substantial increase in drug sentences. The Commission is prepared to provide impact analysis and other expertise to both Congress and the Executive Branch at any time.

B. Penalties for the Simple Possession of Crack Cocaine

The Commission has also reassessed the penalties uniquely applicable to the simple possession of crack cocaine. Much of the rationale for reexamining the 100-to-1 quantity ratio applicable to cocaine trafficking offenses similarly applies to the penalties applicable to crack simple possession offenses. The Commission reiterates its unanimous finding that the penalty for simple possession of crack cocaine should be the same as for the simple possession of powder cocaine.

Richard P. Conaboy
Chairman

Michael S. Gelacak
Vice Chairman

Michael Goldsmith
Vice Chairman

Wayne A. Budd
Commissioner

Deanell R. Tacha
Commissioner

Michael J. Gaines
Ex-officio

Mary Frances Harkenrider
Ex-officio

Concurring Opinion of
VICE CHAIRMAN MICHAEL S. GELACAK

COCAINE AND FEDERAL SENTENCING POLICY
(as directed by section two of Public Law 104-38)

I concur with my colleagues in this report and the recommendations in response to Congress's request. However, the recommendations, while moving our federal sentencing system in the direction of greater fairness, fail to rectify fully an unjust sentencing system for crack cocaine. After several years of careful study, detailed examination of our sentencing system, and meetings with defendants sentenced under these penalties, I have come to the conclusion that Congress established an unfair mandatory minimum of five years for trafficking in five grams of crack cocaine. This is particularly the case when those who traffic in up to 500 grams of powder cocaine may in many instances not even be prosecuted at the federal level. The Sentencing Commission exacerbated this problem by constructing its guidelines to increase sentences proportionately for drug quantities above mandatory minimum levels. The result is extremely severe sentences for those at the lower ends of the drug distribution chain.

I support severe sentences for serious criminal conduct. I oppose a penalty structure that results in unfair sentences, and it is clear to me that the current mandatory minimum sentences for five grams of crack cocaine are unjust and that failing to correct the imbalance with powder cocaine does not serve justice. I am also troubled by the economics of this penalty structure. Incarceration is expensive. Whether lengthy federal prison sentences for street-level crime is the wisest use of scarce resources deserves far more consideration. I believe the country would be better served by our dealing more directly with these issues. Political compromise is a function better left to the Legislature.

Congress and the Sentencing Commission have a responsibility to establish fair sentencing standards that protect the public, enhance the public's confidence in our criminal justice system, and ensure that similarly situated offenders are treated similarly. For the majority of crimes, we have accomplished these goals by establishing a "truth in sentencing" system and fair sentencing standards. We have jointly failed in our approach toward crack cocaine sentences, and the result is seriously disparate sentences. We should not lose sight of that overriding reality.

President Kennedy in a speech to the Massachusetts State Legislature said:

For of those to whom much is given, much is required.
And when at some future date the high court of history

sits in judgment on each of us, recording whether in our brief span of service we fulfilled our responsibilities to the state, our success or failure, in whatever office we hold, will be measured by the answers to four questions: First, were we truly men of courage.... Second, were we truly men of judgment.... Third, were we truly men of integrity.... Finally, were we truly men of dedication?

Does any Commission preserve its integrity by persevering in that which it is unable to accomplish even though it believes it to be right? The answer seems apparent. In its original recommendation to the Congress, the Commission proposed changes to the sentencing guidelines for cocaine offenses that would have equated base sentences for powder and crack offenders by adopting a 1:1 quantity ratio at the powder cocaine level with sentencing enhancements for violence and other harms disproportionately associated with crack cocaine.

Congress and the Administration chose not to accept that recommendation. The Congress specifically rejected the proposed amendments that would otherwise have taken effect by operation of law on November 1, 1995. That, of course, was the prerogative of both but does not necessarily lead to the conclusion that the Commission's recommendation was wrong as a matter of policy.

We can argue over the merits. We could also propose simple solutions in the hope that the problem would then go away. The Commission, for its part, could simply do nothing. Silence is clearly the simplest course. I believe that that would accomplish nothing positive. Conversely, the Congress could suggest that the ratio be eliminated by simply raising the penalties for powder cocaine to the same level as crack. That also would accomplish nothing positive. There are no easy answers.

During the year 1993, of those sentenced for crack cocaine, 88.3 percent were Black and 95.4 percent were non-White. Even though the Commission has conceded that there was no intent by the Legislature that penalties fall disproportionately on one segment of the population, the impact of these penalties nonetheless remains. If the impact of the law is discriminatory, the problem is no less real regardless of the intent. This problem is particularly acute because the disparate impact arises from a penalty structure for two different forms of the same substance. It is a little like punishing vehicular homicide while under the influence of alcohol more severely if the defendant had become intoxicated by ingesting cheap wine rather than scotch whiskey. That suggestion is absurd on its face and ought be no less so when the abused substance is cocaine rather than alcohol.

The logic of this analogy is compelling, but even if that is not so, eliminating discrimination is a principle to which this nation has committed itself. As a signator

of the United Nations International Convention on the Elimination of all Forms of Racial Discrimination, the United States pledged to:

... take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.

Clearly the 100:1 powder/crack cocaine ratio would qualify as such a law.

Although a discussion of the nation's drug abuse problem and the impact of penalties on African Americans and other people of color is often uncomfortable and elevates the profile of the issue as well as the political consequences, we cannot choose to ignore it or act as if it is of no concern. The perception of unfairness is a very real problem. Black Americans know that the penalties for crack cocaine fall primarily upon the youth of their communities and they do not countenance the present penalty structure. There is a vast difference between wanting to rid your neighborhoods of crack users and dealers and wanting members of your community treated more harshly than others using and trafficking in the same substance in a different form. How is what we are doing or propose to change making the lives of these people better? It seems to me it is not. Rather, I believe that those we would like to protect and help are those most affected and harmed by a law that clearly leads to a racially disparate and overly severe result. That is wrong.

There are other, and better ways to deal with drug abuse in this country. The current quantity-driven system of imposing penalties is simplistic and quite effective in filling our prisons. It begs the question of what the role of the federal government ought to be with regard to drug use, abuse, and trafficking. Should the federal government focus its enforcement efforts more on street-level dealers or on major importers and traffickers of the drug trade? Is the best use of federal manpower concentrating on street-level trade or are states and localities better able to be cost-efficient in this area? Conceding that reasonable men and women can and do differ on these questions, I submit that the federal government ought to focus resources on the major players in the drug trade and leave the street-level players to be dealt with by state courts as a local issue. If you accept that premise of different roles for the federal and state governments in dealing with drug abuse, a federal penalty scheme based upon significant punishment for minimal quantities of drugs is counterproductive. The current policy focuses law enforcement efforts on the lowest level of the distribution line - the street-level dealer. Unless we ignore all evidence to the contrary, the current policy has little or no impact upon the drug abuse problem. The jails are full. Drug abuse is a more significant problem than it was when Congress in 1986 adopted mandatory minimum penalties based on the quantity of drugs involved in the offense. There also seems to be an unending

supply of willing participants in the drug trade, and it is unlikely that many citizens would say they feel significantly safer today than they did 20 or even ten years ago. As a nation, we cannot punish our way out of this problem. Increased penalties and sentences offer no panaceas for societal ills. We need to look at other solutions and stop making false promises. We should be concerned about our current focus on long-term incarceration and where that leads us. Is it more advantageous to invest in structures or people? Does it make sense to invest upwards of \$100,000 of federal resources to incarcerate someone involved in a street-level drug transaction that at best will net a few hundred dollars illicit profit, or are there other ways to get at and deal with this problem?

It seems to me that a better way to direct the federal law enforcement effort in dealing with the drug abuse problem is to change the focus of statutory mandatory minimum penalties from quantities of drugs to consideration of the role of the perpetrator in the offense. This change would target our law enforcement efforts on middle- and high-level drug dealers. Congress, the Administration, and this Commission could probably all agree on a statute that increases penalties for serious offenders and might actually impact the flow of drugs to our communities. This approach, not inconsequentially, resolves the problem caused by the different penalty structures for powder and crack cocaine.

Although an approach that would lower sentences for a segment of low-level defendants could be labeled "soft on crime," additional considerations indicate that the label might be inaccurate. Recognizing that whenever concerns about lowering penalties are raised the level of discourse is amplified, the Commission nonetheless would be remiss in not acknowledging that it has information (based on interviews, discussions, correspondence and commentary solicited from those involved in the criminal justice system throughout the country) that many judges, wardens, police officials, law enforcement officers, assistant United States attorneys, probation officers and Members of Congress are also concerned about the injustices caused by the present drug sentencing policies.

Additionally, public attitudes about appropriate drug penalties may be different from the view generally acknowledged. In its study, Just Punishment: Public Perceptions and the Federal Sentencing Guidelines, the Commission, as a result of a national survey found that generally respondents were more likely to give crack cocaine traffickers shorter punishments than those called for under the sentencing guidelines. That finding is startling and contrasts sharply with widely expressed views. If the public and various law enforcement officials and personnel acknowledge there is a problem, perhaps the Commission and Congress and the Administration ought to pay attention. Bad laws weaken respect of good laws. Consequences follow. Sooner or later all those people who feel alienated as a result of receiving what they believe to be unfair treatment and unjust sentences will be

released from jail. Does this country really expect them to become productive members of society or might we anticipate some retributive behavior?

I believe strongly that the disparity between penalties for the same quantities of crack and powder cocaine is wrong. The only real solution to the injustice is to eliminate it. I also believe that tenacity of purpose in a rightful cause should not be shaken by the frenzy of those clamoring for what is wrong. The congressional mandate that penalties for crack cocaine must be higher than those for a similar quantity of powder cocaine, however, makes it impossible for the Commission alone to accomplish that goal at the present time. The Commission's recommendation is better than simply choosing to ignore the problem.

99TH CONGRESS
2D SESSION

S. 2580

To amend the Controlled Substances Act and the Controlled Substances Import and Export Act to impose increased criminal penalties on cocaine dealers.

IN THE SENATE OF THE UNITED STATES

JUNE 20 (legislative day, JUNE 16), 1986

Mr. D'AMATO, (for himself and Mr. MATTINGLY) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend the Controlled Substances Act and the Controlled Substances Import and Export Act to impose increased criminal penalties on cocaine dealers.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Crack and Cocaine
5 Meaningful Penalties Act".

6 **SEC. 2. AMENDMENT TO THE CONTROLLED SUBSTANCES ACT.**

7 Section 401(b)(1)(A) of the Controlled Substances Act
8 (21 U.S.C. 841(b)(1)(A)) is amended—

9 (1) in clause (i) by striking out beginning with
10 "other than a narcotic drug" through and including

1 subclause (III) and inserting in lieu thereof a semi-
2 colon; and

3 (2) by striking out clause (ii) and inserting in lieu
4 thereof the following:

5 “(ii) 1 gram or more of a base form of
6 cocaine;”.

7 **SEC. 3. AMENDMENT TO THE CONTROLLED SUBSTANCES**
8 **IMPORT AND EXPORT ACT.**

9 Section 1010(b)(1) of the Controlled Substances Import
10 and Export Act (21 U.S.C. 960(b)(1)) is amended—

11 (1) in subparagraph (A) by striking out beginning
12 with “other than a narcotic drug” through and includ-
13 ing clause (iii) and inserting in lieu thereof a semicolon;
14 and

15 (2) by striking out subparagraph (B) and inserting
16 in lieu thereof the following:

17 “(B) 1 gram or more of a base form of
18 cocaine;”.

99TH CONGRESS
2D SESSION

H. R. 5112

*Referred into
5484*

To amend the Controlled Substances Act and the Controlled Substances Import and Export Act to impose increased criminal penalties on cocaine dealers.

IN THE HOUSE OF REPRESENTATIVES

JUNE 26, 1986

Mr. DIOGUARDI (for himself and Mr. WYDEN) introduced the following bill; which was referred jointly to the Committees on Energy and Commerce and the Judiciary

A BILL

To amend the Controlled Substances Act and the Controlled Substances Import and Export Act to impose increased criminal penalties on cocaine dealers.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Crack and Cocaine
5 Meaningful Penalties Act".

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2 "other than a narcotic drug" through and including
3 subclause (III) and inserting in lieu thereof a semi-
4 colon; and

5 (2) by striking out clause (ii) and inserting in lieu
6 thereof the following:

7 "(ii) 1 gram or more of a base form of cocaine;"

8 **SEC. 3. AMENDMENT TO THE CONTROLLED SUBSTANCES**
9 **IMPORT AND EXPORT ACT.**

10 Section 1010(h)(1) of the Controlled Substances Import
11 and Export Act (21 U.S.C. 960(b)(1)) is amended—

12 (1) in subparagraph (A) by striking out beginning
13 with "other than a narcotic drug" through and includ-
14 ing clause (iii) and inserting in lieu thereof a semicolon;
15 and

16 (2) by striking out subparagraph (B) and inserting
17 in lieu thereof the following:

18 "(B) 1 gram or more of a base form of cocaine;"

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132 Cong Rec S 8091 Friday, June 20, 1986; (Legislative day of Monday, June 16, 1986)

Congressional Record -- Senate

Friday, **June 20**, 1986;
(Legislative day of Monday, June 16, 1986)

99th Cong. 2nd Sess.

132 Cong Rec S 8091

REFERENCE: Vol. 132 No. 85

TITLE: STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS

SPEAKER: MR. D'AMATO

TEXT:

Text that appears in UPPER CASE identifies statements or insertions which are not spoken by a Member of the Senate on the floor. By Mr. D'AMATO (for himself and Mr. Mattingly):

S. 2580. A bill to amend the Controlled Substances Act and the Controlled Substances Import and Export Act to impose increased criminal penalties on cocaine dealers; to the Committee on the Judiciary.

CRACK AND COCAINE MEANINGFUL PENALTIES ACT

MR. D'AMATO. MR. PRESIDENT, I RISE TODAY TO INTRODUCE THE CRACK AND COCAINE MEANINGFUL PENALTIES ACT. I AM PLEASED TO ANNOUNCE THAT THE DEPARTMENT OF JUSTICE ENTHUSIASTICALLY SUPPORTS THE THRUST OF THE BILL.

MR. PRESIDENT, IT IS TIME THAT WE BEGIN TO PUNISH COCAINE AND CRACK DEALERS AS SEVERELY AS WE PUNISH HEROIN DEALERS. CURRENTLY, COCAINE DEALERS ARE NOT SUBJECT TO THE MAXIMUM PENALTIES AVAILABLE UNDER 21 U.S.C. 841(B) AND 960(B) UNLESS THEY ARE IN TRAFFICKING IN, IMPORTING, OR EXPORTING AT LEAST A KILOGRAM (1,000 GRAMS OR 2.2 LBS.) OF COCAINE. THIS IS 10 TIMES AS HIGH AS THE AMOUNT OF HEROIN REQUIRED TO MERIT A MAXIMUM SENTENCE, YET COCAINE IS NO LESS DANGEROUS A NARCOTIC.

THIS AMOUNT IS UNREASONABLY HIGH. IT OFFERS THOSE WHO PREY ON OUR CHILDREN AND OUR COMMUNITIES A SAFE HAVEN THAT THEY SIMPLY DO NOT DESERVE. WHEN 4 OR 5 MILLION AMERICANS ARE REGULAR USERS OF COCAINE, WHEN 1 OF EVERY 6 HIGH SCHOOL SENIORS HAS TRIED COCAINE AT LEAST ONCE, AND WHEN AN EPIDEMIC OF CRACK ABUSE IS CAUSING VIOLENT CRIME TO INCREASE DRAMATICALLY IN COMMUNITIES ACROSS THIS COUNTRY, IT IS TIME TO STOP TREATING COCAINE AS ANYTHING LESS THAN AN URGENT DRUG LAW ENFORCEMENT PRIORITY. IT IS TIME TO MAKE THE PUNISHMENT FIT THE CRIME.

CRACK -- OR ROCK, AS IT IS ALSO KNOWN -- IS SMOKEABLE FREEBASE COCAINE. IT SELLS FOR \$5 TO \$20 A DOSE. THE CURRENT ISSUE OF NEWSWEEK (JUNE 16, 1986) DESCRIBES THE SEVERITY OF THE CRACK CRISIS IN ITS COVER STORY ON "CRACK AND CRIME:"

THE CRACK TRADE OPERATES LIKE A GUERRILLA INSURGENCY AND MAKES AN INFURIATINGLY ELUSIVE TARGET FOR POLICE. DEALERS -- "OUNCE MEN," AS THEY ARE KNOWN IN L.A. -- ORGANIZE SMALL CELLS OF PUSHERS, COURIERS, AND LOOKOUTS FROM THE GHETTO'S LEGION OF UNEMPLOYED TEENAGERS.... POLICE RAIDS ON "CRACK HOUSES" TYPICALLY RECOVER TOO LITTLE COCAINE TO IMPRESS PROSECUTORS OR THE COURTS... ROCK AND CRACK REPRESENT A QUANTUM LEAP IN THE ADDICTIVE PROPERTIES OF COCAINE... SOLD IN TINY CHIPS THAT GIVE THE USER A 5- TO 20-MINUTE HIGH, CRACK OFTEN IS PURER THAN SNIFFABLE COCAINE... CRACK ADDICTS ARE LIKELY TO BE PARANOID AND HIGHLY ACTIVE.

THE DIRECTOR OF THE 1-800-COCAINE HOTLINE IS QUOTED IN THE NEWSWEEK ARTICLE AS SAYING:

33 PERCENT OF ALL COKE USERS WHO CALL ARE TALKING ABOUT CRACK ADDICTION. THE EXPLOSION HAS TAKEN PLACE IN THE PAST SIX TO NINE MONTHS. IT'S A TRUE EPIDEMIC.

ACCORDING TO INFORMATION COMPILED BY THE HOTLINE, CRACK AND ROCK ARE WIDELY AVAILABLE IN 17 CITIES: ATLANTA, BOSTON, CHICAGO, DENVER, DETROIT, HOUSTON, LOS ANGELES, MIAMI, NEWARK, NEW ORLEANS, NEW YORK, PHILADELPHIA, PHOENIX, SAN FRANCISCO, SEATTLE, ST. LOUIS, AND THE WASHINGTON-BALTIMORE AREA. IT IS WIDELY AVAILABLE IN 25 STATES.

OUR LAWS ARE SERIOUSLY OUT-OF-DATE AS APPLIED TO COCAINE, AND ABSURDLY SO AS APPLIED TO CRACK, OR FREEBASE COCAINE. AN AVERAGE DOSE OF CRACK IS ONLY 65 MILIGRAMS. UNDER CURRENT LAW, THEREFORE, A CRACK DEALER CANNOT BE SUBJECT TO THE MAXIMUM PRISON TERM UNLESS HE IS CAUGHT WITH A KILOGRAM, OR MORE THAN 15,000 DOSES, OF CRACK. THIS SIMPLY NEVER HAPPENS. AS A RESULT, THOSE WHO TRAFFIC IN ONE OF THE MOST ADDICTIVE SUBSTANCES KNOWN TO MAN -- A SUBSTANCE THAT IS SPREADING A NEW CRIME WAVE THROUGH OUR CITIES AND TOWNS AND OUR RURAL AND SUBURBAN AREAS -- ESCAPE THE SEVERE PUNISHMENT THEY DESERVE.

THE BILL I AM INTRODUCING TODAY RECOGNIZES HOW INADEQUATE THESE CURRENT PENALTIES ARE. IT SET 100 GRAMS OF COCAINE AND I GRAM OF CRACK, INSTEAD OF 1,000 GRAMS, AS THE THRESHHOLD AMOUNTS THAT WILL TRIGGER IMPOSITION OF THE MAXIMUM PENALTIES UNDER 21 U.S.C. 841 AND 960.

THE CRACK AND COCAINE MEANINGFUL PENALTIES ACT SUBJECTS THE FIRST-TIME OFFENDER, WHO TRAFFICS IN 100 GRAMS OF COCAINE OR 1 GRAM OF CRACK TO A MAXIMUM PRISON TERM OF 20 YEARS AND A FINE OF \$250,000. IT SUBJECTS THE REPEAT OFFENDER TO UP TO 40 YEARS AND A \$500,000 FINE.

THE OFFENSES INVOLVED ARE THOSE COVERED BY 21 U.S.C. 841(A) AND 960(A), INCLUDING, AMONG OTHERS: THE MANUFACTURE, DISTRIBUTION, POSSESSION WITH INTENT TO MANUFACTURE AND DISTRIBUTE, IMPORTATION, AND EXPORTATION OF COCAINE AND FREEBASE COCAINE.

THIS BILL CREATES, FOR THE VERY FIRST TIME, A SPECIAL PENALTY APPLICABLE TO CRACK. BECAUSE CRACK IS SO POTENT, DRUG DEALERS NEED TO CARRY MUCH SMALLER QUANTITIES OF CRACK THAN OF COCAINE POWDER. BY TREATING 1,000 GRAMS OF FREEBASE COCAINE NO MORE SERIOUSLY THAN 1,000 GRAMS OF COCAINE POWDER, WHICH IS FAR LESS POWERFUL THAN FREEBASE, CURRENT LAW PROVIDES A LOOPHOLE THAT ACTUALLY ENCOURAGES DRUG DEALERS TO SELL THE MORE DEADLY AND ADDICTIVE SUBSTANCE, AND LETS THEM SELL THOUSANDS OF DOSES WITHOUT FACING THE MAXIMUM PENALTY POSSIBLE.

AS THE EXPLOSIVE SPREAD OF COCAINE AND CRACK MADE CLEAR, WE ARE FAILING TO

MEET ONE OF THE ESSENTIAL PURPOSES OF OUR CRIMINAL LAW, THE DETERRENCE OF CRIME. WITH PENALTIES THAT DRUG DEALERS LAUGH AT, THIS PLAGUE CAN ONLY GET WORSE.

I URGE MY COLLEAGUES TO COSPONSOR THE CRACK AND COCAINE MEANINGFUL PENALTIES ACT TO CLOSE THE LOOPHOLES THAT SERVE ONLY TO PROTECT SOCIETY'S ENEMIES -- THE DRUG DEALERS WHO OPERATE TODAY WITH IMPUNITY. LET'S LET THE PURVEYORS OF THESE DEADLY SUBSTANCES KNOW HOW TOUGH WE ARE WILLING TO BE.

MR. PRESIDENT, I ASK UNANIMOUS CONSENT THAT THE FULL TEXT OF MY LEGISLATION BE PRINTED IN THE RECORD AT THE CONCLUSION OF MY REMARKS.

THANK YOU, MR. PRESIDENT.

THERE BEING NO OBJECTION, THE BILL WAS ORDERED TO BE PRINTED IN THE RECORD, AS FOLLOWS:

S. 2580

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED,

SECTION. 1. SHORT TITLE.

THIS ACT MAY BE CITED AS THE "CRACK AND COCAINE MEANINGFUL PENALTIES ACT".

SEC. 2. AMENDMENT TO THE CONTROLLED SUBSTANCES ACT.

SECTION 401(B)(1)(A) OF THE CONTROLLED SUBSTANCES ACT (21 U.S.C. 841(B)(1)(A)) IS AMENDED --

(1) IN CLAUSE (I) BY STRIKING OUT BEGINNING WITH "OTHER THAN A NARCOTIC DRUG" THROUGH AND INCLUDING SUBCLAUSE (III) AND INSERTING IN LIEU THEREOF A SEMICOLON; AND

(2) BY STRIKING OUT CLAUSE (II) AND INSERTING IN LIEU THEREOF THE FOLLOWING:

"(II) 1 GRAM OR MORE OF A BASE FORM OF COCAINE;"

SEC. 3. AMENDMENT TO THE CONTROLLED SUBSTANCES IMPORT AND EXPORT ACT.

SECTION 1010(B)(1) OF THE CONTROLLED SUBSTANCES IMPORT AND EXPORT ACT (21 U.S.C. 960(B)(1)) IS AMENDED --

(1) IN SUBPARAGRAPH (A) BY STRIKING OUT BEGINNING WITH "OTHER THAN A NARCOTIC DRUG" THROUGH AND INCLUDING CLAUSE (III) AND INSERTING IN LIEU THEREOF A SEMICOLON; AND

(2) BY STRIKING OUT SUBPARAGRAPH (B) AND INSERTING IN LIEU THEREOF THE FOLLOWING:

"(B) 1 GRAM OR MORE OF A BASE FORM OF COCAINE;"

MR. MATTINGLY. MR. PRESIDENT, I AM PLEASED TO JOIN WITH MY DISTINGUISHED COLLEAGUE FROM NEW YORK, SENATOR D'AMATO, IN SPONSORING THE "CRACK AND COCAINE MEANINGFUL PENALTIES ACT." AS MY COLLEAGUE HAS DESCRIBED, THE LEGISLATION RECOGNIZES THE REAL HAZARD THAT COCAINE AND SMOKEABLE FREEBASE

COCAINE, KNOWN ON THE STREETS AS "CRACK" AND "ROCK," POSE TO THE CITIZENS OF OUR NATION AND PROVIDES FOR APPROPRIATE PENALTIES FOR THOSE WHO TRAFFIC IN THESE DANGEROUS SUBSTANCES.

CRACK HAS BEEN KNOWN TO LAW ENFORCEMENT OFFICIALS IN CITIES THROUGHOUT THIS COUNTRY FOR LESS THAN A YEAR, YET, ACCORDING TO A REPORT IN THE JUNE 16, 1986, ISSUE OF NEWSWEEK, IT "HAS SUDDENLY BECOME AMERICA'S FASTEST-GROWING DRUG EPIDEMIC AND POTENTIALLY ITS MOST SERIOUS. IT IS CHEAP, PLENTIFUL, AND INTENSELY ADDICTIVE, A DRUG WHOSE POTENTIAL FOR SOCIAL DISRUPTION AND INDIVIDUAL TRAGEDY IS COMPARABLE ONLY TO HEROIN." THAT IS A SOBERING STATEMENT, MR. PRESIDENT, AND ONE WHICH DEMANDS OUR ATTENTION AND ACTION.

BECAUSE CRACK IS INDEED A NEW PHENOMENON, OUR CURRENT CRIMINAL CODE DOES NOT DEAL WITH IT EFFECTIVELY. THIS MEASURE WOULD CREATE A SPECIAL PENALTY WHICH WOULD APPLY TO THIS "SPECIAL" SUBSTANCE BY PROVIDING FOR A MAXIMUM PRISON TERM OF 20 YEARS AND A FINE OF \$250,000 FOR THE FIRST-TIME OFFENDER WHO TRAFFICS IN 1 GRAM -- THE EQUIVALENT OF MORE THAN 15 DOSES -- OF CRACK. THE PENALTY FOR REPEAT OFFENDERS, OF COURSE, WOULD BE GREATER.

MR. PRESIDENT, THOSE WHO TRAFFIC IN CRACK AND COCAINE LURE THEIR CUSTOMERS, MANY OF WHOM ARE CHILDREN, INTO WHAT OFTEN BECOME A LIFE OF IMPRISONMENT TO THE DRUG, OR WORSE, EVEN DEATH. I BELIEVE IT IS ENTIRELY APPROPRIATE, AND LONG OVERDUE, THAT WE GET TOUGH WITH THE COCAINE AND CRACK DEALER.

THE JUNE 8 EDITION OF THE NEW YORK TIMES CARRIED A STORY ENTITLED "CRACK ADDICTION SPREADS AMONG THE MIDDLE CLASS." ACCOMPANYING THAT STORY WAS A PHOTOGRAPH WHICH DISPLAYED A PLACARD READING "CRACK DOWN ON CRACK." THAT, MR. PRESIDENT, IS WHAT THIS LEGISLATION WOULD DO.

TODAY WE KNOW CRACK IS AVAILABLE IN 17 CITIES, AMONG THEM ATLANTA AND NEW YORK, MAJOR MUNICIPALITIES IN MY AND MY COLLEAGUE'S HOME STATES; AND CRACK IS AVAILABLE IN 25 STATES. MR. PRESIDENT, IT IS TOO LATE FOR SOME OF THE CITIZENS WHO LIVE THERE. THEIR LIVES HAVE ALREADY BEEN DAMAGED THROUGH ADDICTION OR THROUGH THE DISTRESSING WAVE OR CRIME WHICH ACCOMPANIES CRACK. BUT IT IS NOT TOO LATE FOR OTHERS, AND THEY DESERVE PROTECTION.

WE HOPE THAT THE PENALTIES WHICH THIS BILL WOULD IMPOSE WILL CREATE AN EFFECTIVE DETERRENT AGAINST THE SPREAD OF CRACK TO OTHER CITIES AND STATES. THOSE WHO ARE NOT DETERRED WOULD BE PUNISHED IN A MANNER MORE FITTING THEIR CRIME THAN IS PROVIDED FOR UNDER CURRENT LAW.

THE STAKES ARE HIGH, MR. PRESIDENT. THEY ARE THE WELFARE, PROTECTION, AND VERY LIVES OF OUR CITIZENS, PARTICULARLY OUR CHILDREN, AND THE SAFETY AND TRANQUILITY OF OUR COMMUNITIES. THE AMERICAN PEOPLE UNDERSTAND THIS. IN FACT, A WALL STREET JOURNAL/NBC NEWS POLL CONDUCTED EARLIER THIS MONTH SHOWS THAT A GREATER NUMBER OF THOSE QUESTIONED BELIEVED THAT IT WAS MORE IMPORTANT FOR THE FEDERAL GOVERNMENT TO COMBAT DRUG ABUSE THAN TO REFORM THE TAX CODE. I ASK UNANIMOUS CONSENT THAT THE ARTICLE ENTITLED "FIGHT AGAINST DRUG ABUSE ILLUSTRATES THE LIMITS OF POLITICS AS LEGISLATIVE SOLUTIONS PROVE ELUSIVE" IN WHICH IT APPEARED IN TODAY'S WALL STREET JOURNAL BE PRINTED IN THE RECORD AT THE CONCLUSION OF MY REMARKS.

IN CLOSING, I URGE MY COLLEAGUES TO RESPOND TO THE CONCERNS OF OUR CITIZENS AND TO LEND THEIR SUPPORT AND COSPONSORSHIP TO THIS IMPORTANT MEASURE.

There being no objection, the article was ordered to be printed in the Record, as follows:

[From the Wall Street Journal, June 20, 1986]

FIGHT AGAINST DRUG ABUSE ILLUSTRATES THE LIMITS OF POLITICS AS LEGISLATIVE SOLUTIONS PROVE ELUSIVE

(By David Shribman)

Athens, GA. -- Sen. Mack Mattingly had just finished a speech in northeast Georgia and now, during the long ride back to Atlanta, he was musing about the sort of issues politicians talk about when they run for reelection.

There's the successful flight against inflation, he was saying, and the progress in bringing down interest rates. And then, as the lights of Atlanta became visible in the distance, the Georgia Republican leaned over in the car and said, "But the biggest cloud out there is the problem of drugs."

Indeed, the most recent Wall Street Journal/NBC News poll indicates that while the public believes the drug problem is less urgent than reducing the federal budget deficit and unemployment and fighting terrorism, it regards curbing drug abuse as an important challenge -- a higher priority, in fact, than overhauling the tax system. "It should be the most significant issue that we face," says Mr. Mattingly, who is seeking a second term this November.

But though Rep. William Gray (D., Pa.) calls it "an epidemic on the level of the medieval European plague and the No. 1 problem we face" and Sen. Dan Quayle (R., Ind.) recognizes it is "one of the biggest issues in America's families," the fight against drug abuse illuminates the limits of politics.

USUAL TOOLS OF POLITICS DON'T WORK

Political figures have come to recognize that the usual tools of politics -- speeches, bargaining, commissions, legislation -- are poorly suited to this challenge. "It's not the kind of problem that we usually deal with," says Sen. Quayle. "If the drug problem could be resolved by spending \$1 billion, we'd spend \$1 billion. But it's not one of those kinds of problems."

Moreover, politicians, who are at ease discoursing on traditional themes like the economy and foreign affairs are simply uncomfortable talking about drug abuse.

"This kind of issue spooks us," says Senate Republican Whip Alan Simpson of Wyoming. "We're embarrassed about this issue -- not embarrassed to talk about it, but embarrassed that we don't know anything about these things."

To be sure, Congress has taken some steps to help win the battle against drug abuse. It has passed legislation allowing the military to help local law-enforcement officials, stiffened penalties for drug-dealing offenses, tied U.S. foreign aid to drug-eradication efforts in nations that have exported narcotics here, and upgraded law-enforcement equipment so that the U.S. isn't, as Sen. Paula Hawkins (R., Fla.) is fond of saying, "outspent, outgunned and outmanned" by the drug underground.

CONGRESS FAILS TO RESPOND

But lawmakers acknowledge that Congress has failed to respond creatively to the drug issue and that traditional politics hasn't been supple enough to find answers to the problem or, just as important, to make it easier for others to address the issue.

In the past, conventional liberals have sought to address this issue by attacking the social

problems that lead to drug abuse while conservatives have sought to increase penalties against drug traffickers. But the problem hasn't lent itself to such facile responses, particularly in an age when drugs have won wide acceptance as a recreational activity among people of all classes.

"You can make speeches and denounce drug abuse -- nobody will criticize you for that -- but to get hold of this issue in a meaningful way is almost impossible for folks like us," says Sen. Paul Simon (D., Ill.). "There are clearly limits to what we can do, and that's frustrating."

Many experts in drug abuse believe that political figures have acquitted themselves especially poorly in this important national issue.

'UTTER IGNORAMUSES' ABOUT DRUGS

"Most of the leading policy makers and legislators are utter ignoramuses when it comes to the drug issue," says Arnold Trebach, a drug-policy expert at the American University in Washington. Mark Kleiman, a research fellow in criminal justice at Harvard's Kennedy School of Government and a former Reagan administration Justice Department official, adds: "Politicians love to talk about this issue, but they talk about it in a way that is totally remote from any attempt to make sensible drug policy."

Mr. Trebach contends that the political arena is the worst place to debate and fashion a strategy for combatting drug abuse. "You've got people who are embarrassed to talk about anything that creates personal pressure, you've got enormous ignorance on the part of Congress and you have pure political expedience -- the willingness to exploit this issue. It's a recipe for social disaster."

In the past year many Republican legislators, eager to ensure that the GOP continues to control the Senate, have deferred on the drug issue to Sen. Hawkins, who is running for reelection from Florida, where the connection between drugs and crime has given the question great urgency. "She knows," says on Republican senator, "what she has to target to get reelected."

At the same time, others believe the issue offers great political opportunity to office-seekers beyond Florida's borders. "This should be a major political issue," says Judith Richards Hope, a member of the President's Commission on Organized Crime and a top domestic adviser in the Ford administration. "It affects productivity in every segment of our society, it is a major cancer that has got to be rooted out. It is the fuel... of organized crime. It's as serious a problem as we have in this country."

STRIKING A RESPONSIVE CHORD

Sen. William Armstrong of Colorado, a potential GOP presidential candidate, has suggested that the drug issue might even make a foundation for a national campaign. "A person who raises this as an issue will find that it strikes a responsive chord," he says. "It is a legitimate issue. It cuts clear across other political and demographic barriers. This is a concern in the barrio and in the WASP suburbs."


But many lawmakers believe that the public has lost faith in politicians' ability to address this problem. "We can answer questions about Contra aid, tax reform, South Africa and the farm crisis, but I always wonder why we have such a hard time getting to the nub of this issue," says Sen. Nancy Kassebaum (R., Kan.), who was active in anti-drug work in Wichita before she went to Washington. "People don't think we can help this problem. They don't look to the Senate."

Congress hasn't rushed to address the issue, mainly because the questions involved offer political peril: How widely should drug testing be applied? What level of drug abuse is

"acceptable"? Would legalizing certain milder "recreational" drugs such as marijuana ease the problem?

"Politicians like to portray it as a war to the death with drugs," says Mr. Kleiman, the Harvard criminal-justice expert. "So they can't even think about new ways to attack this problem because they're afraid of being seen as an opponent of current policies and thus soft on drugs."

SUBJECT: COCAINE (95%); DRUG RELATED CRIME (93%); SUBSTANCE ABUSE (92%); CONTROLLED SUBSTANCES (91%); DRUG POLICY (90%);

Source: [All Sources](#) > [Federal Legal - U.S.](#) > [Individual Congressional Record Materials](#) > **Congressional Record - 99th Congress** 

Terms: [date\(geq \(6/20/1986\) and leq \(6/20/1986\)\)](#) ([Edit Search](#))

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FREQUENTLY ASKED QUESTIONS

Congressional Instructions

- Q. Are there specific Congressional instructions on setting cocaine penalty levels?
- A. Yes, in the 1995 legislation disapproving the Commission's amendment to equalize crack and powder, Congress directed that **the sentence imposed for trafficking in a quantity of crack cocaine should generally exceed the sentence imposed for trafficking in a like quantity of powder.**
- Q. Are there specific factors that Congress wanted to be taken into consideration when the Commission reevaluated cocaine penalties?
- A. Yes, in the in the 1995 legislation disapproving the Commission's amendment to equalize crack and powder, Congress required the Commission to consider the following factors when settling cocaine penalty levels:
- bodily injury
 - weapon involvement
 - use or distribution to minors and pregnant individuals
 - trafficking near protected locations
 - criminal history
 - role in the offense (organizer and leaders)

1997 Report and Recommendations

- Q. In 1997, the Commission reported back to Congress and made recommendations (rather than an amendment) as to appropriate ranges for Congress to consider in modifying the mandatory minimums. What were those ranges?
- A. For **powder cocaine**, the Commission recommended reducing the amount required to trigger the five year mandatory minimum from **500 grams** to between **125 and 375 grams**.

For **crack cocaine**, the Commission recommended increase the amount required to trigger the five year mandatory minimum from **5 grams** to between **25 and 75 grams**.

As a result, under the 1997 Commission recommendation, the ratio between powder and crack cocaine would be 15 to 1 at most.

2002 Proposed Recommendations

Q. Under proposed options under consideration by the Commission, what enhancements are listed?

A. The following enhancements, that would apply across all drug types and would not be limited to cocaine penalties, are under consideration by the Commission:

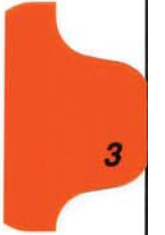
- increased penalties if bodily injury results
- increased penalties for distribution in protected locations
- increased penalties for use or sales to minors or pregnant persons
- increased penalties for recidivists (prior drug felonies)
- increased penalties for discharging a firearm
- increased penalties for brandishing a dangerous weapon
- increased penalties for using a dangerous weapon
- increased penalties for possessing a
machine gun,
sawed off shotgun, or
semi-automatic weapon
- increased penalties if a dangerous weapon is possessed

Q. These proposed enhancements apply to all drug types. Can they be limited to apply only to cocaine offenses?

A. Yes, the enhancement can be limited to apply only to cocaine offenses. However, the purpose of the guidelines is to penalize similar harms similarly, regardless of drug type. Therefore, it was recommended that these enhancements should be apply across all drug types rather than just to cocaine.

Moreover, adding enhancements just for crack may create the appearance that we are targeting cocaine defendants for increase penalties once again, just in a new way.

To the extent that the Commission is troubled by applying the new enhancements to other drug types without evaluating their quantity-based penalties, we could limit the impact substantially by deleting the enhancement for prior drug trafficking felonies. The remaining enhancements have minimal applicability (although substantial impact in those rare cases in which they do apply).



3

Testimony of Julie Stewart
President
Families Against Mandatory Minimums Foundation (FAMM)

United States Sentencing Commission Hearings
January 26, 2002

Good morning, Judge Murphy and Commissioners. It is a pleasure to testify before you once again to address the issue of crack cocaine penalties. Many of FAMM's 25,000 members are either serving crack sentences, or have family members who are, and they are deeply concerned about the decisions you will make regarding crack penalties. I am here today on their behalf, and that of the other FAMM members who include lawyers, judges, politicians, professors, criminal justice professionals and concerned citizens.

As many of you are aware, I have appeared before the Commission every year since 1992 to urge you to amend the sentencing guidelines in ways that increase judicial discretion while providing appropriate penalties that fit the offense and offender. Today my comments will focus on amending the crack cocaine guideline to lower the penalties associated with possession and distribution of the drug.

The penalties for crack are unconscionable. You know that. They are also insupportable as was demonstrated with such care in the 1995 Special Report to Congress; as was set out so succinctly in the Issues for Comment published on January 17, 2002 and the statistical analysis just completed by the Commission staff; and as has been underscored in testimony over these two days. I am delighted that the Commission has decided to tackle this difficult issue with the thoroughness that it is.

FAMM has long been on record in support of equalizing crack and powder cocaine sentences at the current levels of powder cocaine. However, in 1995 when the Sentencing Commission voted to do just that, I left the room feeling glad that they took a moral stand, but deeply concerned that it was not the best decision politically. Today, making crack penalties the same as powder is not an option for the Commission, given the congressional directive to propose an amendment that establishes sentences that generally higher for crack than powder. Pub. L. No. 104-38, § 2(a)(1)(A), 109 Stat. 334 (1995).

So, the question is, what is the correct penalty for crack cocaine defendants? It's a hard question to answer and one that is critical to whether the Commission will have support for its recommendation. As long as we are operating in a weight-based sentencing structure, I encourage you to amend the crack guidelines by applying the same organizing principle to crack cocaine that applies to other drugs: punish a mid-level dealer with a five-year minimum sentence and a high-level dealer with a ten-year minimum sentence.

Mid- and high-level dealers

This organizing principle has been stated in the Commission's Issue for Comment,

[i]n general, the statutory penalty structure for most, but not all, drug offenses was designed to provide a five year sentence for a serious drug trafficker (**often a manager and supervisor of retail level trafficking**) and a ten year sentence for a major drug trafficker (**often the head of the organization that is responsible for creating and delivering very large quantities**). . . . The drug quantities that trigger the five year and ten year penalties for crack cocaine offenses, however, are thought by many to be too small to be associated with a serious or major trafficker. As a result, many low level retail crack traffickers are subject to penalties that may be more appropriate for higher level traffickers.

Proposed Amendments to the Sentencing Guidelines, November 28, 2001 and January 17, 2002

(Reader friendly version) at 80 (“Proposed Amendment”)(emphasis added).

The Commission reached the same conclusion in its 1995 report to Congress following a close examination of legislative history. Congress, the Commission said then, meant to impose the ten-year mandatory term on major distributors and five- year terms on serious distributors “for all drug categories including crack cocaine.” Cocaine Report at 119. At some point however, crack cocaine was cut out for different treatment by Congress, likely due to a widespread belief that crack was much more harmful than most other drugs, including even powder cocaine. As you recognize in the Issue for Comment, the crack penalty appears to incorporate penalties for conduct that was considered inherent in the crack trade – an association that has been discredited

[C]oncern has been expressed that the penalty structure does not adequately differentiate between crack cocaine offenders who engage in aggravating conduct and those crack cocaine offenders who do not. This lack of differentiation is caused by the fact that, for crack cocaine offenses, the Drug Quantity Table accounts for aggravating conduct that is sometimes associated with crack cocaine (e.g., violence). Building these aggravating factors into the Drug Quantity Table essentially penalizes all crack cocaine offenders to some degree for aggravating conduct, even though a minority of crack offenses may involve such aggravating conduct. As a result, the penalty structure does not provide adequate differentiation in penalties among crack cocaine offenders and often results in penalties too severe for those offenders who do not engage in aggravating conduct.

Proposed amendments at 79.

Today, as your recently published analysis of crack and powder sentencing demonstrates, the vast majority (66.5 percent) of those sentenced for crack offenses, were street-level dealers. U.S. Sentencing Commission, “Drug Briefing, January 2002 (“Drug Briefing”), Fig. 11. The median quantity attributed to them was 52 grams (Drug Briefing, Figure 18), for which they are

sentenced at a median of 120 months. (Drug Briefing, Figure 2). Managers and Supervisors are dealing in median quantities of around 250 grams of crack cocaine, while organizers and leaders are handling roughly 500 grams. Drug Briefing, Figure 18.

While these figures represent the quantity involved in crack convictions from the year 2000, the Commission has nearly 15 years worth of data from which to extract the average quantity of crack cocaine handled by mid- and high-level dealers (weighted for trends) to determine role-based trigger amounts for five and ten year penalties. I urge the Commission to do such analysis. As much as FAMM opposes weight-based sentencing, if weight is to be used to establish base sentences, then the weight must be justifiable to the public. The Commission cannot simply pick a number out of the blue because it creates a nice sounding ratio, and expect to gain the support of the sentencing reform community. There has to be a sound basis for the new quantity trigger. Using the mid-and high-level organizing principle intended by Congress when it enacted mandatory minimum sentences in the mid-80s, provides that justification. It will establish coherence, rationality and proportionality to crack cocaine sentencing.

The Commission should not change the powder cocaine penalty.

Seven years ago when the Commission voted to make crack penalties the same as those for powder cocaine, no one suggested raising powder sentences to achieve equalization. In her dissent, Commissioner Deanell Tacha proposed ratios of 5:1, 10:1, or 20:1, for reasons that were arguably valid, but she did not propose raising powder penalties. In 1997, 27 federal judges who previously served as U.S. Attorneys, felt compelled to send a letter to each member of the House and Senate Judiciary Committees urging Congress to lower crack cocaine penalties but **not** raise powder cocaine penalties. Specifically, they said “The penalties for powder cocaine, both

mandatory minimum and guideline sentences, are severe and should not be increased.”

They're right. The problem is not powder cocaine penalties, it is crack cocaine penalties. Crack cocaine is sentenced more severely than any of the other drugs--even methamphetamine, which has the same triggering threshold. The Sentencing Commission 2000 Sourcebook of Federal Sentencing Statistics shows that the mean quantity of crack cocaine involved by defendants sentenced at level 26, was 11.3 grams, while the mean quantity for methamphetamine defendants at the same level was 27 grams. At level 32, the mean amounts were 88.5 grams for crack defendants and 228 grams for methamphetamine defendants.

Raising powder cocaine penalties to make powder traffickers spend more time in prison does nothing to cure the excessiveness of crack cocaine sentencing; it would merely send cocaine traffickers, the majority of whom are Hispanic, to prison for lengthier terms for no discernible reason. Drug Briefing, Figs. 26 and 27.

Therefore, I urge you to leave the powder cocaine penalty untouched.

The Commission can and should act absent a change to the mandatory minimum statute.

The Commission should promulgate guidelines independent of the mandatory minimum sentences. Congress has several times in the past permitted amendments to be adopted that delinked certain drug guidelines from their then-corresponding mandatory minimums. In 1993, the Commission changed the LSD-marijuana equivalency to standardize the penalty for LSD and to limit the impact of carrier weight on that penalty. Amendment 488 at Appendix C. In 1995, the Commission successfully proposed Amendment 516 to change the equivalency for marijuana

plants from the statutory 1 plant, 1 kilogram equivalency to the 1 plant, 100 grams equivalency.

I was involved in both amendments and know that the Congress was fully aware and able to defeat them if it had desired. It did not. Were there any legal bar to such decoupling amendments, they would have been raised at the time. Instead, just days before November 1, 1995, a Congressman from Oregon got wind of the imminent marijuana guideline amendment and raised his concerns about it to Rep. Bill McCollum, the minority chair of the House Judiciary Committee. Rep. McCollum stated that he was aware of the proposed amendment and would keep an eye on its impact but he did nothing to stop it from becoming law.

From my recent conversations with Judiciary staff members on the House and Senate sides, they are eagerly awaiting an amendment from the Commission and have expressed no reservations about the Commission submitting an amendment instead of a recommendation. Why should they? The Commission was established in 1984 to promulgate sentencing policy that would reduce unwarranted disparity and increase certainty and uniformity of sentencing. It is doing so in the current proposals to delink the crack possession guideline from the mandatory minimum contained in the statute. I urge you not to let crack cocaine trafficking penalties become an exception to the goals of the Sentencing Reform Act.

The Commission should act in such a way that reassures the public that it has fulfilled its mandate.

I was recently asked by the chief counsel of a senior senator if the sentencing reform community and the civil rights community would respect a crack proposal put forth by the Sentencing Commission. It was a good question and it gave me pause. FAMM did not respect the Ecstasy decision made by the Commission last year because the process was so flawed. I do

not want to feel that way about the crack proposal.

I am encouraged by the Commission's desire to hear from experts in all areas of crack cocaine and to use that information to shape a sensible and rational policy. But, at the end of the day, the Commission must be able to explain in plain terms how it arrived at the quantity it did and how that quantity is consistent with other drug guideline sentences.

The Drug Briefing charts you have compiled are a wonderful source of information regarding crack and powder cocaine sentencing. But from what I understand, a great deal of attention has been paid to the proposed sentences at varying ratios between crack and powder cocaine. While this is certainly of interest, I hope the Commission will not let the length of sentence guide its proposed changes. Instead, a consistent organizing principle should be used to guide the development of new crack cocaine sentences, and all drug sentencing changes. If it is, I will be able to tell FAMM's membership, with confidence, that this is an amendment that makes sense.

However you choose to go forward, the guideline and the process you use must be of unassailable quality so that all Americans can trust that the penalty you chose was the product of informed judgement, not political expedience.

Conclusion

I am enormously heartened by the attention you are paying to this serious problem. Last weekend, FAMM members gathered for our bi-annual organizing conference. They share my hope and enthusiasm, even as they shared with us again their stories of young men and women imprisoned for horrific terms under the crack cocaine guidelines. You can demonstrate the

courage of your obvious conviction that this penalty must change, by proposing an amendment to Congress that brings sentencing for crack cocaine in line with that for other drug offenses.

Thank you.

SUGGESTED QUESTIONS/ISSUE AREAS FOR COMMISSIONER QUESTIONS ON CULTURAL HERITAGE RESOURCES GUIDELINE AMENDMENT

- Who are the main offenders in these kinds of crimes(age, gender, ethnicity, race, other background factors)? Will this guideline impact disproportionately on Native Americans? [Question for Agent Fryar]
- How sophisticated are many of these offenders? Are many casual hikers or passers-by involved in these offenses, or is there a good deal of planning involved in their offense conduct? [Question for Agent Fryar and Messrs. Warner/Dance]
- On “pattern of similar misconduct” [changed from “similar **violations**” in the published version], is there not a potential for double counting given the definition in the Application Note? Would it not be better to add to the definition at Application Note 5(B) the limitation proposed by the Department of Justice, to ensure fairness and consistency? [Question for Messrs. Warner/Dance]

The modifying language proposed by the Department in its letter of comment is:

“However, any such act of misconduct shall not be considered under this subsection if (i) it constitutes relevant conduct under section 1B1.3, and (ii) the value of any such cultural heritage resource involved in such act of misconduct is fully taken into account in determining value under section (b)(1).”

- Why should the Commission entertain the idea of making “pecuniary gain/commercial purpose” and “pattern of similar misconduct” separate cumulative enhancements as Mr. Warner suggests? Are these different aggravating factors which should be punished separately, and if so, how are they different? [Question for Messrs. Warner/Dance]
- Determination of Value: Can not archaeological value be a suitable method for all historic resources, so that we do not need a special rule for “archaeological resource” and let whichever methods are applicable to the particular resource be applied by the court?

[This is a key point of Paul Warner’s testimony (and of many commentators like the American Association of Museums and the Society of American Archaeology) and makes sense. Archaeological value is a sound methodology, and the judge should be able to adopt it when it suits the historic resource involved in the offense. Its use should not be confined to the 100 -year old threshold. The example of the Arizona Memorial in Mr. Warner’s testimony is an apt illustration of this point.]



UNITED STATES SENTENCING COMMISSION

Public Hearing: February 26, 2002

Testimony of

PAUL M. WARNER
United States Attorney
District of Utah

Concerning

CULTURAL HERITAGE GUIDELINE
USSG § 2B1.5 (Proposed)

Honorable Judge Murphy and Distinguished Commissioners:

Thank you for giving me the opportunity and privilege of appearing before the Commission today to testify concerning the proposed Cultural Heritage Guideline. I respectfully request that my full written statement be incorporated as part of the record of this hearing. My testimony today is taken from the full statement. I would like to say at the outset that the adoption of this Guideline is not only necessary and appropriate, but indeed is also long overdue. The Cultural Heritage Guideline will, in my opinion, prove to be one of the most important of all the sentencing guidelines for the long-term benefit of our nation.

Consequently, I commend the Commission for considering this urgently-needed Cultural Heritage Guideline. Before addressing the specifics of the proposed Guideline, and recommending several revisions to improve its effectiveness, some background would be helpful.

The United States Attorney's Office for the District of Utah is uniquely qualified to address the proposed Cultural Heritage Guideline. During the past decade, the District of Utah has led the nation in the enforcement of the Archaeological Resources Protection Act (ARPA), whose noble purpose "is to secure, for the present and future benefit of the American people, the protection of archaeological resources and sites which are on public lands and Indian lands."

16 U.S.C. § 470aa(b). During this period, 38 defendants in Utah were convicted of ARPA offenses, which included 32 ARPA felony convictions. My office has successfully prosecuted the largest case under the ARPA statute (10 defendants convicted of 18 felonies). In another case, we obtained the longest ARPA prison sentence (63 months) for a notorious looter of archaeological resources. Last year the Society for American Archaeology presented its Public Service Award to Assistant U. S. Attorney Wayne Dance, District of Utah, for his exemplary ARPA prosecution record and his nation-wide training efforts.

Based on our experience in prosecuting ARPA cases, and particularly in dealing with the sentencing issues, we and our colleagues in the Justice Department throughout the nation became convinced that the current Sentencing Guidelines are wholly inadequate for ARPA and other cultural heritage resource offenses. These crimes cause devastating and irreparable harm to the nation's cultural heritage, yet there is no specific treatment of them in the Sentencing Guidelines. Consequently, in December of 2000 I wrote a letter to the Commission, through then Commissioner (ex officio) Laird Kirkpatrick, pointing out this serious problem and strongly urging the Commission to adopt a specific guideline for archaeological resources and other cultural heritage resources. We

are gratified that our letter was the genesis of the Cultural Heritage Guideline now under consideration by the Commission.

I commend the staff of the Commission for their dedicated and sustained efforts in drafting and revising the proposed guideline to bring it to its present excellent form. In particular I would like to extend our praise and gratitude to Deputy General Counsel Paula Desio for her outstanding efforts for more than a year in furthering this worthy endeavor.

The proposed Cultural Heritage Guideline, as published for comment in the Federal Register last November, effectively addresses the multitude of deficiencies in the current Sentencing Guidelines concerning cultural heritage resources. As a result of extensive public comment and suggested revisions, including those from my office and the Department of Justice, it is my understanding that the staff has prepared a revised draft of the Guideline for the Commission's consideration. We appreciate the staff's responsiveness to the public comment. The proposed Guideline, with its latest revisions, greatly strengthens the Sentencing Guidelines for cultural heritage crimes. I offer the following comments to inform the Commission of revisions which will add to the Guideline's effectiveness.

First, I want to emphasize that the value determination provision in

subsection (b)(1) and Application Note 2 is the heart of this Guideline because it measures the degree of harm associated with the cultural heritage offense. In United States v. Shumway, 112 F.3d 1413, 1425 (10th Cir. 1997), an ARPA case prosecuted by AUSA Dance, the Tenth Circuit upheld the use of archaeological value, plus cost of restoration and repair, as the appropriate method “to gauge the severity of a particular (ARPA) offense.” It is essential to an effective Cultural Heritage Guideline that the Shumway value methodology be explicitly required for archaeological resource offenses.

The latest draft Guideline before the Commission, a revision of the published draft, accomplishes this important requirement by what is termed the “Special Rule for Archaeological Resources.” The published draft also met this essential requirement by equating the value of an archaeological resource with its archaeological value or its commercial value, whichever is greater. I strongly encourage the Commission, in deciding upon the language of the value determination provision, to maintain the requirement that archaeological value be utilized in determining the value of archaeological resources.

Second, the value determination provision of the Guideline (both the published draft and the latest version submitted by staff) has a serious flaw

concerning the valuing of cultural heritage resources which are not “archaeological resources” by statutory and guideline definition. For these resources, the draft Guideline provides for value determination based only on commercial value (plus cost of restoration and repair, where applicable). For some types of cultural heritage resources which are not archaeological resources, commercial value may well be an adequate means of “gaug(ing) the severity of the offense.” Shumway, 112 F.3d at 1425. An example would be “an object of cultural heritage” which by statutory and guideline definition, must have a threshold commercial value.

However, there are various types of cultural heritage resources covered by this Guideline for which commercial value is simply not applicable, or difficult to ascertain, or wholly inadequate to fully assess the harm caused by the offense. Although troubling to contemplate, we must recognize that offenses may occur involving our national monuments and memorials, historic properties and resources, Native American cultural items, and other resources covered by this Guideline, which will not be fully and appropriately valued for sentencing purposes by simply using commercial value (plus cost of restoration and repair, where applicable). How could a meaningful commercial value be placed on a



national monument, for example, which is covered by this Guideline yet not an archaeological resource and valued as such, simply because it is less than 100 years of age? If the U.S.S. Arizona Memorial were vandalized, who would dare say that the mere cost of restoration and repair for removing the graffiti would fully “gauge the severity of the offense?”

This serious problem can be addressed in one of two ways. One corrective measure would be to revise the value determination provision to reflect that the archaeological value method of value determination be applied not only to archaeological resources, but also to any other cultural heritage resource for which commercial value is (a) not applicable, (b) difficult to ascertain, or (c) inadequate to fully assess the harm caused by the offense. Distinguished archaeologists, including the President of the Society for American Archaeology and the Departmental Consulting Archeologist for the U. S. Department of the Interior, have submitted public comment to the Commission expressing their expert opinion that many cultural heritage resources which are not archaeological resources under the Guideline, since they are less than 100 years old, nevertheless can be appropriately valued by the archaeological value method in the same manner as archaeological resources.

The second alternative is to specifically address this Guideline deficiency in the Upward Departure commentary (Application Note 7) by strongly urging an upward departure to correct the inadequacy of assessing value solely on commercial value (plus cost of restoration and repair, where applicable) for any cultural heritage resource which does not meet the definition of an archaeological resource, where the commercial value of that resource is (a) not applicable, (b) difficult to ascertain, or (c) inadequate to fully assess the harm caused by the offense.

The Upward Departure provision (Application Note 7) also deserves mention for another important reason. The commentary appropriately recommends upward departures in “cases in which the offense level determined under this guideline substantially understates the seriousness of the offense.” This provision is essential to the overall effectiveness of the Cultural Heritage Guideline. That said, the Upward Departure provision nevertheless needs ③ revision.

Because this Cultural Heritage Guideline may on occasion apply to cultural heritage resources which have profound uniqueness and significance to our nation’s history and culture, the Upward Departure provision should emphasize

this important point by specific reference, rather than the less important example used in the comment draft. Consequently, we recommend adding the following after the second sentence of proposed Application Note 7:

For example, an offense may result in a loss of knowledge or cultural importance associated with an archaeological or other cultural heritage resource for which the value of the cultural heritage resource as determined under this guideline results in a substantial understatement of the seriousness of the offense. This is particularly true where the offense involved a cultural heritage resource of profound uniqueness or significance.

The proposed Cultural Heritage Guideline provides sentence enhancements for two aggravating factors: where the offense involved commercial advantage or private financial gain, and where the defendant has engaged in a pattern of misconduct involving cultural heritage resources (subsection (d)(4)(A) and (B)). Unfortunately, the proposed Guideline sets forth these two valid and appropriate enhancements as alternative enhancements in the same subdivision.

Consequently, although each enhancement appropriately addresses an aggravating factor deserving separate sentencing consideration, and both could factually apply to an individual defendant, the Guideline as currently drafted limits the sentencing court to applying only one of the two appropriate enhancements. For example, a

commercial looter with a history of such misconduct should be subject to both enhancements on the basis of these distinct aggravating factors. Such an offender should not get a "pass" on one of the enhancements simply because the Guideline joins the two enhancements under one Specific Offense Characteristic subsection. We recommend that these two enhancements be made independent of one another by making each a Specific Offense Characteristic.

4

Finally, we have several recommendations concerning technical revisions which we will provide to the Commission's staff. We will continue to assist the staff in every way we can with the Cultural Heritage Guideline.

In conclusion, I repeat what I stated in my December 7, 2000 letter to the Commission:

Amending the Sentencing Guidelines to fully address the irreparable harm caused by ARPA offenses and other heritage resources crimes will truly manifest to "the present and future benefit of the American people" as Congress intended. 16 U.S.C. § 470aa(b). Few undertakings by the Sentencing Commission could be of greater significance to the nation.

Thank you very much for this opportunity to address the Commission on so vital a matter as the proposed Cultural Heritage Guideline.

Oney - should "sacred objects" be separately treated.
Not one included in "cultural patrimony"

**TESTIMONY OF JOHN FRYAR
UNITED STATES SENTENCING COMMISSION
PUBLIC HEARING
FEBRUARY 26, 2002**

Good Morning, my name is John Fryar. I am an enrolled member of the Pueblo of Acoma in New Mexico and a criminal investigator for the Bureau of Indian Affairs. I appreciate the opportunity to talk with you regarding my work and experience in the investigation and prosecution of crimes involving the Archaeological Resources Protection Act (ARPA) and the Native American Graves Protection and Repatriation Act (NAGPRA). First I want to commend the Sentencing Commission for it's work in proposing a new guideline which specifically addresses crimes involving the damage and destruction of cultural resources. In my work, I have been very frustrated by how the system allows these criminals to get away with only minimal sentences or in some cases, no sentence at all. These looters are then able to get back into the field and continue their desecration of human burials while stealing anything that may have value to sell on the black market. My frustration as a criminal investigator is great but it does not compare to the level of frustration and anger that tribal communities feel when all they can do is watch their culture be erased, site by site. This proposed guideline is one step in ensuring that the punishment received for these crimes approaches the harm caused to the tribal community.

I have investigated cultural resources crimes for approximately fifteen years. I first became aware of these crimes while working for the United States Forest Service in New Mexico. I worked for the Forest Service for over fifteen years, about five years as a uniformed Law Enforcement Officer. In 1991, I transferred to the Bureau of Land Management as a Special Agent where I was assigned to the Four Corners ARPA Task Force which was based in Santa Fe, New Mexico. The task force was primarily an undercover unit which included various land management agencies and was successful in prosecuting a number of cases in the four corners states of Arizona, New Mexico, Utah and Colorado. In 1995, I transferred to the Bureau of Indian Affairs (BIA) as the only criminal investigator tasked with working ARPA and NAGPRA violations on a national level. At present, I am the only full time ARPA investigator for the BIA and the Department of Interior. My case work covers the entire country and I have traveled all over the country working not only investigations but providing ARPA training for tribes and other law enforcement agencies. I have witnessed firsthand the devastating impact looters have had on individual Indians and tribal communities.

The ARPA is over twenty years old now and NAGPRA over ten years old. Newspapers and magazines have published countless articles and television shows such as National Geographic and Nightline have aired segments that have addressed looting and vandalism on our public lands and on Indian reservations. As a result of some of this publicity, there has been a dramatic drop in the instances of looting caused by "mom and pop" out for a Sunday picnic or damage caused by a boy scout troop out for a day hike. While this type of damage caused by the casual hiker still occurs, the reports of these incidents are uncommon.

The Professional Looter

The cases that I am seeing in the field now are the result of the hard core looters, the grave robbers, the ones I refer to as the professional looters. These professional looters could care less if a federal law prohibits grave robbing or damage to cultural resources and they have no regard for centuries old culture, heritage or history. The majority of these looters already have criminal histories, usually drug related (methamphetamine) or violence related (domestic abuse and assaults). Incidentally, these looters are also usually involved in other illegal trafficking activities, such as cactus rustling and sales of endangered species.

Let me give you an illustration as to how professional looters operate. First, they educate themselves about the locations of archaeological sites and the kinds of artifacts and grave goods that may be found at the sites. Many have taken classes in archaeology and anthropology, some have even volunteered with land management agencies as archaeological technicians to learn more about archaeology in their areas. They are also very adept at using technology to assist in their criminal activities - using Global Positioning Systems (GPS) and conducting extensive computer research to locate specific sites. These individuals are deeply proud of what they do and document their illegal activities with photographs and videotapes. This documentation serves two purposes: it provides bragging rights to other looters about how good they are and it also increases the value of the items illegally taken by providing a context for the objects they are selling on the black market.

These professional looters will go to great lengths not to get caught. We have been told that some looters become familiar with the ceremonial schedules on various reservations so that they can operate in the back country while the police officers and tribal rangers are working at the ceremonial events. Many looters will dig at night using the cover of darkness to mask their activities. They usually park vehicles some distance from the site they are working and then hike in and carry their tools, such as probes, shovels, trowels, flashlights, and screens. Once it is dark, they begin their pattern of destruction in a very methodical manner. They use probes to locate the walls of a pueblo and burial sites. Many looters have bragged about how good they are when using their probes at being able to tell if they are hitting a rock, a pot or a skull. Once an item is located or the walls of a site have been defined, they will use shovels to remove the valuable items. One example of how calculating the looters are in masking their work is that I have investigated crime scenes where the looters have cut out the top layer of earth and set it aside before they begin their work. The looters then dug holes three feet deep, removed the artifacts, filled the holes in with back dirt, placed the top portion of the earth back over the holes and then brushed out the piece and the area around it to look like it had never been disturbed.

Of course this example is just one technique of the professional looter. Many looters are much bolder and do not limit themselves to small tools that can be carried in a backpack but will use backhoes and other heavy equipment to completely devastate an area. The looters remove all the valuable and sellable items out of the ground and then simply bulldoze over the entire area. Once this type of destruction has happened, it is impossible to ever know the historical and

archaeological context of the site and that information is lost forever.



These professional looters believe that they have an inherent right to “treasure hunt” or steal from these grave sites. Many of them grew up in rural western states and have looted and collected artifacts as kids along with their families. Many looters are better at locating archaeological sites than the local law enforcement officers are. Since they are so proud of their abilities and believe that their chances of getting caught are almost non-existent, they routinely brag of their discoveries to friends and relatives.

Case Study of a Professional Looter

I will give you a good example of a case study of a professional looter. In 1992, I was involved in an investigation on the Zuni Reservation in New Mexico. A tribal member had turned himself in as he could not sleep at night because of the crimes he had committed. This tribal member was a sheep herder and addicted to alcohol. The crimes he had committed involved the selling of ceremonial items from Zuni known as masks or friends. Native Americans believe these friends are living, breathing spirits. They pray to them, ceremonially feed them and care for them. These masks are the items that have been defined as “cultural patrimony.” These objects do not belong to any individual in the Tribe and cannot be sold by any individual.

The tribal member was stealing ceremonial masks for a non-Indian from Payson, Arizona, named Rodney Tidwell. Tidwell had befriended the tribal member, providing money for alcohol and giving him presents. Law enforcement officials had received additional information from other reservations in New Mexico and Arizona regarding Tidwell’s illegal trafficking of ceremonial items. We even had documentary evidence of some attempted sales he was involved in with very high profile individuals in Santa Fe, New Mexico.

The tribal member agreed to assist us in the investigation and a telephone call was placed to Rodney Tidwell. I watched the sale go down at four in the morning and watched Tidwell browbeat the tribal member down on the price for the item he had for sale. Then I watched as he told the tribal member he wanted more masks but he wanted them "fully dressed" meaning that he wanted everything on the masks, including feathers and all attachments.

The tribal police detained Tidwell and interviewed him where they discovered a loaded gun in his car. At the same time tribal police were interviewing him, a team of officers were executing a search warrant of the Tidwell residence in Payson, Arizona. The tribal police eventually released Tidwell. The team executing the search warrant at his home in Payson seized many items of cultural patrimony along with eagle feathers and whole migratory birds that had been shot and put in the freezer to be used as trading material on the various reservations. Some of the information found during this search led to other individuals and other search warrants. In October of 1995, Tidwell was sentenced for illegally purchasing the Zuni mask from the tribal member. He received three years probation and a small fine.

In April of 1996, while working an undercover operation in Arizona, I was personally introduced to Rodney Tidwell. At this point in time, Tidwell had been on probation for less than six months and I worked the next year and a half buying items of cultural patrimony from him in New Mexico and Arizona. Tidwell offered to sell me the same types of items we had just prosecuted him for in the Zuni case. During my contacts with him, he taught me how not to get caught in what he called "stings" and to watch for body wires. He taught me what to say and how to act if I was on a reservation and stopped by the police. He taught me what to say and how to act if a tribal member became upset during a negotiation. He told me what was legal and what might not be legal on the various reservations and how to hide these items during transport.



At the end of this undercover portion, a search warrant was executed. I was in Tidwell's residence as the vehicles carrying members of the search warrant team drove up and he had me help him hide the masks we had been looking at. During the search, the authorities seized scrapbooks, newspaper articles, photographs and many more documents that showed his knowledge of the crimes he had been involved in including copies of the ARPA and NAGPRA statutes. It was also during this search that he threatened to "blow" my head off.

Through the use of the documents seized during the search, I was able to prove Tidwell's criminal activity dating back to 1970. The search produced citations from the White Mountain Apache reservation in Arizona for damaging archaeological sites, citations from the Tonto National Forest for digging in Indian ruins, letters from the Forest Service trying to get him to stop his looting activities and partial copies of a case from the Tonto National Forest for looting in the 1980's. He had been prosecuted in federal court for looting and while under indictment, had been caught digging another burial site on the national forest. He had entered into a plea agreement in that case to pay a fine, forfeit his vehicle and probation. The following poem was seized during this search warrant.

Rodney, the lone grave robber
Had a very shiny pick.
And if you ever met him
You would even say he's "sick"
All of the other neighbors
laughed and called him strange
They thought the indian's spirits
had put his mind in disarrange

But then one sunny summer day
Police came to say
Rodney if you don't stop now
I'll stake you to the loose-cow

Rodney thought this whole thing thru
And shouted out with glee
I can do it, by moon light
And when no one else can see
Now watch for Rodney sitting
in jail
Jason and Pat won't go his bail

Other documentation seized during the search showed Tidwell worked as a backhoe operator and had earned \$7500 the previous year. At the time I was working with him, his residence was up for sale for \$640,000. He dealt strictly in cash with tribal members and the mark up of the "Black market" material he was selling to me was over one hundred times the price he paid for the items. I was able to locate the tribal member from the Hopi Reservation who was involved in this case and received confessions during each of the three interviews I did with him. This tribal member committed suicide before the trial took place. The trial took two weeks and Tidwell was convicted of twenty felony counts including ARPA, the illegal trafficking of Native American cultural items, theft from tribal organizations and conspiracy. Rodney Tidwell was sentenced to serve only thirty three months in jail and a \$10,000 fine. This minimal sentence was received after showing a history of almost thirty years of the same type of illegal behavior. The thing that really sticks with me throughout all of these investigations is the callous attitude and behavior that these "professional looters" all seem to exhibit. The following is another poem found in Tidwell's scrapbook that sums up his level of animosity towards other human beings and ancient cultures.

Diggins 1971

An Indian walks softly,
Holds his head up high,
World has treated him badly,
Yet he seems too proud to cry.
He remembers his Indian ancestry,
Which he desperately wishes to save,
Returns to talk with his grand father's
chief.
But there is a goul in his grave,
His grand father's legs are thrown on
the ground.
His head lies there in a sack,
And some man stands on his pelvic bone,
Stealing beads from his back.

S.

I have gone into some detail about one looter who has done incalculable damage to many Indian reservations and our public lands because I think it is important for the Commission to understand how most of these professional looters operate. I think that the behavior exhibited by just this one individual illustrates why it is so important for the guidelines to be amended and a new one established for cultural resources crimes. Compiling evidence in these cases often takes years of investigation and involves the cooperation of many law enforcement agencies. While Tribes feel that the damage done by these looters is incalculable, it is good to know that if a looter is successfully prosecuted, his sentence may now be more commensurate with the harm that he has caused. Now I would like to briefly address some of the specific areas in the proposed guideline.

Items of Cultural Patrimony

Many tribes have suggested that the proposed guideline include an enhancement when items of cultural patrimony are damaged, stolen or destroyed. For far too long, the non-Indian world has viewed items of cultural patrimony as merely exquisite examples of Indian art and has ignored the ceremonial and traditional meanings that give these objects significance. Cultural patrimony has been defined in NAGPRA as "an object having an ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group." 25 U.S.C. 3001(3)(D).

Objects of cultural patrimony derive their importance from their ceremonial place in tribal society and they are not just beautiful art objects. I have already mentioned how the Zuni and Hopi masks were important items for sale in the Tidwell investigations. These Zuni masks or friends are critically important to the ceremonial life of the Zuni. Indeed, in my investigation, one tribal member was so torn up about his misuse of the masks that he voluntarily turned himself into tribal authorities so that he could sleep at night. In the investigation involving the sale of Hopi masks, a tribal member committed suicide because he had tried to sell the sacred masks. Objects of cultural patrimony are very powerful not because they are beautiful but because of their integral role in tribal culture.

An object of cultural patrimony evolves in stages and it is analogous in many ways to a birthing process. First, the materials are gathered to create the object. This is the period of gestation for the item, just like that of a child. Then the object is "born" and more ceremonies are performed and the object takes on its role in the ceremonial life of the Tribe just as a child grows and learns to be a member of the society in which he lives. Depending on the object, they are fed, purified, and cared for much in the same manner in which we care for and educate our children about our beliefs and traditions. Because the object has become an integral part of our society, just as each individual child does, these items are irreplaceable. No one would ever suggest after the loss of a child that the parents should just go have another child - it is the same situation for items of

cultural patrimony. These items are unique because of the ceremonies performed and because of the symbolism that they represent in the Tribe and cannot be merely replaced by buying additional materials and creating a new object. For these reasons, I agree with the other tribal commentators that an enhancement is justified in the new guideline for damage or theft of items of cultural patrimony.

Upward Departure

I believe that it is important for the Commission to give some guidance to the courts to help them determine under what circumstances an upward departure from these guidelines would be warranted. As a tribal member, it is difficult for me not to see these crimes as the most heinous and deserving of the harshest punishment in all instances. However, in my many investigations, I have seen how some individuals are truly without conscience in their actions. I think that Tidwell's repetitive pattern of ignoring the law and the poems he wrote exhibit such disregard for other people and cultures that an upward departure could be warranted in a case like that. Since this guideline will be new and unfamiliar to most courts, the Commission should advise the courts that some situations may warrant an upward departure from the guidelines.

Conclusion

Members of the Commission, I appreciate the opportunity to come before you and provide a perspective from the field. These investigations involve an incredible amount of work on the part of law enforcement officials to successfully prosecute these cases. The amount of damage we are seeing on the ground and the constant desecration of our graves and stealing of our cultural heritage and history is unbelievably disturbing to Native American peoples. So the prosecution of these cases becomes critically important to tribal communities in that there is some sense of justice for these looters. While no sentence will ever be able to replace the damage and harm done to our people by these looters desecrating and digging up our ancestors, the proposed guideline is a good attempt to assure that these criminals receive a sentence commensurate with the damage they have caused. The fact that these grave robbers may spend time in jail for their crimes may help the tribal communities begin their healing process and continue with their cultural traditions.

Thank you for the opportunity to speak with you this morning and again, I want to commend the Commission for all its hard work in getting us to this point.

1.2 mill coke users

265,000 - crack (1/5 of coke users)

45,000 women (18%) pregnant take drug while preg.

med. consequences between intravenous & smoke - same.

No pharmacological differences between crack & powder.

More rapid onset of effect, more addictive, i.e. smoking & I.V., more addictive

People smoke coke (crack) avoid HIV

~~smoking~~
Makes more sense to punish delivery of drug: (I.V., smoking, oral)

Violence - not involved w/ drug, but could be involved in getting \$ for the drug.

Brain - some paranoia which could result in violence.

Drug - how do enforcement rates among drug compare?

i.e. compare use & convictions, the Blacks targeted unfairly

Use of cocaine appears to be down. Difference between powder & crack,

If concerned w/ HIV should we be

The actual effects from coke same as nicotine.

Crack baby syndrome - media stereotype.

Unlike alcohol exposure, doesn't cause birth defects.

No evd associated w/ SIDs

No evd of neg. effects on IQ as opposed as to what happens ~~to~~ w/ alcohol & tobacco.

"Crack Baby" is a myth *

Fetal alcohol syndrome much worse problem

1993

Never seen a "crack baby". Mother never uses
just one drug.

Physiology of crack & powder are the same.

Can't distinguish 1 drug from another by
mother. Problem is "substance abuse".

Children can suffer from substance abuse.

Home environment strongest predictor of
how children come out.

Laura

System effects

Viol. lowest in U.S. since 60s.

100/1 disparity - racial discrim in
crim justice system
sentence should

low rate of violence
... by using people

2/3 of cases involving powder case -

A.

M.M. - Opposed
Opposed to reducing level to crack for

Violence, it in market when crack came in,
but market matured, violence markedly
reduced.

Incorporation rate
~~that~~ - ↑ 8

price of coke ↓ 3-5
if equalize crack/powder

Issue now is not just crack, but also
unequal powder targeting on black &
resulting disparity.

It strongly appeared to mixing powder.

38) 71.5 kg

36) 500 g to 1.5 kg

34) 150 g to 500 g

32) 50 g to 150 g

30) 35 g to 50 g

28) 20 g to 35 g

26) 5 g to 20 g

24) 4 g to 5 g

22) 3 g to 4 g

20) 2 to 3

18) 1-2

16) .5 to 1

14) .25 to .5

12) 0 to .25

Cathleen: threats & hoaxes & conveying false info.
(that these 3 the same)

~~My carpool lady left my son at school...~~

● gls shd recognize distinctions but gls must recognize how serious these are in a terrorism context

2A 6.1 - BOL doesn't reflect seriousness need modification

consider heartland of the offenses -

- enhancements for:
- express threat of death
- ability or intent to carry out threat
- multiple victims
- signif. disruption

175 (b) & b → 2m6.1

● BOL [14-22] 22 most appropriate, more serious than threat at 20 - here, Δ has at his disposal means to commit enormous harm - threat to society at large possession by Δ's Cong has judged unfit to possess there is also serious -

select agent - account for increased seriousness when select agents involved -
if you have a real agent (Hill, anthrax) real response

2339A & B - that separately Δ knows or knew wd be used in supporting specific offense - Aiding & abetting, or if support is subsequent, in concealment...

● 39 B - go to 2m5.1 any support, whatever its nature, supports terrorism... or enact a gl... 26 + 2 SOC's
SOC when material support if weapons, explosives lethal substances...
49/col 203 B → 2K1.4, 2B1.1 problems -

Consp. & attempts to commit terrorist offenses
clearly 3A1.4 applies to acts subsequent to offense

3B0 - Tim Jarboe | areas of importance to FBI

• threats & hoaxes

threats to commit - great psych. harm
FBI - drain on resources

hoaxes - law enforcement must take it seriously until proven false

et. - threat to blow up a refinery - they found the explosives

possession of anthrax - select agents shd only be possessed by authorized persons - too dangerous

2339 A & B

provides material support to a terrorist - shd be punished same as terrorist

for terrorist org. - when A provides them support, it's serious - supports their ultimate goal to destroy our infrastructure & some kill our people

attacks on infrastructure

can affect thousands - attacks on gas pipelines ...

Alaskan pipeline supplies 1/5 US oil ...

conspiracies

shd minor substantive penalty - Ramzi Yousef - WTC '93 in Philippines - wd've bombed planes - only a kitchen fire & discovery stopped him ...

supervised release [Terrorists are philosophical - fanatics]

life in some cases is appropriate or lengthy term in some cases ...

Sessions

what if A just provided info that allowed terrorist to get driver's license vs. providing explosives?