
UNITED STATES SENTENCING COMMISSION



WRITTEN TESTIMONY

PUBLIC HEARING
March 19, 2002

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Washington, DC

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U.S. Sentencing Commission Public Hearing
March 19, 2002
3:00 p.m.– 5:00 p.m.

PANEL ONE

William D. McColl
Director of National Affairs
Drug Policy Alliance

Laura Murphy
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American Civil Liberties Union

PANEL TWO

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PANEL FOUR

Judge Sim Lake
Chair, Subcommittee on Sentencing Guidelines
U.S. Judicial Conference Committee on Criminal Law

Federal Sentencing Laws

U.S. Sentencing Commission Testimony

Statement by William D. McColl, Director of National Affairs

Drug Policy Alliance, Washington, DC.

before the United States Sentencing Commission, March 19, 2002.

Good afternoon. Thank you for allowing Drug Policy Alliance to participate in today's hearing on federal sentencing issues, including the crack/powder cocaine sentencing disparity. That the Commission is again taking on the issue of the crack/powder disparity is a testament to its desire to ensure fairness in the criminal justice system.

In the interest of fairness, the Sentencing Commission should:

Propose statutory and guideline revisions reducing the crack/powder cocaine sentencing disparity by raising the crack thresholds as much as possible, without increasing penalties for powder cocaine;

Approve the proposed amendment eliminating the cross-reference to the drug trafficking guideline for possession of five or more grams of crack cocaine; and

Recommend to Congress that it thoroughly reexamine mandatory minimum drug sentencing laws.

Additionally, the Sentencing Commission should NOT approve the proposed amendment to consolidate the two alternative base offense levels for renting or managing an establishment where drug offenses may occur.

The Crack/Powder Disparity

The crack/powder cocaine disparity is among the greatest sources of injustice in our

criminal justice system. Not only does it impose longer sentences for a drug associated with the poor than it does for a drug associated with the more affluent, its imposition is creating enormous racial disparities in our criminal justice system. Despite relatively equal use rates of crack among white and black drug users, the most current figures provided by the U.S. Sentencing Commission indicates that of those persons sentenced to prison on crack-related offenses, 84.2 % were black, 9% were Hispanic and only 5.7% were white.

The penalties for crack cocaine are unjust not just because they are more severe than those for powder cocaine, but also because the added severity doesn't make any sense. There is no scientific evidence that justifies treating crack offenses a hundred times more severely than powder cocaine offenses, as this Commission has reported in the past. Current penalties for crack are also at odds with the organizing principle applied to other drugs, namely that five-year sentences should be reserved for serious drug traffickers and ten-year sentences reserved for major drug traffickers. Yet, as the Commission's Issues for Comment points out: "the drug quantities that trigger the five year and ten year penalties for crack cocaine offenses, however, are thought by many to be too small to be associated with a serious or major trafficker. As a result, many low level retail crack traffickers are subject to penalties that may be more appropriate for higher level traffickers."

Thus, the solution to the crack/powder disparity isn't so much about reducing or eliminating the penalty disparity between the two drugs as it is about bringing crack cocaine penalties in line with powder cocaine and other drugs. That's why the Sentencing Commission should reduce the crack/powder disparity as much as possible, without increasing penalties for powder cocaine. This is what the Commission suggested in its 1995 report and this is what the Commission should suggest again. While Congress has limited the Commission's ability to propose a 1-to-1 ratio, the Commission should raise the crack cocaine threshold to as close to the powder cocaine threshold as possible.

It is important to understand why it is wrong to lower the threshold for powder cocaine. The crack/powder disparity doesn't exist in a vacuum, it exists within an entire drug sentencing structure that is fundamentally flawed. Severe racial disparities already exist in arrests and sentencing for powder cocaine offenses; subjecting more offenders to

mandatory minimums will only intensify these disparities. Raising powder cocaine penalties will only result in more non-violent cocaine offenders, predominately Hispanic, being subjected to harsh mandatory minimums.

The real problem with the crack/powder disparity is that low-level crack offenders are more likely to be subjected to mandatory minimums than low-level powder cocaine offenders. While allowing more powder cocaine offenders to be subjected to mandatory minimums would reduce the disparity between crack and powder it would do nothing to reduce racial disparities in the criminal justice system. Nor would it do anything to alleviate the injustices inherent in mandatory minimums, which prevent judges from using the full facts of each case to determine an appropriate punishment.

As long as mandatory minimums exist they should be reserved for the highest-level drug traffickers. Raising the crack cocaine threshold adheres to this principle, applying the five and ten year minimums to higher-level offenders. Lowering the powder threshold violates this principle, subjecting more non-violent, low-level offenders to long mandatory minimums.

At this point, subjecting more non-violent offenders to mandatory minimums is the wrong way to go. It would be better to leave powder cocaine alone, while raising crack cocaine higher, and leaving a disparity between the two than to eliminate the disparity by bringing crack up and powder down. As a recent Sentencing Commission report shows, just lowering the powder five-year threshold to 400 grams could add as many as 1,400 new prison beds over the next 10 years. Lowering it to 250 grams, would add more than 4,000.

It is in the interest of justice to equalize the ratio as much as possible by raising to the greatest allowable extent the level that triggers penalties for crack cocaine, without lowering the powder thresholds.

The Commission should also approve its amendment to delink guideline penalties for possession of crack cocaine from the statutory mandatory minimums. While very few crack offenders would be affected by this change, it is a starting point for restoring justice and equality to federal sentencing

The Time is Right

The time is right for bringing crack cocaine penalties more in line with powder cocaine penalties. Public sentiment is rapidly shifting away from a punitive criminal justice approach to drugs towards a public health approach. A recent Peter Hart Research Associates poll found that by a 56% to 38% margin, voters supported eliminating "three strikes" policies and other mandatory sentencing laws, favoring letting judges choose sentences. More than three-quarters of respondents favored proposals requiring mandatory drug treatment rather than prison time for people convicted of drug possession. More than 70% favored extending the approach even to small-scale drug sellers. In general, the survey found support had grown to 65% for dealing with crime by providing job training, family counseling and youth activities, with only 29% favoring stricter sentencing, capital punishment for more crimes and fewer paroles for convicted felons.

Since 1996, 17 out of 19 statewide ballot measures in support of drug policy reform have passed, including sweeping, "treatment instead of incarceration" initiatives in Arizona and California. Voters in Florida, Michigan and Ohio will likely vote on similar "treatment instead of incarceration" measures this November. The Michigan initiative would also reform that state's draconian mandatory minimums. Last year legislatures across the country passed dozens of significant drug reform measures.

For instance, Connecticut gave judges the right to waive mandatory minimums for non-violent offenders. Indiana passed sweeping drug reform legislation, eliminating mandatory minimums for many drug offenses, reforming the state's three-strikes law, and allowing drug offenders to receive drug treatment, home detention or work release instead of prison. Louisiana passed legislation reforming their three strikes law, repealing a number of mandatory minimums, and cutting many drug sentences in half. Nevada decriminalized marijuana, turning simple possession of an ounce or less of marijuana from a felony to a misdemeanor punishable by a small fine. North Dakota eliminated mandatory minimums for certain first time drug offenses.

President Bush, drug czar John Walters, DEA administrator Asa Hutchinson, and

Attorney General have all indicated their willingness to re-examine mandatory minimums. The Administration is expected to have some proposed reforms within the next couple of months. Republican Senators Jeff Sessions and Orrin Hatch have already introduced legislation to deal with the crack/powder disparity, although by increasing penalties for powder cocaine their bill will probably do more harm than good. Democrats have indicated that they're waiting for the Sentencing Commission to make recommendations before they decide what to do.

Putting the Crack/Powder Sentencing Disparity in Its Proper Context

The crack/powder disparity is a terrible injustice that needs to be addressed immediately. As the crack/powder problem is addressed, however, it is also clear that the crack/powder problem is part of a larger problem in our criminal justice system, mandatory minimum sentencing. Although Congress intended mandatory sentences to target "king pins" and managers in drug distribution networks, only 5.5 percent of all federal crack cocaine defendants and 11 percent of federal drug defendants in general are high-level drug dealers. This is because the most culpable defendants are also the defendants who are in the best position to provide prosecutors with enough information to obtain sentence reductions - the only way to reduce a mandatory sentence. Individuals at the lowest level of the drug trade - usually those selling drugs to pay for their own addiction - don't have a lot of information to trade on. As a result, they often serve much longer sentences than drug kingpins that can testify against dozens of low-level offenders.

Mandatory sentencing has exacerbated the racial and gender disparities that are prevalent in the war on drugs. In 1986, the year Congress enacted federal mandatory drug sentences the average federal drug sentence for African Americans was 11 percent higher than for whites. Four years later, the average federal drug sentence for African Americans was 49 percent higher.

Between 1986 and 1996, the number of women in prison for drug law violations increased by 421 percent. This prompted U.S. Bureau of Prisons Director Kathleen Hawk-Sawyer to testify before Congress, "The reality is, some 70-some percent of our female population are low-level, nonviolent offenders. The fact that they have to come into prison is a

question mark for me. I think it has been an unintended consequence of the sentencing guidelines and the mandatory minimums."

While proposing statutory and guideline changes to crack penalties, the Sentencing Commission should make clear to Congress that the crack/cocaine disparity is only part of the problem. The Commission should recommend that Congress thoroughly review and address the many problems associated with mandatory minimum sentencing, including the role they play in producing racial disparities in the criminal justice system.

Protecting Public Health

Deeply disturbing is the Commission's proposed amendment to consolidate the two alternative base offense levels for renting or managing an establishment where drug offenses occur. This amendment is directed at promoters and nightclub owners that host all-night dance parties, commonly referred to as "raves" and would punish business-owners for crimes they were not involved in.

The current guidelines in this area make a clear distinction between those businessmen operating an establishment where some of their customers commit drug offenses and businessmen who operate such an establishment and participate in the drug offenses. This is a reasonable distinction. Unfortunately, the proposed amendment blurs these distinctions and subjects innocent business-owners to increased penalties.

This proposed amendment is fundamentally wrong. It is one thing to run an establishment in which one engages in drug offenses and encourages others to do so, and quite another to run an establishment where your customers engage in drug offenses in which you have no involvement. The truth is drug use goes on in nightclubs, restaurants, and in-door and out-door events all over the country, despite the best efforts of business-owners to prevent it. Ironically, the government is punishing honest business-owners for not being able to prevent their customers from using drugs, when the government can't even keep people from using drugs inside its own prisons.

Perhaps most disturbing is the unintended effects this proposed amendment could have on public health. It is a reality today that any event or club that attracts a large number of people, especially young people, is going to draw some people that will use drugs. While business-owners have devised strategies for deterring such offenses (such as hiring off-duty police officers) they have also devised strategies to reduce the harm that drug using customers may do to themselves and others. In the case of dance events that might attract Ecstasy users, many business-owners have designed “chill out” rooms, improved their ventilation systems, and made cold water available so that anyone dancing on Ecstasy can cool down. Such harm reduction efforts are essential to reducing the harms associated with Ecstasy and saving lives.

Unfortunately, implementing such harm reduction measures is taken by some prosecutors and law-enforcement officers to be a tacit acknowledgement that the owners know that some of their customers may use drugs. Since current law already leaves business-owners open to prosecution for the crimes of their customers, there is already incentive for them to avoid doing anything that might help build a prosecutor’s case that they knew people were using drugs in their establishments. That the Commission’s proposed amendment would allow business-owners to be subjected to higher penalties even if they’re not involved in any drug offenses only heightens the incentives for business owners to ignore implementing public health measures that save lives.

This proposed amendment should be rejected.

Conclusions

In conclusion, Drug Policy Alliance urges the Sentencing Commission to make recommendations that not only make sense but begin to address the fairness issues of not merely the crack vs. powder disparity but of the system of mandatory minimums in general. We urge you not to erase useful guideline distinctions that treat business-owners differently based on their level of involvement in drugs offenses that occur on their property.

Finally, we find that it is our duty to speak out about the crack cocaine vs. powder cocaine sentencing disparity. It is very likely that the disparity is going to be addressed this year by Congress. The question is how will it be addressed.

The Sentencing Commission's recommendations will be the starting point for the first meaningful debate in this country on this issue since 1995. Congress, the White House, and civil rights groups will look to the commission for guidance on these issues. Members of the Sentencing Commission are no doubt mindful about having its proposals and recommendations rebuffed by Congress as in 1995, but we urge the Commission to do the right thing. It can no longer be denied that this is an issue of Civil Rights. According to the Department of Justice 31,385 African Americans were in federal prison for drug offenses in 1998. African Americans are 45% of people incarcerated for drug offenses. More than 10,000 African Americans were there for crack cocaine violations compared to less than a thousand for Whites. These numbers are disproportionate to the size of the population, the use of drugs by the population, and the sale of drugs by the population. Many of these individuals, African American men and women, have been disenfranchised, they have lost families, access to legal sources of work and more because of the disparity. It is undeniable that the crack/powder disparity has contributed to this biased outcome. The sentencing disparity is unjust and it is immoral. It has brought untold misery to our nation's most disadvantaged communities, while failing to make these communities safer.

Although Members of Congress will ultimately enact changes that fall short of the Commission's recommendation, it is doubtful that they will enact changes that surpass the Commission's recommendations. It is this sense of importance of these recommendations, that causes us to urge the Commission to make strong, courageous recommendations that will rightfully restore a sense of fairness, and even compassion, in sentencing. The Commission had it right in 1995. The Commission has consistently understood, better than most Americans, better than Congress the indefensible effects of the disparity. Today, the Commission has an opportunity to weigh in on an issue of the utmost importance to our country. We ask the Commission to stand up and be counted, to

maintain the threshold for powder cocaine at its current level (or to raise it) and to minimize the disparity as much as possible.

Drug Policy Alliance is the nation's leading organization working to end the war on drugs and promote new drug policies based on reason, science, compassion and justice. The Alliance, headquartered in New York City, maintains offices in California, Washington, DC and New Mexico. Ethan Nadelmann is the executive director. Board members include Ira Glasser, former executive director of the American Civil Liberties Union, Mathilde Krim, Ph.D., founder of the American Foundation for AIDS Research, Rev. Edwin Sanders of Tennessee, and George Soros of the Open Society Institute.

William D. McColl, Esq., is the Director of National Affairs of Drug Policy Alliance. McColl's interests in the drug and alcoholism field began with a unique legal internship during the formation of the Baltimore City Drug Treatment Court in early 1993. He published the first major law review article on drug courts, Baltimore City's Drug Treatment Court: Theory and Practice in an Emerging Field, in the Maryland Law Review (Spring, 1996). He has additionally served as the Executive Director of the National Association of Alcoholism and Drug Abuse Counselors (NAADAC) and as a missile combat crew officer in the U.S. Air Force.

**Testimony of Laura Murphy, Director
American Civil Liberties Union Washington National Office
United States Sentencing Commission Hearings
March 19, 2002**

The American Civil Liberties Union (ACLU) appreciates this opportunity to comment upon several proposed guideline amendments. The ACLU is a nonpartisan organization of nearly 300,000 members dedicated to the defense and enhancement of civil liberties. Because protection of the Bill of Rights stands at the core of our mission, we have a particular interest in ensuring that due process and equal protection of the law, as well as the right of freedom of association and freedom from disproportionate punishment, are upheld wherever threatened. We have been involved for nearly a decade in opposing the disparity in sentencing for equal amounts of crack and powder cocaine. We urge the commission to amend the crack guidelines to equalize crack and powder cocaine sentences at the current level of powder cocaine.

The majority of this testimony will focus on the proposed amendment to the Sentencing Guidelines that addresses this concern. (Drug Amendment #8) However, we are also interested in two guideline changes relating to passage of the USA PATRIOT Act. They would change the definition of terrorism to include domestic terrorism within the sentencing guidelines (Terrorism Amendment #1 Parts A, E, F and H) and punishing hoaxes and threats to the same degree as the underlying offense (Amendment A). We urge the Commission not to include the definition of domestic terrorism passed in the PATRIOT Act as part of the definition of terrorism in the Guidelines. We also ask that the Commission not to

amend the application note regarding the punishment of threats. We believe that hoaxes and threats should not be punished to the same degree as commission of the underlying crime.

Since the Controlled Substances Act of 1970, Congress has drawn a clear distinction between the manufacture and distribution of a drug and its simple possession. Regardless of the drug, the penalty for simple possession was the same -- a maximum of one year imprisonment for a first time offender. However, in 1988, Congress enacted an amendment to the Anti-Drug Abuse Act of 1986 that created a distinction in sentencing with respect to one substance, cocaine base or "crack." This amendment set a mandatory minimum sentence of five years for a first time offender's simple possession of more than five grams of crack cocaine. The maximum one-year penalty for a first offense remained the same for possession of any other form of cocaine, including cocaine hydrochloride (powder cocaine). This is an extraordinarily harsh penalty.

Two classes of mandatory minimum sentences were established pursuant to the Anti-Drug Abuse Act of 1986. For the highest-level traffickers, a minimum 10-year sentence, without parole, was provided for participating in the manufacture, distribution or conspiracy to manufacture or distribute 5 kilograms (approximately 11 pounds) of cocaine and for mid-level cocaine distributors, a 5-year minimum was set for 500 grams (a little more than 1 pound). However, because of the enormous media attention paid to crack cocaine, the 10-year minimum was set for only 50 grams (less than 2 ounces) of crack, and the 5-year minimum was set for 5 grams (about the weight of two pennies).

Crack is cocaine. The Commission has been sympathetic to this fact for a long time, which is why it made the courageous recommendation to address this problem in 1995. Most recently, the Commission has heard testimony from experts who have re-iterated this point. During the two days of hearings in February of this year, the Commission heard testimony from Dr. Deborah Frank and Dr. Ira Chasnoff, who both made this point. The distinction lies in the manner in which the drug is ingested -- cocaine powder is usually absorbed through the nasal passages and sniffed, snorted, or freebased; whereas crack cocaine is absorbed through the lungs and smoked.

Cocaine Sentencing Has Racially Discriminatory Consequences

Unfortunately, the difference in the cocaine weights that trigger mandatory sentences for crack and powder cocaine has racially discriminatory consequences. Nationwide statistics compiled by this Commission reveal that the race of those prosecuted for crack offenses has predominately been African American. In 1992, 91.4% of those sentenced federally for crack offenses were Black, 5.3% were Hispanic and only 3.2% were White. Caucasians, however, comprised a much higher proportion of crack users: 2.4 million Caucasians (64.4%), 990,000 African Americans (26.6%), and 348,000 Hispanics (9.2%). Since 1992, the percentages have changed somewhat, but the disparities still remain. Of the total of crack cases prosecuted in 2000, 84.7% were against African-Americans, 9% were against Hispanics and 5.6% were against Whites.

The ACLU has been closely monitoring issues involving race and drug policy now for nearly a decade. On August 26, 1993, we helped convene the

first national symposium exploring the disparity in sentencing between crack and powder cocaine, entitled "Racial Bias in Cocaine Laws." This Symposium featured "The Experts Speak" panel, "The Families Speak" panel, and a Roundtable Discussion with representatives of civil rights, criminal justice, and religious organizations. The thrust of the expert's panel was that the mandatory minimum sentences for crack cocaine is not medically, scientifically or socially supportable, is highly inequitable against African Americans, and represents a national drug policy tinged with racism. I wish I could say that once these disparities were highlighted, Congress acted to change them.

Many other organizations have been intimately involved in fighting to change this disparity. The Commission heard excellent testimony from Families Against

Mandatory Minimums, the National Council of La Raza, the Leadership Conference on Civil Rights and even the American Bar Association, protesting the disparities. I hope that the Commission will once again submit to Congress proposed changes and that this time Congress will accept those changes.

Reasons for the Sentencing Differences are Unwarranted

Three reasons are often cited for the gross distinction in penalty between powder and crack cocaine: addictiveness and dangerousness, violence, and accessibility due to low cost. All three reasons fail as a justification for the 100-to-1 ratio in punishment between two methods of ingesting the same drug. The Commission has been aware for many years that there are no justifiable scientific or medical reasons to justify the disparity.

Disparate treatment in sentencing between crack and powder cocaine

users is not justified on the basis of the alleged greater dangerousness or addictiveness of crack. There is no difference in health risk. In her 10-year study of the developmental and behavioral outcomes of children exposed to powder and base cocaine in utero, Dr. Frank testified that the “the biologic thumbprints of exposure to these substances” are identical. While there are differences in the manner in which the body absorbs base versus powder cocaine, since Cocaine hydrochloride (powder) can easily be transformed into crack by combining it with baking soda and heat, it is irrational to apply a stiffer penalty between cocaine which is directly sold as crack, and cocaine which is sold in powder form but which can be treated by the consumer and easily transformed into crack.

Furthermore, the myth of the “crack baby” has been debunked. Dr. Frank testified, “There are no long-term studies, which identify any specific effects of “crack” compared to cocaine on children’s development. Based on years of careful research, we conclude that the ‘crack baby’ is a grotesque media stereotype, not a scientific diagnosis.”

There is no research to indicate that the use of crack cocaine creates more violent behavior than using powder cocaine. A comparison of powder to crack cocaine offenses indicates that in 91% of all powder cases and in 88.4% of all crack cases there is no bodily injury. Threats were present in 4.2 % of powder cases and 3.7% of crack cases. Bodily injury occurred in 1.4% of powder cases and 4.5% of crack cases and death occurred in 3.4% of both powder and crack cases. Furthermore, according to Dr. Hanson, there is “very

little research on the role that drugs of abuse, such as stimulants like cocaine or amphetamine actually play in violence.” Dr. Hanson concludes, that, “research has not been able to validate a casual link between drug use and violence.”

Stiffer penalties for crack are not justified by its cheapness and accessibility. To apply draconian penalties for first time possession of crack on the basis of its low cost discriminates on the basis of class, especially in light of the fact that powder cocaine, in spite of its higher expense, is a drug abused more in this country. Furthermore, higher penalties for crack cocaine guarantee that small time street level users will be penalized more severely than larger distributors who possess powder cocaine before it is transformed into crack. This type of drug abuse policy, which disproportionately impacts lower income people, is neither logical nor effective.

The Legislative History of the 100 to 1 Ratio is Based on a Weak Record

Eric Sterling, counsel to the House Judiciary Subcommittee on Crime participated in the enactments of the 1984 and 1986 Anti-Drug Abuse Acts. Mr. Sterling has explained how five weeks before the 1984 presidential election, with the Republicans accusing the Democrats of being “soft on crime,” the Republicans attached a “tough” crime bill onto an emergency-spending bill, which passed with 20 minutes of debate. In 1986, college basketball star Len Bias died from a drug overdose, adding to the emotionally charged situation. The Commission noted the sense of hysteria surrounding passage of the crack laws. In the 1995 Special Report, the Commission noted, “The media played a large role in creating the national sense of urgency surrounding drugs,

generally, and crack cocaine specifically. Crack cocaine was first sold in the United States in the early 1980's and began to attract media attention in 1984 and 1985. By 1986, the media coverage of crack reached frenzied proportions. Congress also took a role in promoting the crack hype by declaring October of 1986 "Crack/Cocaine Awareness Month." Politicians made hysterical and non-rational statements. Mr. Sterling spoke of Representatives filling the Congressional Record with articles of "crazed black men killing innocent people while on cocaine." Sterling quoted Senator Chiles as stating, "I doubt America can survive crack." Senator Gramm added an amendment sentencing imprisoned cocaine possessors to twice the amount of time they would have received had they possessed a grenade instead.

The fact that the disparities are not based on either a rational congressional record or a rational scientific record raises even more serious due process concerns. Fairness and rationality are touchstones of due process. Unfortunately, there is nothing fair or rational about the crack powder disparity.

Drug Policy as a Whole is Racially Biased

Many commentators have noted that the history of drug policy in the United States has been tinged with racial bias. In a recent law review article, Richard Dvorak noted that

From the first anti-drug law forbidding opium dens in San Francisco in the late 1800s to anti-crack legislation in the 1980s, race has been the driving force behind the movement to outlaw drugs. From opium to heroin, powder cocaine, marijuana, and finally crack cocaine, there has been a pattern of drug criminalization in America motivated by White fear. Those fears were based on a belief that crazed drug addicts would denigrate the White community, and the drug pushers, usually thought to be people of color, would lead vulnerable Whites on a road of crime and prostitution.

Given the underlying racial bias in drug policy, or at the very least, the perceived racial bias, the Commission must adopt a policy that is seen as fair and non-biased. Otherwise, drug policy will continue to be discredited, especially among people of color.

Efforts to Repeal the Disparity

Of course, this body made a significant effort to address the disparity in 1995 when it unanimously recommended that Congress reconsider the five-year mandatory minimum sentence for simple possession of crack and a majority of the Commissioners voted to equalize the sentences of cocaine distribution. Unfortunately, Congress blocked those recommendations. However, both before the 1995 recommendation and since then, there have been a number of legislative attempts to address the problem. On October 13, 1993, Congressman Charles Rangel (D-NY), introduced the "Crack-Cocaine Equitable Sentencing Act of 1993" (H.R. 3277). This bill would have amended the Controlled Substances Act and the Controlled Substances Import and Export Act to eliminate certain mandatory minimum penalties relating to crack cocaine offenses. For all cocaine offenses, if 500 or more grams were involved, the defendant would have received a minimum sentence of five years, and if 5 kilograms or more were involved, a minimum sentence of 10 years.

On the opposite end of the spectrum are the bills that would lower the amount for powder cocaine to trigger the 5-year mandatory sentence to equal that of crack. In 1997, Representative Solomon introduced H.R. 332 the "Powder-Crack Cocaine Penalty Equalization Act of 1997." Representative

Solomon's Bill brought the ratio of powder and crack to 1 to 1 by decreasing the amount of powder cocaine necessary to trigger mandatory sentences to the same level as crack cocaine. Representative Pascrell introduced H.R. 2229, which basically mirrored H.R. 332 but also contained a provision requiring that the DEA report annually to Congress on the number of Federal arrests for crack and powder cocaine offenses including the age, gender and race of the persons arrested and the amount of controlled substance involved in the offense.

In 1999, Senator Hatch, Chairman of the Senate Judiciary Committee, (R-UT) and Senator Abraham attached an amendment to the Bankruptcy Reform Act that would have lowered the disparity between crack and cocaine by reducing from 500 to 50 grams the amount of powder cocaine necessary to trigger the mandatory minimum, putting the ratio at 10 to 1 instead of 100 to 1. This Amendment was basically S. 260, a bill introduced by Senator Spencer Abraham (R-MI) and co-sponsored by Senators Hatch, Feinstein (D-CA) and Robb (D-VA).

The ACLU strongly opposes any measures that involve lowering the amount of powder cocaine. Cocaine sentences are already severe and increasing the number of people incarcerated for possessing small amounts of cocaine is not the answer to the problem. Additionally, any measures that decrease the amount of powder cocaine would disproportionately impact minority communities because of the disparate prosecution of powder cocaine offenses. In 2000, 17.8% of all powder cocaine defendants were white, 30.5% were black and 50.8% were Hispanics. As Charles Kamasaki, Vice-President of

the National Council of La Raza noted in his testimony before the Commission on February 25, 2002, "Latinos are significantly over-represented among those convicted of powder cocaine offenses. Lowering powder thresholds would increase average sentences by at least 14 months, with the inevitable increase in incarceration rates. In our judgment, the real-world, tangible harm produced by lowering the powder thresholds would far outweigh the abstract, symbolic value of reducing statutory sentencing ratios." The ACLU agrees with National Council of La Raza and believes that any proposals that reduce the amount of powder cocaine necessary to trigger mandatory sentences will only exacerbate the equal protection problems with cocaine policy, not solve them.

Representative Rangel (D-NY) re-introduced his original legislation in the form of H.R. 939 the "Crack-Cocaine Equitable Sentencing Act of 1999" and in 1999, Representative Waters (D-CA) introduced H.R. 1241 the "Elimination of the Crack Cocaine Disparate Sentencing Act of 1999," which mirrored the Rangel bill. And in 2001, Rep. Rangel again introduced his same legislation as H.R. 697.

Rangell/Waters and Hatch/Abrahams bills represent the two opposite extremes. Both bills eliminate the disparity between powder and crack, the first by eliminating the penalties for crack and the second by lowering the trigger amounts for powder cocaine. There have been other proposals that have suggested a variety of other ratios from 20 to 1 to 10 to 1. Current proposals suggest lowering the amount of powder cocaine from 500 to 400 and raising the amount of crack from 5 grams to 30 grams so that the disparity was 20 to 1.

The ACLU believes that the disparity in sentencing between powder and crack cocaine is irrational and unwarranted, and that, by and large, the legislature and the courts have drawn a distinction where science and medicine have concluded none exists. As such, we strongly urge this Commission to request that Congress eliminate the provisions that distinguish between the punishment for powder and crack cocaine at the quantity ratio of 100-to-1. In the face of the overwhelming statistics and the growing sentiment in Congress and the courts, this Commission must not continue to adhere to the unwarranted distinction in penalty between crack and powder cocaine. But we strongly urge the Commission not to exacerbate the problem by increasing the punishment for powder cocaine sentences.

Patriot Act

Definition of Terrorism

Section 802 of the USA PATRIOT Act amended 18 U.S.C. sec. 2331 to include a definition of domestic terrorism. The Congress defined domestic terrorism as activities that involve acts dangerous to human life that are a violation of the criminal laws of the United States or any State and appear to be intended to intimidate or coerce a civilian population, influence the policy of a government by intimidation or coercion or to affect the conduct of a government by mass destruction, assassination, or kidnapping, and occur primarily within the territorial jurisdiction of the United States. The ACLU opposed this definition before Congress and we urge the Sentencing Commission not to adopt it for sentencing purposes. The Act does not require the Commission to adopt this

definition and we urge you not to.

This definition is so broad that government could prosecute political protestors as terrorists. Any act of civil disobedience is designed to influence government policy by intimidation or coercion. A number of high-level political protests such as the protestors at Vieques Island who entered onto United States military bases to protest U.S. weapons testing, or the protestors at the World Bank and IMF meetings who have engaged in acts such as destroying property or throwing objects into large crowds or Green Peace who protest while in boats anything from nuclear weapons testing to whale hunting. All of these scenarios are arguably acts that "pose a danger to human life." The ACLU does not take the position that people who violate the law are protected under the First Amendment - people who commit civil disobedience may be prosecuted for violating whatever law they have violated. However, we do object to people who are engaged in legitimate forms of protest being characterized as terrorists. This definition is too broad and could be misused by the government to prosecute people with unpopular political beliefs.

It is notable that Congress did not create a new crime of domestic terrorism, which it could have done and at one point was considering doing.

The Commission has proposed changes to the terrorism definition in three places. First, Part E recommends adding a note to Guideline section 3A1.4 (Terrorism), which would allow for upward departure in cases of domestic terrorism. Section 2S1.1 (Money Laundering) would amend the application notes to include a new definition of terrorism that defines terrorism as "Domestic

terrorism (as defined in 18 U.S.C. sec. 2331(5)), a federal crime of terrorism (as defined in 18 U.S.C. sec. 2332(b)(g)(5)) or international terrorism (as defined in 18 U.S.C. sec. 2331(1)). And lastly, section 2L1.2 (unlawfully entering or remaining in the United States), amends the application notes section to add a definition of terrorism that mirrors the definition previously mentioned.

If the Commission wishes to amend its definition of terrorism, it does not need to adopt the one passed in the PATRIOT Act and we would urge the Commission NOT to include one general definition of terrorism that contains both sections 2331 and 2332, which is federal crime of terrorism. Besides the fact that Section 2331 is so broadly defined as to sweep in conduct that one would not traditionally think of as "terrorism," section 2331 does not create a crime, whereas section 2332 is. For sentencing purposes it is unfair to combine in one definition conduct part of which is criminal and part of which is not. Combining domestic terrorism with federal terrorism would be like including alcohol or cigarettes in a definition of dangerous substances. Those substances may in fact be dangerous, but it is not a crime for adults to consume them and therefore a person should not be penalized for doing so. Likewise, domestic terrorism might in some cases be dangerous, it is not in and of itself a crime (a person could be prosecuted for the underlying criminal offense that is contained within the definition of domestic terrorism) and a person should not be punished to the same degree as an offense that is a crime. I

Hoaxes and Threats

Section 801 of the USA PATRIOT Act created a new crime, 18 U.S.C.

sec. 1993 "Terrorist Attacks and Other Acts of Violence against Mass Transportation Systems." Proposed Guideline Amendment A incorporates this new crime. Apart from incorporating the new law, the Commission queried whether hoaxes and threats to commit crimes of mass destruction should be treated the same as if the person had committed the underlying offense. Guideline sec. 2M6.1, "Unlawful Production, Development, Acquisition, Stockpiling, Alteration, Use, Transfer, or Possession of Nuclear Material, Weapons, or Facilities, Biological Agents, Toxins, or Delivery Systems, Chemical Weapons, or Other Weapons of Mass Destruction: Attempt or Conspiracy" currently has several base offense levels. If the offense involved a threat to use one of the aforementioned weapons but did not involve any conduct evidencing an intent or ability to carry out the threat, then the offense base level is 20, whereas if the offense was committed with intent to injure the United States or aid a foreign national, then the base offense level is 42. Under current law, a person is punished twice as severely for committing the criminal offense than for threatening to do so.

The ACLU recommends that the Commission does not adopt a guideline that punishes threats to the same level as the underlying offense. The current policy of differentiating between a threat made without any evidence of intent or ability to carry out the threat, and an intentional offense, makes sense and there is no reason to change it. A person who does not have the ability to carry out a threat simply does not pose the same danger to society as a person who does. Furthermore, people who threaten such conduct but do not carry it out are

sometimes mentally ill or delusional and should be treated differently from someone who is not. The PATRIOT Act does not require that Congress treat threats and hoaxes the same as a completed offense and we recommend staying with the status quo. Additionally, Congress is currently considering a number of hoax bills that would penalize more severely terrorist hoaxes. We recommend that the Commission wait until Congress passes this new legislation before amending any guidelines addressing hoaxes or threats.

Conclusion

In conclusion, we ask the Commission to eliminate the 100 to 1 disparity in cocaine sentencing. We also ask that the Commission NOT include domestic terrorism within the definition of terrorism and that the Commission not make upward adjustments for hoaxes or threats.

Thank you for taking our views into consideration.



Written Statement of
Irwin H. Schwartz

on behalf of the
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

before the
United States Sentencing Commission

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

March 19, 2002

Irwin H. Schwartz

Irwin Schwartz, of Seattle, Washington, is President of the National Association of Criminal Defense Lawyers ("NACDL"). He is a litigator concentrating in the representation of persons and companies in federal criminal matters. After graduating from Stanford Law School in 1971, he served as a federal prosecutor and then the Federal Public Defender in the Western District of Washington.

Good afternoon. Thank you for allowing me to speak on behalf of the thousands of criminal defense lawyers who practice in the federal courts across our nation.

A 1997 survey reveals that nearly one quarter of the 54,000 drug offenders in federal prisons at that time were there because of a crack cocaine conviction.¹ By way of example, I would like to discuss the case of one woman who, that same year, began serving a twenty-four-year guideline sentence for conspiracy to distribute crack cocaine.

A single parent with two young children, Sylvia Foster always held a steady job and had no criminal record whatsoever. In the summer of 1994, Ms. Foster, who was living with her children in a modest home in Gainesville, met Melvin Singleton and began a romantic relationship that lasted approximately six months. Singleton, as it turns out, was part of a crack cocaine distribution ring. He and his cohorts began using Ms. Foster's home to cook and store crack cocaine. Ms. Foster later told the FBI and testified at trial that she was not aware that Singleton was using her home to prepare or store drugs until she found a crack cocaine "cookie" hidden under a dresser drawer. She further told the FBI and testified that when she found the "cookie" she confronted Singleton and ended the relationship.

Regardless whether one believes Ms. Foster (and the favorable results of her post-conviction polygraph examination) or the government's jailhouse informant — there was no evidence to suggest that she played anything but a minor role in the conspiracy. Indeed, Ms. Foster seems just the type of defendant envisioned by Senators Sessions (R-AL) and Hatch (R-UT) in proposing an additional two-level reduction for certain minimal participants who "receive little or no compensation from the illegal transaction, and acted on impulse, fear, friendship, or affection when he or she was otherwise unlikely to commit such an offense." S. 1874, 107th Cong. § 202 ("The Drug Sentencing Reform Act of 2001").

Despite these circumstances — which led the sentencing judge to remark "when you're in love, you're blind" and the prosecutor to bemoan the judge's lack of sentencing discretion — Ms. Foster will not see her children beyond prison walls until they are well into their adult years (her 292-month sentence means she will serve approximately 21 years). Her children, now ages 9 and 15, are being raised by their aunt in Gainesville, 150 miles from their mother's cell in FCI Tallahassee.

Drug Sentencing Has Overshadowed the Guidelines

Egregiously harsh sentences for crack cocaine offenses and stories like Ms. Foster's have provoked broad based and serious criticism of the Federal Sentencing Guidelines. Public exposure to federal sentencing laws and the guidelines has been limited, by and large, to media stories describing particular cases of injustice, and few federal defense lawyers or district court judges are without at

¹ U.S. Department of Justice, Office of Justice Programs, *Federal Drug Offenders, 1999, with Trends 1984-99* at 11 (2001).

least one story where the “tiger trap” of crack sentencing laws was “sprung on a sick kitten.”²

During the last month of President Clinton’s term of office, he pardoned twenty-three federal drug prisoners.³ At least nine (40%) of these prisoners were serving lengthy crack cocaine sentences. What the past fifteen years makes clear, however, is that we cannot rely on the fortuity of clemency to address the Guidelines’ principal failings and to assure, in any fair and comprehensive way, that federal drug sentences are appropriate to the offense and the offender. This responsibility lies with the Commission in the first instance.

Until this responsibility is fulfilled, lawyers and judges will continue explaining to defendants, parents, children, and other loved ones that unfair sentences and the human devastation wrought by them are the result of sentencing guidelines. Words cannot describe people’s anguish and confusion when they learn the draconian consequences of a federal crack conviction — often that children will reach adulthood, marital relationships will wither, and parents will grow old and die during the client’s term of imprisonment.

Racial Disparity and Public Perceptions

The problem is compounded by public perception that unfair guidelines sentences for crack cocaine are more often applied to people of color than to whites. President George W. Bush acknowledged growing public dissatisfaction with certain drug sentencing policies, commenting further that the crack/powder disparity “ought to be addressed by making sure the powder-cocaine and the crack-cocaine penalties are the same. I don’t believe we ought to be discriminatory.” Statement of President George W. Bush, *CNN Inside Politics* (CNN television broadcast, Jan. 18, 2001) (transcript on file with NACDL).

Ninety-three percent of defendants receiving the harsher penalties for crack are people of color. The average sentence for crack cocaine (119.5 months), unmatched by any other drug, is 55% higher than that for powder cocaine (77 months). This figure is all the more disturbing when one considers that 66.5% of crack defendants are street-level dealers. Five grams of crack cocaine represents approximately 10-50 doses and might sell for \$225-\$750; 500 grams of cocaine powder, which triggers the same five-year sentence, represents approximately 2500-5000 doses and might sell for \$32,500-\$50,000.⁴ When people ask us why a street-level crack dealer is punished more

² *Terrebonne v. Butler*, 848 F.2d 500, 505-507 (5th Cir. 1988).

³ See COMMUTATION, REMISSIONS, AND REPRIEVES GRANTED BY PRESIDENT CLINTON <http://www.usdoj.gov/pardon/clinton_comm.htm#2000> President Clinton’s drug sentence commutations were dramatized in the recent television movie *Guilt by Association* (Court TV television broadcast, Mar. 13, 2002) (videotape on file with Families Against Mandatory Minimums).

⁴ William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 Ariz. L. Rev. 1233, 1273 (1996). For the sake of additional comparison, the five-year

harshly than a major trafficker in wholesale quantities of powder cocaine, we can only tell them that is the way the sentencing guidelines are written.

Sentencing policies and law enforcement practices that operate in a racially disparate manner erode public confidence in our criminal justice system, particularly in minority communities. Few would question that federal crack cocaine sentences have had this effect. While supporters of the status quo argue that minority communities beset by certain drug markets favor incapacitation of drug dealers, this begs the question of sentence proportionality. Leaders from two preeminent organizations representing African-American and Hispanic persons, testified before the Commission on February 25. They expressed the view that current cocaine sentences are excessive and operate in a racially disparate manner. Through their testimony, and the submissions of others, the Commission has heard repeatedly that the crack/powder disparity is viewed as a symbol of racism in the criminal justice system. We need the Commission to tear down this symbol and to restore public confidence in the criminal justice system.

Current Crack Sentences are Irrational

As established in the Commission's 1995 report and reaffirmed at the February 2002 hearings, there is no basis — scientific or otherwise — for the current disparity. Crack and powder cocaine, simply different forms of the same drug, should carry the same penalties. Many of the supposed crack-related harms referenced by Congress in 1986 have proven false or have subsided considerably over time. For example, recent Commission data reveals that 92% of crack cases do not involve violence, 79% of crack offenders have no weapon involvement, and rarely is a weapon ever brandished or used in a crack offense.

The Correct Ratios: 1:1 and 2:1

We believe the Commission was correct in 1995 when it attempted to bring crack sentences in line with those for cocaine powder. Because the legislation rejecting a 1:1 ratio at the powder cocaine levels forecloses that well-reasoned alternative, NACDL suggests that the Commission set the ratio as close to 1:1 as possible.

One approach for determining new punishment levels for crack cocaine (within the existing quantity-driven framework) looks to the statute for guidance. It appears that Congress intended the five-year mandatory minimum sentence for mid-level dealers ("serious traffickers") and the ten-year sentence for kingpins ("major traffickers"). Thus, determining the quantities typically handled by these traffickers will yield thresholds that fulfill this congressional purpose.

According to Commission data, 253 grams is the median weight of crack cocaine attributable to those characterized as managers and supervisors. Since these roles fairly approximate the mid-level dealers targeted by the five-year mandatory minimum sentences, a 250-gram threshold makes

threshold quantity of heroin represents approximately 3500 doses that might sell for \$100,000; for ecstasy, the five-year threshold represents approximately 2500 doses that might sell for \$50,000-\$100,000.

sense and would result in a 2:1 crack/powder ratio. Also to its credit, this ratio would nearly eliminate the “inversion of penalties” phenomenon.⁵ In response to arguments for a greater differential, we note that the dosage units (500-2500 doses) and retail value (\$11,250-\$37,500) represented by this quantity of crack still pale in comparison to the doses and profit reaped by the 5-year quantities of powder cocaine and other drugs.

Congress did not flatly prohibit the use of a 1:1 ratio for every category of offender, and NACDL encourages the Commission to consider a hybrid of the 2:1 and the 1:1 ratios. Specifically, we offer the suggestion of a 1:1 ratio for street-level dealers (those distributing less than 50 grams, according to Commission data) and a 2:1 ratio for mid- and high-level dealers. This is consistent with the public law rejecting the 1:1 ratio, which states that “the sentence imposed for trafficking in a quantity of crack cocaine should *generally* exceed the sentence imposed for trafficking in a like quantity of powder cocaine.”

Increasing Powder Cocaine Sentences is the Wrong Approach

NACDL opposes any proposal to reduce the disparity by increasing powder cocaine penalties. Raising already harsh powder cocaine sentencing levels is no answer to the problem of disproportionate and discriminatory crack sentences.

There is no credible evidence that powder cocaine penalties, which are generally much longer than heroin or marijuana sentences, are insufficiently harsh. Regarding congressional purposes, the current 5- and 10-year thresholds for powder cocaine are low enough to accomplish their intended goals; indeed, under the original 1986 House bill, it would have taken 1000 grams to trigger the five-year sentence intended for mid-level distributors.

Amendment vs. Recommendation

We join the American Bar Association in support of a guidelines amendment rather than a recommendation to Congress. As the Commission is well aware, the 1997 report offered a recommendation. Four years later, roughly 20,000 more crack offenders have been sentenced based on the same dreadful crack guidelines. We can ill afford to let this problem fester for another five years. We need the Commission to use its expertise and to demonstrate its leadership to achieve the stated goals of guidelines sentencing.

We believe that election-year concerns are overstated and that Congress will not react negatively to an amendment. As evidence that the political landscape has shifted, we note that two prominent law-and-order Republicans, Senators Sessions (R-AL) and Hatch (R-UT), chose this time to offer a bill that would lower sentences for crack offenders and others. Politicians understand the problem better than they did in 1995; some may even see the political advantages of supporting reform as outweighing any disadvantages. This is an opportunity — perhaps just a window of

⁵ Currently, the 500 grams of cocaine that can send one powder defendant to prison for five years can be distributed to eighty-nine street dealers who, if they convert it to crack, could make enough crack to trigger the five-year mandatory minimum sentence for each defendant.

opportunity — that the Commission should not waste.

The past few years have witnessed a significant decline in many of the aggravating circumstances believed to be associated with crack. Because the majority of crack cases do not involve aggravating circumstances, it makes no sense to incorporate these factors into the Drug Quantity Table. And because the existing guideline enhancements, in concert with the applicable statutes, more than adequately punish such offense aggravators (e.g., weapon involvement or prior criminal conduct), there is no need for new Specific Offense Characteristics. On the other hand, there is a tremendous need for guidelines that would diminish the over-emphasis given to drug quantity in sentencing minor participants and first-time offenders. NACDL supports the proposed amendment that would cap the base offense level at 24 for minor and minimal participants and the proposed amendment that would reduce the sentences of safety-valve-eligible defendants with no criminal history.

Concluding Comments Regarding Terrorism Guidelines

NACDL has submitted detailed and comprehensive comments regarding the proposed terrorism guidelines, but I would like to conclude by highlighting one point. As the Anti-Drug Abuse Act of 1986 and its effect on the Sentencing Guidelines demonstrate, crisis legislation poses a challenge to rational sentencing policies. While there is a tendency to view terrorism as *sui generis*, just like every other offense that is punished under the guidelines, terrorism-related offenses encompass a wide range of conduct.

For example, material support of terrorism might involve donations to a designated terrorist organization to acquire weapons or, quite dissimilarly, food and medicine for refugees. While both donations violate the material support statute, the vastly different offense characteristics call for different sentencing outcomes. We urge the Commission to improve these proposed guideline enhancements so as to reserve the most serious penalties for offenses that pose the greatest risk to our national security. Whether the offense is drug- or terrorism-related, one-size-fits-all sentencing has no place in our courts.

Questioning Current Sentencing Policies

- “And I think a lot of people are coming to the realization that maybe long minimum sentences for the first-time users may not be the best way to occupy jail space and/or heal people from their disease. And I'm willing to look at that. . . . [The crack-powder disparity] ought to be addressed by making sure the powder-cocaine and the crack-cocaine penalties are the same. I don't believe we ought to be discriminatory.” Statement of President George W. Bush, *CNN Inside Politics* (CNN television broadcast, Jan. 18, 2001) (transcript on file with NACDL).
- “I believe it is time for us to look at the drug guidelines and the penalties we are imposing. . . . Judges think this minimum mandatory [for crack cocaine] which has the effect of driving up all of the sentencing guidelines is too tough.” Cong. Rec. S14452 (Nov. 10, 1999) (statement of Senator Sessions).
- “Far from saving the inner cities, our barbaric crack penalties are only adding to the decimation of inner-city youth.” Stuart Taylor Jr., *Courage, Cowardice on Drug Sentencing*, *Legal Times*, April 24, 1995, at 27.
- “Too many lives are unfairly ruined by Draconian sentences that do not achieve the law-enforcement objectives — primarily deterrence — supposedly promoted by them. . . . The way to mitigate the unfairness of the crack-cocaine standards is not to toughen the powder-cocaine sentencing rules; it is to take the more courageous step of ameliorating the crack-sentencing scheme.” Michael Bromwich (former Inspector General of the Justice Department), *Put A Stop to Savage Sentencing*, *Wash. Post*, Nov. 22, 1999, at A23.
- “Too often, our drug laws result in the long-term imprisonment of minor dealers or persons only marginally involved in the drug trade.” John R. Dunne (former Assistant Attorney General under President George Bush), *Paying For Failed Drug Laws*, *Wash. Post*, Aug. 12, 1999.

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NACDL is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. A professional bar association founded in 1958, NACDL's 10,000 direct members — and 80 state and local affiliate organizations with another 28,000 members — include private criminal defense lawyers, public defenders, active-duty U.S. military defense counsel, law professors and judges committed to preserving fairness within America's criminal justice system.



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March 13, 2002

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To the Chair and Members of the U.S. Sentencing Commission:

The Committee on Criminal Law respectfully submits comments to the proposed January 17, 2002, guideline amendments.

Proposed Amendment 8 (Drugs)

Mitigating Role Adjustment (pages 65 and 66 of Proposed Amendments). The Committee believes that the maximum base offense level for minimal participants who do not receive enhancement for aggravating conduct such as weapons involvement or bodily injury should be 26 and that the maximum base offense level for minor participants who do not receive enhancement for aggravated conduct such as weapons involvement or bodily injury should be 32.

The Commission invites comments whether it should address three circuit conflicts concerning mitigating role adjustments. (The circuit conflicts are described at pages 82 and 83.) The Committee does not believe that the Commission should attempt to resolve these conflicts. The Committee believes that the Commission should adopt a comment noting the conflicts and stating that no hard and fast rule should be applied and that the

district court must make its assessment based on all the facts before it. Determining a defendant's role in the offense is a fact-intensive determination, and the Committee believes the Commission would be better served by not trying to add additional criteria for district judges to apply, but instead leaving this determination to the sound judgment of the district judges.

Prior Criminal Conduct (pages 68 and 72). The Commission proposes amending § 2D1.1(b) by adding a subsection (8) that would provide a two- or four-level increase in the offense level if a defendant had a prior conviction of a crime of violence or a drug offense. Because most prior convictions are already counted in the defendant's criminal history category, this proposed change is unnecessary. Although this change could be justified in cases where prior convictions are not counted because of their age, the Committee does not believe that these cases, which are probably few in number, warrant adding Chapter Four criteria into Chapter Two.

Reduction for No Prior Convictions. The Committee is opposed to amending the guidelines to provide a two-level reduction in the offense level for a defendant who has no prior criminal convictions. A defendant who qualifies for the "safety valve" already receives a two-level reduction. Sentencing judges can and do consider a defendant's lack of any prior conviction in determining where in the guideline range to sentence him. Because that discretionary ability already affords sentencing judges a basis for distinguishing among defendants who fall within Criminal History Category I, this proposed change is not needed.

Simple Possession of Crack Cocaine (page 70). The Committee supports the deletion of the cross-reference in § 2D2.1(b) for simple possession of crack cocaine.

Crack Cocaine Sentences (pages 79 and 80). The Committee strongly endorses dramatically lowering the current 100-to-1 crack-to-powder cocaine ratio without increasing the guideline for powder cocaine, and the Committee will carefully consider any proposed alternative crack cocaine guideline that the Commission proposes.

The Committee is concerned, however, that without legislation reducing the minimum sentences for crack cocaine any proposed guideline amendment could drastically reduce proportionality and significantly increase disparity because the current statutory mandatory minimums, which apply the 100-to-1 statutory ratio, would create enormous "cliffs" between those to whom a mandatory minimums apply and those to whom they do not. The Committee is also mindful that the Commission was directed to report to Congress on the different penalty levels that apply to different forms of cocaine and to include any recommendations the Commission may have for retention or modification of those differences in penalty levels. That Special Report to Congress: Cocaine and Federal Sentencing Policy, was submitted in February of 1995, and while it may be dated in some respects, it may be useful to revisit the research and empirical data as the Commission considers this important issue.

Revised Proposed Amendment Nine - Alternatives to Imprisonment

The Committee favors Option One, which would amend the sentencing table by expanding Zone B to include current Zone C. This option eliminates the complexity of having four zones and affords the sentencing judge adequate discretion to sentence defendants who would now come within expanded Zone B.

Alternatively, the Committee would support proposed Option Two.

Proposed Amendment Ten – Discharged Terms of Imprisonment (page 102)

As the Committee explained in its December 20, 2001, letter to the Commission, the Committee supports amending § 5G1.3 to provide, to the extent practicable, that a defendant should be given credit for time served, even if his prior sentence has been discharged. Instead of the proposed structured downward departure suggested in this amendment, the Committee would prefer merely amending the commentary to § 5G1.3 to state that in the case of a discharged term of imprisonment that arose from conduct involved in the instant offense, a sentencing judge may consider a downward departure limited to the increment in the guideline sentence that resulted from including in the offense level conduct for which the defendant has already served time. The limited number of cases in which such a departure would be necessary militates against requiring a more complex structure for departure that would have to be mastered by probation officers and district judges.

The members of the Committee appreciate the opportunity to comment on these proposed guideline amendments. As Chair of the Sentencing Guideline Subcommittee, I look forward to meeting with the Commission by videoconference on March 19, 2002, at 4:30 p.m. (Eastern Time) and will be prepared to answer any questions about these comments and to discuss any other matters of interest with the Commission.

Yours very truly,



Sim Lake
Chair
Sentencing Guideline Subcommittee

Chair and Members of the U.S. Sentencing Commission
March 13, 2002
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cc: Members of the Committee on Criminal Law
John Hughes, Assistant Director
Kim Whatley, Special Assistant to Assistant Director