

In fact there is evidence to suggest that high incarceration rates can actually increase crime. Research by Todd Clear examining a geographically distinct section of Tallahassee, FL that had a high percentage of its residents cycling through the prison system demonstrated that the effect of this was to increase family and community instability which had a criminogenic effect on the neighborhood. It would appear that rather than protecting communities as asserted by the representative from the Fraternal Order of Police (FOP).

Dr. Alfred Blumstein of Carnegie Mellon testified that a significant amount of the violence associated with crack cocaine markets during its early advent was related to the following factors:

- The crack cocaine market in inner city communities was predominantly a street market – making it more visible and vulnerable to violence in comparison to the powder cocaine market which tended to be more indoors, controlled and less prone to violence;
- The rapid popularity of crack cocaine led to increased competition among street level dealers including turf battles and disputes over drugs and/or money.
- Increased law enforcement combined with long mandatory minimums led to a “replacement effect” where young men with minimal impulse control and ready access to guns were recruited to replace older, more experienced dealers.

He further testified that the past ten years have seen a steady decrease in crime and violence related to crack cocaine distribution. Distribution roles in crack cocaine and other drug markets are well known, and easy to access by inner-city youth. For many, participating in the drug trade appears to be the only available economic option. Yet, these youth are apprehensive. Selling drugs requires a wide range of skills they lack, including the ability to recognize undercover police, possess and use guns and deal with rivals.

Dr. Blumstein provided a very salient basis for eliminating the crack-powder sentencing disparity in particular and mandatory minimums in general when he noted: *“the appropriateness of mandatory [minimums] decays over time, as I believe it clearly has in the difference between crack and powder cocaine. So that it would appear that mandatory [minimums] are acts of the moment that, when incorporated into statute, keep on forever. It would be desirable, obviously to not impose them on the future. It would be desirable, at a minimum to sunset the mandatory on this particular law and it would be desirable generally to sunset mandatory [minimums] more widely....”*<sup>18</sup>

Only **six** states have separate statutorily-based penalties for crack and powder cocaine possession offenses and only **nine** states’ statutes specify separate penalties for crack and powder cocaine sale offenses. Such data suggest that what is of significant importance at the federal level may be considerably less important at the state level if similar differences do not exist in state sentencing guidelines. This is particularly noteworthy since traditionally crime fighting has been the primary purview of state and local governments and local public officials are generally considered to be more responsive to community concerns regarding crime. This would suggest that the anti-crack hysteria that gripped Congress in the mid-1980s and led to the passage of these draconian sentences was not reflected on a state and local level where one would have expected to hear the most vigorous calls for action from communities most affected by the crack outbreak.

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<sup>18</sup> U.S. Sentencing Commission Public Hearing on Cocaine Sentencing Policy, Tuesday, November 16, 2006, Pgs. 206-211.

The severity of punishment for crack cocaine offenses was based in large part on the perception of crack as the most “powerfully addictive” and “dangerous” drug that posed a significant threat to communities and society. However, the past decade has witnessed the re-emergence of a drug that is almost unanimously considered to be more addictive and dangerous than crack cocaine – that drug is methamphetamine. Methamphetamine is a powerful stimulant drug that can be injected, smoked, inhaled or swallowed. In most areas of the country methamphetamine is cheaper than cocaine and for some users more desirable because it metabolizes slowly so the high lasts longer, generally between four to six hours after which users often turn to other drugs to ease the crash that follows.

As was true when crack cocaine first emerged, media outlets around the country have reported on methamphetamine as “the most dangerous and addictive drug” in the United States. Unlike prior drug outbreaks that were generally identified with urban inner city communities, methamphetamine abuse has spread from the biker and trucker communities of California to the Pacific Northwest, Mountain states and the rural heartland. Communities that previously had little experience with illicit drug addiction or drug-related crime have seen significant increases in many of the direct and collateral consequences of addiction. As was true with crack cocaine, many of those who have become addicted to methamphetamine are women, often with devastating impact on their lives and families. Methamphetamine abuse is associated with crime, domestic violence, child abuse, erratic behavior, paranoid delusions and rapid physical deterioration. Methamphetamine is comprised of synthetic chemicals that can be easily obtained and “cooked”. These chemicals are extremely volatile, particularly in the hands of non-chemists, consequently areas of methamphetamine production are marked by an increase in chemical explosions of unstable labs causing damage to humans, wildlife and the environment.

Methamphetamine is considered by both scientists and public officials to be more addictive and dangerous than crack cocaine, but so far the Congressional response to rising methamphetamine abuse has not been as punitive as it was towards crack. As noted in a Congressional Quarterly story last year, the primary response to methamphetamine production and use has not focused on punishing and incarcerating low level sellers and users. Instead, according to Rep. Elijah Cummings, *“There seems to be more of an emphasis on shutting down these methamphetamine labs and trying to figure out ways to treat these addicts and then get them back into the flow of society”*.<sup>19</sup>

Unfortunately, thus far that compassion has not carried over to our treatment of men and women involved with crack cocaine. Many believe this difference in attitude is because of the demographics of the affected communities. Unlike crack, -- which is associated with poor, inner-city communities of color – methamphetamine is primarily used by white men and women in small cities and rural communities. While crack cocaine is now generally regarded as less dangerous than methamphetamine, crack offenses are still punished more severely. We prefer to think that this time Congress is acting in accordance with evolving knowledge and growing compassion.

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<sup>19</sup> Stern, Seth, *Meth vs. Crack – Different Legislative Approaches*, Congressional Quarter Weekly, June 5, 2006 – Page 1548

However, for Congress to continue to maintain the crack-powder sentencing disparity in the face of overwhelming evidence of its ineffectiveness as a strategy and the unfairness in its application would have to be viewed as racist. It would be the criminal justice equivalent of the decision to withhold treatment from syphilis infected black farmers in Alabama, when a cure was available and being provided to others. We know that we cannot incarcerate our way out of the problem of illicit substance abuse. This knowledge is being applied by state and local governments (with considerable support from federal authorities) as they craft their coordinated responses to the outbreak of methamphetamine abuse in their communities. To do any less for those communities that have suffered over two decades from the inequities of racially disparate sentencing policies for crack and powder cocaine would be manifestly unjust.

There is now a Congressional Methamphetamine Caucus with about 135 members. This development along with the recent change in leadership in the House of Representatives and Senate gives us hope that Congress may be ready to give serious consideration to recommendations from the Commission regarding changes in federal cocaine sentencing. Rep. John Conyers, Chair of the House Judiciary Committee has been a long time advocate for the repeal of mandatory minimum drug sentencing in general and the crack powder sentencing disparity in particular. I have no doubt he would welcome a recommendation from the Commission that would address at least part of those concerns.

Reforming the current crack cocaine sentencing scheme would allow federal judges the flexibility in at least some cases to give shorter sentences to street level drug sellers; police to de-emphasize the arrest of users for simple possession; and government to shift some resources from punishment into prevention and treatment. The federal drug budget has for decades been heavily weighted in favor of law enforcement in relation to funding drug treatment and drug abuse prevention. The fear of appearing "soft" on crime or the drug issue has had a deleterious effect on the quality of public debate in this area. The research illustrates that for many white crack cocaine users and sellers drugs are already effectively decriminalized since the risk of apprehension and incarceration for them is negligible. Hopefully, Congress will decide to rethink its adherence to drug enforcement strategies that do little to impact drug use and crime but cause considerable harm to communities of color.

Human Rights Watch spoke to the consequences of continued failure to act to correct what is rightfully perceived as a racist policy:

"The racially disproportionate nature of the war on drugs is not just devastating to black Americans. It contradicts faith in the principles of justice and equal protection of the laws that should be the bedrock of any constitutional democracy; it exposes and deepens the racial fault lines that continue to weaken the country and belies its promise as a land of opportunity; and it undermines faith among all races in the fairness and efficacy of the criminal justice system. Urgent action is needed, at both the state and federal level, to address this crisis for the American nation."<sup>20</sup>

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<sup>20</sup> Key Recommendations from *Punishment and Prejudice: Racial Disparities in the War on Drugs* (Washington, DC: Human Rights Watch, June 2000), <http://www.hrw.org/campaigns/drugwar/key-reco.htm>

We urge the Commission to reaffirm its 1995 recommendation - repeal of the mandatory five year sentence for simple crack possession, and eliminating the crack-powder cocaine sentencing disparity by raising the threshold amount that triggers a mandatory minimum for crack cocaine offenses to equal the amount established for powder cocaine offenses. Let's demonstrate compassion for people caught in the net of drugs and addiction regardless of their drug of choice. Twenty years of racial injustice is too long - **justice delayed is justice denied.**

April 2, 2007

Honorable Ricardo Hinojosa  
Chairman, United States Sentencing Commission  
One Columbus Circle, N.E.  
Washington, D.C. 20002-8002  
[pubaffairs@ussc.gov](mailto:pubaffairs@ussc.gov)

Dear Mr. Chairman:

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

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

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

Respectfully submitted,

Arthur L. Burnett, Sr.  
National Executive Director

Enclosure

[285]



March 20, 2007

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

Attention: Public Affairs Officer

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

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

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

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

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<sup>1</sup> NCLR is the largest national Latino civil rights and advocacy organization in the U.S. Through its network of nearly 300 affiliated community-based organizations (CBOs), NCLR reaches millions of Hispanics each year in 41 states, Puerto Rico, and the District of Columbia. NCLR conducts applied research, policy analysis, and advocacy, providing a Latino perspective in five key areas – assets/investments, civil rights/immigration, education, employment and economic status, and health.

<sup>2</sup> Founded in 1968, MALDEF, the nation’s leading Latino legal organization, promotes and protects the rights of Latinos through advocacy, litigation, community education and outreach, leadership development, and higher education scholarships.

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

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

### DISPARATE IMPACT OF DRUG LAWS ON LATINOS

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

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

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

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

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

<sup>5</sup> *Report to the Congress: Cocaine and Federal Sentencing Policy*, United States Sentencing Commission, May 2002, p. 63.

<sup>6</sup> *Lost Opportunities: The Reality of Latinos in the Federal Criminal Justice System*, National Council of La Raza, October 2004.

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

## RECOMMENDATIONS

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

1. **Substantially redress the crack-powder ratio disparity by raising the crack thresholds and maintaining the powder thresholds.** Over the past 20 years, it has been proven that the 100:1 powder-crack sentencing ratio has a negative impact mainly on African Americans but increasingly on Latinos as well. Therefore, we call for closing the gap between crack and powder sentences, so that five grams of crack triggers the same exact sentence as five grams of powder.
2. **Resist proposals that would lower the powder thresholds in order to achieve equalization between crack and powder.** NCLR and MALDEF believe that the only proper way of equalizing the ratio is by raising the crack threshold, not by lowering the powder threshold. According to the Commission's data, reducing the powder threshold would have a disproportionate negative impact upon the Latino community. Achieving equalization by lowering the powder threshold might be perceived as reducing sentencing inequalities. In fact, it would have the perverse effect of not reducing high levels of incarceration of low-level, nonviolent African Americans while substantially increasing incarceration of low-level, nonviolent Latinos. In our judgment, the real-world, tangible harm produced by lowering the powder thresholds would far outweigh the symbolic value of reducing statutory sentencing ratios.
3. **Make more widely available alternative methods of punishment for low-level, nonviolent drug offenders.** Under 18 USC Section 3553(a), penalties should not

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

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

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

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

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

Sincerely,

Janet Murguia  
President and CEO  
NCLR

Peter Zamora  
Regional Counsel  
MALDEF

Please accept this letter as public comment. A PDF version with relevant citations can be found at <http://www.ssdp.org/campaigns/ussc-cocaine-letter.pdf>

Thanks,  
Tom Angell  
Students for Sensible Drug Policy

March 26, 2007

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

Re: USSC Federal Register notice requesting public comment on cocaine sentencing

As an organization representing thousands of American college students concerned with the negative impact that both drug abuse and overly-punitive drug policies have on our campuses and communities, Students for Sensible Drug Policy (SSDP) strongly urges the U.S. Sentencing Commission to equalize sentencing for crack and powder cocaine to the current level for the latter.

As you know, the amount of crack that currently triggers an automatic felony charge and a mandatory minimum sentence upon conviction (5 grams) is 100 times lower than the amount necessary to trigger a felony charge and mandatory minimum for powder cocaine (500 grams).

Students have a particular interest in seeing these penalties equalized because the current sentencing scheme can hamper their eligibility for the Hope Scholarship Credit. The credit, which is unavailable to taxpayers with felony drug convictions, can be applied to the first \$1,000 of a student's education expenses and half of the next \$1,000 over the first two years of college. In 2003 alone, just under 3.5 million taxpayers took advantage of the credit.

By equalizing the penalties for crack and powder cocaine, fewer students convicted of possessing relatively small amounts of crack cocaine for personal use will be deemed ineligible for the Hope Credit. Low- to middle-income students who are unable to take advantage of the credit may be more likely to leave school and never return. Such individuals are increasingly disposed to develop serious drug problems, commit crimes, or rely on costly social service programs, instead of becoming law abiding and productive members of society.

Young people also suffer collateral damage when their parents are convicted of drug offenses. Youth whose parents are incarcerated are often left without the familial grounding and/or financial resources needed to get accepted to, and stay enrolled in, college. Adolescents and children can also lose access to housing, food stamps, or other government assistance programs

when their parents are convicted of drug offenses.

Students are also very concerned with the racial implications of the sentencing disparity. In 2000, there were more African American men incarcerated in prisons and jails than there were enrolled in colleges and universities, thanks in large part to our nation's drug sentencing policies.

In 2003, 80% of defendants sentenced under crack cocaine laws were African Americans, despite the fact that greater than 66% of crack cocaine users in the United States are Hispanic or white.

The disparity in sentencing between powder and crack cocaine has had a devastating impact on African American individuals, communities, and families by inhibiting educational opportunity and by breaking up families through incarceration.

For these and other reasons, we respectfully urge the Commission to eliminate the disparity between sentences for powder and crack cocaine by aligning both penalties to the current level of the former.

Sincerely,  
Kris Krane, Executive Director  
Students for Sensible Drug Policy

--

Tom Angell, Government Relations Director

Students for Sensible Drug Policy

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Facebook: <http://www.facebook.com/profile.php?id=14310710>

***LETTER FROM LAW SCHOOL PROFESSORS REGARDING  
REFORM OF THE 100:1 CRACK AND POWDER COCAINE  
FEDERAL SENTENCING DISPARITY***

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March 30, 2007

**VIA EMAIL**

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

Dear Commissioners:

Re: USSC Federal Register notice requesting public comments, January 30, 2007

We, the undersigned law school professors, write to express our deep concern with the current 100:1 federal sentencing disparity between crack and powder cocaine. Distribution of just 5 grams of crack carries a minimum 5-year federal prison sentence, while distribution of 500 grams of powder cocaine—100 times the amount of crack cocaine—carries the same sentence. October 2006 marked the twentieth anniversary of the Anti-Drug Abuse Act of 1986, the law establishing much tougher sentences for crack cocaine offenses than for powder cocaine offenses. During the last two decades this law has had a disparate impact on minorities and women. In addition, over the past twenty years, experts have established that there is no penological or scientific rationale for such vastly different treatment under law for the two forms of the drug. We urge the United States Sentencing Commission (USSC) to make a formal recommendation to Congress that equalizes the trigger for federal prosecution of crack offenses at the current levels for powder cocaine.

The current 100:1 drug quantity ratio promotes unwarranted racial disparities in sentencing. African Americans comprise the overwhelming majority of those convicted for crack cocaine offense, while the majority of those convicted for powder cocaine offenses are white.<sup>1</sup> This is startling given that whites and Hispanics make up the majority of crack users in the country. For example, in 2003 whites represented 7.8% and African Americans represented more than 80% of the defendants sentenced under the harsh federal crack cocaine laws, despite the fact that more than 66% of crack cocaine users in the United States are white or Hispanic.<sup>2</sup> The 100:1 disparity between crack and

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<sup>1</sup> Nkechi Taifa, *The "Crack/Powder" Disparity: Can the International Race Convention Provide a Basis for Relief?* (American Constitution Society for Law and Policy, May 2006).

<sup>2</sup> U.S. Sentencing Commission, 2003 Sourcebook of Federal Sentencing, Table 34(2003), available at <http://www.ussc.gov/ANNRPT/2003/table34.pdf>.

powder cocaine has resulted in African Americans serving considerably longer prison terms than whites for drug offenses. The average sentence for a crack cocaine offense in 2003 was 123 months, 3.5 years longer than the average sentence of 81 months for an offense involving the powder form of the drug.<sup>3</sup> African Americans now serve virtually as much time in prison for a drug offense at 58.7 months, as whites do for a violent offense at 61.7 months.<sup>4</sup>

Judges, federal prosecutors, medical professionals, and other experts have all joined the USSC in calling for a reassessment of the current standards. Recently, federal judges across the country in roughly two dozen district courts have issued lower sentences than those suggested by the 100:1 ratio, thus questioning the wisdom of the sentencing guidelines set forth by this Commission.

During the November 2006 Sentencing Commission hearing, witnesses testified that there is no rational basis for the crack and powder cocaine sentencing disparity, which continues to produce racially disparate levels of incarceration. The quantities of crack cocaine that trigger federal prosecution and sentencing should be equalized with and increased to the current levels for powder cocaine. Thank you for your time and attention to this very important matter.

Sincerely,

(Institutional affiliation for identification purposes only. The signatures do not reflect the official policy of the named institutions.)

Ty Alper  
Associate Director, Death Penalty Clinic  
Clinical Instructor  
Boalt Hall School of Law  
University of California, Berkeley

Fran Ansley  
Professor of Law  
University of Tennessee

Annette Ruth Appell  
William S. Boyd Professor of Law  
Associate Dean for Clinical Studies  
William S. Boyd School of Law  
University of Nevada, Las Vegas

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<sup>3</sup> Bureau of Justice Statistics, Compendium of Federal Justice Statistics, 1994, Table 6.11, at 85 (1998); Bureau of Justice Statistics, Compendium of Federal Justice Statistics, 2003, Table 7.16, at 112 (2004).

<sup>4</sup> Bureau of Justice Statistics, Compendium of Federal Justice Statistics, 2003, Table 7.16, at 112 (2004).

Elvia R. Arriola  
Associate Professor of Law  
Northern Illinois University

Michael Avery  
Professor  
Suffolk Law School

Milner S. Ball  
Emeritus Caldwell Professor of  
Constitutional Law  
University of Georgia School of Law

Taunya Lovell Banks  
Jacob A. France Professor of Equality  
Jurisprudence  
University of Maryland School of Law

Robin Barnes  
Professor of Law  
University of Connecticut

Professor Susan J. Becker  
Cleveland-Marshall College of Law  
Cleveland State University

Brenda Bratton Blom  
Director, Clinical Law Programs  
University of Maryland School of Law

Peter Blum  
Legal Writing Instructor  
Howard University School of Law

Pamela D. Bridgewater  
Professor of Law  
American University  
Washington College of Law

David A. Brennen  
Professor of Law  
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Darryl Brown  
Class of 1958 Alumni Professor  
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Maxine Burkett  
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Susan Carle  
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Professor of Clinical Education  
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Erwin Chemerinsky  
Alston & Bird Professor of Law and  
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Gabriel "Jack" Chin  
Chester H. Smith Professor of Law  
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Carol Chomsky  
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Liz Ryan Cole  
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David Cole  
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Malina Coleman  
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Lisa A. Crooms  
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Law

Professor Angela J. Davis  
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Washington College of Law

Christine Desan  
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Melvyn R. Durchslag  
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Professor of Constitutional Law  
Hofstra Law School

Professor Theresa Glennon  
James E. Beasley School of Law  
Temple University

Rashmi Goel  
Assistant Professor of Law  
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Susan L. Goldberg  
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David Goldberger  
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Phobe A. Haddon  
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Vivian Hamilton  
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Law

David A. Harris  
Balk Professor of Law and Values  
University of Toledo College of Law

Bernadette W. Hartfield  
Associate Professor  
Georgia State University College of Law

Enid Trucios-Haynes  
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***LETTER FROM UNIVERSITY PROFESSORS AND SCHOLARS  
REGARDING REFORM OF THE 100:1 CRACK AND POWDER  
COCAINE FEDERAL SENTENCING DISPARITY***

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March 30, 2007

**VIA EMAIL**

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

Dear Commissioners:

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

We the undersigned professors and scholars, representing a variety of disciplines, join to express our concern with the current federal crack and powder cocaine sentencing disparity enacted in the Anti-Drug Abuse Act of 1986. We are writing to you to support efforts to equalize sentencing for crack and powder cocaine at the current level of powder cocaine.

Currently under federal law, distribution of 5 grams of crack carries a minimum 5-year federal prison sentence, while distribution of 500 grams of powder cocaine carries the same sentence. It takes 5000 grams of powder cocaine—about 11 pounds—to trigger a 10-year sentence, while it takes only 50 grams of crack to get the same.

This disparity creates the false implication that crack is 100 times more dangerous and destructive than the powder form of the drug. Two decades of research, however, has uncovered that the effects of the two forms of cocaine are the same. A 1996 study in the *Journal of the American Medical Association* found that "the physiological and psychoactive effects of cocaine are similar regardless" of its form.<sup>1</sup>

The myths of crack babies, instant addiction, and super-violent users and traffickers—which in great part led to the 1986 Act—have been dispelled. Researchers have found that the negative effects of prenatal crack cocaine exposure are identical to the negative effects of prenatal powder cocaine exposure. Recent data also indicates that significantly less trafficking-related violence is associated with crack than was previously assumed.

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<sup>1</sup> D. K. Hatsukami & M. W. Fischman, *Crack Cocaine and Cocaine Hydrochloride. Are The Differences Myth or Reality?*, 279 *Journal Of American Medicine*, No. 19, Nov. 1996, at 1580.

For example, in 2000 only 2.3% of crack offenders actively used a weapon.<sup>2</sup> As the Commission has established over the last 13 years, there is little rationale for disparate treatment of two forms the same drug, and no rational basis for that treatment to differ by 100 times.

The crack and powder cocaine sentencing disparity has resulted in alarmingly disproportionate incarceration rates for African Americans. African Americans comprise the overwhelming majority of those convicted for crack offenses, while the majority of those convicted for powder offenses are white.<sup>3</sup> This is disturbing given that whites and Hispanics make up the majority of crack users in the country. Indeed, in 2003 whites represented only 7.8% and African Americans represented more than 80% of defendants sentenced under the federal crack cocaine laws, despite the fact that more than 66% of crack cocaine users in the United States are white or Hispanic.<sup>4</sup>

Drug sentencing laws have also resulted in drastic increases in the number of women in federal prison. In 2003, more than half of the women in federal prison were there for drug offenses. African American women's incarceration rates for all crimes, largely driven by drug convictions, has increased by 800% from 1986, compared to an increase of 400% for women of all races for the same period.<sup>5</sup> Mandatory sentencing laws prohibit judges from considering the many reasons women are involved in or remain silent about a partner or family member's drug activity, such as domestic violence and financial dependency.

The effect of mandatory minimums, especially in the instance of simple possession or low-level involvement with crack cocaine, is devastating, not just for the accused, but for their entire family. Mandatory minimums, such as the federal crack cocaine sentencing law, result in the deterioration of communities by incarcerating parents for minor possession crimes and separating them from their children. Felony convictions prohibit previously incarcerated people from receiving social services such as welfare, food stamps,<sup>6</sup> and access to public housing<sup>7</sup> that are vital to their ability to support their families.

Felony convictions have also resulted in massive disfranchisement. Approximately 1.4 million African American males—13% of all adult African American men—are

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<sup>2</sup> See U.S. Sentencing Commission, Report to the Congress: Cocaine and Federal Sentencing Policy 102-103 (2002), at 54, 100, Table 17.

<sup>3</sup> Nkechi Taifa, *The "Crack/Powder" Disparity: Can the International Race Convention Provide a Basis for Relief?* (American Constitution Society for Law and Policy, May 2006).

<sup>4</sup> U.S. Sentencing Commission, 2003 Sourcebook of Federal Sentencing, Table 34 (2003), available at <http://www.ussc.gov/ANNRPT/2003/table34.pdf>.

<sup>5</sup> ACLU Et Al., *Caught In The Net: The Impact of Drug Policies on Women and Families* 17 (2005) (Citing Susan Boyd, *From Witches To Crack Moms: Women, Drug Law, And Policy* 208-09 (2004)).

<sup>6</sup> P.L. 104-193, sec.115, 42 USC 862a.

<sup>7</sup> P.L. 100-690, sec. 5101, 102 Stat. 4300.

disfranchised because of felony convictions. This represents 33% of the total disfranchised population and a rate of disfranchisement that is 7 times the national average.<sup>8</sup>

Perhaps most jarring of all, in 2000, there were more African American men in prison and jails in this country than there were in colleges and universities across the country.<sup>9</sup> Standing alone, this comparison of incarceration and education reasonably leads to the conclusion that the criminal justice system is a major contributor to the disruption of the African American family and community.

During the November 2006 Commission hearing, many witnesses testified that there is no rational basis for the crack and powder cocaine sentencing disparity which continues to produce a racially disparate incidence of incarceration. The quantities of crack cocaine that trigger federal sentencing should be increased to equal the current levels for powder cocaine.

Sincerely,

(Institutional affiliation for identification purposes only. The signatures do not reflect the official policy of the named institutions.)

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<sup>8</sup> Human Rights Watch & The Sentencing Project, *Losing The Vote: The Impact of Felony Disenfranchisement Laws in the United States* 8 (1998).

<sup>9</sup> Justice Policy Institute, *Cellblocks or Classrooms?: The Funding of Higher Education and Corrections and its Impact on African American Men* 10 (2002).

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## ChildrensHospitalLosAngeles

*International Leader in Pediatrics*

March 20, 2007

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

Dear Commissioners:

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

We the undersigned professors and scholars, representing a variety of disciplines, join to express our concern with the current federal crack and powder cocaine sentencing disparity enacted in the Anti-Drug Abuse Act of 1986. We are writing to you to support efforts to equalize sentencing for crack and powder cocaine at the current level of powder cocaine.

Currently under federal law, distribution of 5 grams of crack carries a minimum 5-year federal prison sentence, while distribution of 500 grams of powder cocaine carries the same sentence. It takes 5000 grams of powder cocaine—about 11 pounds—to trigger a 10-year sentence, while it takes only 50 grams of crack to get the same.

This disparity creates the false implication that crack is 100 times more dangerous and destructive than the powder form of the drug. Two decades of research, however, has uncovered that the effects of the two forms of cocaine are the same. A 1996 study in the Journal of the American Medical Association found that "the physiological and psychoactive effects of cocaine are similar regardless" of its form.[1]

The myths of crack babies, instant addiction, and super-violent users and traffickers—which in great part led to the 1986 Act—have been dispelled. Researchers have found that the negative effects of prenatal crack cocaine exposure are identical to the negative effects of prenatal powder cocaine exposure. Recent data also indicate that significantly less trafficking-related violence is associated with crack than was previously assumed. For example, in 2000 only 2.3% of crack offenders actively used a weapon.[2] As the Commission has established over the last 13 years, there is little rationale for disparate treatment of two forms the same drug, and no rational basis for that treatment to differ by 100 times.

The crack and powder cocaine sentencing disparity has resulted in alarmingly disproportionate incarceration rates for African Americans. African Americans comprise the overwhelming majority of those convicted for crack offenses, while the majority of those convicted for powder offenses are white.[3] This is disturbing given that whites and Hispanics make up the majority of crack users in the country. Indeed, in 2003 whites represented only 7.8% and African Americans represented more than 80% of defendants sentenced under the federal crack cocaine laws, despite the fact that more than 66% of crack cocaine users in the United States are white or Hispanic.[4]

Drug sentencing laws have also resulted in drastic increases in the number of women in federal prison. In 2003, more than half of the women in federal prison were there for drug offenses. African American women's incarceration rates for all crimes, largely driven by drug convictions, has increased by 800% from

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1986, compared to an increase of 400% for women of all races for the same period.[5] Mandatory sentencing laws prohibit judges from considering the many reasons women are involved in or remain silent about a partner or family member's drug activity, such as domestic violence and financial dependency.

The effect of mandatory minimums, especially in the instance of simple possession or low-level involvement with crack cocaine, is devastating, not just for the accused, but for their entire family. Mandatory minimums, such as the federal crack cocaine sentencing law, result in the deterioration of communities by incarcerating parents for minor possession crimes and separating them from their children. Felony convictions prohibit previously incarcerated people from receiving social services such as welfare, food stamps,[6] and access to public housing[7] that are vital to their ability to support their families.

Felony convictions have also resulted in massive disfranchisement. Approximately 1.4 million African American males—13% of all adult African American men—are disfranchised because of felony convictions. This represents 33% of the total disfranchised population and a rate of disfranchisement that is 7 times the national average.[8]

Perhaps most jarring of all, in 2000, there were more African American men in prison and jails in this country than there were in colleges and universities across the country.[9] Standing alone, this comparison of incarceration and education reasonably leads to the conclusion that the criminal justice system is a major contributor to the disruption of the African American family and community.

During the November 2006 Commission hearing, many witnesses testified that there is no rational basis for the crack and powder cocaine sentencing disparity which continues to produce a racially disparate incidence of incarceration. The quantities of crack cocaine that trigger federal sentencing should be increased to equal the current levels for powder cocaine.

Sincerely,

Bill Sanders, PhD  
Assistant Professor of Pediatrics, USC  
The Saban Research Institute, CHLA

Footnotes:

[1] D.K. Hatsukami & M.W. Fischman, *Crack Cocaine And Cocaine Hydrochloride. Are The Differences Myth of Reality?*, 276 Journal of The American Medical Association, No.19, Nov.1996 at 1580.

[2] See U.S. Sentencing Commission, Report To The Congress: Cocaine And Federal Sentencing Policy 102-103 (2002), at 54, 100, Table 17.

[3] Nkechi Taifa, *The "Crack/Powder" Disparity: Can the International Race Convention Provide a Basis for Relief?* (American Constitution Society for Law and Policy, May 2006).

[4] U.S. Sentencing Commission, 2003 Sourcebook of Federal Sentencing, Table 34(2003), available at <http://www.uscc.gov/ANNRPT/2003/table34.pdf>.

[5] ACLU et al., *Caught In The Net: The Impact of Drug Policies On Women And Families* 17 (2005). (Citing Susan Boyd, *From Witches to Crack Moms: Women, Drug Law, And Policy* 208-209 (2004)).

[6] P.L. 104-193, sec.115, 42 USC 862a.

[7] P.L. 100-690, sec. 5101, 102 Stat. 4300.

[8] Human Right Watch & The Sentencing Project, *Losing The Vote: The Impact of Felony Disenfranchisement Laws In The United States* 8 (1998).

[9] Justice Policy Institute, *Cellblocks or Classrooms?: The Funding Of Higher Education And Corrections And Its Impact On African American Men* 10(2002).

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March 30, 2007

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

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The myths of crack babies, instant addiction, and super-violent users and traffickers---which in great part led to the 1986 Act---have been dispelled. Researchers have found that the negative effects of prenatal crack cocaine exposure are identical to the negative effects of prenatal powder cocaine exposure. Recent data also indicate that significantly less trafficking-related violence is associated with crack than was previously assumed. For example, in 2000 only 2.3% of crack offenders actively used a weapon.[2] As the Commission has established over the last 13 years, there is little rationale for disparate treatment of two forms the same drug, and no rational basis for that treatment to differ by 100 times.

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[322]

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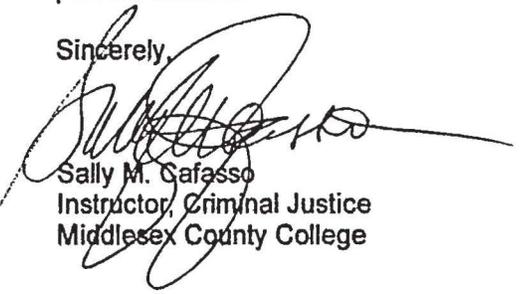
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Sincerely,



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Footnotes:

[1] D.K. Hatsukami & M.W. Fischman, /Crack Cocaine And Cocaine Hydrochloride. Are The Differences Myth of Reality?/, 276 Journal of The

American Medical Association, No.19, Nov.1996 at 1580.

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[8] Human Right Watch & The Sentencing Project, /Losing The Vote: The Impact of Felony Disenfranchisement Laws In The United States/ 8 (1998).

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March 20, 2007

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This disparity creates the false implication that crack is 100 times more dangerous and destructive than the powder form of the drug. Two decades of research, however, has uncovered that the effects of the two forms of cocaine are the same. A 1996 study in the *Journal of the American Medical Association* found that "the physiological and psychoactive effects of cocaine are similar regardless" of its form.[1]

The myths of crack babies, instant addiction, and super-violent users and traffickers—which in great part led to the 1986 Act—have been dispelled. Researchers have found that the negative effects of prenatal crack cocaine exposure are identical to the negative effects of prenatal powder cocaine exposure. Recent data also indicate that significantly less trafficking-related violence is associated with crack than was previously assumed. For example, in 2000 only 2.3% of crack offenders actively used a weapon.[2] As the Commission has established over the last 13 years, there is little rationale for disparate treatment of two forms the same drug, and no rational basis for that treatment to differ by 100 times.

The crack and powder cocaine sentencing disparity has resulted in alarmingly disproportionate incarceration rates for African Americans. African Americans comprise the overwhelming majority of those convicted for crack offenses, while the majority of those convicted for powder offenses are white.[3] This is disturbing given that whites and Hispanics make up the majority of crack users in the country. Indeed, in 2003 whites represented only 7.8% and African Americans represented more than 80% of defendants sentenced under the federal crack cocaine laws, despite the fact that more than 66% of crack cocaine users in the United States are white or Hispanic.[4]

Drug sentencing laws have also resulted in drastic increases in the number of women in federal prison. In 2003, more than half of the women in federal prison were there for drug offenses. African American women's incarceration rates for all crimes, largely driven by drug convictions, has increased by 800% from

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1986, compared to an increase of 400% for women of all races for the same period.[5] Mandatory sentencing laws prohibit judges from considering the many reasons women are involved in or remain silent about a partner or family member's drug activity, such as domestic violence and financial dependency.

The effect of mandatory minimums, especially in the instance of simple possession or low-level involvement with crack cocaine, is devastating, not just for the accused, but for their entire family. Mandatory minimums, such as the federal crack cocaine sentencing law, result in the deterioration of communities by incarcerating parents for minor possession crimes and separating them from their children. Felony convictions prohibit previously incarcerated people from receiving social services such as welfare, food stamps,[6] and access to public housing[7] that are vital to their ability to support their families.

Felony convictions have also resulted in massive disfranchisement. Approximately 1.4 million African American males—13% of all adult African American men—are disfranchised because of felony convictions. This represents 33% of the total disfranchised population and a rate of disfranchisement that is 7 times the national average.[8]

Perhaps most jarring of all, in 2000, there were more African American men in prison and jails in this country than there were in colleges and universities across the country.[9] Standing alone, this comparison of incarceration and education reasonably leads to the conclusion that the criminal justice system is a major contributor to the disruption of the African American family and community.

During the November 2006 Commission hearing, many witnesses testified that there is no rational basis for the crack and powder cocaine sentencing disparity which continues to produce a racially disparate incidence of incarceration. The quantities of crack cocaine that trigger federal sentencing should be increased to equal the current levels for powder cocaine.

Sincerely,

Bill Sanders, PhD  
Assistant Professor of Pediatrics, USC  
The Saban Research Institute, CHLA

Footnotes:

[1] D.K. Hatsukami & M.W. Fischman, *Crack Cocaine And Cocaine Hydrochloride. Are The Differences Myth of Reality?*, 276 Journal of The American Medical Association, No.19, Nov.1996 at 1580.

[2] See U.S. Sentencing Commission, Report To The Congress: Cocaine And Federal Sentencing Policy 102-103 (2002), at 54, 100, Table 17.

[3] Nkechi Taifa, *The "Crack/Powder" Disparity: Can the International Race Convention Provide a Basis for Relief?* (American Constitution Society for Law and Policy, May 2006).

[4] U.S. Sentencing Commission, 2003 Sourcebook of Federal Sentencing, Table 34(2003), available at <http://www.uscc.gov/ANNRPT/2003/table34.pdf>.

[5] ACLU et al., *Caught In The Net: The Impact of Drug Policies On Women And Families* 17 (2005). (Citing Susan Boyd, *From Witches to Crack Moms: Women, Drug Law, And Policy* 208-209 (2004)).

[6] P.L. 104-193, sec.115, 42 USC 862a.

[7] P.L. 100-690, sec. 5101, 102 Stat. 4300.

[8] Human Right Watch & The Sentencing Project, *Losing The Vote: The Impact of Felony Disenfranchisement Laws In The United States* 8 (1998).

[9] Justice Policy Institute, *Cellblocks or Classrooms?: The Funding Of Higher Education And Corrections And Its Impact On African American Men* 10(2002).

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March 30, 2007

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

Dear Commissioners:

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

We the undersigned professors and scholars, representing a variety of disciplines, join to express our concern with the current federal crack and powder cocaine sentencing disparity enacted in the Anti-Drug Abuse Act of 1986. We are writing to you to support efforts to equalize sentencing for crack and powder cocaine at the current level of powder cocaine.

Currently under federal law, distribution of 5 grams of crack carries a minimum 5-year federal prison sentence, while distribution of 500 grams of powder cocaine carries the same sentence. It takes 5000 grams of powder cocaine---about 11 pounds---to trigger a 10-year sentence, while it takes only 50 grams of crack to get the same.

This disparity creates the false implication that crack is 100 times more dangerous and destructive than the powder form of the drug. Two decades of research, however, has uncovered that the effects of the two forms of cocaine are the same. A 1996 study in the Journal of the American Medical Association found that "the physiological and psychoactive effects of cocaine are similar regardless" of its form.[1]

The myths of crack babies, instant addiction, and super-violent users and traffickers---which in great part led to the 1986 Act---have been dispelled. Researchers have found that the negative effects of prenatal crack cocaine exposure are identical to the negative effects of prenatal powder cocaine exposure. Recent data also indicate that significantly less trafficking-related violence is associated with crack than was previously assumed. For example, in 2000 only 2.3% of crack offenders actively used a weapon.[2] As the Commission has established over the last 13 years, there is little rationale for disparate treatment of two forms the same drug, and no rational basis for that treatment to differ by 100 times.

The crack and powder cocaine sentencing disparity has resulted in alarmingly disproportionate incarceration rates for African Americans. African Americans comprise the overwhelming majority of those convicted for crack offenses, while the majority of those convicted for powder offenses are white.[3] This is disturbing given that whites and Hispanics make up the majority of crack users in the country. Indeed, in 2003 whites represented only 7.8% and African Americans represented more than 80% of defendants sentenced under the federal crack cocaine laws,

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despite the fact that more than 66% of crack cocaine users in the United States are white or Hispanic.[4]

Drug sentencing laws have also resulted in drastic increases in the number of women in federal prison. In 2003, more than half of the women in federal prison were there for drug offenses. African American women's incarceration rates for all crimes, largely driven by drug convictions, has increased by 800% from 1986, compared to an increase of 400% for women of all races for the same period.[5] Mandatory sentencing laws prohibit judges from considering the many reasons women are involved in or remain silent about a partner or family member's drug activity, such as domestic violence and financial dependency.

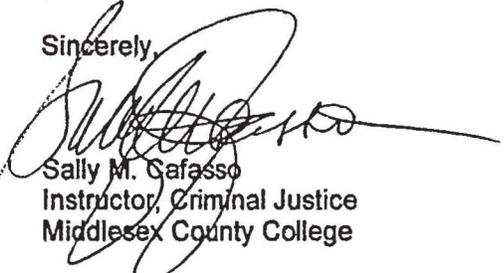
The effect of mandatory minimums, especially in the instance of simple possession or low-level involvement with crack cocaine, is devastating, not just for the accused, but for their entire family. Mandatory minimums, such as the federal crack cocaine sentencing law, result in the deterioration of communities by incarcerating parents for minor possession crimes and separating them from their children. Felony convictions prohibit previously incarcerated people from receiving social services such as welfare, food stamps,[6] and access to public housing[7] that are vital to their ability to support their families.

Felony convictions have also resulted in massive disfranchisement. Approximately 1.4 million African American males---13% of all adult African American men---are disfranchised because of felony convictions. This represents 33% of the total disfranchised population and a rate of disfranchisement that is 7 times the national average.[8]

Perhaps most jarring of all, in 2000, there were more African American men in prison and jails in this country than there were in colleges and universities across the country.[9] Standing alone, this comparison of incarceration and education reasonably leads to the conclusion that the criminal justice system is a major contributor to the disruption of the African American family and community.

During the November 2006 Commission hearing, many witnesses testified that there is no rational basis for the crack and powder cocaine sentencing disparity which continues to produce a racially disparate incidence of incarceration. The quantities of crack cocaine that trigger federal sentencing should be increased to equal the current levels for powder cocaine.

Sincerely,



Sally M. Cafasso  
Instructor, Criminal Justice  
Middlesex County College

Footnotes:

[1] D.K. Hatsukami & M.W. Fischman, /Crack Cocaine And Cocaine Hydrochloride. Are The Differences Myth of Reality?/, 276 Journal of The

American Medical Association, No.19, Nov.1996 at 1580.

[2] /See/ U.S. Sentencing Commission, Report To The Congress: Cocaine And Federal Sentencing Policy 102-103 (2002), at 54, 100, Table 17.

[3] Nkechi Taifa, /The "Crack/Powder" Disparity: Can the International Race Convention Provide a Basis for Relief?/ (American Constitution Society for Law and Policy, May 2006).

[4] U.S. Sentencing Commission, 2003 Sourcebook of Federal Sentencing, Table 34(2003), available at <http://www.ussc.gov/ANNRPT/2003/table34.pdf>.

[5] ACLU et al., /Caught In The Net: The Impact of Drug Policies On Women And Families/ 17 (2005). (Citing Susan Boyd, /From Witches to Crack Moms: Women, Drug Law, And Policy/ 208-209 (2004)).

[6] P.L. 104-193, sec.115, 42 USC 862a.

[7] P.L. 100-690, sec. 5101, 102 Stat. 4300.

[8] Human Right Watch & The Sentencing Project, /Losing The Vote: The Impact of Felony Disenfranchisement Laws In The United States/ 8 (1998).

[9] Justice Policy Institute, /Cellblocks or Classrooms?: The Funding Of Higher Education And Corrections And Its Impact On African American Men/ 10(2002).



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Honorable Paul Cassell, Chair

March 16, 2007

Honorable Ricardo H. Hinojosa, Chair  
United States Sentencing Commission  
One Columbus Circle, N.E.  
Suite 2-500, South Lobby  
Washington, D.C. 20002-8002

Re: Comments on Sentencing Commission Amendments: Incorporation of Mandatory Minimum Terms of Imprisonment created or increased by the Adam Walsh Child Protection Act of 2006

Dear Chairman Hinojosa,

The Criminal Law Committee of the Judicial Conference is pleased to respond to the U.S. Sentencing Commission's Notice of Proposed Amendments, Request for Public Comment, and Notice of Public Hearings for the amendment cycle ending May 1, 2007.<sup>1</sup> While the Committee recognizes that the Commission is considering several important revisions to the guidelines, we would like to focus on one issue that we believe impacts the fair administration of justice. Specifically, the Committee believes that when the Commission is promulgating base offense levels for guidelines used for offenses with mandatory minimums, the Commission should set the base offense level irrespective of the mandatory minimum term of imprisonment that may be imposed by statute.

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<sup>1</sup> 72 Fed. Reg. 4372-4398 (Jan. 30, 2007).

On July 27, 2006, the President signed the Adam Walsh Child Protection and Safety Act of 2006 into law.<sup>2</sup> Among the many provisions in the Act were several new or increased mandatory minimum terms of imprisonment. The Commission has offered four options to harmonize the new and enhanced mandatory penalties with the base offense levels of the guideline system:

First, the Commission can set the base offense level to correspond to the first offense level on the sentencing table with a guideline range in excess of the mandatory minimum. Historically, this is the approach the Commission has taken with respect to drug offenses. For example, a 10-year mandatory minimum would correspond to a base offense level of 32 (121 - 151 months).

Second, the Commission can set the base offense level such that the guideline range is the first on the sentencing table to include the mandatory minimum term of imprisonment at any point within the range. Under this approach, a 10-year mandatory minimum would correspond to a base offense level of 31 (108 - 135 months).

Third, the Commission could set the base offense level such that the corresponding guideline range is lower than the mandatory minimum term of imprisonment but then anticipate that certain frequently applied specific offense characteristics would increase the offense level and corresponding guideline range to encompass the mandatory minimum. The Commission took this approach in 2004 when it implemented the PROTECT Act.

Fourth, the Commission could decide not to change the base offense levels and allow §5G1.1(b) to operate. Section 5G1.1(b) provides that if a mandatory minimum term of imprisonment is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence.<sup>3</sup>

The Criminal Law Committee has considered each of the options offered by the Commission, and believes that Option Four, with a slight modification, is the preferred method to employ when promulgating guidelines to be used in conjunction with mandatory minimum terms of imprisonment. The Committee believes that the Commission should set the base offense level, irrespective of the mandatory minimum, and furthermore encourages the Commission to review each base offense level affected by the Adam Walsh Child Protection and Safety Act of 2006 to ensure that, in the Commission's own expert opinion, the levels adequately address the seriousness of the offenses.

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<sup>2</sup> Public Law No. 109-248 (July 27, 2006).

<sup>3</sup> 72 Fed. Reg. 4382 (Jan. 30, 2007).

The Judicial Conference has a long history of opposing mandatory minimum terms of imprisonment.<sup>4</sup> The basis of the Conference's position is that not only do mandatory minimums unnecessarily limit judicial discretion, but that they interfere with the operation of the Sentencing Reform Act and may, in fact, create unwarranted sentencing disparity.<sup>5</sup> The Conference supports the Sentencing Commission's role as an independent commission in the judicial branch charged with establishing sentencing policies for the federal criminal justice system.<sup>6</sup> The Conference, like the Commission, has opposed efforts by the Congress to directly amend the sentencing guidelines, and favors allowing the Commission to amend the guidelines based on its own expert opinion.<sup>7</sup> While the Commission must respect the intent of Congress when promulgating guidelines, the Conference believes that the Commission is also obligated to make an independent assessment of what the appropriate sentence should be. For these reasons, the Committee does not support Options One or Two.

Likewise, the Committee can not support Option Three. Although the Commission does not propose to set the base offense level to correspond to the mandatory minimum term of imprisonment, the Commission explains that the intent is to still arrive at a guideline range at or above the mandatory minimum term of imprisonment by combining the base offense level with several frequently anticipated specific offense characteristics. The Commission has noted that this was the method used to promulgate guideline amendments in 2004, following the passage of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (the PROTECT Act).<sup>8</sup> However, in a March 8, 2004, letter, then Committee Chair, Hon. Sim Lake, informed the Commission that the Committee opposed such an approach. While the Committee

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<sup>4</sup> See, e.g., JCUS-SEP 53, p. 28; JCUS-SEP 61, p. 98; JCUS-MAR 62, p. 22; JCUS-MAR 65, p. 20; JCUS-SEP 67, p. 79; JCUS-OCT 71, p. 40; JCUS-APR 76, p. 10; JCUS-SEP 81, p. 90; JCUS-MAR 90, p. 16; JCUS-SEP 90, p. 62; JCUS-SEP 91, pp. 45, 56; JCUS-MAR 93, p. 13.

<sup>5</sup> See JCUS-MAR 90, p. 16 (paraphrasing the recommendation of the Criminal Law Committee to "reconsider the wisdom of mandatory minimum sentencing statutes and restructure them in such a way that the Sentencing Commission may uniformly establish guidelines for all criminal statutes in order to avoid unwarranted sentencing disparity" as contemplated by the Sentencing Reform Act); see also Speech of Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited* (Nov. 18, 1998), reprinted at 11 FED. SENT. REP. 180 (1999):

[S]tatutory mandatory sentences prevent the Commission from carrying out its basic, congressionally mandated task: the development, in part through research, of a rational, coherent set of punishments.... Every system, after all, needs some kind of escape valve for unusual cases.... For this reason, the Guideline system is a stronger, more effective sentencing system in practice. In sum, Congress, in simultaneously requiring Guideline sentencing and mandatory minimum sentencing, is riding two different horses. And those horses, in terms of coherence, fairness, and effectiveness, are traveling in opposite directions. [In my view, Congress should] abolish mandatory minimums altogether.

*Id.* at 184-85.

<sup>6</sup> 28 U.S.C. § 991.

<sup>7</sup> JCUS-SEP 03, pp. 5-6

<sup>8</sup> Public Law No. 108-21.

acknowledged the need to address proportionality concerns as a result of the PROTECT Act's many mandatory minimum provisions and direct amendments, the Committee stated that it believed that "the goal of proportionality should not become a one-way ratchet for increasing sentences."<sup>9</sup> The Commission should not feel obligated to follow the approach it used following the enactment of the PROTECT Act since even Congress contemplated the need to revisit the implementation of the Act after some time.<sup>10</sup>

It is the view of the Criminal Law Committee that Option Four represents the best approach to harmonizing what are essentially two competing approaches to criminal sentencing (i.e., a matrix of a comprehensive sentencing guideline system and a collection of powerful but indiscriminate blunderbuss of mandatory minimum sentences). Where mandatory minimum sentences are applicable, they must be imposed, of course, thereby trumping the guideline system. But it is the view of the Judicial Conference that mandatory minimum sentences are less prudent and less efficient than guideline sentencing,<sup>11</sup> and that a system of sentencing guidelines, developed and promulgated by the expert Commission, should remain the foundation of punishment in the federal system. The guideline system should operate as the principal means of establishing criminal penalties for violations of federal law, and the Sentencing Reform Act's principles of parity, proportionality, and parsimony should be observed wherever possible. Thus, Option Four appears to best preserve the primacy of the guidelines as a coherent system, and to avoid injustices that may stem from efforts to engraft meaningful guidelines upon a framework of mandatory minimum sentences.

There is another rationale for establishing meaningful base offense levels without keying these to applicable mandatory minimum sentences: the need to provide meaningful benchmarks for cases in which mandatory minimum penalties do not apply. Setting the base offense level at or near the guideline range that includes the mandatory minimum, as is often seen in drug cases, often leaves the court without guidance on what the appropriate guideline range should be in cases where the mandatory minimum term does not apply. For example, for mandatory minimum offenses covered by §2D1.1, the Commission has set the base offense level, as determined by the drug quantity table, so that the resulting offense level meets or exceeds the mandatory minimum; however, in cases where either §§5K1.1 or 5C1.2 apply, the courts are left with little guidance on what the appropriate sentence should be. If the Commission were to independently set the base offense level to reflect the seriousness of the offense, in its own expert opinion and irrespective of the mandatory minimum term of imprisonment, then the courts would have some benchmark to use when the mandatory minimum would not apply.

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<sup>9</sup> Letter from Hon. Sim Lake, Chair of the Judicial Conference Committee on Criminal Law to Members of the Sentencing Commission, March 8, 2004.

<sup>10</sup> See, Public Law No. 108-21, Title IV, § 401(j)(2), authorizing the Commission to promulgate amendments after May 1, 2005, to certain sections of the sentencing guidelines revised by the PROTECT Act.

<sup>11</sup> See, JCUS-APR 76, p. 10; JCUS-SEP 81, pp. 90, 93.