

Judge Patti B. Saris, Chair  
United States Sentencing Commission  
One Columbus Circle, N.E.  
Suite 2-500, South Lobby  
Washington, D.C. 20002-8002



March 17, 2011

**RE: Public Comment on Permanent Amendment: Fair Sentencing Act of 2010 and the Reduction of Federal Drug Guidelines by Two Base Offense Levels**

Dear Judge Saris,

The Drug Policy Alliance, the nation's leading organization advocating alternatives to the failed war on drugs, appreciates this opportunity to comment on the amendment promulgated in response to Section 8 of the Fair Sentencing Act of 2010, Pub. L. 111-120 ("Fair Sentencing Act" or "FSA"). This amendment, effective November 1, 2010, made a number of substantive changes to § 2D1.1, including changes to the Drug Quantity Table for offenses involving cocaine base (crack cocaine), new enhancements to account for certain aggravating factors, and new reductions to account for certain mitigating factors. This letter will address two specific issues: (1) whether to permanently set the base offense levels for crack cocaine quantities at 26 and 32, using the new drug quantities established in response to the permanent adoption of the FSA; and (2) whether to permanently reduce all federal drug sentencing guidelines by two base offense levels.

Section 2 of the FSA increased the quantity thresholds associated with five- and ten-year mandatory minimum penalties for crack cocaine to 28 and 280 grams, respectively. The emergency amendment raised the base offense levels for crack cocaine so that the statutory minimum penalties correspond to levels 26 and 32.<sup>1</sup> The Commission has asked whether these base offense levels should be permanently set (the "level 26 option"). We strongly urge that the base offense levels be returned to the thresholds established under Amendment 706, promulgated by the Commission in 2007, in which the statutory minimum penalties for crack cocaine corresponded to levels 24 and 30 (the "level 24 option").

The Drug Policy Alliance also supports the reduction of all federal drug sentencing guidelines by two base offense levels. Understandably, if the Commission were to readopt the level 24 option for crack cocaine offenders, it would create a mathematical inconsistency between the base offense levels for quantities that trigger the statutory minimums for these individuals and all other drug offenders. We do not believe that a desire for consistent ratios across drug offenses is a compelling consideration upon which to reject the level 24 option adopted for crack cocaine offenders. However, if the Commission believes that consistent ratios are preferable, reducing all drug sentencing guidelines by two base offense levels would achieve this objective, as well as ensure greater proportionality and equity in sentencing across the board.

**I. The Commission should restore the base offense levels for crack offenders to the standards established in Amendment 706 (the level 24 option), using the new quantities established under the FSA**

The Commission strongly urged Congress to repair the sentencing disparity between crack and powder cocaine four separate times before finally acting on its own and promulgating Amendment 706.<sup>2</sup> The FSA should operate to further advance the objectives of Amendment 706. Furthermore, neither Congress nor the FSA require that the Commission set the base offense levels at 26 and 32. The level 24 option is not only preferable, it is necessary in order to alleviate the unconscionable consequences that necessitated the passage of the FSA.

The level 26 option is at odds with the fundamental objectives of the FSA. The legislative history of the Act reveals that the goals of the statute are to (1) ensure greater proportionality between the nature of the crime and the imposed sentence<sup>3</sup>; (2) reduce the over-incarceration of lower-level offenders<sup>4</sup>; and (3) create greater equity within, and greater credibility for, the criminal justice system.<sup>5</sup>

In order to effectively meet these goals, the Commission should reset the base offense levels that trigger the statutory minimums for crack offenders at levels 24 and 30. This would ensure greater proportionality and fairness in sentencing, better mitigate the racial injustices that are maintained and exacerbated, and will continue to be so, as long as a disparity remains, and result in far more cost savings to taxpayers than if the Commission were to adopt the level 26 option.

It makes no more sense to raise the base offense levels for crack offenders that trigger the statutory minimums from level 24 to level 26 than it does for the Commission to lower the triggering quantities of powder cocaine as a means of reducing sentencing disparities between the two substances. Furthermore

**A. The level 24 option will ensure greater proportionality between the seriousness of the crime and the sentence imposed**

The original 100-to-1 sentencing disparity, enacted in 1986 at the height of drug war hysteria, was based largely on assumptions that crack was more dangerous than powder cocaine, that it was instantly addictive, and that it was more likely to be associated with violent behavior.<sup>6</sup> Since then, extensive scientific, medical, and legal research has shown that these beliefs were not informed by sound data, were exaggerated, or were wholly fabricated.<sup>7</sup> In both the 2002 and 2007 Commission reports to Congress on cocaine and federal sentencing, the Commission found that penalties for crack overstated the harmfulness of the drug when compared to powder cocaine, as well as the seriousness of the offenses that triggered the statutory minimums.<sup>8</sup>

Base offense levels and statutory minimums in general are inherently flawed to begin with, as they place too much emphasis on the quantity of drugs and not enough on the circumstances of the offense when determining the length of sentence. It is well-accepted now that drug quantity does not indicate offense seriousness, as evidenced by the failure of minimum sentences to apprehend and incarcerate high-level drug “kingpins.” According to the Commission, 55 percent of federal cocaine defendants are low-level offenders, such as street sellers, and only 1.8 percent are classified as high-level dealers or importers.<sup>9</sup> The practical experiences of law enforcement officials confirm that statutory minimums and base offense levels with low triggering quantities for crack cocaine result in the arrest of low-level, street sellers who are on the periphery of the drug trade.<sup>10</sup>

In light of this evidence, permanently adopting the level 26 option would represent a step backward in crafting a set of guidelines which recommend that sentences be “sufficient, but not greater than necessary,” in compliance with the statutory principles of sentencing under 18 U.S.C. § 3553(a)(2). Although the FSA commendably raised the crack cocaine quantities necessary to trigger minimum sentences, these thresholds continue to be set far lower than quantities of powder cocaine that trigger the same penalties. The disparate impact still caused by the new 18:1 ratio should be minimized as much as possible. Since the core intent of the FSA was to decrease the number of lower-level offenders receiving significant sentences under the 2007 Amendment, the base offense level should be set so as to reduce the average crack cocaine sentences to the greatest extent possible in accordance with the legislation—namely, the level 24 option.

Furthermore, the level 26 option sets the guidelines for drug quantities that trigger mandatory minimum sentences *above* the statutory minimum. For example, 28 grams of cocaine base triggers a five year mandatory minimum, while that same quantity triggers a guideline range of 63-78 months under base offense level 26. This is problematic for several reasons. Mandatory minimum sentences set harsh penalties that take into account the most serious instance of a crime. They are used to convey the notion that Congress is “tough” on a particular type of crime and make it impossible for a judge to consider a defendant’s mitigating role in an offense. Greater drug amounts, criminal history, or other aggravating factors push the guideline ranges even further above the statutory requirements.

In addition, basing offense levels solely on quantity neglects culpability, as in the case of an offender whose sole job is to transport a large quantity of drugs that is ultimately controlled by others. The few mitigating adjustments that are available in the guidelines, as well as the additional ones promulgated under the emergency amendment to the FSA, do not provide enough relief to enough defendants, as evidenced by this almost 25-year-long practice of over-incarcerating primarily minority, nonviolent drug offenders.

The level 26 option is also unnecessary given the additional penalty enhancements to account for certain aggravating factors promulgated under the Commission’s amendment. These standards require an increase in 2 base offense levels if the defendant used violence, bribed a law enforcement official in connection with a drug trafficking offense, maintained an establishment for the manufacture of a controlled substance, or was an organizer or leader of a drug trafficking operation. These enhancements will ensure that more culpable offenders are held accountable for their actions, without promoting an over-reliance on high threshold quantities.

Restoring the level 24 option for quantities of crack cocaine that trigger the statutory minimum would bring the guidelines into greater conformity with these minimums (e.g. 28 grams of cocaine base would trigger a guideline range of 51-63 months, which incorporates the mandatory sentence of five years for that same quantity). It will also allow judges to better account for culpability in sentencing. They will be able to hold the more responsible offenders accountable through the enhancements available under the guidelines, and also ensure that those who had a lesser role in an offense are not automatically exposed to a high guideline range.

**B. The level 24 option would best alleviate the severe over-crowding in the federal prison system**

High thresholds based solely on drug quantity also unnecessarily contribute to severe prison overcrowding. Over the past twenty years the U.S. prison population has grown at an unprecedented rate, driven by the overuse of incarceration for nonviolent drug offenses, high guideline ranges, and strict statutory minimums. This country now has the largest prison population both numerically and per capita in the world; while we account for only 5 percent of the world's population, we hold 25 percent of the world's prisoners.<sup>11</sup> According to the Bureau of Justice Statistics, nearly 2.3 million people are incarcerated in the United States<sup>12</sup>; this means that one in one hundred adults is now behind bars.<sup>13</sup> Even this Commission has found that higher offense levels for drug traffickers are not correlated with increased risk of recidivism,<sup>14</sup> and that modest increases in length of stay have little to no impact on recidivism or aggregate crime rates.<sup>15</sup>

The quantity thresholds and penalties in the mandatory minimum statutes, and their linkage with the sentencing guidelines, are the primary cause of the severe overcrowding the Bureau of Prisons now faces.<sup>16</sup> The level 24 option would best promote reductions in prison population, thereby advancing the FSA's goal to alleviate the over-incarceration of low-level, nonviolent drug offenders.<sup>17</sup> For example, if the level 24 option were adopted, an estimated total of 5,874 prison beds would be saved within 10 years after the effective date.<sup>18</sup> Under the level 26 option, only 3,826 prison beds would be saved within that same time period.<sup>19</sup>

**C. The level 24 option will best promote fundamental fairness in sentencing**

Unfortunately, if the Commission permanently adopts the level 26 option, many crack defendants will see no change in their length of sentence, frustrating the impact of the FSA. For example, defendants charged with trafficking in quantities between 28 and 35 grams, 280 and 499 grams and 840 grams and 1.49 kilograms do not receive a different sentence under the November 1, 2010 temporary amendment. In addition, some of these individuals may qualify for new enhancements established under the FSA—the cumulative effect of the Act for these individuals would be to increase their sentences above what they would have been before the Act's passage.

It is more than fair to assume that Congress was aware the Commission had lowered the base offense level for crack cocaine offenders from 26 to 24 in 2007 when considering the passage of the Fair Sentencing Act. Given that the primary purpose of the FSA was to reduce the sentencing disparities between crack and other drug offenses, it seems unlikely that Congress intended for the Commission to promulgate an amendment that would produce little to no change in sentencing for a significant number of crack offenders. If maintaining mathematical consistencies in base offense levels that trigger the application of the statutory minimums were a priority for Congress, they would have addressed this issue in the FSA by mandating that the triggering quantity of crack cocaine be raised back to level 26. They did not.

**D. The level 24 option will best mitigate the racial injustices created by the crack/powder sentencing disparity**

The over-incarceration that has resulted from the disproportionate sentencing policies for crack offenses has most detrimentally impacted the African American community. Restoring the base offense levels for crack cocaine offenders to 24 and 30 would have the greatest positive impact on penalties for minorities, thereby promoting equity in the system.

In its 2007 Report the Commission found that 81.8 percent of those sentenced under federal crack cocaine laws were black, and only 8.8 percent were white.<sup>20</sup> This disparate impact is present despite consistent data showing that African Americans and whites use drugs at similar rates, have similar rates of chemical dependence, and are involved in drug sales in similar numbers.<sup>21</sup> And in an earlier report documenting this phenomenon, the Commission stated that “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.”<sup>22</sup> In fact, some critics believe that these historic levels of incarceration under the auspices of the war on drugs function as a means of socially controlling people of color, just as slavery and Jim Crow did in their time.<sup>23</sup>

A primary goal of the FSA was to address the egregious racial disparity resulting from the cocaine sentencing inconsistency that both the Commission and Congress have repeatedly identified as a problem.<sup>24</sup> Restoring the level 24 option would effect greater reductions in incarceration rates and better promote equity and racial proportionality in sentencing practices than permanently adopting the level 26 option. Even if the Commission does not reduce the base offense levels for all drugs to 24, restoring the level 24 option for crack cocaine is a distinction that is appropriate given the history and practical application of federal sentencing policy, which set low quantities for crack based on erroneous assumptions about the addictive quality of the drug and its connection with violent crime.

#### **E. The level 24 option is the most cost-effective**

The overuse of incarceration and draconian prison sentences for nonviolent drug offenses has resulted in the warehousing of thousands of nonviolent prisoners at enormous costs to taxpayers. Beginning in 1973, the prison population and imprisonment rates began to rise dramatically, fueled by stiffer sentencing and release laws, which sent more offenders to prison and kept them there for longer terms.<sup>25</sup>

Since then, the federal prison population has increased by a staggering 705 percent.<sup>26</sup> The Pew Center attributes this whopping expansion to tougher sentencing laws, more restrictive supervision policies, and the limited opportunities for diversion present in the federal system.<sup>27</sup> Although incarceration rates are growing at a lower rate than they did in the 1980s or 1990s, the United States continues to have the highest incarceration rate and the largest prison population in the world.<sup>28</sup> Federal corrections spending mirrors this growth in incarceration rates. According to the Bureau of Justice Statistics, the federal prison budget rose from \$541 million in 1981 to nearly \$5.2 billion in 2001, an 861 percent increase in just 20 years.<sup>29</sup>

In addition to the direct prison costs, there are also hidden costs to the overuse of incarceration. These costs include lost wages for those who are incarcerated, lost lifetime wages after release from prison due to diminished employment prospects, lost taxable revenue for the state and lost child support. The federal government loses a stream of money in the form of income-tax receivables for the time it incarcerates offenders, who when freed have limited abilities to secure well-paying positions that could lead to higher taxes going to the government.<sup>30</sup> In the aggregate, this translates in to billions of dollars of lost taxable revenue to the government and individuals states—money that would have gone into the federal and state economies.

If the Commission adopts the level 26 option, it will perpetuate prison overcrowding and result in higher than necessary federal spending. It costs nearly \$25,000 to incarcerate an individual in federal prison for one year—or \$250,000 for the course of one mandatory ten-year sentence. The level 26 option, which sets base offense levels above mandatory sentences, ensures

that many who are serving minimum sentences will remain incarcerated for longer than is required under statute. This will result in increased federal expenditures at a time when budgetary issues are at the forefront of Congressional concern. On the other hand, the level 24 option would result in \$46 million more in taxpayer savings than the level 26 option.<sup>31</sup>

## **II. The Sentencing Commission should reduce all federal drug guidelines by two base offense levels**

The mathematical inconsistencies created by setting the quantities of cocaine that trigger the statutory minimum at 24 and 30, and setting the triggering quantities for all other drugs at 26 and 32 is best remedied by effecting a two-level reduction for all drug offenses. Under this approach, statutory minimum penalties would fall within, rather than below, the guideline range for first-time, nonviolent offenders. If there are aggravating factors present in the commission of the offense, those defendants could be dealt with through the available enhancements under the guidelines. Changing this structure would reduce offenders' exposure to excessively lengthy guideline ranges.

The Commission reported in 1995 that it set the base offense levels for drug offenders slightly higher than necessary to pressure defendants to plead guilty or otherwise cooperate with the government.<sup>32</sup> Unfortunately, the low quantity thresholds for crack cocaine result primarily in the apprehension of small-time dealers, who, even if they wanted to cooperate, do not have any valuable information about the drug trafficking industry to provide prosecutors with. Law enforcement officials have testified to the fact that the vast majority of crack cocaine offenders prosecuted under the guidelines are street-level dealers.<sup>33</sup>

Regardless, the guidelines are an inappropriate mechanism by which to encourage cooperation. In fact, this policy has the unfortunate effect of punishing *noncooperation*, which raises a host of due process concerns and arguably inhibits a defendant's 6th Amendment right to trial. Furthermore, recent evidence belies the assumption that higher guidelines ranges encourage cooperation: the plea rate in crack cocaine cases did not fall after the downward guideline adjustment promulgated by the Commission in 2007.<sup>34</sup> And defendants who provide substantial assistance to the prosecution are eligible for sentence reductions below the mandatory minimum under 18 U.S.C. 3553(e), making the purpose of higher guideline ranges as a means to encourage cooperation superfluous.

In addition, the current guidelines do not accomplish their stated goals. For example, although the federal government spends an enormous amount of money enforcing the current sentencing regime, it does not get a safer society in return. There is no evidence that longer terms of incarceration result in safer communities and studies, including a major one conducted by the Department of Justice, have concluded that there is little – if any – connection between fluctuations in criminal activity and incarceration rates.<sup>35</sup> Furthermore, evidence is beginning to surface that imprisonment leads to greater rates of recidivism among drug offenders, when compared to probation and other alternative interventions.<sup>36</sup> These data highlight the need for the U.S. to move away from a criminal justice approach to drug policy in favor of a public health model that expands and emphasizes access to treatment and rehabilitation, such as the decriminalization regime that has proved extremely successful Portugal.<sup>37</sup>

Lengthy terms of incarceration also do not result in lower rates of drug use or drug-related crime. A 1997 report by the RAND Corporation found that mandatory minimums and long terms of incarceration reduce cocaine consumption and drug-related crime less per million taxpayer dollars spent than putting heavy users through treatment programs.<sup>38</sup> Researchers also

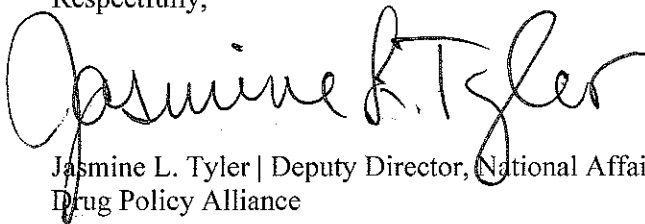
found that while imposing longer sentences only on high-level dealers has the potential to be cost-effective in reducing consumption, determining offense seriousness based solely on drug quantity is an ineffective means by which to accomplish this feat.<sup>39</sup> Additionally, high-level dealers are less likely to possess large amounts of drugs, as they are able to pay others to assume this risk.<sup>40</sup>

The current guidelines also result in the imprisonment of a vast number of nonviolent, low-level drug offenders and trigger a downward spiral of disadvantage that negatively affects those incarcerated, their families and their communities. The overuse of incarceration makes tens of thousands of United States citizens permanent economic and labor market outsiders. It increases and entrenches poverty in our most vulnerable communities.<sup>41</sup> Families suffer when a financial contributor is imprisoned. Larger communities suffer from a cumulative loss of earning power when high concentrations of returning ex-offenders are unable to procure employment.<sup>42</sup> And tragically, incarceration promotes a cycle of involvement with the criminal justice system for the children of offenders.<sup>43</sup>

As they stand now, federal drug sentences are too long and come at too high a cost to communities and taxpayers. They perpetuate a system that is not cost-effective in reducing drug consumption and drug-related crime, does not improve public safety, and destabilizes the lives of countless non-violent individuals. The passage of the FSA indicates a growing consensus among policymakers that harsh sentencing schemes are no longer the best way to address the drug issue. Adopting the level 24 option for all drugs would represent a commendable step towards mitigating the harms of a counterproductive sentencing policy that results in unconscionable side-effects.

For these reasons, and the reasons articulated in Section I, the Drug Policy Alliance strongly suggests that the Commission reduce all federal drug guidelines by two base offense levels and return to the level 24 option for crack cocaine offenses when permanently adopting the FSA. We would like to thank the Commission for its attention to this matter and the opportunity to comment.

Respectfully,

A handwritten signature in black ink that reads "Jasmine L. Tyler". The signature is written in a cursive, flowing style with a large initial "J".

Jasmine L. Tyler | Deputy Director, National Affairs  
Drug Policy Alliance

<sup>1</sup> See generally §2D1.1.

<sup>2</sup> USSC, *1995 Report to Congress: Cocaine and Federal Sentencing Policy* (February 1995) [hereinafter “1995 Commission Report”]; USSC, *1997 Report to Congress: Cocaine and Federal Sentencing Policy* (April 1997) [hereinafter “1997 Commission Report”]; USSC, *2002 Report to Congress: Cocaine and Federal Sentencing Policy* (May 2002) [hereinafter “2002 Commission Report”]; USSC, *2007 Report to Congress: Cocaine and Federal Sentencing Policy* (May 2007) [hereinafter “2007 Commission Report”]

<sup>3</sup> The purpose of the FSA is to “return the focus of Federal cocaine sentencing policy to drug kingpins, rather than street level dealers.” 155 Cong. Rec. S10,492 (daily ed. Oct. 15, 2009) (statement of Sen. Patrick Leahy).

<sup>4</sup> “For over 20 years, the ‘crack-powder’ disparity in the law has contributed to swelling prison populations without focusing on the drug kingpins. We must be smarter in our Federal drug policy.” 155 Cong. Rec. S10,492 (Oct. 15, 2009) (statement of Sen. Patrick Leahy).

<sup>5</sup> “I hope that this legislation will finally enable us to address the racial imbalance that has resulted from the cocaine sentencing disparity, as well as to make our drug laws more fair, more rational, and more consistent with our core values of justice.” 155 Cong. Rec. S10,492 (daily ed. Oct. 15, 2009) (statement of Sen. Patrick Leahy).

<sup>6</sup> 2002 Commission Report at 8, quoting The Narcotics Penalties and Enforcement Act: Markup on H.R. 5394 before the Subcomm. on Crime of the H. Comm. on the Judiciary, 99th Cong. 131 (1986) (statement of Rep. Hughes).

<sup>7</sup> Dorothy K. Hatsukami and Mirian W. Fischman, “Crack Cocaine and Cocaine Hydrochloride: Are the Differences Myth or Reality?” *Journal of the American Medical Association*, November 20, 1996 (finding analogous effects on the body for both crack and powder cocaine); Testimony of Charles Schuster before the Subcommittee on Crime and Drugs of the Senate Judiciary Committee, May 22, 2002 (stating that crack and powder cocaine produce identical physiological effects once they reach the brain) 2002 Commission Report at 32 (finding that a substantial number of both powder cocaine and crack cocaine offenses did not involve violence).

<sup>8</sup> 2002 Commission Report at v-vi; 2007 Commission Report at 7-8.

<sup>9</sup> 2007 Commission Report at 21.

<sup>10</sup> “If I arrest a guy carrying five grams of crack... I figure this is a low-level street corner drug dealer. Or maybe he’s someone carrying a lot of crack for his own personal consumption.” Testimony of John Timoney, Chief of Police of Miami Police Department, before the Subcommittee on Crime and Drugs of the Senate Judiciary Committee, April 29, 2009.

<sup>11</sup> Roy Walmsley, “World Prison Population List, 8<sup>th</sup> edition,” International Centre for Prison Studies, School of Law, King’s College London (December 2008), available at [http://www.kcl.ac.uk/depsta/law/research/icps/downloads/wpp1-8th\\_41.pdf](http://www.kcl.ac.uk/depsta/law/research/icps/downloads/wpp1-8th_41.pdf) (accessed March 10, 2011).

<sup>12</sup> Lauren E. Glaze, *Correctional Populations in the United States, 2009*, Bureau of Justice Statistics NCJ 231681 (December 2010), at 2, available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cpus09.pdf> (accessed March 10, 2011).

<sup>13</sup> The Pew Center on the States, *One in 100: Behind Bars in America 2008* (2008), at 5.

<sup>14</sup> USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 13 (demonstrating “no apparent relationship between the sentencing guideline final offense level and recidivism risk”).

<sup>15</sup> U.S. Department of Justice, *Recidivism of Prisoners Released in 1994*, Bureau of Justice Statistics, NCJ 193427 (June 2002), <http://bjs.ojp.usdoj.gov/content/pub/pdf/rpr94.pdf> (accessed March 10, 2011).

<sup>16</sup> The Sentencing Project, *The Federal Prison Population: A Statistical Analysis* (2006), available at [http://www.sentencingproject.org/doc/publications/sl\\_fedprisonpopulation.pdf](http://www.sentencingproject.org/doc/publications/sl_fedprisonpopulation.pdf); Eric Simon, *The Impact of Drug-Law Sentencing on the Federal Prison Population*, 6 Fed. Sent’g Rep. 26 (1993).

<sup>17</sup> “For over 20 years, the ‘crack-powder’ disparity in the law has contributed to swelling prison populations without focusing on the drug kingpins. We must be smarter in our Federal drug policy.” 155 Cong. Rec. S10,492 (Oct. 15, 2009) (statement of Sen. Patrick Leahy).

<sup>18</sup> USSC FY2009 Crack Cocaine Prison Impact Analysis at 1.

<sup>19</sup> *Ibid.* at 2.

<sup>20</sup> 2007 Commission Report at 15



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<sup>21</sup> Substance Abuse and Mental Health Services Administration, *Results from the 2009 National Survey on Drug Use and Health: Volume I. Summary of National Findings*, Office of Applied Studies (Washington, D.C.: September 2010), <http://oas.samhsa.gov/NSDUH/2k9NSDUH/2k9ResultsP.pdf> (accessed March 10, 2011).

<sup>22</sup> 1997 Commission Report at 8.

<sup>23</sup> Marian Wright Edelman, "The New Jim Crow: Social Control, Social Death," *The Huffington Post*, March 11, 2001, available at [http://www.huffingtonpost.com/marian-wright-edelman/the-new-jim-crow\\_b\\_834792.html?ir=Impact](http://www.huffingtonpost.com/marian-wright-edelman/the-new-jim-crow_b_834792.html?ir=Impact).

<sup>24</sup> "Certainly one of the sad ironies in this entire episode is that a bill which was characterized by some as a response to the crack epidemic in African American communities has led to racial sentencing disparities which simply cannot be ignored in any reasoned discussion of the issue. When African Americans, low-level crack defendants, represent 10 times the number of low-level white crack defendants, I don't think we can simply close our eyes." 156 Cong. Rec. H6,202 (daily ed. July 28, 2010) (statement of Rep. Daniel Lungren); "I do not believe that the 1986 Act was intended to have a disparate impact on minorities but the reality is that it does." 155 Cong. Rec. S10,492 (daily ed. Oct. 15, 2009) (statement of Sen. Arlen Specter); "I hope that this legislation will finally enable us to address the racial imbalance that has resulted from the cocaine sentencing disparity, as well as to make our drug laws more fair, more rational, and more consistent with our core values of justice." 155 Cong. Rec. S10,492 (daily ed. Oct. 15, 2009) (statement of Sen. Patrick Leahy).

<sup>25</sup> The Pew Center on the States, *Prison Count 2010* (April 2010), at 1, available at [http://www.pewcenteronthestates.org/uploadedFiles/Prison\\_Count\\_2010.pdf](http://www.pewcenteronthestates.org/uploadedFiles/Prison_Count_2010.pdf) (accessed March 10, 2011).

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*, at 5.

<sup>28</sup> Christopher Hartney, *U.S. Rates of Incarceration: A Global Perspective*, Oakland, California: The National Center on Crime and Delinquency (2006).

<sup>29</sup> Lynn Bauer and Steven D. Owens, "Justice Expenditures and Employment in the United States, 2001," U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics (Washington, DC: GPO, 2004), <http://www.ojp.usdoj.gov/bjs/pub/pdf/jeeus01.pdf>.

<sup>30</sup> Individuals with prison records are estimated to earn 30 to 40 percent less than those without a prison record and research has shown that a formerly incarcerated person will have his or her lifetime earnings reduced by approximately \$100,000 throughout the prime earning years.

<sup>31</sup> Based on the figures cited in FN 18 and 19. Calculated using Bureau of Justice statistics showing that the annual cost of incarceration for one individual is \$22,650. Bureau of Justice Statistics, *Expenditures/Employment*, [http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=16#data\\_collections](http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=16#data_collections) (accessed March 14, 2011).

<sup>32</sup> See USSC, *Special Report to the Congress: Cocaine and Federal Sentencing Policy*, ch. 7 (1995).

<sup>33</sup> "While both crack and powder offenders are concentrated in lower-level functions, crack cocaine offenders continue to be dominated by street-level dealers." Testimony of Lanny Breuer, Assistant Attorney General Criminal Division (DOJ), before the Subcommittee on Crime and Drugs of the Senate Judiciary Committee, April 29, 2009.

<sup>34</sup> United States Sentencing Commission, *Sourcebook of Federal Sentencing Statistics*, Table 38 (93.9% plea rate in crack cases in FY2009; 95.1% in 2008; 93% in 2007; 93.7% in 2006; and 91.8% in 2005).

<sup>35</sup> James Austin and John Irwin, *It's About Time. America's Imprisonment Binge*, 3<sup>rd</sup> ed. (Palo Alto, CA: Wadsworth, 2000), cited in James Austin and Tony Fabelo, *The Diminishing Returns of Increased Incarceration: A Blueprint to Improve Public Safety and Reduce Costs*, The JFA Institute (Washington, D.C.: July 2004), [http://www.nacdl.org/sl\\_docs.nsf/freeform/nationalissues/\\$FILE/BlueprintFinal.pdf](http://www.nacdl.org/sl_docs.nsf/freeform/nationalissues/$FILE/BlueprintFinal.pdf) (accessed March 10, 2011), 11; U.S. Department of Justice, *Recidivism of Prisoners Released in 1994*, Bureau of Justice Statistics, NCJ 193427 (Washington, D.C.: June 2002), 2, <http://bjs.ojp.usdoj.gov/content/pub/pdf/rpr94.pdf> (accessed March 10, 2011).

<sup>36</sup> Cassia Spohn and David Holleran, "The Effect of Imprisonment on Recidivism Rates of Felony Offenders: A Focus on Drug Offenders." *Criminology* vol. 40, no. 2 (2002): 329-357, 351.

<sup>37</sup> For a more thorough report documenting the benefits of Portuguese decriminalization, see Caitlin Hughes and Alex Stevens, "What Can We Learn From the Portuguese Decriminalization of Illicit Drugs?" *The British Journal of Criminology* vol. 50, no. 6 (2010): 999-1022. Also see Glen Greenwald, "Drug

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Decriminalization in Portugal: Lessons for Creating Fair and Successful Drug Policies,” CATO Institute (Washington, D.C.: 2009), available at [http://www.cato.org/pubs/wtpapers/greenwald\\_whitepaper.pdf](http://www.cato.org/pubs/wtpapers/greenwald_whitepaper.pdf) (accessed March 14, 2011).

<sup>38</sup> Jonathan P. Caulkins, et al., *Mandatory Minimum Sentences: Throwing Away the Key or the Taxpayers' Money?* RAND: Drug Policy Research Center (1997), 62.

<sup>39</sup> *Ibid.*, 61-62; RAND Research Briefs, *Are Mandatory Minimum Drug Sentences Cost Effective?* RB-6003 (1997), [http://www.rand.org/pubs/research\\_briefs/RB6003/index1.html](http://www.rand.org/pubs/research_briefs/RB6003/index1.html) (accessed March 10, 2011), under “Sensitivity of the Results to Changes in Assumptions.”

<sup>40</sup> RAND, *Mandatory Minimum Drug Sentences*, under “Sensitivity of the Results to Changes in Assumptions.”

<sup>41</sup> Diana R. Rose, Todd R. Clear, “Incarceration, Social Capital and Crime: Implications for Social Disorganization Theory,” *Criminology*, 36, no. 3 (August 1998), <http://onlinelibrary.wiley.com/doi/10.1111/j.1745-9125.1998.tb01255.x/abstract> (abstracted accessed January 20, 2011) (suggesting that the collateral consequences of social breakdown in communities with high incarceration levels counteract any incapacitating effects of prison).

<sup>42</sup> Dina R. Rose, Todd R. Clear, and Judith A. Ryder, *Drugs, Incarceration and Neighborhood Life: The Impact of Reintegrating Offenders into the Community*, National Criminal Justice Reference Service (Rockville, MD: 2002), <http://www.ncjrs.gov/pdffiles1/nij/grants/195164.pdf> (accessed January 20, 2011), 14.

<sup>43</sup> Joseph Murray, Carl-Gunnar Janson, and David P. Farrington, “Crime in Adult Offspring of Prisoners: A Cross-National Comparison of Two Longitudinal Studies,” *Criminal Justice and Behavior* 34, no. 1 (January 2007), <http://cjb.sagepub.com/content/34/1/133.abstract> (abstract accessed January 20, 2011): 133-149.