

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.