
UNITED STATES SENTENCING COMMISSION



WRITTEN TESTIMONY

**PUBLIC HEARING
NOVEMBER 14, 2006**

MIKE C.

**U.S. SENTENCING COMMISSION
PUBLIC HEARING
ON
COCAINE AND FEDERAL SENTENCING POLICY**



November 14, 2006

**Georgetown University Law Center
Washington, DC**

**U.S. SENTENCING COMMISSION
PUBLIC HEARING
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**UNITED STATES SENTENCING COMMISSION
PUBLIC HEARING ON COCAINE SENTENCING POLICY**

**Tuesday, November 14, 2006
Georgetown University Law Center
Gewirz Student Center, 12th Floor Conference Room
Washington, D.C.**

9:15 a.m. - 9:30 a.m.

OPENING REMARKS

9:30 a.m. - 10:15 a.m.

PANEL ONE: EXECUTIVE BRANCH

Joseph T. Rannazzisi
Drug Enforcement Administration

R. Alexander Acosta
U.S. Department of Justice

10:15 a.m. - 11:00 a.m.

PANEL TWO: DEFENSE BAR

A.J. Kramer
Federal Public Defenders

David Debold
Practitioners Advisory Group

Stephen Saltzburg
American Bar Association

Carmen Hernandez
NACDL

11:00 a.m. - 11:45 a.m.

PANEL THREE: STATE AND LOCAL AGENCIES

Chuck Canterbury
Fraternal Order of Police

Elmore Briggs

*Director of Clinical Services, District of Columbia Department of Health, Addiction
Recovery and Prevention Administration*

11:45 a.m. - 12:15 p.m.

PANEL FOUR: JUDICIAL BRANCH

The Honorable Reggie B. Walton

Criminal Law Committee

12:15 p.m. - 1:45 p.m.

LUNCH

1:45 p.m. - 2:30 p.m.

PANEL FIVE: MEDICAL AND TREATMENT COMMUNITIES

Dr. Nora Volkow

Director, National Institute on Drug Abuse

Dr. Harolyn Belcher

Johns Hopkins University

2:30 p.m. - 3:30 p.m.

PANEL SIX: ACADEMICS

Dr. Alfred Blumstein

Carnegie-Mellon University

Dr. Bruce Johnson

Institute for Special Populations Research

Dr. Peter Reuter

University of Maryland

3:30 p.m. - 3:45 p.m.

BREAK

3:45 p.m. - 4:15 p.m.

PANEL SEVEN: COMMUNITY INTERESTS

Julie Stewart

Families Against Mandatory Minimums

Jesselyn McCurdy

American Civil Liberties Union

Hilary Shelton

NAACP

4:15 p.m. - 4:45 p.m.

PANEL EIGHT: COMMUNITY INTERESTS

Ryan King

The Sentencing Project

Nkechi Taifa

Open Society Institute

Angela Arboleda

National Council of La Raza

4:45 p.m. - 5:00 p.m.

CLOSING REMARKS

ADJOURN

IMPORTANT NOTES

**PUBLIC HEARING ON COCAINE AND FEDERAL
SENTENCING POLICY**

TUESDAY, NOVEMBER 14, 2006

PANEL ONE

A View From The Executive Branch

**UNITED STATES SENTENCING COMMISSION
PUBLIC HEARING ON COCAINE SENTENCING POLICY**

WITNESSES AND BIOS

PANEL ONE: EXECUTIVE BRANCH

Joseph T. Rannazzisi
Drug Enforcement Administration

R. Alexander Acosta
Department of Justice

Questions for written submission

Department of Justice

1. What differences, if any are there between powder and crack cocaine in terms of:

pharmacological effects,
social impact,
trafficking patterns,
weapon involvement,
violence or risk of violence,
associated or co-occurring criminal conduct,
distribution and/or use by youth, and
distribution in protected locations such as schools and playgrounds?

Is it possible to account, at least in part, for any of these differences through mechanisms other than the quantity-based penalty structures, for example by adding specific offense characteristics in a manner recommended by the Commission in 2002? To what extent, if any, would such sentencing enhancements not fully account for such differences?

2. Have there been any noticeable changes since 2002 in regard to trafficking patterns, weapon involvement, violence or risk of violence, use, or associated criminal conduct for either crack or powder cocaine? If so, what are they?
3. Have there been any changes in federal drug enforcement policy and strategy since 2002, specifically relating to cocaine? Specifically, have enforcement resources been reallocated in any way toward certain types of drug or cocaine offenders?
4. What is the typical distribution patterns of powder and crack cocaine? What constitutes a high level dealer, a mid level dealer or wholesaler, a street level dealer etc. In what quantity does each level typically deal, and specifically how do they distribute (e.g., hand to hand "eight balls" etc.)? What is the typical price structure at each level, and what is the typical purity at each level?
5. When Deputy Attorney General Thompson testified before the Commission in February 2002, he stated that the Department was not aware of any information suggesting that powder cocaine penalties are too low.¹ Is there any evidence today suggesting that powder penalties should be increased? If so, should this be achieved through a change in the quantity based penalties, through specific offense characteristics, or both?
6. How should the Commission react to the perception held by some that the current drug

¹ Statement of Larry Thompson, Deputy Attorney General, Department of Justice, to the U.S. Sentencing Commission, regarding Drug Penalties, March 19, 2002, at TR. 71.

quantity ratio creates unwarranted racial disparity?

7. Have there been any changes in any of these areas since the Department testified before the Commission and released a DoJ Report on cocaine in February and March 2002 that should be considered by the Commission?

TESTIMONY OF THE UNITED STATES DEPARTMENT OF JUSTICE

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R. ALEXANDER ACOSTA
UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF FLORIDA

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FEDERAL COCAINE SENTENCING POLICY

- - -

BEFORE THE UNITED STATES SENTENCING COMMISSION

- - -

NOVEMBER 14, 2006

INTRODUCTION

Judge Hinojosa, members of the Commission –

Thank you for inviting the Administration to appear before you today to discuss the important issue of federal cocaine sentencing policy. With me today is Joseph T. Rannazzisi, Deputy Assistant Administrator at the Drug Enforcement Administration, and he and I are available to answer any questions you may have. This testimony represents the Administration's view on federal cocaine sentencing policy and addresses many issues that we know are of concern to you.

For well over a decade, federal cocaine sentencing policy has been the subject of extensive debate at the Sentencing Commission, in Congress, the Judiciary, academia, and beyond. Since 1994, when Congress for the first time directed the Commission, in the Violent Crime Control and Law Enforcement Act of 1994, to report on federal cocaine sentencing policy, there has been disagreement about whether federal cocaine sentencing policy should change, and if so, how it should change. A few things, though, have remained unchanged in all of that time and through all of the discussions. First, the devastation that cocaine has on individuals, families, and communities

has not changed. Cocaine – both crack and powder cocaine – are very dangerous substances and trafficking in these substances is a very serious crime. Second, the route of administration of cocaine continues to be a significant factor in the extent to which cocaine impacts the brain of the user. Smoking crack has a different impact than snorting powder cocaine. And third, there continue to be major differences in the trafficking patterns of powder and crack cocaine, resulting in very different effects on individual communities and requiring a range of law enforcement responses.

In the Commission's 1995 report, and in subsequent reports on the issue, the Commission recognized the devastatingly destructive impact of cocaine on users of the drug, the families of those users, and the neighborhoods in which cocaine abuse and trafficking occur. Systemic violence including murder, injury to and neglect of children, HIV and STD transmission are all real and common effects of cocaine use. Moreover, the Commission has documented significant differences between powder and crack cocaine use and trafficking, including the differences in the pharmacology as a result of these drugs' routes of administration, rates of addiction and other serious societal harms, violence associated with their respective trafficking, and much more.

Since 1995, commissioners and members of Congress have recommended many different changes to federal cocaine sentencing policy. Some have suggested lowering crack penalties dramatically. Others have suggested raising powder penalties. Still others have suggested different combinations of the two. During this same period of almost 12 years, Congress and the Commission have increased drug trafficking penalties on a number of occasions for a number of different drugs, including setting the amount of methamphetamine that triggers a five or ten year

mandatory minimum sentence at the same levels currently set for crack cocaine. These penalty increases have been part of a consistent and bipartisan national drug control policy that has included a commitment to treatment for users, but at the same time, has shown no tolerance for drug trafficking and no retreat from the ongoing struggle against illegal drugs.

In 2002, Deputy Attorney General Larry Thompson testified before the Commission on behalf of the Administration opposing proposals, then under consideration, to lower penalties for crack cocaine. The existing policy that includes both the mandatory minimum sentencing scheme and sentencing guidelines has been an important part of the Federal government's efforts to hold traffickers of both crack and powder cocaine accountable, including violent gangs and other organizations that traffic in crack cocaine and operate in open air crack markets that terrorize neighborhoods, especially minority neighborhoods. However, the Administration recognizes that the Commission and many others have been especially concerned because the 100-to-1 quantity ratio appears to many to be an example of unwarranted racial disparity in sentencing. It may very well be appropriate to address the ratio between the drug weight triggers for mandatory minimum sentences for the trafficking of crack and powder cocaine, and we hope over the next months, the Commission, the Administration, and the Congress will work together to study this issue further and to determine whether any changes are indeed warranted. We think this collective work is especially critical in light of larger, systemic changes taking place in federal sentencing, and we are committed to participating in this collective work. Creating a sensible, predictable, and strong federal sentencing system is necessary to keeping the public safe and keeping crime rates at historic lows. Addressing the debate over federal cocaine sentencing policy is part of this effort.

It is important to stress too that changes to federal cocaine sentencing policy, as with systemic changes to federal sentencing more generally, must take place first and foremost in Congress. Existing statutes embody federal cocaine sentencing policy and represent the democratic will of the Congress. While we look forward to continuing this dialogue, we would oppose guidelines that do not adhere to enacted statutes clearly defining the penalty structure for federal cocaine offenses.

THE PRESIDENT'S NATIONAL DRUG CONTROL STRATEGY

We are guided in all of our work on drug policy by the President's comprehensive national strategy to fight illegal drug use. Over the past six years, the President's strategy has expanded the national drug treatment system and anti-drug education programs while recognizing the vital role of law enforcement and the essential need to continually disrupt drug markets at the international, wholesale, and local levels.

Unfortunately, drug abuse continues to plague this country at unacceptably high levels. According to estimates from the National Survey on Drug Use and Health, 19.7 million Americans were current illegal drug users in 2005; 2.4 million Americans were current cocaine users; and 680,000 were current crack cocaine users. In 2002, the Office of National Drug Control Policy estimated that the economic cost of illegal drug abuse was \$180 billion. Data provided by the Substance Abuse and Mental Health Services Administration indicate that there are roughly 380,000 emergency room incidents annually related just to cocaine. The sum total, from these and other data, is that we cannot become complacent about the enormous negative role illegal drugs – and cocaine in particular – still play in the United States.

The President's National Drug Control Strategy includes various initiatives to reduce drug use, including initiatives on drug education and community action to stop drug use before it starts. It has included significant new steps to get treatment resources where they are needed most, recognizing the need to heal America's drug users. The number of state drug courts has more than doubled over the last six years; the President's Access to Recovery Plan has made treatment more widely available; and interdiction and enforcement have disrupted drug markets in the United States and around the world.

The good news is that drug use among high school students has been reduced significantly over the past six years. According to the Monitoring the Future study, drug use among our nation's 8th, 10th, and 12th graders has dropped 19 percent since 2001. But while there has been a marked decrease in the use of methamphetamine, steroids, and ecstasy among high schoolers over that time, the use of cocaine, including crack cocaine, has remained fairly constant. More troubling, is that more than 40 percent of 12th graders report that cocaine is "fairly easy" or "very easy" to get, and that only about 50 percent of high schoolers see a great risk in using cocaine, a marked decrease from earlier years.

There should be no doubt that the serious problem of drug abuse in America remains, and any complacency will be disastrous for the country. All of America has been victimized by drug trafficking violence.

FEDERAL COCAINE SENTENCING POLICY

A. The Current Sentencing Guidelines Scheme for Drug Offenses

As the Commission knows, sentencing policy for drug offenses is a critical component of the effort to disrupt and dismantle drug trafficking organizations. It would be of little value to investigate and break up a violent drug gang, only to see the members of that gang return to the community in short order to continue their work. In 1987, working in a coordinated fashion with Congress and the Executive Branch, the Sentencing Commission tied the sentencing guidelines and federal drug penalties for drug trafficking offenses to the type and quantity of drug associated with the offense. These guidelines, found at §2D1.1 of the sentencing guidelines, call for base offense levels ranging from level 6 to level 38, moving in two-level increments determined by the type and quantity of drugs trafficked by the defendant.

The guidelines are tied – by law – to the applicable mandatory minimum drug trafficking statutes passed by Congress. The amount of controlled substance that triggers a mandatory minimum corresponds to a base offense level calibrated with the mandatory penalty. For example, five grams of actual methamphetamine triggers a mandatory minimum sentence of five years and is tied to a base offense level of 26 with a corresponding sentence of 63-78 months under the guidelines for a first offender. Title 21 U.S.C. § 841 specifies the quantity thresholds that trigger mandatory minimum sentences. Some observers have criticized the present sentencing guidelines scheme, arguing that this quantity-based scheme does not adequately address other relevant sentencing factors. We disagree.

Current law – both in the federal statutes and the guidelines – allows for appropriate consideration of aggravating factors such as the use of a gun or a defendant’s criminal history or bodily injury. Current law also allows for the consideration of mitigating factors, through the “safety valve” exception to mandatory minimums, the guidelines’ mitigating role adjustment and mitigating role cap, the acceptance of responsibility adjustment, and guideline departures when a defendant provides substantial assistance in the investigation or prosecution of another person.

Overall, we believe the structure of federal drug sentencing policy is sound and fosters a fair and aggressive law enforcement response to the national drug problem.

B. Cocaine and Federal Sentencing Policy

We similarly believe the current federal cocaine sentencing policy is properly calibrated and advances the law enforcement response to crack cocaine in a fair and just manner. We continue to believe higher penalties for crack cocaine offenses appropriately reflect the greater harm posed by crack cocaine; harms recognized by the Commission consistently since 1995. While cocaine base – crack – and cocaine hydrochloride – cocaine powder – are chemically similar, there are significant differences in the predominant way the two substances are ingested and marketed. Based on these differences and the resulting harms to society, crack cocaine is an especially dangerous drug, and its traffickers should be subject to significantly higher penalties than traffickers of like amounts of cocaine powder. We will address these differences in turn.

1. Pharmacology, Routes of Administration, and Societal Harms

An examination of the pharmacology and most common routes of administration of powder and crack cocaine reveals that crack is more potent and addictive, resulting in more emergency-room episodes and public-facility treatment admissions than powder cocaine, despite the fact that powder cocaine is much more widely used. The quicker, more intense, and shorter-duration effects of smoked crack contribute to its greater abuse and dependency potential as compared to snorted cocaine powder. Its greater addictive effects cause heavier and more frequent use and greater binging, causing more severe social and behavioral changes than use of cocaine powder.

The highest concentration of cocaine and the fastest entry to the central nervous system occur when cocaine is smoked. Smoking is one of the most efficient ways to take a psychoactive drug. The amount of cocaine that is absorbed through the large surface area of the lungs by smoking is greater even than the amount absorbed by injecting a solution of cocaine. In addition, the ease of smoking allows a user to ingest extreme levels of the drug in the body without repeatedly filling a syringe, finding injection sites, and then actually injecting oneself. The intensity of the euphoria, the speed with which it is attained, and the ease of repeat administration are factors that explain the user attraction to crack.

Differences in distribution methods, age groups involved, and levels of violence between crack and powder – all discussed more ahead – flow from the fact that smaller amounts of crack are needed to produce the euphoria that is sought by the typical user. Crack can be distributed in smaller unit sizes than powder cocaine and is sold in single dose units at prices that are at first easily affordable by the young and the poor. Because crack is distributed in such relatively small amounts in transactions that often occur on street corners, control of small geographic areas by

traffickers takes on great importance. As a result, crack offenders are more likely to possess a weapon, and crack is often associated with serious crime related to its marketing and distribution, especially violent street crime connected with gangs, guns, serious injury and death. The struggle to gain and maintain that geographic control is infused with great violence. All of this flows from the pharmacology of crack.

Moreover, other societal harms flow from the ease of use and distribution of crack. In a study of drug use and societal harms, fully one-third of crack-using women surveyed became involved in prostitution in the year after they began crack use. Women who were already involved in prostitution dramatically increased their involvement, with rates nearly four times higher than before beginning crack use. Because of the incidence of prostitution among crack users to finance their habit, crack cocaine smokers have been found to have rates of HIV infection as high as those among IV drug users.

Similarly, a 2001 study found that women who used crack cocaine had “much higher than average rates of victimization” than women who did not, and were more likely to be attacked and more likely to be raped. Although the study did not compare the victimization rates with other drug-using groups, it nevertheless starkly reflected the tremendous human toll this drug takes. Among an Ohio sample of 171 non-drug injecting adult female crack users, 62% had been physically attacked from the onset of crack use. Rape was reported by 32% of the women from the time they began using crack, and among these, 83% reported being high on crack when the rape occurred, as were an estimated 57% of the perpetrators.

2. Cocaine Trafficking Patterns

Cocaine trafficking patterns, moreover, lead to high rates of violence associated with both powder and crack cocaine trafficking, but especially with crack trafficking.

As noted above, it is important to recognize that crack cocaine does not typically enter the distribution chain in the chemical form that makes it crack cocaine; rather, it enters the distribution chain as powder cocaine, and at some point later in the distribution chain, is converted into the form known as crack. For this reason, the Administration recognizes that disrupting the cocaine market at its highest levels will have benefits in addressing both powder cocaine and the crack cocaine trafficking domestically.

At the highest levels, powder cocaine is generally trafficked in metric-ton quantities by sophisticated criminal enterprises that manage its shipment from source countries to major markets in the United States. The Drug Trafficking Organizations ("DTOs") of today maintain an infrastructure of compartmentalized cells, each managed by a cell head and having a specific function in the overall scheme of the DTO's illicit drug trade. The Colombian DTOs are still controlled by a hierarchy; however, these current leaders are content to detach themselves from outgoing loads of illicit drugs once handed off to an entirely separate organization, typically in Mexico. The Colombian DTOs of today may be described as a loose confederation, coexisting and cooperating with each other, while aided and supported by guerilla and paramilitary groups indigenous to Colombia.

Transportation of illicit drugs within the interior of Colombia is accomplished only with the assistance of these paramilitary and guerilla groups, who complete the task through the use of both riverboats, in Colombia's dense jungles, and containerized loads hauled by tractor trailers over paved regions of the country. The illicit drugs are ultimately brought to Colombia's north and west coasts where they then leave the country through maritime smuggling operations, specifically through the use of go-fast boats. Once the illicit drugs arrive in Mexico or Central America, the Mexican DTOs take custody and the drugs are transported through Mexico in compartmentalized containers hauled by tractor trailer and most often concealed with perishables. The loads of illicit drugs are broken up into smaller parcels just prior to being smuggled into the United States. This reduction in parcel size is typically accomplished at residences, purchased by the Mexican DTOs, within close proximity to the United States border.

Upon entry into the United States, the distribution of illicit drugs by the Mexican and Colombian DTOs is further compartmentalized, with the Mexican DTOs controlling the west coast of the United States and Colombian DTOs controlling the east coast of the United States, at the wholesale distribution level. The ultimate domestic destination of a shipment of illicit drugs is decided by the Colombian or Mexican DTO head. At times, the DTO's cell head within the United States influences this decision as well. Typically, once in the United States, final destination is based on the geographic lines set forth above. Security for the illicit drugs that have arrived in the United States is often provided by heavily armed members of the DTO. Upon completion of division into smaller parcels, the illicit drugs are then turned over to the buyer or member of the DTO operating in the United States. The illicit drugs are then transported to the domestic cities predetermined by the DTO for ultimate retail sale.

At this point, the cocaine shipment is generally divided into even smaller amounts for sale to local wholesalers, who distribute 15-kilogram or fewer quantities. The local wholesalers sell kilogram amounts to retail distribution groups that further divide the cocaine for retail sales. Retail distribution groups repackage cocaine purchases in ounce and gram quantities for sale by that group or other smaller retailers. While there continues to be a market for powder cocaine at the retail level, primarily among casual users and cocaine injectors, crack distribution and abuse now constitute an important force behind the current cocaine threat in the United States.

Although crack trafficking methods vary widely, generally, they are conducted at three broad levels, namely, wholesale trafficking, mid-level distribution, and retail selling. Wholesale crack traffickers purchase cocaine in kilogram or multi-kilogram allotments from traditional cocaine sources. They will either package the cocaine into ounce quantities or convert it into crack and then divide it into ounces for sale at the next level. Wholesalers represent large groups responsible for the majority of the interstate transportation of crack and cocaine intended for crack conversion. Crack distributors further divide the ounces of crack into dosage units for sale at the retail level. If the distributors purchase cocaine themselves, they can perform the conversion process easily. These distributors often operate crack houses or manage street-corner sales locations and supervise up to 20 individual sellers. Mid-level distributors can be either members of larger groups or independent operators. Retail crack sellers carry dosage units of crack totaling no more than a few grams at any one time, although during the course of a work shift, the amount of crack sold by one retail seller can be substantial. Workers in crack houses will sell dosage units from the one or two ounces that are delivered by the mid-level distributors.

Crack cocaine is packaged in vials, glassine bags, film canisters, etc. Rock sizes are not precise, but they generally range from 1/10 to 1/2 gram. A retail or street dosage unit for crack is approximately 100 milligrams. These rocks can sell for as little as \$2 to as much as \$50. As Professor Randall Kennedy noted, “[b]ecause it is relatively inexpensive,” crack has the “dubious ‘achievement’” that it has “helped tremendously to democratize cocaine use.” Crack is easier to package, transport and conceal than powder. Crack cocaine is not water soluble and can be more easily concealed in a piece of tissue, in the mouth, or in body cavities, allowing easier and wider distribution.

Crack generally is converted locally from cocaine and sold at the retail level. When crack is available in kilogram quantities, prices are comparable to those for kilogram quantities of cocaine, with modest price increases to compensate for the task of converting the cocaine into crack. The national range for prices of ounce quantities is from \$475 to \$2,800. A gram of crack generally costs between \$80 and \$125.

3. Cocaine Trafficking and Violence

Sentencing Commission data and other studies continue to show that crack cocaine is associated with violence to a greater degree than most other controlled substances. In fiscal year 2002, when the Administration last testified before the Commission on this subject, 23.1 percent of all federal crack offenders possessed a weapon, almost double that of powder cocaine’s then 12.1 percent rate. In fiscal year 2005, weapon involvement for crack cocaine offenders was 27.8 percent versus 13.6 percent for powder cocaine offenders. In addition, the percentage of crack defendants at criminal history category VI – those offenders with long criminal records – increased to 23.5

percent in FY 2005 from the 20.2 percent figure in FY 2002. A much smaller percentage of cocaine powder defendants were involved with a weapon or were at criminal history category VI in both 2002 and 2005.

Much of the crack cocaine violence is associated with gang activity, and drug gang violence has increased in recent years. Many drug gangs that traffic in crack cocaine include very young members who carry and use guns to promote their drug trafficking. Crack cocaine is associated more with street level gang violence than is cocaine powder, although gangs also deal in methamphetamine, PCP, and many other controlled substances. According to the 2005 National Gang Threat Assessment, 38 percent of law enforcement respondents reported moderate to high involvement of gangs in the distribution of powder cocaine, while 47.3 percent reported moderate to high involvement of gangs in the distribution of crack cocaine. National Drug Threat Assessment ("NDTS") 2004 data also show that gangs are very substantially involved in crack distribution, particularly in metropolitan areas. In fact, NDTS 2004 data indicate that 52.7 percent of state and local law enforcement agencies in large cities report high or moderate involvement of street gangs in crack distribution compared with 28.3 percent of state and local agencies in all areas.

Moreover, the National Institute of Justice's Arrestee Drug Abuse Monitoring ("ADAM") program 2000 urinalysis findings revealed that high percentages of ADAM arrestees had recently used cocaine – on average, 30 percent of arrestees tested positive for cocaine. NIJ sponsored a study in 1999 to examine whether arrestees testing positive for cocaine had used crack or powder

cocaine. That study looked at six ADAM sites and found that the majority of cocaine-positive arrestees – 65 percent – were using crack cocaine.

4. Enhancements Versus Drug Quantity Triggers

Some have argued that for sentencing purposes, the greater violence and other harms associated with crack can be addressed separately as a sentencing enhancement. We think this is wrong. Enhancements cannot account for all of the differences, both because of the systemic nature of some of the harms and the problems of proof in individual cases. Enhancements for violence by individual traffickers only address a portion of the systemic violence and crime of the crack trade. A sentencing court cannot know in individual cases how many of the defendant's customers' lives have been destroyed by those customers resorting to prostitution to finance their habit, nor how many innocent neighbors may have been robbed to buy the defendant's drugs. Yet we know these crimes are happening often. Crack is associated with an increase in robbery, theft, and prostitution to finance crack use.

Moreover, the Commission has documented that crack users are more likely than powder cocaine users to engage in drug transactions in a manner that elevates personal and aggregate risk, including possessing larger dealer networks and being more likely to use sex to finance drug-taking behavior. Also, because of the short high, buyer and seller will often still be in the same general vicinity when the high wears off. Users coming off a crack high often feel an intense need for more crack, and frequently suffer from dysphoria and extreme agitation. Combined, these situational factors elevate the potential for violence during crack transactions. Punishing individual dealers

only when they possess a weapon or when they use a weapon simply does not account for much of the violence they spawn.

Finally, raising the quantity threshold for crack penalties from five grams would make the investigation and prosecution of drug organizations and gang and other violence much more difficult. Successful prosecutions of violent crack cocaine distribution networks are built one drug dealer at a time from the bottom up. Without the likelihood of significant punishment, there is little incentive for drug defendants to provide information to law enforcement authorities. Simply put, if these drug defendants are not facing significant prison time, they will simply not cooperate in the investigation. Moreover, retail crack distribution networks are often insulated and difficult to penetrate, and compelling repeated purchases of larger quantities by undercover law enforcement officers or informants risks exposing the investigation of the larger organization.

For all of these reasons, we believe the quantity based mandatory minimum and guideline triggers must reflect crack's greater dangers and the needs of law enforcement to break up violent drug organizations from the bottom up.

C. Changing The Guidelines Before Congressional Action Would Be Wrong

Regardless of the Commission's ultimate position on the penalty structure for crack and powder cocaine, we strongly urge the Commission to make only recommendations to Congress and not to issue guidelines amendments. We believe issuing guidelines inconsistent with current drug sentencing policy as embodied in federal statutes is itself contrary to law. Moreover, by issuing guidelines, the Commission would effectively decouple the guidelines from the mandatory

minimums passed by Congress. The Department of Justice opposes – and has historically opposed in both Democratic and Republican Administrations – departing from the penalty scheme established by Congress, for two principal reasons: it disregards Congress’ expressed preferences, and in the absence of corresponding congressional action, it would result in an irrational sentencing scheme.

Many advocates of reducing crack penalties have urged the Commission to issue guidelines, noting Congress’ failure to act on the Commission’s 1997 and 2002 recommendations. Some advocates of reducing crack penalties say that by disregarding Congress’ preferences, the Commission would be exercising its leadership. We think this approach is wrong. A sentencing system consisting of guidelines that are inconsistent with federal statutes could produce potentially irrational sentences, providing a ten-year sentence under the mandatory minimum statute for a defendant who trafficked in 50 grams of crack, while providing for a far lesser sentence for a defendant who trafficked in a hundredth of a gram less. Such a system would fail to honor the congressional mandate to “avoi[d] unwarranted disparities among defendants with similar records.” 28 U.S.C. § 991(b)(1)(B).

But more fundamentally, the current mandatory minimums are the law of the land. The Commission is not free simply to ignore them and impose its own will in the face of clear congressional action. By changing the guidelines before any change in the existing provisions of title 21, the Commission will be doing just that: ignoring existing law. We think that issuing guidelines inconsistent with the existing mandatory minimums would fail to heed the Commission’s own oft-repeated refrain that Congress is the ultimate authority over federal

sentencing policy. In our constitutional system, the Sentencing Commission exists to effectuate the expressed will of Congress. The Supreme Court's decision upholding the constitutionality of the Sentencing Reform Act is fundamentally premised on the belief that Congress had appropriately cabined the Commission's discretion. As the Court noted at the time, "Congress instructed the Commission that these sentencing ranges must be consistent with pertinent provisions of Title 18 of the United States Code" *Mistretta v. United States*, 488 U.S. 361, 374-75 (1989). It would be wrong to depart from that understanding.

CONCLUSION

As noted above, the existing mandatory minimum sentencing scheme for cocaine trafficking has been an important part of the Federal government's efforts to disrupt the cocaine market generally, and the crack cocaine and powder cocaine markets specifically. For all the reasons we have discussed, we continue to believe that the current federal sentencing policy and current sentencing guidelines for crack cocaine offenses are reasonable. The Administration appreciates the opportunity to testify at this hearing and hopes the dialogue will continue. As we stated earlier, in light of the perception of racial disparity from the 100-to-1 quantity ratio as well as the larger, systemic changes taking place in federal sentencing, our work together must go on so that we ensure that federal sentencing is predictable, and strong. In this way, we will better be able to keep the public safe, keep crime rates at historic lows, and minimize the harmful effects of illegal drugs.

IMPORTANT NOTES

**PUBLIC HEARING ON COCAINE AND FEDERAL
SENTENCING POLICY**

TUESDAY, NOVEMBER 14, 2006

PANEL TWO

A View from the Defense Bar

UNITED STATES SENTENCING COMMISSION
PUBLIC HEARING ON COCAINE SENTENCING POLICY

WITNESSES AND BIOS

PANEL TWO: DEFENSE BAR

A.J. Kramer

Federal Public Defenders

David Debold

Practitioners Advisory Group

Stephen Saltzburg

American Bar Association

Carmen Hernandez

NACDL

A.J. Kramer

Federal Public Defender for the District of Columbia

A.J. Kramer has been the Federal Public Defender for the District of Columbia since 1990. A highly experienced career public defender, he served as an Assistant Federal Public Defender in San Francisco and as Chief Assistant Federal Public Defender in Sacramento prior to his current position. He received his undergraduate degree from Stanford University, and his law degree from Boalt Hall School of Law at U.C. Berkeley. Mr. Kramer is a Fellow of the American College of Trial Lawyers, and is a member of the permanent faculty of the National Criminal Defense College and the Western Trial Advocacy Institute. He clerked for the Honorable Procter Hug, Jr., on the U.S. Court of Appeals for the Ninth Circuit.

DAVID DEBOLD

David Debold joined the Washington, D.C. office of Gibson, Dunn & Crutcher LLP in 2003. He practices in the Litigation Department, with special emphasis on appellate matters, internal investigations and complex civil and criminal cases. Prior to joining Gibson Dunn, Mr. Debold was as an Assistant United States Attorney in Detroit, Michigan, where he served in both the criminal and appellate divisions. In 1991 he served as Special Counsel to the United States Sentencing Commission and has lectured nationally on federal sentencing issues. Mr. Debold currently serves as Co-Chair of the Practitioners' Advisory Group to the Sentencing Commission. He graduated *magna cum laude* from Harvard Law School, and was a law clerk to the Honorable Cornelia G. Kennedy, of the United States Court of Appeals for the Sixth Circuit.

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Stephen A. Saltzburg American Bar Association

Stephen A. Saltzburg has been the Wallace and Beverley Woodbury University Professor at the George Washington University Law School since January, 2004. Professor Saltzburg served as Associate Independent Counsel in the Iran-Contra investigation from 1987 to 1988, Deputy Assistant Attorney General in the Criminal Division of the Department of Justice in 1988 and 1989, the Attorney General's ex officio representative on the United States Sentencing Commission in 1989 and 1990, and the Director of the Tax Refund Fraud Task Force in the U.S. Treasury Department in 1994-1995. Professor Saltzburg is the author of numerous books and articles on evidence, procedure, and litigation. He serves as a member of the ABA House of Delegates, chaired the ABA Justice Kennedy Commission in 2003-2004, and now co-chairs the ABA Commission on Sentencing, Corrections and Re-Entry.

Carmen Hernandez

National Association of Criminal Defense Lawyers

Carmen Hernandez is the President-Elect of the National Association of Criminal Defense Lawyers (NACDL). She is a past chair of NACDL's Federal Sentencing Committee and a member of the U.S. Sentencing Commission's Practitioner's Advisory Group. Now in private practice, Ms. Hernandez previously served as an Assistant Federal Defender. She received a J.D. with honors from the University of Maryland School of Law and a B.A. from New York University. Following law school, she served as a law clerk to the Honorable Herbert F. Murray, United States District Judge for the District of Maryland. Ms. Hernandez has taught as an adjunct professor at the University of Maryland School of Law and at the Columbus School of Law, Catholic University of America. She has lectured nationally, written articles and testified before Congress regarding federal sentencing.

Questions for written submission

Legal Organizations

1. What are the effects of cocaine distribution on the community? Does the form in which the drug is distributed (crack cocaine versus powder cocaine) have a different effect on the communities in which it is distributed in terms of: levels of violent crime in the community; presence of other types of crime (for example, crime to support a drug habit); or disruption within the community?
2. What is the typical distribution pattern of cocaine? Does the form in which the drug is distributed (crack cocaine versus powder cocaine) result in different distribution patterns? What constitutes a high level dealer, a mid level dealer, wholesaler, street level dealer etc. In what quantity does each level typically deal, and specifically how do they distribute (e.g., hand to hand, "eight balls" etc.)? What is the typical price structure at each level, and what is the typical purity at each level?
3. Have there been any noticeable changes since 2002 in regard to trafficking patterns, weapon involvement, violence or risk of violence, or associated criminal conduct for, or use of either crack or powder cocaine? If so, what are they?
4. Have there been any changes since the Commission issued its 2002 report on federal cocaine sentencing policy that should be considered by the Commission?
5. From your perspective is there a difference in harms associated with the use/trafficking of crack versus powder cocaine:

If there is a difference, should trafficking in one form of the drug be punished more severely than trafficking in the other form of the drug?

If a difference exists but they should be punished identically? Please explain.

If a difference exists and they should be punished differently, what should that specific difference be, and what is the justification for that specific difference?

**Testimony of
A.J. Kramer
Federal Defender for the District of Columbia
Before the
United States Sentencing Commission
Public Hearing on Cocaine and Sentencing Policy
November 14, 2006**

I wish to thank the United States Sentencing Commission on behalf of the Federal Public and Community Defenders for holding this hearing, and for the opportunity to testify regarding why and how current federal cocaine sentencing policy should be changed.

The harsh sentences for crack cocaine, and the racial disparity they create, have a particularly strong impact in the District of Columbia, where I have been the Federal Defender since 1990. The population of the District of Columbia is approximately 56.8% African American.¹ Its incarcerated population is 92.8% African American.² More than 50% of young black males in the District of Columbia are incarcerated or under supervision.³ When I testified before the Commission in 2002, 55% of our drug cases were crack cases, two and a half times the national average of 21%. By 2005, 58.8% of our drug cases were crack cases, nearly three times the national average of 20.9%.⁴

Federal crack sentencing policy has earned the label of the new Jim Crow law.⁵ Judge Oberdorfer has likened the guidelines and mandatory minimums to the Fugitive Slave Law, which inflexibly condoned and facilitated slavery, and identified the

¹U.S. Census Bureau, American Community Survey 2005, http://factfinder.census.gov/servlet/ACSSAFFacts?_event=Search&_lang=en&_sse=on&geo_id=04000US11&_state=04000US11

² Human Rights Watch, *Incarcerated America*, April 2003, <http://www.hrw.org/background/usa/incarceration/>.

³ By 1997, the percentage was 50%. See Eric Lotke, *National Center on Institutions and Alternatives, Hobbling a Generation: Young African American Men in D.C.'s Criminal Justice System Five years Later* (August 1997), available at <http://66.165.94.98/stories/hobblgen0897.html>. The national incarceration population has grown 3.4% annually since then. See U.S. Dept. of Justice, Bureau of Justice Statistics, Bulletin NCJ 213133, *Prison and Jail Inmates at Midyear 2005*, p. 2 (May 2006) (Table 1).

⁴ U.S. Sentencing Commission, Statistical Information Packet, Fiscal Year 2005, District of Columbia, Figure A, <http://www.ussc.gov/JUDPACK/2005/dc05.pdf>.

⁵ *National War on Drugs Symposium, Panel II: Social Justice and the War on Drugs* (2000) (statement of Hon. Robert Sweet), <http://www.pbs.org/wgbh/pages/frontline/shows/drugs/symposium/panel2.html>; Drug Policy Alliance, *Race and the Drug War* (2006).

“discrepancy in the treatment of those who traffic in crack cocaine versus powder cocaine traffickers [as] the most serious vice in the Guidelines today.” Judge Louis F. Oberdorfer, *Mandatory Sentencing: One Judge’s Perspective*, 40 Am. Crim. L. Rev. 11, 13, 16 (2002).

In addition to the racial disparity, the penalty structure for crack cocaine makes no sense. A person with no criminal history who possesses 5 grams of crack, whether for personal use or sale, is subject to a guideline sentence of 63-78 months and a mandatory minimum of five years. A person possessing the same amount of powder cocaine with intent to distribute receives a guideline sentence of only 10-16 months, or if for personal use, no more than 12 months. That amount of powder cocaine converts to about 4 ½ grams of crack cocaine by simply adding baking soda, water and heat. The sentence for possessing 5 grams of crack is higher than that for dumping toxic waste knowing that it creates an imminent danger of death, higher than that for theft of over \$7 million, and double that for aggravated assault resulting in permanent or life threatening bodily injury.

There is no scientific, medical, or law enforcement justification for any sentencing differential between crack and powder cocaine. Moreover, anything other than a 1:1 ratio would continue to provide an incentive for agents and informants to manipulate drug quantity and type for the sole purpose of lengthening sentences. We therefore urge the Commission to:

- Equalize guideline penalties for crack and powder cocaine at the powder cocaine level.
- Recommend to Congress that it do likewise with mandatory minimum thresholds, short of abolishing mandatory minimums altogether.
- Address particular harms with existing guideline and statutory provisions.
- Recommend that Congress repeal the mandatory minimum for simple possession of crack.

I. The Interaction of the 1:100 Ratio with Relevant Conduct Rules, Lack of Procedural Safeguards, and Rewards for Cooperation Create the Perverse and Wasteful Incentive for Law Enforcement Agents and Their Informants to Create More Serious Crimes.

In 2002, I told the Commission about a recent case in our district in which a DEA agent testified that it was his regular practice, when street dealers tried to sell him powder, to ask them to cook it into crack, in order to obtain the mandatory minimum sentence. I also told the Commission about a recent client who was caught with ½ gram of heroin but was serving a 17 ½ year sentence based on the uncorroborated testimony of a gang leader that my client had once sold him 62 grams of crack. The gang leader, though he had admitted to several murders and robberies, served less than a year in prison

in exchange for his testimony against low-level people including my client who either had no information to give or were afraid to tell it.

The Commission noted in 2004 that drug quantity manipulation and untrustworthy information provided by cooperators are continuing problems in federal drug cases.⁶ Based on responses from several Defenders to my inquiry, these problems continue unabated today and may even have worsened.

Undercover agents and eager-to-please informants hold out for higher quantities in a single sale, come back repeatedly for additional sales, and insist that powder be cooked into crack before accepting it. *See, e.g., United States v. Fontes*, 415 F.3d 174 (1st Cir. 2005) (at agent's direction, informant rejected two ounces of powder defendant brought and insisted on two ounces of crack); *United States v. Williams*, 372 F.Supp.2d 1335 (M.D. Fla. 2005) ("[I]t was the government that decided to arrange a sting purchase of crack cocaine [producing an offense level of 28]. Had the government decided to purchase powder cocaine (consistent with Williams' prior drug sales), the base criminal offense level would have been only 14."); *United States v. Nellum*, 2005 WL 300073 (N.D. Ind. Feb. 3, 2005) (defendant could have been arrested after the first undercover sale, but agent purchased the same amount on three subsequent occasions, doubling the guideline sentence from 87-108 months to 168-210 months).

Courts can lower the sentence for entrapment, but they rarely do, assuming that the fact that the defendant *did* ultimately provide crack in the requested amount is proof of predisposition. Cooperating witnesses claim that the defendant sold them crack in certain amounts, knowing full well that they will be rewarded commensurate with the defendant's sentence. These tactics are easier and produce more bang for the buck in crack cases than in any other kind of drug case because a very small increase in quantity results in a very large increase in the sentence, and because the simple process of cooking powder into crack results in a drastic sentence increase. Cooperators have much to gain and little to lose from exaggeration or lying. The "facts" they provide, often "calculated" by multiplying an estimated number of sales by an estimated quantity, need only be "proved" by a mere preponderance of the un-cross-examined "probably accurate" hearsay. Without procedures designed to ensure accuracy, there is little chance that untruthfulness will be exposed.

This dynamic is encouraged by the relevant conduct rules, which can be manipulated or misapplied to make a low-level participant look like a mid- or high-level participant. First, § 1B1.3(a)(2), which calls for sentencing for additional sales above and beyond those charged and proved, and above mandatory minimum levels, invites agents and informants to arrange repeated sales before an arrest is made, and provides cooperators the opportunity to invent extra sales out of whole cloth. Second, despite application notes attempting to limit jointly undertaken criminal activity under §

⁶ See U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 50, 82 (2004).

1B1.3(a)(1)(B) to that embraced by the defendant's specific agreement, some courts continue to include all amounts allegedly involved in an entire conspiracy on the theory that such amounts are "reasonably foreseeable" from any participant's point of view. How § 1B1.3(a)(1)(B) is applied depends on the judge, the probation officer, and the skill and experience of the defense lawyer.

A "major goal" of the Anti-Drug Abuse Act of 1986 was "to give greater direction to the DEA and the U.S. Attorneys on how to focus scarce law enforcement resources" on "major" and "serious" drug traffickers.⁷ Rather than focusing on existing "major" and "serious" drug traffickers, law enforcement agents and informants often take advantage of the crack/powder disparity, the relevant conduct rules, and the lack of procedural safeguards to *create* more serious offenses for the sole purpose of obtaining longer sentences. This has a racially disparate impact and is a waste of taxpayer dollars.

I can illustrate this abuse with recent examples from cases handled by Federal Defender Offices across the country.

- In a recent case in the District of Columbia, a merely "detectable" amount of crack was found during a search of the apartment the defendant shared with others. The defendant was not indicted until an undercover agent had made 10 purchases of less than 5 grams each over the next year and a half and finally caught him with over 5 grams of crack in his possession, thus subjecting him to the five-year mandatory minimum.
- In a case tried in Louisiana a few months ago, the defendant made an initial sale of less than 30 grams of crack to an undercover agent. The agent admitted on the stand that he went back for a second sale seeking 100 grams in order to obtain a higher sentence. Because the defendant had a prior conviction for possession of a crack pipe with residue in it and another for possession of six joints of marijuana (for neither of which he served any time), he was sentenced to mandatory life in prison. Absent the second sale, the defendant would have been subject to a mandatory minimum of ten years.
- In a recent case in Massachusetts, an informant facing state charges after being caught with 50 grams of powder cocaine began cooperating with the FBI. He and a close friend, the eventual defendant, had occasionally sold each other powder cocaine, never crack. The informant asked the defendant to get him two ounces of cocaine. Although there was no evidence that the defendant had ever sold crack to anyone, the FBI directed the informant to accept only crack, not powder. When the defendant showed up with two ounces of powder cocaine, the informant refused to accept it, insisting on crack. The defendant returned the powder to the supplier, who eventually replaced it with two ounces of crack. The agent testified at the sentencing hearing that he directed the informant to buy only crack because

⁷ H.R. Rep. No. 99-845, 99th Cong., 2d Sess. 1986, 1986 WL 295596 (Background).

it would result in a higher sentence. The sentence for two ounces of cocaine powder would have been 30-37 months with no mandatory minimum. The sentence for two ounces of crack carried a guideline sentence of 140-175 months and a mandatory minimum of ten years. The district court found that the FBI agent's primary purpose in directing the informant to buy two ounces of crack rather than two ounces of powder was to procure the highest possible penalty, which was not a legitimate law enforcement purpose. The district court reduced the guideline sentence by fourteen months and imposed a sentence of 126 months. The state charges against the informant were dismissed, he was charged federally, and was sentenced to 24 months under a 5K1.1 motion.

- In a recent case in Los Angeles, a female informant, at the government's direction, twice sought to buy crack from the defendant, but the defendant brought powder cocaine instead. The informant requested crack a third time, and the defendant again showed up with powder. By then, the informant had established a sexual relationship with the defendant. At her insistence, the defendant cooked the powder into crack. For the fourth transaction, the defendant again showed up with powder, and again, at the informant's insistence, cooked the powder into crack. In this way, the government purposely doubled the defendant's guideline range from 84-105 months to 168-210 months and subjected him to a ten-year mandatory minimum sentence rather than a five-year mandatory minimum. By the time the defendant was indicted, three years had passed since the last sale, he had established his own plumbing company, and he had a stable home life with his fiancée and their daughter.

II. Federal Cocaine Sentencing Policy Has a Devastating Effect on Urban Minority Families and Communities, Undermines Public Confidence in Our Justice System, and Does Not Prevent Drug Crime.

Faced with the Sentencing Commission's 1995 report that the sentencing distinction between powder and crack cocaine was irrational, and that its starkly disproportionate racial impact on African-American defendants was unwarranted, those members of Congress who voted to reject the Commission's equalization of the cocaine penalties claimed that their purpose was to protect and benefit African-Americans. *See* 104 Cong. Rec. H10256-10283 (daily ed. Oct. 18, 1995).

Now as then, this claim is unsupportable. There are more African American men in prison than in college. One of every fourteen African American children has a parent in prison. Thirteen percent of all African American males are not permitted to vote because of felony convictions.⁸ The harsh treatment of federal crack offenders obviously contributes to this destruction of families and communities.

⁸ *See* American Civil Liberties Union, *Cracks in the System: Twenty Years of the Unjust Federal Crack Cocaine Law* 3-4, October 2006; Justice Policy Institute, *Cellblocks or Classrooms?: The Funding of Higher Education and Corrections and its Impact on African American Men* 10 (2002); Human Rights Watch & the Sentencing Project, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States* 8 (1998).

Nor has the policy succeeded in reducing drug use or drug crime. John Walters, the Director of the Office of National Drug Control Policy, told Congress in early 2005 that the current policy of focusing on small-time dealers and users is ineffective in reducing crime while breaking generation after generation of poor minority young men.⁹ Indeed, the persistent removal of persons from the community for lengthy periods of incarceration weakens family ties and employment prospects, and thereby contributes to increased recidivism.¹⁰ Drug crime is driven by demand, street dealers and couriers are easily replaced, so the crime is simply committed by someone else.¹¹ Drug use rates have increased over the past few years,¹² teenagers are using drugs at twice the rate they did in the 1980s,¹³ and the price of both powder and crack cocaine has substantially declined.¹⁴ Studies show that if a small portion of the budget currently dedicated to incarceration were used for drug treatment, intervention in at-risk families, and school completion programs, it would reduce drug consumption by many tons and save billions of taxpayer dollars.¹⁵

We as Federal Public Defenders see the pointless destruction of our clients' families on a frequent basis. Under the crack guidelines, even a first offender must spend a substantial period of time in prison, cutting off education and meaningful work, often for good. My office recently represented a 22-year-old young man who was working toward his GED and taking a weekly class in the plumbing trade when he was sentenced to prison for selling a total of 7 grams of crack on four occasions over a six-month period. He had no prior convictions or even any prior arrests, no history of drug or alcohol abuse,

⁹ Kris Axtman, *Signs of Drug-War Shift*, Christian Science Monitor, May 27, 2005.

¹⁰ The Sentencing Project, *Incarceration and Crime: A Complex Relationship* 7-8 (2005) (hereinafter "*Incarceration and Crime*"), available at <http://www.sentencingproject.org/pdfs/incarceration-crime.pdf>.

¹¹ U.S. Sentencing Commission, *Cocaine and Federal Sentencing Policy* 68 (Feb. 1995) (DEA and FBI reported that dealers were immediately replaced); Fifteen Year Report at 133-34.

¹² *Incarceration and Crime* at 6.

¹³ Opinion editorial by Eric E. Sterling and Julie Stewart, *Undo This Legacy of Len Bias' Death*, Washington Post, July 24, 2006.

¹⁴ Office of National Drug Control Policy, *The Price and Purity of Illicit Drugs, 1981 Through the Second Quarter of 2003* at 10 (November 2004), http://www.whitehousedrugpolicy.gov/publications/price_purity/results.pdf.

¹⁵ Caulkins, Rydell, Schwabe & Chiesa, *Mandatory Minimum Sentences: Throwing Away the Key or the Taxpayers' Money?* at xvii-xviii (RAND 1997); Rydell & Everingham, *Controlling Cocaine: Supply Versus Demand Programs* (RAND 1994); Aos, Phipps, Barnoski & Lieb, *The Comparative Costs and Benefits of Programs to Reduce Crime* (Washington State Institute for Public Policy 2001), <http://www.nicic.org/Library/020074>.

was in a stable relationship, and had two small children to whom he was devoted. He was a random casualty of an investigation of a serious drug trafficking conspiracy that had nothing to do with him. When a cooperator in that investigation, who happened to live in the same housing project, asked our client to get him some crack, he agreed because he needed cash to support his family. The government prosecuted our client in federal court, not because he was involved in the case under investigation, but in order to make a better record for its cooperator. If our client had been prosecuted in superior court, he would have received a sentence of probation. If our client had been prosecuted in federal court for selling 7 grams of powder cocaine, he would have received a sentence of probation. Our client is now serving a prison sentence, while the cooperator, who had a very substantial record, received a sentence of time served.

In a recent case handled by the Federal Defender's Office in Los Angeles, the client was just finishing up a sentence for being a felon in possession of a firearm. He had completed the 500-hour drug treatment program, had served as a suicide watch companion in prison for over a year, had been released to a halfway house, was working full time, and was about to regain custody of his son. On the eve of his return home and just before the statute of limitations would have expired, the government indicted him for a sale of four ounces of crack to a confidential informant, which had occurred seven months *before* the felon in possession offense. In that case, the informant, at the direction of law enforcement officers, rejected the four ounces of powder cocaine the defendant brought and insisted on four ounces of crack instead. If the government had indicted the defendant for both offenses at once, he would have received a concurrent sentence. If the informant had not insisted on crack, the entire sentence would be wrapped up, the defendant would have been working, and his son would have a parent to care for him. Instead, the defendant is now serving a ten-year mandatory minimum sentence.

III. Even if Incarceration Were an Effective Way to Stop Crack Use, the Effects of Crack Use Would Not Justify a Disparity in Sentences Between Crack and Powder Cocaine.

Defenders report that crack distribution has no more negative effect on the community in terms of other crimes or level of violence than other addictive drugs such as powder cocaine, heroin and methamphetamine. Actual violence in typical crack cases is very rare.

As the Commission reported in 2002, the physiological and psychotropic effects of crack and powder cocaine are the same. Powder cocaine may be less addictive if snorted, but is just as addictive if injected. While powder cocaine is snorted more often than it is injected, the danger to public health associated with needles, including the spread of AIDS and hepatitis, is more severe than any threat to public health posed by smoking crack. Moreover, injection can result in overdose and death. I have not heard of any case in which someone overdosed or died from smoking crack.

As the Commission noted in its 2002 Report, the negative effects of prenatal crack cocaine exposure are identical to the negative effects of prenatal powder cocaine

exposure, which are significantly less severe than previously believed, are similar to prenatal tobacco exposure and less severe than prenatal alcohol exposure. See U.S. Sentencing Commission, *Report to Congress – Cocaine and Federal Sentencing Policy* vi, 21-31 (May 2002) (hereinafter “2002 Report”). Further, the small but identifiable effects of prenatal cocaine exposure cannot be separated from the effects of socioeconomic disadvantage. *Id.*

A recent study found no differences in growth, IQ, language or behavior between three-year-olds who were exposed to cocaine in the womb and those who were not. See Kilbride, Castor, Cheri, *School-Age Outcome of Children With Prenatal Cocaine Exposure Following Early Case Management*, *Journal of Developmental & Behavioral Pediatrics*, 27(3):181-187, June 2006.

Another recent study demonstrates the negative effect on children of the “crack baby” stereotype created by politicians and the media. In this study, trained child development assessors evaluated the development of 163 four-year-olds, then guessed which children were exposed to cocaine *in utero* and which were not. Assessors assumed that children with lower scores were exposed and that those with higher scores were not, resulting in 37% of children who were exposed being misclassified as unexposed and 74% of those who were unexposed incorrectly classified as exposed. See Rose-Jacobs, Cabral, Posner, Epstein, Frank, *Do “We Just Know”? Masked Assessors’ Ability to Accurately Identify Children with Prenatal Cocaine Exposure*, *Journal of Developmental & Behavioral Pediatrics*, 23(5):340-346, October 2002.

IV. Functions, Quantities, Purity, Prices

The Commission has asked about distribution patterns, dealer functions, quantities, prices and purity levels. The Commission should not retain or support any sentencing differential between crack and powder cocaine based on assumptions that certain quantities, purities and/or prices are handled by persons occupying certain functions for different forms of cocaine. The Commission should equalize cocaine penalties at the powder cocaine level.

Differences in quantity purportedly corresponding with different functions in crack cases are not meaningful for several reasons. What constitutes a more or less culpable function is unavoidably imprecise and subjective, differences in quantity attributed to different functions are too small, and both the quantity and the type of cocaine are subject to manipulation and happenstance. For its 2002 Report, the Commission defined various offender functions, to some extent independent of quantity, read the narrative in the offense conduct section of the pre-sentence report to determine what function the defendant had, then determined the median quantity for each function. See 2002 Report at 36, 45, Table C1. Other than the 2962-gram amount for high-level suppliers, the median quantities for the other functions in crack cases were extremely close to one another. *Id.* at 45, Fig. 10. Given that the differences were so small, that the amount of crack can be easily increased by holding out for a larger amount or stringing together small sales, and that defendants are often led to obtain crack instead of powder

or to convert powder to crack, reliance on distinctions in quantity associated with different subjectively-defined functions at any given time would be a mistake.

For example, the Commission's 2002 data indicated that the median amount for those defendants it had identified as managers/supervisors was 253 grams. *See* 2002 Report at 36, 45, Table C1. On that basis, I testified that 250 grams should be the cut-off between a mid-level and a low-level dealer. However, a street-level dealer can easily be involved with quantities at or above 250 grams. For example, I currently represent a defendant on appeal who can only be described as a small time street dealer: he is mentally ill, supervised no one, and made little profit from selling crack. He sold 188 grams of crack to an undercover officer in multiple sales over a one-month period. The amount would have been higher, except that my client became suspicious of the undercover officer, at which point he was arrested and charged. Moreover, an undercover agent could easily arrange to buy 250 grams or more from a small-time dealer in one transaction.

Furthermore, a true high-level dealer is a person who imports a large quantity of powder before it is ever cooked into crack. A sentencing differential based on different thresholds for powder and crack would fail to take that into account and therefore perpetuate the inversion problem. Moreover, I do not believe there is a meaningful category of a crack "wholesaler." Wholesale distribution occurs before the powder is cooked into crack. In discussing with staff what it had in mind by a wholesaler, we were told that it might be a person who sold an ounce of crack at a time and did not supervise others. Defining a "wholesaler" in this way would mean the government could convert a street-level dealer of powder cocaine into a "wholesaler" of crack cocaine by inducing a seller of an ounce of powder cocaine to sell an ounce of crack cocaine, as in the Massachusetts case described above.

The following chart demonstrates that there is no meaningful difference in the number of doses, purity, or price at different quantity levels between crack and powder cocaine. Prices and purity are those for 2003 taken from Tables 1-4 of the Office of National Drug Policy Control's Report, *The Price and Purity of Illicit Drugs, 1981 Through the Second Quarter of 2003* (November 2004).¹⁶ The number of doses are taken from the Commission's previous reports.

	Powder	Crack
Quantity	1 gram	1 gram
-Number of doses	5-10	2-10
-Price at this quantity	\$107	\$74
-Purity at this quantity	.70	.69
Quantity	5 grams	5 grams
-Number of doses	25-50	10-50

¹⁶ Available at http://www.whitehousedrugpolicy.gov/publications/price_purity/results.pdf.

-Price at this quantity	$\$70.52 \times 5 = \353	$\$74 \times 5 = \370
-Purity at this quantity	.67	.69
Quantity	25 grams	25 grams
-Number of doses	125-250	50-250
-Price at this quantity	$\$44 \times 25 = \1100	$\$47 \times 25 = \1175
-Purity at this quantity	.62	.59
Quantity	50 grams	50 grams
-Number of doses	250-500	100-500
-Price at this quantity	$\$44 \times 50 = \2200	$\$47 \times 50 = \2350
-Purity at this quantity	.62	.59

Defendants at each quantity level should be sentenced the same, with differences taken into account by the criminal history rules, weapons adjustments or charges, role in the offense, and so on.

V. What if anything has changed?

The percentages of black, white and Hispanic defendants being prosecuted for crack offenses has remained essentially the same since 2000: Over 80% of crack defendants are black, less than 10% are white, and less than 10% are Hispanic. *See* U.S. Sentencing Commission, Sourcebook of Federal Sentencing Statistics, Table 34 (2000-2005). As before, though crack offenses involve quantities orders of magnitude lower than powder defendants, *id.*, Table 42, the average sentence length for crack offenders continues to be approximately one and a half times that for crack offenders. *Id.*, Figure J.

Judges have exercised their post-*Booker* discretion to reduce sentences in 14.7% of crack cases, as compared to 6.2% pre-Protect Act and 4.3% post-PROTECT Act. *See* U.S. Sentencing Commission, *Final Report on the Impact of United States v. Booker on Federal Sentencing* at 128 (March 2006). However, the majority of judges decline to do so based on the misunderstanding of some courts of appeals that judges are not free to disagree with policy choices reflected in the guidelines, no matter how misguided the Commission itself says they are.¹⁷

The percentage of defendants at each quantity level shown in Table 42 of the Sourcebook has stayed fairly constant, except that the percentage of defendants at the highest level of 1500 grams or greater has decreased from 6% in 2000 to about 4-4.5% in succeeding years. The percentage of crack offenders receiving aggravating role adjustments has fallen every year since 2000. *See* U.S. Sentencing Commission, Sourcebook of Federal Sentencing Statistics, Table 40 (2000-2005). This could mean

¹⁷ If the oral argument in *Cunningham v. California*, No. 05-6551, is any indication, that misunderstanding may soon be dispelled.

that the government is focusing even less on high-level offenders, or that there are fewer high-level offenders.

Table 42 does not indicate whether the 70% of cases not shown there involve less than 50 grams or more than 149 grams, making the data less than useful. Some Defenders report fewer large quantity crack cases. Many Defenders report sentencing manipulation. In my experience, the vast majority of crack offenders are still low-level offenders, regardless of whether their sentences are based on less than 50 grams or more than 149 grams.

VI. Public Opinion

Ten years after the disparate ratio went into effect in the statute and in the guidelines, a public opinion survey conducted on the Commission's behalf showed that the public disagrees with the harshness of drug sentences generally and with the harsher treatment of crack cases. According to the study:

The strongest sentencing disagreements occur over drug trafficking crimes: The guidelines call for drug trafficking sentences that vary according to the type of drug sold, roles played in the crime and the amount of drugs involved. In contrast, respondents did not make such distinctions nor did they weigh these crime elements the same way as do the guidelines. The result is strong differences in sentencing drug trafficking crimes with the guideline sentences being much harsher. . . . [R]espondents did not treat trafficking in heroin, powder cocaine or crack cocaine very differently from each other. . . . Median sentences for trafficking in crack cocaine, powder cocaine, and heroin all topped out at about 12 years, even for defendants with four prior prison terms. . . . For possession of crack cocaine, powder cocaine, and heroin, average sentences were about a year.¹⁸

With the Bureau of Prisons operating at 40% overcapacity, and with drug sentences the primary cause, I suspect that public support for warehousing non-violent drug offenders of any type, especially under a racially disparate scheme, would be at an all-time low.

VII. The States Have Not Adopted the Federal Crack/Powder Sentencing Structure.

In its 2002 Report, the Commission noted that the vast majority of states do not distinguish between powder and crack cocaine. At that time, there were only fourteen states that had some form of disparity. Since then, in 2005, Connecticut eliminated its

¹⁸Peter H. Rossi & Richard A. Berk, U.S. Sentencing Commission, Public Opinion on Sentencing Federal Crimes (1997), http://www.ussc.gov/nss/jp_exsum.htm.

disparity.¹⁹ In 2003, Vermont enacted a statute under which a person convicted of possessing 60 grams or more of powder is subject to a statutory maximum of ten years and a person convicted of possessing 60 grams of crack is subject to a statutory maximum of thirty years.²⁰ None of the states has a 100:1 disparity except Iowa, which distinguishes for purposes of the statutory maximum only. The disparities in the other thirteen states range from 2:1 to 12:1, with only Missouri anywhere close to the federal disparity at 75:1. It also appears that unlike the federal system, few if any states impose different punishment on crack and cocaine offenders at all quantity levels and for all purposes in both mandatory minimum statutes and sentencing guidelines. *See* 2002 Report at 73-81.

VIII. Recommendations

- Cocaine penalties under the guidelines should be equalized at the powder cocaine level. There is no scientific, medical, or law enforcement justification for any differential. Further, any disparity would continue to provide an incentive for agents and informants to create more serious drug crimes, lengthen sentences, and waste taxpayer dollars.
- The Commission should recommend that Congress equalize the mandatory minimum thresholds as well. In 2002, the Commission recommended that Congress increase the five-year mandatory minimum threshold for crack to at least 25 grams and the ten-year threshold to at least 250 grams. These thresholds are too low. Twenty-five grams of crack is indicative of a low-level dealer. Two hundred and fifty grams is indicative, at most, of a mid-level dealer. Moreover, any disparity creates the incentive for agents and informants to induce their targets to convert relatively small amounts of cocaine powder into crack. That incentive is indefensible and should be removed.
- Particular harms can be addressed by existing guideline provisions. New enhancements should not be added, first because drug sentences are if anything already too high, and second because the Commission has pledged to simplify the guidelines.
 - Dangerous weapons are already covered through the two-level enhancement in § 2D1.1(b)(1), the four-level enhancement in §

¹⁹ The Real Cost of Prisons Weblog, CT: Gov. Signs Law to Help Correct Racial Injustice in Sentencing, http://realcostofprisons.org/blog/archives/2005/07/ct_gov_signs_la.html.

²⁰ 18 V.S.A. § 4231. We note that the ACLU in its report includes Utah as having a disparity. However, it does not appear that Utah punishes possession or distribution of cocaine powder differently from possession or distribution of crack. The statute cited, U.C.A. 1953 § 58-37d-5, provides that under certain circumstances, production of any of a number of controlled substances, *see* U.C.A. 1953 § 58-37d-3, in a clandestine laboratory is a first degree felony, and the sentence may not be probation and may not be suspended.

2K2.1(b)(6), and through a separate § 924(c) charge. The Commission should not include the complex series of adjustments tied to problematic definitions (*e.g.*, brandished, otherwise used, etc.) suggested in the 2002 Report.

- The Commission can suggest a departure for bodily injury. It should not add the complex set of adjustments for various levels of bodily injury suggested in the 2002 Report.
- Use of a minor is covered by § 3B1.4.
- Sales to pregnant women, to minors and in a protected location can be charged under applicable statutes and sentenced under § 2D1.2.
- There is no justification, as suggested in the 2002 Report, for adding any further enhancement for a repeat felony drug trafficking offense. Though African-Americans comprise only 15% of the country's drug users, they comprise 37% of those arrested for drug offenses, 59% of those convicted, and 74% of those sentenced to prison for a drug offense.²¹ This is an unfortunate result of racial profiling and/or the fact that drugs are sold and used on the street in the inner city, while they are sold and used indoors in the suburbs. *See Fifteen Year Report* at 133-34. As a result, African Americans already have higher criminal history scores, are sentenced more often under the career offender guideline, are subjected to higher mandatory minimums for prior drug trafficking felonies under 21 U.S.C. § 841, and are disqualified from safety valve relief. Adding a further enhancement for a repeat felony drug trafficking offense would double count this form of racial disparity.
- Nor is there any justification for enhancing a sentence for the absence of a mitigating role, as suggested in the 2002 Report.
- The Commission should also recommend that Congress repeal the mandatory minimum for simple possession of crack.

On behalf of the Federal Public and Community Defenders, I thank you again for this opportunity to present our views on why and how federal cocaine sentencing policy should be changed.

²¹ See Interfaith Drug Policy Initiative, *Mandatory Minimum Sentencing Fact Sheet*, http://idpi.us/dpr/factsheets/mm_factsheet.htm.

Questions for written submission

Legal Organizations

1. What are the effects of cocaine distribution on the community? Does the form in which the drug is distributed (crack cocaine versus powder cocaine) have a different effect on the communities in which it is distributed in terms of: levels of violent crime in the community; presence of other types of crime (for example, crime to support a drug habit); or disruption within the community?
2. What is the typical distribution pattern of cocaine? Does the form in which the drug is distributed (crack cocaine versus powder cocaine) result in different distribution patterns? What constitutes a high level dealer, a mid level dealer, wholesaler, street level dealer etc. In what quantity does each level typically deal, and specifically how do they distribute (e.g., hand to hand, "eight balls" etc.)? What is the typical price structure at each level, and what is the typical purity at each level?
3. Have there been any noticeable changes since 2002 in regard to trafficking patterns, weapon involvement, violence or risk of violence, or associated criminal conduct for, or use of either crack or powder cocaine? If so, what are they?
4. Have there been any changes since the Commission issued its 2002 report on federal cocaine sentencing policy that should be considered by the Commission?
5. From your perspective is there a difference in harms associated with the use/trafficking of crack versus powder cocaine:

If there is a difference, should trafficking in one form of the drug be punished more severely than trafficking in the other form of the drug?

If a difference exists but they should be punished identically? Please explain.

If a difference exists and they should be punished differently, what should that specific difference be, and what is the justification for that specific difference?

Testimony of

David Debold

**Co-Chair of the Practitioners' Advisory Group to the
United States Sentencing Commission**

**Before the United States Sentencing Commission's
Public Hearing on Cocaine and Sentencing Policy**

**November 14, 2006
Washington D.C.**

* * * * *

Judge Hinojosa and members of the Commission. My name is David Debold and I am currently in private practice at the law firm of Gibson, Dunn & Crutcher, LLP here in Washington D.C. I have been invited to testify today in my capacity as Co-Chair of the Practitioners' Advisory Group to the Commission. On behalf of that standing advisory group, it is always a pleasure to be invited to share our views from the front lines, as it were, on how the Guidelines operate. Of course, we serve primarily to provide the Commission with the defense bar's perspective, but I will add that – particularly as it relates to today's topic – most of my experience with sentencing and the federal sentencing guidelines system has been as an Assistant United States Attorney. I like to think that having seen the way the Guidelines operate in both capacities – as a prosecutor and as defense counsel – I am able to provide a balanced perspective.

The drug guidelines in general, and in particular their relative treatment of offenses involving crack and powder, have been the subject of much debate over the years. As a former Assistant United States Attorney I recall quite clearly Congress's enactment of a 1:100 ratio between crack and powder. I also recall working on many a sentencing memorandum and appellate brief defending the position that the ratio was constitutional and that downward departures based on the alleged unfairness or irrationality of the ratio were forbidden. Many judges before whom I appeared struggled mightily with how to impose sentences in crack cases that they believed were consistent with the purposes of sentencing, yet not subject to reversal.

The Commission has asked a number of questions of the panelists in an effort to assist it in deciding what changes – if any – should be made to the guidelines applicable to cocaine offenses. My comments will focus on what is listed under question number 5; which generally addresses possible differences in harms associated with crack versus powder cocaine and asks more particularly whether trafficking in one form of the drug should be punished more severely than trafficking in the other form.

There is a broader issue that I will only touch on briefly to put my comments in context. Sentences for drug defendants have always been driven primarily by drug quantity. The assumption, which I accept at a general level, is that – all other things being equal – a defendant whose offense involves a large quantity of a particular drug is more culpable, and more deserving of punishment, than a person whose offense involves a smaller quantity of the same drug. Of course, all things are rarely equal as between any two defendants. Part of the challenge

in creating a system that generates appropriate offense levels in drug cases is to figure out which factors other than drug quantity should be considered, what weight they should receive in relation to drug quantity and each other, and what to do about factors that are less susceptible to ready measurement or categorization. For example, how should the drug Guidelines account for the differences between these defendants:

- Defendant A came from a privileged background and decided to start importing large shipments of drugs to make money more easily than he could in a legitimate – and readily available – occupation.
- Defendant B came from a broken impoverished family and got involved in the drug business as a youth because his brother, whom he idolized, encouraged him to do so.
- Defendant C started dating a drug dealer knowing generally about his illegal doings and ended up agreeing to answer business phone calls for him when he was unavailable.

To some extent the role-in-the-offense provisions in Chapter 3 and specific offense characteristic provisions in section 2D1.1 try to differentiate such defendants, but in the end the quantity of drugs that can be attributed to each of my hypothesized defendants will play a large part in his or her offense level.

That is the context in which I'd like to make a few observations about the crack/powder ratio. Crack is made from powder. The process is quite simple – it involves baking powder, water and a heat source (such as a microwave oven). The mixture is cooked and a hard substance is produced. It is then broken into rocks of varying sizes. This simple conversion of cocaine from powder to rock has an enormous impact on the sentence for the person left – often quite literally – holding the bag.

Should the Guidelines recommend such disparate treatment of two defendants – one who handles the drug in powder and the other who handles it in rock form?

Consider the lifeline for a kilogram of cocaine. Coca plants are harvested, usually in a South American country. Some individual or group of individuals in that country oversees the production of powder cocaine, which is packaged for shipment to the United States. Our hypothetical kilogram could enter the United States as part of a multi-kilogram package or all by itself, say in a courier's vehicle. Someone or some group in the United States buys it. It could be my defendant A, the privileged ne'er-do-well who had every opportunity to make an honest living. The first point of contact in the United States might be buying in large quantities from a foreign source, or that person could be part of an international conspiracy and working for someone in the source country. At some point the kilogram is broken down into amounts that a user will want to buy. It also probably will be diluted with "cut" at one or more points in the process. It could remain as powder and end up being snorted by the user. Or the user could convert it to crack and smoke it. Or the person selling to the user could convert it to crack (or have someone else do it – perhaps my defendant B whose brother got him into the business). Or an organized group (of varying possible sizes) within a particular community could have a

system by which large quantities of powder are converted to crack and then the crack is distributed to various locations where it is sold to the users.

Under the Guidelines, a person who handles the kilogram of cocaine in powder form is at base offense level 26, which without any other adjustments equates to 63 – 78 months for criminal history category I. A person handling some or all of that kilogram after it has been converted to crack will be treated more harshly. According to the Commission's 2002 Report to Congress on Cocaine and Federal Sentencing Policy (page 16), a kilogram of pure cocaine will convert to 890 grams of crack under ideal conditions. Because the cocaine will probably be cut before it is made into crack, the ratio in the real world may be about the same or somewhat lower. Assume the original kilogram of powder is made into 750 grams of crack. If a defendant handles the entire 750 grams, he is at level 36, which equates to 188 – 235 months. That is three times longer than the powder defendant. To end up in the same range as the person caught with the kilogram of powder – all other things being equal – the defendant caught after conversion to crack would have to be accountable for 20 grams or less. A person possessing just 5 grams of crack would also fall also within the range that applies to a kilogram of powder.

This does not promote proportionality in sentencing. In fact, it runs counter to the goal of calibrating punishment to levels of culpability. As a general matter, the persons selling or handling the crack at a retail level are no more responsible for the harms caused by that form of the drug than the persons handling it when it was still in powder form. Indeed, again as a general matter, we would want to reserve the greater penalty for the person or persons higher in the chain of distribution – at the wholesale rather than the retail level, as it were.

To be sure, the crack defendant may be more likely to engage in violence or possess a firearm. If these are features of that particular defendant's conduct, there are ways to differentiate him or her from other crack defendants, that is, through enhancement that are already included in the Guidelines. But if we are saying that crack defendants should receive higher sentences simply because crack tends to do worse things to the community, something that itself appears not to be true, there is no good reason to single them out for harsher punishment than those who handle the cocaine before it is converted to crack.

To return to my examples, defendant A may be caught with a single shipment of a kilogram of powder cocaine, and with a plea to a single count in the absence of other drug involvement, he could be looking at a guideline range with acceptance of responsibility of 46 – 57 months. Defendant B, whose brother asked him to convert a smaller amount of powder into 60 grams of crack, and is caught in possession of that crack, would be facing a sentence of 87 – 108 months were he to plead guilty and accept responsibility (more than twice the sentence for possessing less than 1/10th what defendant A had). Defendant C, who relayed messages between her boyfriend and his co-conspirators, would face vastly different sentences depending on whether the conspirators were in the part of the distribution chain where the cocaine was still in powder form as opposed to crack.

The solution here is to return crack cocaine penalties to those applicable to the same quantity of powder cocaine – a 1:1 ratio. The penalties would still be quite stiff, but the anomalies mentioned above would be eliminated.

Questions for written submission

Legal Organizations

1. What are the effects of cocaine distribution on the community? Does the form in which the drug is distributed (crack cocaine versus powder cocaine) have a different effect on the communities in which it is distributed in terms of: levels of violent crime in the community; presence of other types of crime (for example, crime to support a drug habit); or disruption within the community?
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5. From your perspective is there a difference in harms associated with the use/trafficking of crack versus powder cocaine:

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AMERICAN BAR ASSOCIATION

GOVERNMENTAL AFFAIRS OFFICE • 740 FIFTEENTH STREET, NW • WASHINGTON, DC 20005-1022 • (202) 662-1760

Testimony of

Stephen A. Saltzburg

On behalf of the

American Bar Association

Before the

United States Sentencing Commission

Washington, D.C.
November 14, 2006

on

Eliminating Disparities in
Sentencing for Cocaine Offenses

Good morning. My name is Stephen Saltzburg. I am the Wallace and Beverley Woodbury University Professor at the George Washington University Law School. It was my privilege and honor to serve as the Attorney General's ex officio representative on the U.S. Sentencing Commission from 1989 to 1990.

On behalf of the American Bar Association, I appear to urge that the Commission recommend, as it did on May 1, 1995, that Congress amend federal drug laws to eliminate the differences between sentences imposed for crack and powder cocaine offenses. The American Bar Association is the world's largest voluntary professional organization, with a membership of over 400,000 lawyers (including a broad cross-section of prosecuting attorneys and criminal defense counsel), judges and law students worldwide. The ABA continuously works to improve the American system of justice and to advance the rule of law in the world. I appear today at the request of ABA President Karen Mathis to reiterate to the Commission the ABA's position on sentencing for cocaine offenses.

At its August meeting in 1995, the House of Delegates of the American Bar Association approved a resolution endorsing the proposal submitted by the Commission to Congress which would have resulted in crack and powder cocaine offenses being treated similarly and would have taken into account in sentencing aggravating factors such as weapons use, violence, or injury to another person.

The American Bar Association has not departed from the position that it took in 1995, and the Commission's May 2002 *Report to the Congress: Cocaine and Federal Sentencing Policy* confirms the ABA's judgment that there are no arguments supporting the draconian sentencing of crack cocaine offenders as compared to powder cocaine offenders. We continue to believe that Congress should amend federal statutes to eliminate the mandatory differential between crack and powder cocaine and that the Commission should promulgate guidelines that treat both types of cocaine similarly.

It is important that I emphasize, however, that the ABA not only opposes the crack-powder differential, but we also strongly oppose the mandatory minimum sentences that are imposed for all cocaine offenses. The ABA believes that, if the differential penalty structure is modified so that crack and powder offenses are dealt with in a similar manner, the resulting sentencing system would remain badly flawed as long as mandatory minimum sentences are prescribed by statute.

At its August 2003 annual meeting in San Francisco, U.S. Supreme Court Justice Anthony M. Kennedy challenged the legal profession to begin a new public dialogue about American sentencing and other criminal justice issues. He raised fundamental questions about the fairness and efficacy of a justice system that disproportionately imprisons minorities. Justice Kennedy specifically addressed mandatory minimum sentences and stated, "I can neither accept the necessity nor the wisdom of federal mandatory minimum sentences." He continued that "[i]n too many cases, mandatory minimum sentences are unwise or unjust."

In response to Justice Kennedy's concerns, the ABA established a Commission (the ABA Justice Kennedy Commission) to investigate the state of sentencing and corrections in the United States and to make recommendations on how to ameliorate or correct the problems Justice Kennedy identified. One year to the day that Justice Kennedy addressed the ABA, the ABA House of Delegates approved a series of policy recommendations submitted by the Kennedy Commission. Resolution 121 A, approved August 9, 2004, urged all jurisdictions, including the federal government, to "[r]epeal mandatory minimum sentence statutes." The same resolution called upon Congress to "[m]inimize the statutory directives to the United States Sentencing Commission to permit it to exercise its expertise independently."

The Kennedy Commission resolution re-emphasized the strong position that the ABA traditionally has taken in opposition to mandatory minimum sentences. The 1994 Standards for Criminal Justice on Sentencing (3d ed.) State clearly that "[a] legislature should not prescribe a minimum term of total confinement for any offense." Standard 18-3.21 (b). In addition, Standard 18-6.1 (a) directs that "[t]he sentence imposed should be no more severe than necessary to achieve the societal purpose or purposes for which it is authorized," and "[t]he sentence imposed in each case should be the minimum sanction that is consistent with the gravity of the offense, the culpability of the offender, the offender's criminal history, and the personal characteristics of an individual offender that may be taken into account."

Mandatory minimum sentences raise serious issues of public policy. Basic dictates of fairness,

due process and the rule of law require that criminal sentencing should be both uniform between similarly situated offenders and proportional to the crime that is the basis of conviction.

Mandatory minimum sentences are inconsistent with both commands of just sentencing.

Mandatory minimum sentences have resulted in excessively severe sentences. They operate as a mandatory floor for sentencing, and as a result, all sentences for a mandatory minimum offense must be at the floor or above regardless of the circumstances of the crime. This is a one-way ratchet upward and, as the Kennedy Commission found, is one of the reasons why the average length of sentence in the United States has increased threefold since the adoption of mandatory minimums. Not only are mandatory minimum sentences often harsher than necessary, they too frequently are arbitrary, because they are based solely on “offense characteristics” and ignore “offender characteristics.” In addition, mandatory minimum sentences can actually increase the very sentencing disparities that they, in theory at least, are intended to reduce. The reason is that it is prosecutors who sentence by the charging decisions they make rather than judges imposing a sentence taking into account all relevant factors regarding and offender and a charged offense. Mandatory minimum sentencing schemes shift discretion from judges to prosecutors who lack the training, incentive, and often appropriate information to properly consider a defendant’s mitigating circumstances at the charging stage of a case.

Justice Kennedy’s 2003 address to the ABA specifically noted the harsh consequences of mandatory minimum cocaine sentences:

Consider this case: A young man with no previous serious offense is stopped on

the George Washington Memorial Parkway near Washington D.C. by United States Park Police. He is stopped for not wearing a seatbelt. A search of the car follows and leads to the discovery of just over 5 grams of crack cocaine in the trunk. The young man is indicted in federal court. He faces a mandatory minimum sentence of five years. If he had taken an exit and left the federal road, his sentence likely would have been measured in terms of months, not years.

Under the federal mandatory minimum statutes a sentence can be mitigated by a prosecutorial decision not to charge certain counts, There is debate about this, but in my view a transfer of sentencing discretion from a judge to an Assistant U. S. Attorney, often not much older than the defendant, is misguided. Often these attorneys try in good faith to be fair in the exercise of discretion. The policy, nonetheless, gives the decision to an assistant prosecutor not trained in the exercise of discretion and takes discretion from the trial judge. The trial judge is the one actor in the system most experienced with exercising discretion in a transparent, open, and reasoned way. Most of the sentencing discretion should be with the judge, not the prosecutors.

Justice Kennedy's views are consistent with ABA policy.

The 2004 Report accompany ABA Resolution 121 A emphasized the dangers of shifting sentencing authority from judges to prosecutors and the special danger that sentencing of minority offenders will be disproportionately harsh:

Aside from the fact that mandatory minimums are inconsistent with the notion that sentences should consider all of the relevant circumstances of an offense and an offender, they tend to shift sentencing discretion away from courts to prosecutors.

Prosecutors do not charge all defendants who are eligible for mandatory minimum sentences with crimes triggering those sentences. If the prosecutor charges a crime carrying a mandatory minimum sentence, the judge has no discretion in most jurisdictions to impose a lower sentence. If the prosecutor chooses not to charge a crime carrying a mandatory minimum sentence, the normal sentencing rules apply. Although prosecutors have discretion throughout the criminal justice system not to charge offenses that could be charged and thereby to affect sentences, their discretion is pronounced in the case of mandatory minimums because of the inability of judges to depart downward.

Federal drug sentences also illustrate some of possible effects of mandatory minimum sentences on racial disparity. When compared either to state sentences or to other federal sentences, federal drug sentences are emphatically longer. For example, in 2000, the average imposed felony drug trafficking sentence in state courts was 35 months, while the average imposed federal drug trafficking sentence was 75 months. In 2001, the average federal drug trafficking sentence was 72.7 months,⁶⁸ the average federal manslaughter sentence was 34.3 months, the average assault sentence was 37.7 months, and the average sexual abuse sentence was 65.2 months.

These lengthy sentences largely result from the impact of the Anti-Drug Abuse Act of 1986 (ADAA). The ADAA created a system of quantity-based mandatory minimum sentences for federal drug offenses that increased sentences for drug offenses beyond the prevailing norms for all offenders. Its differential treatment of crack and powder cocaine has resulted in greatly increased sentences for African-Americans drug offenders.

The Act set forth different quantity-based mandatory minimum sentences for crack and powder cocaine, with crack cocaine disfavored by a 100-to-1 ratio when compared to powder cocaine. Thus, it takes 100 times the amount of powder cocaine to trigger the same five-year and ten-year minimum mandatory sentences as for crack cocaine. The Act does three other things: (1) It triggers the mandatory minimums for very small quantities of crack -- five grams for a mandatory five-year sentence and 500 grams generates a ten-year term. (2) It makes crack one of only two drugs for which possession is a felony. (3) It prescribes crack as the only drug that triggers a mandatory minimum sentence for mere possession.

The overwhelming majority of crack defendants are African-American, while the overwhelming majority of powder cocaine defendants are white or Hispanic. In 1992, 91.4% of crack offenders were African-American, and in 2000, 84.7% were African-American. The disproportionate penalties for crack offenses obviously

have a great impact on African-American defendants in federal prosecutions.

(Footnotes omitted)

In conclusion, the American Bar Association opposes the crack-powder disparity in sentencing. Not only do we believe that the crack-powder distinction is arbitrary and unjust, but we find that it has a large, disparate effect on minorities that calls into question whether the United States is adequately concerned with equal justice under law. We recommend that the Commission ask Congress to eliminate the disparity. But, eliminating the disparity would leave mandatory minimum sentences in place. We also recommend that the Commission ask Congress to abolish mandatory minimum sentences and permit the Commission to perform the informed, impartial and expert task of developing guidelines as originally anticipated by the Sentencing Reform Act.

Questions for written submission

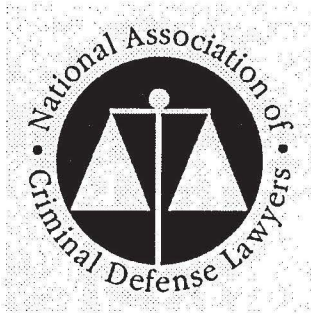
Legal Organizations

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Written Statement of
Carmen D. Hernandez

on behalf of the
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

before the
United States Sentencing Commission

Re: Cocaine and Federal Sentencing Policy - 2006

November 14, 2006

Good afternoon. Thank you for allowing me to speak on behalf of the National Association of Criminal Defense Lawyers, a bar association with thousands of criminal defense lawyers who practice in the federal courts across our nation.

Over the past twenty years, the sentencing disparity for crack as compared to powder cocaine has come to symbolize the flaws of the federal sentencing system and the shortcomings of the Sentencing Reform Act. It is difficult to find a more inclusive example of the unintended consequences of quantity-based drug sentences. Despite countless reports by academics, interest groups, the Commission and other government agencies documenting these problems and debunking the rationales for disparity, reform has remained elusive. The Federal Bureau of Prisons' inmate population is more than 190,000, 54 percent of whom are drug offenders. A 1997 survey reveals that nearly one quarter of the drug offenders in federal prisons at that time were there because of a crack cocaine conviction.¹

This is the fourth time the Commission has formally examined cocaine sentencing policy, and the challenge to say something new is formidable. While the relevant factors have remained the same since the Commission's 2002 report, the intervening four years have seen roughly 20,000 more persons sentenced based on the same indefensible crack guidelines. The failure to correct this grave injustice means that the crack/powder sentencing disparity has continued to gain prominence as a symbol of racism in the criminal justice system.

I. The effects of crack cocaine on the community are compounded by the uniquely severe and notoriously inequitable sentencing scheme.

As the Commission knows, 83% of defendants receiving the harsher penalties for crack cocaine are black. The average sentence for crack cocaine (131 months), unmatched by any other drug, is 61% higher than that for powder cocaine (80 months). In fact, the average crack sentence far exceeds the average sentence for robbery, sexual abuse, and other violent crimes. These comparisons are all the more disturbing when one considers that two-thirds of crack defendants are street-level dealers.

Any discussion of the effects of crack cocaine distribution on the community must include the negative social and economic impact of the uniquely severe sentencing scheme. "Far from saving the inner cities, our barbaric crack penalties are only adding to the decimation of inner-city youth."² Over-incarceration within black communities adversely impacts those communities by removing young men and women who could benefit from rehabilitation, educational and job training opportunities and a second chance. Drug amounts consistent with state misdemeanors become federal felonies, resulting in disenfranchisement, disqualification for important public benefits including student loans and public housing, and significantly diminished economic opportunity. As a result, many of these persons become outsiders for a

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

² Stuart Taylor Jr., *Courage, Cowardice on Drug Sentencing*, *Legal Times*, April 24, 1995, at 27.

lifetime, and their families suffer incalculable damage and suffering. Excessive sentences undeniably exacerbate all of these harms.

Moreover, 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. In the past, former Attorney General Janet Reno and a long list of federal judges, all of whom had served as United States Attorneys, emphasized this disturbing consequence in urging reform.

While supporters of the current scheme might argue that aggressive enforcement and incapacitation of crack dealers is in the best interests of affected black communities, this does not address the question of sentence proportionality. This argument, put forward by Attorney General Larry Thompson in 2002, evinces a one-dimensional view of the federal sentencing system that was rejected by previous Justice Department officials. In 1997, Attorney General Janet Reno and the White House's director of national drug policy, Gen. Barry R. McCaffrey, took the position that the 100-to-1 disparity was excessive and recommended reducing it to 10-to-1.

II. The distribution patterns for cocaine strongly support equalization, but the Commission should not place undue reliance on assumptions regarding the quantity levels handled by various actors.

The current penalty scheme not only skews law enforcement resources towards lower-level crack offenders, it punishes those offenders more severely than their powder cocaine suppliers, an effect known as "inversion of penalties." 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.³ As many have noted, this is incongruous with Congress's intended targets for the 5- and 10-year terms of imprisonment, mid-level managers and high-level suppliers, respectively. The Commission has recognized the unwarranted disparity that results from this penalty inversion and from the unequal number of mitigating role reductions granted to crack defendants.

The Commission has an obligation to correct this problem, which results in sentences that are inconsistent with the Sentencing Reform Act; however, we believe any effort to distinguish between forms of cocaine based on the deceptive quantity/role correlation is bound to fail in a similar manner. Agents and informants routinely manipulate drug quantities to obtain longer sentences; this practice, in combination with the relevant conduct guideline, defeats the value of drug quantity as an indicator of role and culpability. The simple solution is to equalize the two forms of cocaine so that individuation can be based exclusively on criminal history and existing

³ The flipside of this argument -- that similar penalties will encourage distributors to take the final step of converting powder cocaine to crack -- is specious. The Guidelines' relevant conduct rules require that a powder distributor be sentenced according to the crack guidelines if conversion was reasonably foreseeable and within the scope of the defendant's agreement.

specific offense characteristics.

III. Any changes since 2002 in associated criminal conduct are insignificant and, in any case, irrelevant to a determination of appropriate base offense levels.

The past fifteen 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 (SOC's) as proposed in the Commission's 2002 report.

IV. Legal developments since 2002 provide even more reason to abolish the crack/powder sentencing disparity.

The *Booker* decision is the most notable change since the Commission's 2002 report. Because 18 U.S.C. § 3553(a) requires district courts to consider a number of factors in addition to the Sentencing Guidelines -- including the nature and circumstances of the offense and the need to avoid unwarranted disparity -- the Commission's cocaine reports have taken on a new importance. That is, sentencing courts have explicitly referred to the Commission's reports in finding the advisory Guidelines range for crack cocaine "greater than necessary to reflect the seriousness of the offense, to promote respect for the law, and to provide adequate general and specific deterrence."⁴ The fact that the Commission's findings have been repeatedly cited as grounds for non-guideline sentences argues strongly for amending the crack guidelines to eliminate the recognized inequities. Such reform would go a long way toward enhancing respect for the Sentencing Guidelines.

V. Arguments for maintaining the sentencing disparity between crack and powder cocaine are unpersuasive; both substances should be punished at the current powder cocaine levels.

As established in the Commission's 1995 report and reaffirmed at the February 2002 hearings, there is no sound basis -- scientific or otherwise -- for the current disparity. Crack and powder cocaine are simply different forms of the same drug, and they should carry the same penalties.⁵ 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

⁴ Sentencing With Discretion: Crack Cocaine Sentencing After *Booker*, The Sentencing Project (Jan. 2006).

⁵ Even the doses/gram are nearly identical: Five grams of crack cocaine represents approximately 10-50 doses; 500 grams of cocaine powder, which triggers the same five-year sentence, represents approximately 2500-5000 doses. William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 Ariz. L. Rev. 1233, 1273 (1996).

reveals that 88% of crack cases do not involve violence, more than 70% of crack offenders have no weapon involvement, and rarely is a weapon ever brandished or used in a crack offense. As noted above, existing guideline and statutory enhancements are more than sufficient to punish these aggravating circumstances.

Even more importantly, crack cocaine and powder cocaine are part of the same supply chain. Anyone trafficking in powder cocaine is contributing to the potential supply of crack cocaine; thus, any dangers inherent in crack are necessarily inherent in powder cocaine. This simple truth, in our view, is perhaps the more persuasive rationale for treating the two forms of cocaine identically. This is what the Commission proposed in its 1995 report, and we believe it is the most principled 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. First, there is no credible evidence that powder cocaine penalties, which are generally much longer than heroin or marijuana sentences, are insufficiently harsh. Given that 84% of defendants sentenced at the federal level for powder cocaine offenses are non-white, increasing powder sentences would exacerbate the disproportionate impact of cocaine sentencing on minorities.

I urge you to do the right thing. Propose long-overdue changes to the crack guidelines that are supported by every one of Commission's reports and that are required by the statutory mandate -- in 28 U.S.C. § 991 -- to establish sentencing guidelines that provide certainty and fairness while avoiding unwarranted sentencing disparities and that reflect empirical knowledge of human behavior.

Thank you.

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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 12,500 direct members -- and 80 state, local and international affiliate organizations with another 35,000 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.

IMPORTANT NOTES

**PUBLIC HEARING ON COCAINE AND FEDERAL
SENTENCING POLICY**

TUESDAY, NOVEMBER 14, 2006

PANEL THREE

A View From State and Local Agencies

UNITED STATES SENTENCING COMMISSION
PUBLIC HEARING ON COCAINE SENTENCING POLICY

WITNESSES AND BIOS

PANEL THREE: STATE AND LOCAL AGENCIES

Chuck Canterbury

Fraternal Order of Police

Elmore Briggs

*Director of Clinical Services, D.C. Department of Health, Addiction
Recovery and Prevention Administration*

Chuck Canterbury

National President, Fraternal Order of Police

Chuck began serving as President in January 2003 after the death of President Steve Young. He has been reelected twice by acclamation since that time.

President Canterbury joined the Fraternal Order of Police in 1984 when he, along with eleven other officers, chartered their Local Lodge. He served as Local Lodge President for 13 years, during which time he was instrumental in starting the Lodge Legal Defense Plan, purchasing the first lodge building, and starting the Lodge insurance program.

He went on to serve as State Lodge President from 1990 to 1998. During his tenure he was instrumental in establishing the State Lodge lobbying program, initiating the political endorsement program and implementing the State Lodge Legal Defense Plan. He led the effort to hire a full time Executive Director for the State Lodge to manage these programs.

He began his service on the Grand Lodge Executive Board in 1995 when he was elected to the first of three terms as the Second Vice President. In 2001, he was elected Vice President. During this time, he has worked to expand the police labor movement in the areas of our country who do not have collective bargaining rights. Improving the quality of life for police officers has been his foremost goal.

President Canterbury retired in January 2004 from the Horry County Police Department, Conway, South Carolina, where he most recently had oversight of the Operations Bureau. He began his police career in 1978 and over his 25-year career he worked in the Patrol Division, the Criminal Investigations Division and served as the Training Division Supervisor, during which he was certified as an Instructor in basic law enforcement, firearms, chemical weapons, and pursuit driving.

Chuck has been appointed by President George Bush to serve on the Medal of Valor Board and also serves on our Nation's Homeland Security Council.

He earned a Bachelor of Arts degree from Coastal Carolina University. He resides in Myrtle Beach, South Carolina, where he has raised two children. His son is a police officer with the City of Myrtle Beach and his daughter is a Paralegal in a local law firm.

Questions for written submission

Law Enforcement Organizations

1. What is the typical distribution pattern of cocaine? Does the form in which the drug is distributed (crack cocaine versus powder cocaine) result in different distribution patterns? What constitutes a high level dealer, a mid level dealer, wholesaler, street level dealer etc., and does this vary by geographical area (e.g., region of the country) or type of area (e.g., urban versus rural). In what quantity does each level typically deal, and specifically how do they distribute (e.g., hand to hand, "eight balls" etc.)? What is the typical price structure at each level, and what is the typical purity at each level?
2. Have there been any noticeable changes since the Commission issued its most recent report on cocaine sentencing policy in 2002 in regard to trafficking patterns, weapon involvement, violence or risk of violence, use, or associated criminal conduct for either crack or powder cocaine? If so, what are they?
3. What is the impact of crack trafficking and/or use and powder cocaine trafficking and/or use on state and local communities? Does the impact vary depending on whether the cocaine is powder or crack and, if so, what is the difference?
4. Does the difference between federal and state cocaine sentencing policy affect state and local drug enforcement efforts, prosecutorial decisions, or ability to obtain witness cooperation, and if so, how?
5. Is the recently reported increase in violent crime in the United States related to cocaine trafficking generally, and, if so specifically to crack cocaine or powder cocaine?
6. Have there been any changes since the Commission issued its 2002 report on federal cocaine sentencing policy that should be considered by the Commission?
7. From your perspective is there a difference in harms associated with the use/trafficking of crack versus powder cocaine:

If there is a difference, should trafficking in one form of the drug be punished more severely than trafficking in the other form of the drug?

If a difference exists but they should be punished identically? Please explain.

If a difference exists and they should be punished differently, what should that specific difference be, and what is the justification for that specific difference?

Panel 3

**Supplemental Questions for Chuck Canterbury, National President
Fraternal Order of Police
November 14, 2006**

- 1) What further evidence do you have that the evidence demonstrates that crack cocaine does in fact inflict greater harm to both the user and to the environment or communities in which it is available?
- 2) According to the recent report of the ADAM program cited in your testimony, you stated that the number of transactions in the crack market was much larger than in the powder cocaine and marijuana markets. Could you tell us when this report has been updated since it was last issued and, if so, indicate whether the number of transactions in the crack market have since changed?
- 3) In your testimony you expressed your support for increasing the penalties for offenses involving powder cocaine through a reduction in the quantity of powder necessary to trigger the mandatory minimum sentences. Is this still the position of your organization? Would you consider any change a "step back" in the fight against cocaine traffickers, dealers, and users?

**Summary of Testimony for Chuck Canterbury, National President
Fraternal Order of Police
November 14, 2006**

Mr. Canterbury ("FOP") states that the stiffer penalties enacted during the 1980s, particularly from the Anti-Drug Abuse Acts of 1986 and 1988, actually worked. The tougher penalties helped law enforcement to counter the explosion in violence fueled almost entirely by the emergence of crack cocaine. The FOP further states that the mandatory minimum sentences, especially those which took into consideration the type of drug, the presence and use of firearms, the use or attempted use of violence, provided a tool to impose longer sentences for the worst offenders. The FOP referenced the Commission's Crack Report of 1997 required by Public Law 104-38 which recognized that some drugs "have more attendant harms than others and that those who traffic in more dangerous drugs ought to be sentenced more severely than those who traffic in less dangerous drugs." Based on this premise, the FOP believes that the evidence demonstrates that crack cocaine does in fact inflict greater harm to both the user and to the environment—the communities—in which it is available. Reference is made to one example to support this position by stating that while only 22% of all cocaine users use crack cocaine, this percentage represented 72% of all primary admissions to hospitals for cocaine usage in the past year.

Again, the FOP cites to the Commission's 1997 report as stating that crack cocaine is more often associated with systemic crime and produces more intense physiological and psychotropic effects than the use of powder cocaine. The FOP strongly agrees with these findings and states that federal sentencing policy must reflect the dangers associated with crack and impose correspondingly greater punishments. Along the same line, the FOP encourages including additional aggravating factors—the presence of firearms or children, use or attempted use of violence—as a few examples, in the determination of a final sentence. It is also recommended that these and other enhancements should continue to be in addition to a reasonable mandatory minimum sentence that is based on the quantity of the controlled substance as provided under the current law.

The FOP advocates strongly against decreasing crack cocaine penalties and relies on a recent report from the Arrestee Drug Abuse Monitoring (ADAM) Program to support this position. The ADAM Report indicated that in four major metropolitan areas (Miami, Phoenix, Seattle, and Tucson), the number of transactions in the crack market was much larger than in the powder cocaine and marijuana markets. Finally, the FOP expressed its support for increasing the penalties for offenses involving powder cocaine through a reduction in the quantity of powder necessary to trigger the 5- and 10- year mandatory minimums. The FOP, in support of its position, relied on the 1995 Report on "Cocaine and Federal Sentencing Policy" in which the Commission noted that some wholesale distributors who initially handled crack cocaine were moving to distribute powder cocaine to avoid the "harsh federal sentencing guidelines that apply to higher-volume crack sales".

TESTIMONY

of

**Chuck Canterbury
National President,
Grand Lodge, Fraternal Order of Police**

**at a Public Hearing
before the
United States Sentencing Commission**

on

Federal Cocaine Sentencing Policy

14 NOVEMBER 2006

Good morning Mr. Chairman, Vice Chairmen Castillo, Sessions and Steer, and distinguished members of the United States Sentencing Commission. My name is Chuck Canterbury, National President of the Fraternal Order of Police, the largest law enforcement labor organization in the United States, representing more than 324,000 law enforcement officers. The FOP has previously addressed the Commission on the issue of the disparate penalties associated with crack and powder cocaine offenses and this morning, I am here to provide our views on the current U.S. Sentencing Guidelines for cocaine offenses. I appreciate the Commission giving the FOP this opportunity.

Drug abuse and narcotics trafficking in the United States has always been a top concern of our nation's law enforcement agencies. But in the 1980s, our nation experienced an explosion in violence that was fueled almost entirely by the emergence of crack cocaine--a cheaper, more dangerous form of the drug, which was revealed to have a devastating psychological and physiological effect on its users. The rapid spread of crack cocaine's use and availability in our nation's major cities caught many of us in the law enforcement community by surprise, particularly the increased number of related crimes and the violence on the part of drug dealers trying to protect their turf and users who were willing to do anything to pay for their next fix. As a result, drug-related crime became our nation's number one source of crime and law enforcement's number one priority.

Congress moved quickly to confront this violence and the ongoing threat of crime and addiction by giving law enforcement the tools they needed to combat drug traffickers and dealers. Measures like the Anti-Drug Abuse Acts of 1986 and 1988 put stiffer penalties into place for those who would bring the poison of drugs and violence into our neighborhoods and communities. In the experience of the FOP, tougher penalties work. They worked in the 1980s and 1990s and were a very significant factor in the ability of law enforcement to counter the "crack" explosion. Mandatory minimum sentences, especially those which take into consideration the type of drug, the presence or use of firearms, the use or attempted use of violence, mean longer sentences for the worst offenders. The lessons law enforcement learned in fighting the "crack wars" of the 1980s have been applied to other anti-narcotic and anti-crime strategies and have proven to be effective. As recently as this year, Congress adopted the Combat Meth Act which provides enhanced sentences for persons smuggling methamphetamines or the precursor chemicals needed to manufacture this drug into the United States, for persons who function as meth "kingpins" and for those who manufacture or deal the drug where children live or are present. According to local and State law enforcement, the abuse and manufacture of methamphetamines is the number one law enforcement problem in the nation and Congress has acted to give us the tools we need to bring this problem under control by using the success we had in fighting crack as a model.

The current sentencing guidelines for cocaine offenses are based primarily on the quantity of the drug in the possession of the defendant at the time of his arrest and the law does make a significant distinction between the possession of crack and cocaine in its powder form. Under current guidelines, a person convicted of distributing 500 grams of powder cocaine or 5 grams of crack cocaine receives a mandatory 5-year sentence, and a 10-year sentence for those convicted of distributing 5,000 grams of powder or 50 grams

of crack. This Commission and Congress has considered the impact of this disparity on several occasions. In a report to Congress in 1997 required by Public Law 104-38, this Commission recognized that some drugs "have more attendant harms than others and that those who traffic in more dangerous drugs ought to be sentenced more severely than those who traffic in less dangerous drugs." The FOP believe that the evidence demonstrates that crack cocaine does in fact inflict greater harm to both the user and to environment—the communities—in which it is available. One such example is that while only 22% of all cocaine users use crack cocaine, they represented 72% of all primary admissions to hospitals for cocaine usage in the past year.

The Commission's findings in the 1997 report also stated that crack cocaine is more often associated with systemic crime, is more widely available on the street, is particularly accessible to the most vulnerable members of our society, and produces more intense physiological and psychotropic effects than the use of powder cocaine. As a result, Federal sentencing policy must reflect the greater dangers associated with crack and impose correspondingly greater punishments. The FOP agrees strongly with this assessment. Anyone who has ever seen a child or adult addicted to crack, or talked to the families who are forced to live locked inside their own homes for fear of the crack dealers who rule their streets, would also agree with this statement.

There are, however, other factors which should go into the sentencing of those convicted of crack-powder cocaine offenses. The Commission notes that some have suggested that proportionality in drug sentences could be better served by providing enhancements that target offenders who engage in aggravating conduct, and by reducing the penalties based solely on the quantity of crack cocaine to the extent that the Drug Quantity Table already takes aggravating conduct into account. For example, possession of 5 grams of crack is currently assigned a base offense level of 26, which translates into a sentence of between 63 and 78 months for individuals with 0 to 1 Criminal History Points. The Commission has previously considered a differentiation regarding the use and possession of firearms in drug-related offenses, and providing sentencing enhancements for the distribution of drugs at a protected location or to underage or pregnant individuals. We believe that the sentencing guidelines should include additional aggravating factors—the presence of firearms or children, use or attempted use of violence are a few examples—in the determination of a final sentence. However, these and other enhancements should continue to be in addition to a reasonable mandatory minimum sentence that is based first and foremost on the quantity of the controlled substance as provided for under current law.

The FOP has heard and appreciates the concerns of some regarding the 100:1 drug quantity ratio for crack cocaine and powder cocaine offenses. As I mentioned previously, we testified before this Commission on that very issue several years ago and we continue to reject proposals which would "fix" this disparity by *decreasing* the penalties which have proven to be effective in law enforcement's fight against crack cocaine. We hold that this approach is at variance with common sense and strongly disagree with the assumption that 5- and 10-year mandatory sentences should be targeted only at the most serious drug offenders. The so-called "low level dealer," who traffics in small amounts

of either powder or crack cocaine, is no less of a danger to the community than an individual at the manufacturing or wholesale level. Despite the fact that these individuals may represent the bottom of the drug distribution chain that does not necessarily translate into a decrease in the risk of violence that all too often accompanies these offenses, or in the serious threat they pose to the safety of our children and the quality of life in our communities. A 2002 report published by this Commission stated that "the majority of crack cocaine and powder cocaine offenders performed low-level trafficking functions" and that "aggravating factors occurred more often in crack cocaine cases than in powder cocaine cases." The most recent report from the Arrestee Drug Abuse Monitoring (ADAM) Program indicates that in four major metropolitan areas (Miami, Phoenix, Seattle, and Tucson), the number of transactions in the crack market was much larger than in the powder cocaine and marijuana markets. In these sites, the estimated size (measured in dollars) of the crack cocaine market in a 30-day period was 2 to 10 times larger than the size of the powder cocaine and marijuana markets. The range among these sites in the market size of crack cocaine was about \$226,000 to \$1,400,000.

Powder cocaine, while the same in some respects to crack cocaine, does not have the same impact on a community, nor is it associated with the same type of related crime. The efforts of law enforcement to control it must be different as well. The Fraternal Order of Police would support *increasing* the penalties for offenses involving powder cocaine through a reduction in the quantity of powder necessary to trigger the 5- and 10-year mandatory minimum sentences, thereby decreasing the gap between the two similar offenses and addressing the concerns of those who question the current ratio without depriving law enforcement with the tools they need to control the possession, use, and sale of powder cocaine.

There are other reasons to support an increase in the penalties associated with cocaine-related offenses. In its 1995 report on "Cocaine and Federal Sentencing Policy," the Commission wrote that the Drug Enforcement Administration noted that in prior years some wholesale distributors who initially handled crack cocaine were moving to distribute powder cocaine to avoid the "harsh Federal sentencing guidelines that apply to higher-volume crack sales." More recently, in its 2002 edition, the Commission noted that while average prison sentence for someone convicted of possessing crack cocaine has remained fairly static from 1992 to 2000 (an average of 118 months), the average prison sentence for someone found violating the powder cocaine statutes has decreased from 99 months in prison to 74 months in prison—that is 40 percent less than those convicted of possession of crack cocaine. The FOP would strongly oppose attempts to equalize the outcome by decreasing the average time served for crack cocaine offenses, as we believe such an approach would harm the overall effort to keep drugs off the street and violence out of our communities.

The dangers associated with both crack and powder cocaine have not completely disappeared. In fact, the opposite is true. The most recent available information indicates that cocaine is still the primary drug involved in Federal arrests. Between 1 October 2004 and 11 January 2005, there were 1,205 Federal offenders sentenced for crack cocaine-related charges in U.S. Courts, approximately 95% of which involved

crack cocaine trafficking. Between January 12, 2005 and September 30, 2005, there were 4,077 Federal offenders sentenced for crack cocaine-related charges in U.S. Courts, approximately 95.3% of which involved trafficking.

The National Survey on Drug Use and Health (NSDUH) reports that the rate of past year use for cocaine (powder and crack combined) among individuals aged 12 and older (2.4%) has remained stable since 2002. Yet this percentage is still unacceptably high and its use is higher than that for methamphetamine (0.6%) or heroin (0.2%). Among adults, NSDUH data show that rates of past year use for cocaine among young adults (aged 18 to 25) are stable but remain the highest among all age groups.

It is also telling that the number of treatment admissions to publicly funded facilities for cocaine has decreased since the mid-1990s despite increased access to drug treatment. Cocaine is the *only* major drug of abuse for which treatment admissions have decreased.

This year alone, more than 5.5 million Americans will use cocaine, and 872,000 will try it for the first time. Similarly, 1.4 million Americans will use crack cocaine and 230,000 will try it for the first time. These are very disturbing numbers. And despite indications that cocaine production has stabilized since 2002, U.S. law enforcement authorities seized 196 metric tons of cocaine in 2005—a five year high.

All of this information argues strongly against any “step back” in the U.S. Sentencing Guidelines in the fight against cocaine traffickers, dealers, and users.

The Fraternal Order of Police supports tough penalties for all drug-related offenses. Each illegal drug carries with it different effects on their users, as well as different problems associated with their manufacture and distribution. One thing is clear, however, although our nation has seen across the board reductions in crime rates in recent years, early data analysis suggests that we will see a significant increase in homicides, aggravated assaults and robberies in 2006. The relationship between drugs and crime is well-documented and further analysis of the impending increase in the crime rate will certainly provide further information about the negative effect narcotics have on our society. Our nation’s law enforcement community, along with this Administration, the Congress and the Commission must continue to send the message to drug dealers and traffickers that the Federal government will deal harshly with those who continue to deal in drugs and engage in the violence that goes hand-in-hand with the drug trade.

The FOP appreciates the invitation of the U.S. Sentencing Commission to appear today and we look forward to working with you as you consider any changes to the sentencing guidelines for cocaine or other drug-related offenses. On behalf of the membership of the Fraternal Order of Police, let me thank you again, Mr. Chairman and the Commission, for the opportunity to appear before you here today.

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

Questions for written submission

Mr Elmore Briggs

1. When a person using cocaine comes to treatment, what are the symptoms that you typically see? Do the symptoms vary depending on whether the patient abuses crack versus powder cocaine and, if so, how? Do they vary depending on the route of administration and, if so, how?
2. What is a typical treatment plan for a cocaine abuser and does it vary depending on either the form of the drug (crack versus powder) or the route of administration (smoked, injected, or snorted)? Do the treatment plans use different or greater treatment resources (for example, is medical detoxification more likely required for users of one form of the drug compared to than other form of the drug); is there a different likelihood of successful completion of the treatment program based on the form of the drug or route of administration; is there a different risk of relapse?
3. Have there been any changes since the Commission issued its 2002 report on federal cocaine sentencing policy that should be considered by the Commission?
4. From your perspective is there a difference in harms associated with the use/trafficking of crack versus powder cocaine:

If there is a difference, should trafficking in one form of the drug be punished more severely than trafficking in the other form of the drug?

If a difference exists but they should be punished identically? Please explain.

If a difference exists and they should be punished differently, what should that specific difference be, and what is the justification for that specific difference?

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF HEALTH
ADDICTION PREVENTION AND RECOVERY ADMINISTRATION**

Office of the Senior Deputy Director
for Substance Abuse Services



**THE U.S. SENTENCING COMMISSION
Public Hearing on Federal Cocaine Sentencing Policy**

November 14, 2006

ADDICTION PREVENTION AND RECOVERY ADMINISTRATION

The Addiction Prevention and Recovery Administration (APRA) is the District of Columbia's single state agency (SSA) on alcohol, tobacco and other drug abuse prevention and treatment. APRA plans and implements the public substance abuse prevention and treatment initiative for the Department of Health (DOH) and is the primary provider and/or funding agency for substance abuse services for indigent (uninsured or underinsured) District residents at risk or living with a substance use disorder. The DOH Senior Deputy Director for Substance Abuse Services/APRA Administrator provides oversight on all APRA activities.

MISSION:

Building resilience and enabling recovery for DC residents at risk or living with substance use disorders.

VISION:

A healthy and drug free District of Columbia

PHILOSOPHY:

Substance abuse and/or use disorders are associated with biological, psychological and social factors. Therefore substance abuse and addiction are multi-domain concerns and "biopsychosocial" in nature. Thus, prevention and treatment must address these components of the user or person at risk in order to meet the needs of the whole person. Effective prevention efforts build resilience against initial or continued use while treatment is matched to the clinical and social profile of the user through care plans that are based on standard of care and individual profile. Effective planning considers the cofactors to and impact of substance use on the individual and collective (familial and societal levels as well as the efficiency and effectiveness of current efforts.

CRITICAL SUBSTANCE ABUSE TRENDS IN THE DISTRICT:

- The overall illicit drug use rate of 9.6%, 52% higher than the nationwide rate of 6.3%
- Approximately 60,000 residents – nearly 1 in 10 – are addicted to illegal drugs or alcohol.
- There are between 26,000-42,000 individuals with a co-occurring substance abuse and mental health disorders – at least 40% of the street-bound homeless population has a co-occurring disorder.
- 27% of the cumulative AIDS cases are related to injection drug use.
- The social cost of alcohol and drug abuse is estimated to be more than \$1.2 billion.

Through a Mayoral appointed Interagency Task Force on Substance Abuse, Prevention, Treatment and Control, APRA is responsible for leading the development and implementation of the City-Wide Comprehensive Substance Abuse Strategy.

As the substance use disorders treatment experts for the Nations Capitol, following are our collective responses to the very thought provoking questions raised in preparation for setting Cocaine sentencing policy:

1. **When a person using cocaine comes to treatment, what are the symptoms that you typically see? Do the symptoms vary depending on whether the patient abuses Crack versus powder cocaine and, if so, how? Do they vary depending on the route of administration and, if so, how?**
 - Addiction is a brain disease with biopsychosocial implications. While overall symptomatology for cocaine use is similar, clearly nuances are evident between clients presenting for treatment of their addictive disorder. Generally, at admission Crack and powdered Cocaine users present with symptoms indicative of depression. Intermittent binge use of crack cocaine and cocaine is common. The withdrawal symptoms of both agents are similar. The withdrawal symptoms after a 2-3 day binge are different from those that occur after chronic, high dose use. Following regular use the withdrawal syndrome consists of the following: dysphasia, irritability, difficulty sleeping and intense dreaming. These symptoms usually subside after 2 to 4 days of drug abstinence. This is due, in part to the depletion of certain neurotransmitters, which were highly active during the period of Cocaine use. Crack Cocaine enters the brain quickly, with an instantaneous pleasurable effect on the reward pathway of the brain. However, the decline of the effect occurs quickly as well. Hence, the desire to experience the intense feeling of pleasure intensifies cravings and compulsions to obtain more of the drug. Because of the lower price new users of Crack Cocaine often perceive their resources as infinite. This perception changes as they become caught in the cycle of: obsession, compulsion, loss of control over their use and continued use despite adverse consequences. At this juncture, many Crack Cocaine users present for treatment in a state of despair, dejection and destitution. Clearly, this scenario does apply to many users of powdered Cocaine as well. However, given the route of administration and the cost, the inevitable “end” might be merely prolonged. Many users of powdered Cocaine move from “snorting” to injecting and/or smoking

Cocaine. This pattern is indicative of the desire to achieve a more intense level of euphoria and a willingness to adapt behaviors to accomplish this goal. Snorting and/or injecting drugs have the effect of substance dilution that smoking the drug does not have. Hence, a Cocaine addicted person soon realizes that in some ways they are wasting money and diminishing the effect and start using Crack Cocaine.

2. **What is a typical treatment plan for a cocaine abuser and does it vary depending on either the form of the drug (Crack versus powder) or the route of administration (smoked, injected, or snorted)? Do the treatment plans use different or greater treatment resources (for example, is medical detoxification more likely required for users of one form of the drug compared to than other form of the drug); is there a different likelihood of successful completion of the treatment program based on the form of the drug or route of administration; is there a different risk of relapse?**

- All treatment plans designed for persons with addictive disorders must be based on the strengths, needs, abilities and preferences of the client (SNAP). Treatment providers aim to create an environment in which the clients can begin to embrace recovery, based on their assessed needs. When this occurs, treatment works. From this perspective no singular plan of care can address every user of Cocaine admitted to a treatment setting. The best plan for determining the appropriate level of care is the use of the patient placement criteria (PPC) developed by the American Society of Addiction Medicine (ASAM). This is especially important in that many users of Cocaine, in any form, rarely use Cocaine alone. Many are polysubstance users, which could include the use of Heroin, Alcohol, prescription narcotics and or tranquilizers and other licit and/or illicit drugs. Their Alcohol use could require a medically supervised detoxification. An important distinction centers on the debilitating level of the admitted client. Medically supervised detoxification is used to assisted client which are experiencing physical withdrawal that is life threatening. Clearly, all users of Cocaine do not require a medically supervised detoxification. Some users of Crack and or powdered Cocaine do require a period of stabilization found in a Social Model Detoxification placement. Placement at this level of care serves to stabilize the client within an integrated system of care that addresses their biopsychosocial needs as the drug withdraws from their body. Clients with a dependence on Cocaine, admitted to any level of care, often present for treatment with depressive affects that must be evaluated and monitored. Recognition of the issue of possible mood disorders, most notably depression, in the treatment of persons with a dependence on cocaine is vital to their successful care and subsequent outcome. First, the treatment must include plans for the prevention of self-harm, a factor often evident when people in a prerecovery state experience depression. As alluded to in the first question, the withdrawal affects of Cocaine are exacerbated by depletion of the neurotransmitters that produce, in the person, a sense of well being. Second, in all likelihood, the Cocaine addicted person has not slept nor eaten. They come out the euphoric state physically drained, emotionally depressed, hopeless and to some degree, guilt ridden over their behavior and/ or losses. Combined, the potential for self-harm and relapse

are high. The primary goal of the treatment process remains the same. The client must be educated about their addiction and the process of recovery. They learn to see the addictive disease in themselves, by learning to self-diagnose. Clients learn about recovery resources and how to use them to their advantage. Further, they learn that they have the primary responsibility for continued treatment of their addictive disorder. Added emphasis on craving management is helpful to persons addicted to Cocaine in any form. Because addiction is a brain disease, with Cocaine users, there is a continued sensitivity to the effect of the drug within the reward pathways of the brain. Therefore, the addicted individual, although in recovery, can still experience intense cravings long after their last use. These are called triggers. They can be environmental i.e. passing through an old neighborhood; or social i.e. seeing or talking to a friend they shared drugs with in the past or personal. This area speaks especially to the consequences of Crack Cocaine. Many persons addicted to Crack Cocaine who present for treatment have experienced trauma as a result of their drug seeking behavior and suffer PTSD. To be sure, the end point of continued addiction is personal deterioration of one sort or another. With Crack Cocaine the end point appears more pronounced.

3. Have there been any changes since the Commission issued its 2002 report on federal cocaine sentencing policy that should be considered by the Commission?

- Since the changes instituted by Federal guidelines in sentencing there is a great disparity in the numbers of African Americans and other minorities incarcerated for longer periods of time.

4. From your perspective is there a difference in harms associated with the use/trafficking of Crack versus powder cocaine:

- With all drugs of abuse and dependence a clear harm to the individual and society is evident. To place one harm above the other because of type not cause appears counter productive. Having stated that, the end result of Crack Cocaine use is devastatingly pronounced for some individuals, treatment for the addicted persons creates healthy productive citizens and a stronger community. What comes to mind is the question as to whether a Crack addicted mother who neglects to feed her child is worse than a drunk driver who kills a child at a crosswalk. Harm is reduced through new ways of thinking and behaving. This is the process of active recovery, and is just as potent in a positive manner as active addiction is in a negative manner. Addiction is a treatable brain disease. The concomitant harm associated with this disorder is the result of obsession, compulsion, loss of control and continued use despite adverse consequences. Through the use of proven best practice approaches the disease of addiction can be placed in remission, with demonstrated observable behavior changes evident in the "treated person". Moreover, the neighborhood shares in the recovery and benefits from an improved community spirit.

If there is a difference, should trafficking in one form of the drug be punished more severely than trafficking in the other form of the drug?

If a difference exists but they should be punished identically? Please explain.

If a difference exists and they should be punished differently, what should that specific difference be, and what is the justification for that specific difference?

- Trafficking sentencing should be considered equal for Cocaine regardless of the form. However, it is important to consider in any sentencing structure that a significant number of those who sell these drugs do so to support their addiction. Addiction is a brain disorder that research has shown responds to treatment. In many cases those individuals who are incarcerated for possession or sale of illicit drugs can benefit from diversion to treatment rather than prison sentences. Without adequate treatment these same individuals will re-offend and add to the incarceration rate of high recidivism. Any federal sentencing policy that does not take into account the value of diversion and treatment will fail not only the individual with a substance use disorder but the community at large.

IMPORTANT NOTES

**PUBLIC HEARING ON COCAINE AND FEDERAL
SENTENCING POLICY**

TUESDAY, NOVEMBER 14, 2006

PANEL FOUR

**A View From the Judicial Branch:
The Honorable Reggie B. Walton**

**UNITED STATES SENTENCING COMMISSION
PUBLIC HEARING ON COCAINE SENTENCING POLICY**

WITNESSES AND BIOS

PANEL FOUR: JUDICIAL BRANCH

The Honorable Reggie B. Walton
Criminal Law Committee

Honorable Reggie Walton

Criminal Law Committee

Judge Reggie B. Walton assumed his position as a United States District Judge for the District of Columbia on October 29, 2001, after being nominated to the position by President George W. Bush and confirmed by the United States Senate. Judge Walton was also appointed by President Bush in June of 2004, to serve as the Chairperson of the National Prison Rape Elimination Commission, a commission created by the United States Congress and tasked with the mission of identifying methods to curb the incidents of prison rape. Former Chief Justice Rehnquist also appointed Judge Walton to the federal judiciary's Criminal Law Committee, effective October 1, 2005.

Judge Walton previously served as an Associate Judge of the Superior Court of the District of Columbia from 1981 to 1989 and 1991 to 2001, having been appointed to that position on two occasions by Presidents Ronald Reagan in 1981 and George H. W. Bush in 1991. While serving on the Superior Court, Judge Walton was the Court's Presiding Judge of the Family Division, Presiding Judge of the Domestic Violence Unit and Deputy Presiding Judge of the Criminal Division. Between 1989 and 1991, Judge Walton served as President George H. W. Bush's Associate Director of the Office of National Drug Control Policy in the Executive Office of the President and as President Bush's Senior White House Advisor for Crime.

Before his appointment to the Superior Court bench in 1981, Judge Walton served as the Executive Assistant United States Attorney in the Office of the United States Attorney for the District of Columbia, from June, 1980 to July, 1981, and he was an Assistant United States Attorney in that Office from March, 1976 to June, 1980. From June, 1979 to June, 1980, Judge Walton was also the Chief of the Career Criminal Unit in the United States Attorney's Office. Before joining the United States Attorney's Office, Judge Walton was a staff attorney in the Defender Association of Philadelphia from August, 1974 to February, 1976.

Judge Walton was born in Donora, Pennsylvania on February 8, 1949. He received his Bachelor of Arts degree from West Virginia State University in 1971 and received his Juris Doctorate degree from The American University, Washington College of Law, in 1974.

Judge Walton has been the recipient of numerous honors and awards, including, his selection to the West Virginia State University Alumni Wall of Fame in 2004, his inclusion in the 2001 edition of The Marquis Who's Who in America, the 2000 edition of The Marquis Who's Who in the World, the 2000 North Star Award, presented by The American University, Washington College of Law; the 1999 Distinguished Alumni Award presented by The American University, Washington College of Law; the 1997 Honorable Robert A. Shuker Memorial Award, presented by the Assistant United States Attorneys' Association; the 1993 William H. Hastie Award, presented by the Judicial Council of the National Bar Association; the 1990 County Spotlight Award, presented by the National Association of Counties; the 1990 James R. Waddy Meritorious Service Award, presented by the West Virginia State University National Alumni Association; the Secretary's Award, presented by the Department of Veterans Affairs in 1990; the

1989 H. Carl Moultrie Award, presented by the District of Columbia Branch of the National Association for the Advancement of Colored People; the Bar Association of the District of Columbia's Young Lawyers Section 1989 Award for Distinguished Service to the Community and the Nation; the 1989 Dean's Award for Distinguished Service to The American University, Washington College of Law; and the United States Department of Justice's Directors Award for Superior Performance as an Assistant United States

Attorney in 1980. In addition, April 9, 1991, was declared as Judge Reggie B. Walton Day in the State of Louisiana by the Governor for his contribution to the War on Drugs. Judge Walton was also commissioned as a Kentucky Colonel by Governor Wallace G. Wilkinson in 1990 and 1991, which is the highest civilian honor awarded by the state of Kentucky. Numerous mayors in cities throughout the country have bestowed similar honors on Judge Walton for his work on the nation's drug problem.

Judge Walton was one of 14 judges profiled in a 1994 book entitled "Black Judges On Justice: Perspectives From The Bench." The book is the first effort to assess the judicial perspectives of prominent African-American judges in the United States.

Judge Walton traveled to Irkutsk, Russia in May 1996 to provide instruction to Russian judges on criminal law subjects in a program funded by the United States Department of Justice and the American Bar Association's Central and East European Law Initiative Reform Project. Judge Walton is also an instructor in the Harvard University Law School's Advocacy Workshop and a faculty member at the National Judicial College in Reno, Nevada.

Judge Walton has been active in working with the youth of the Washington, D.C. area and throughout the nation. He has served as a Big Brother and frequently speaks at schools throughout the Washington Metropolitan area concerning drugs, crime and personal responsibility.

Judge Walton and his wife are the parents of one daughter.

Testimony of Judge Reggie B. Walton Presented to the United States Sentencing Commission on November 14, 2006, on Sentencing Disparity for Crack and Powder Cocaine Offenses

Thank you for affording me the opportunity to appear before you today on behalf of the Judicial Conference of the United States' Criminal Law Committee. At its September 19, 2006 session, the Judicial Conference expressed its determination "to oppose the existing sentencing differences between crack and powder cocaine and agreed to support the reduction of that difference."¹ Earlier, the Criminal Law Committee had recommended to the Judicial Conference that these positions be taken. What I indicate below are my personal views on the matter.

I personally became involved in the debate about whether there was justification for different sentences in crack and powder cocaine distribution related cases when I served as the White House's Associate Director of the Office of National Drug Control Policy in the late 1980s. At that time, I advocated for different sentences because of the greater potential for addiction from the use of crack² and the level of violence associated with the crack trade which existed at

¹Preliminary Report, Judicial Conference Actions, September 19, 2006, at 5.

²"[A]lthough both powder cocaine and crack cocaine are potentially addictive, administering the drug in a manner that maximizes the effect (*e.g.*, injecting or smoking) increases the risk of addiction. It is this difference in *typical* methods of administration, not
(continued...)

that time.³ However, I never thought that the disparity should be as severe as it ultimately has become.

Whether there remains justification for some level of disparity is obviously a policy decision that will have to be made by the legislative and executive branches of government. Nonetheless, it is unconscionable to maintain the current sentencing structure for several reasons.

First, although I firmly believe that people who distribute illegal drugs should be punished for their conduct, the punishment we impose must be fair. And just as important, the punishment imposed must be perceived as fair. While I cannot categorically say that some degree of difference in punishment for crack and powder cocaine offenses is not warranted, no reasonable justifications exist for the 100-to-1 disparity.⁴ The fact that crack cocaine has greater addictive

²(...continued)

differences in the inherent properties of the two forms of the drugs, that makes crack cocaine more potentially addictive to *typical* users. Smoking crack cocaine produces quicker onset of, shorter-lasting, and more intense effects than snorting powder cocaine. These factors in turn result in a greater likelihood that the user will administer the drug more frequently to sustain these shorter “highs” and develop an addiction.” U.S. SENTENCING COMM’N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 19 (May 2002), available at http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm.

³See footnote 6, infra.

⁴See 21 U.S.C. § 841(b)(1994); U.S.S.G. § 2D1.1 (2006)

potential than powder cocaine cannot be seriously challenged.⁵ However, while violence associated with the crack trade has not totally abated, it is clearly not at the level it was in the 1980s and early 1990s.⁶ Nevertheless, policy makers can undoubtedly justify some level of disparity for crack and powder cocaine sentencing. That said, I believe the following hypothetical illustrates why the current sentencing structure is not fair, nor does it have the appearance of fairness.

On the one hand, a middle class white male college student is arrested for possessing one kilogram of powder cocaine he intended to distribute to some of his fellow students. On the other hand, a black male high school dropout in the same city is arrested on the same day in an economically depressed neighborhood for possessing with intent to distribute one kilogram of crack cocaine after being stopped for committing a traffic violation. Both young men have no prior criminal

⁵See footnote 1, supra

⁶“An important basis for the establishment of the 100-to-1 drug quantity ratio was the belief that crack cocaine trafficking was highly associated with violence generally. More recent data indicate that significantly less trafficking-related violence or systemic violence, as measured by weapon use and bodily injury documented in presentence reports, is associated with crack cocaine trafficking offenses than previously assumed. In 2000, weapons were not involved to any degree by any participant in the offense in almost *two-thirds* (64.8%) of crack cocaine offenses. Furthermore, *three-quarters* of federal crack cocaine offenders (74.5%) had *no personal weapon involvement*. Further, when weapons were present, they rarely were actively used. In 2000, only 2.3 percent of crack cocaine offenders used a weapon. Bodily injury of any type occurred in 7.9 percent of crack cocaine offenses in 2000.” U.S. SENTENCING COMM’N, supra note 2, at 100.

records, but their potential sentences are widely disparate.⁷

In the case of the powder cocaine distributor, he faces a mandatory minimum statutory sentence of 5 years and a maximum sentence of 40 years.⁸ His guideline sentence range, with adjustments, is 37 to 46, but at least the 60 month mandatory minimum statutory sentence would have to be imposed. As for the crack cocaine distributor, he faces a mandatory minimum sentence of 10 years and a maximum sentence of life.⁹ And the crack cocaine distributor's guideline sentence is 108 to 135 months, but at least the 120 month mandatory minimum statutory sentence would have to be imposed. For the powder cocaine distributor to face the same prison exposure as the crack cocaine distributor, he would have to possess with intent to distribute at least 50 kilograms of powder cocaine, and could possess as much as 150 kilograms of powder cocaine and still be subject to the same prison exposure as the first time crack offender who possessed with intent to distribute the one kilogram of crack cocaine.

⁷A detailed breakdown of the statutory and guideline sentence for both hypothetical defendants was prepared by the Court's probation office and is attached as an addendum. What is set forth below is a summary of those sentences.

⁸21 U.S.C. § 841(a)(1) and (b)(1)(B)(ii)(II) (unlawful intent to distribute 500 grams or more of cocaine).

⁹21 U.S.C. § 841(a)(1) and (b)(1)(A)(iii) (unlawful intent to distribute 500 grams or more of cocaine base).

It is difficult to imagine how policy-makers seeking to reach a fair balance between just punishment for the conduct committed by these two hypothetical defendants could conclude that the disparate sentence called for by current federal law is rationally merited. And further complicating the current unfairness in the sentencing of crack and powder cocaine traffickers is the discretion federal prosecutors have to decline prosecution, thereby leaving the two hypothetical defendants to the variables of state laws if prosecutions are pursued in state courts.

But even if policy-makers can somehow rationalize the different potential sentences these two hypothetical individuals face, in my experience many members of the general public do not. Some people fail to believe that different treatment is fair because, in their view, “cocaine is cocaine.” This position overlooks the greater addictive potential of crack cocaine use, but nonetheless, I know some people who have this view. Others, however, although understanding the greater addictive potential of crack, nevertheless disagree with the imposition of different punishment. Underlying the views of many who fall into either of these camps is the belief that the policy of treating crack and powder cocaine offenders differently is unfair to those at the lower end of the socioeconomic ladder and to people of color because people in these categories are disproportionately prosecuted for crack related trafficking offenses. And my

anecdotal observations cause me to conclude that these perceptions are not totally unfounded.

I do not mean to suggest that the policy became law with the conscious objective of targeting the poor and people of color. I know those were not my objectives when I worked for the White House and advocated for different treatment of the two substances, and I would not attribute such improper motives to others who took the same position. However, regardless of why the policy became law, the current state of affairs should cause the policy to be re-examined. With the tremendous increase in the number of inmates in federal prisons,¹⁰ and many, if not most, of this population being poor people of color (namely young black and Latino males)¹¹ charged or convicted for committing crack cocaine

¹⁰As of 2003, 161,673 persons were held in federal prisons, an 81% increase from 89,538 in 1995. BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2003 2 (Nov. 2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p03.pdf>. And as of November 2006, the federal prison inmate population has increased to 193,674. Federal Bureau of Prison Weekly Population Report (November 2, 2006), available at <http://www.bop.gov/locations/weekly-report.jsp>.

¹¹As of September 2006, 40 percent of all inmates in federal prisons are black, and 31 percent self-identify as Hispanic. Federal Bureau of Prisons Inmate Breakdown (September 23, 2006), available at <http://www.bop.gov/news/quick.jsp>. 93 percent of federal prisoners are male. Id. And in 2005, black and Hispanic males comprised roughly 60 percent of all individuals sentenced to federal prison. U.S. Sentencing Comm'n, 2005 ANNUAL REPORT SOURCEBOOK, Table 7 (Age, Race, and Gender of Offenders, Fiscal Year 2005), available at <http://www.ussc.gov/ANNRPT/2005/table7.pdf>.

distribution related offenses,¹² concern should exist.

My experience also tells me that the attitudes of some in the general population about the unfairness of our drug laws has had a coercive impact on the respect many of our citizens have about the general fairness our nations's criminal justice system.¹³ I know from discussions I have had with people, comments made to me by potential jurors during the jury selection process, and comments made to me by jurors at the completion of trials, that some people desire not to serve on juries when crack cocaine is involved because of the negative attitudes they have

¹²54 percent of all federal prisoners are currently incarcerated for drug-related offenses. Federal Bureau of Prisons Inmate Breakdown (September 23, 2006), available at <http://www.bop.gov/news/quick.jsp>. In addition, 34.2 percent of all federal offenders in 2005 were sentenced for drug offenses, nearly half of which concerned either powder or crack cocaine. U.S. Sentencing Comm'n, 2005 ANNUAL REPORT SOURCEBOOK, Figure A (Distribution of Offenders in Each Primary Offense Category, Fiscal Year 2005), available at <http://www.ussc.gov/ANNRPT/2005/Fig-a.pdf>. Furthermore, "[t]he overwhelming majority of crack cocaine offenders consistently have been black: 91.4 percent in 1992 and 84.7 percent in 2000." U.S. SENTENCING COMM'N, supra note 1, at 62.

¹³See Judge Charles P. Sifton, *Guidelines, Ratio Examined in 'Booker' Resentence for Conspiracy to Distribute Crack Cocaine Base*, NEW YORK LAW JOURNAL, March 31, 2005, at 23 (stating that "[t]he disparity between sentences imposed for equivalent amounts of powder versus crack cocaine is now approaching common knowledge, and a source of popular and scholarly concern") (citing cases and articles); cf. Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1287 (Apr. 2004) (citing Todd R. Clear & Dina R. Rose, *Individual Sentencing Practices and Aggregate Social Problems*, in *Crime Control and Social Justice: The Delicate Balance* 27, 42 (Darnell F. Hawkins, Samuel L. Myers, Jr. & Randolph N. Stone eds., 2003)) (noting research suggesting that "people who live in neighborhoods with high prison rates tend to feel a strong distrust of formal sanctions, less obligation to obey the law, and less confidence in the capacity of informal social control in their communities").

about the crack and powder cocaine sentencing disparity or have refused to convict crack offenders, despite the quality of the government's evidence, because of their attitudes about the current sentencing structure.¹⁴

In conclusion, the collateral consequences resulting from the policy decision to differentiate between sentences imposed on offenders convicted of crack cocaine related distribution offenses, as opposed to the sentences imposed on offenders convicted of powder cocaine distribution related offenses, warrants a re-evaluation of the policy. The failure to do so has left many to believe that there is an indifference to the real and perceived unfairness of the policy because of the population is disproportionately impacted by it. As a nation that prides itself on treating all who appear before our courts of law with fairness and equality, the time has come to address a vexing problem for those of us who are entrusted to

¹⁴See William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1279-84 (1996) (describing resistance to the sentencing disparity on the part of judges, juries, and prosecutors, and stating that “[a]necdotal evidence from districts with predominantly African-American juries indicates that some of them acquit African-American crack defendants whether or not they believe them to be guilty if they conclude that the law is unfair”); see also Andrew J. Fuchs, *The Effect of Apprendi v. New Jersey on the Federal Sentencing Guidelines: Blurring the Distinction Between Sentencing Factors and Element of A Crime*, 69 FORDHAM L. REV. 1399, 1437 (2001) (stating that “[a] jury could become conscious of this disparity if it was privy to sentencing information in a case involving defendants charged with possessing both powder and crack cocaine. After being informed of the penalties associated with the crime, jurors may hesitate to reach a verdict that would relegate the defendants to such disparate periods of incarceration”); Gerald F. Uelman, *Perspective on Justice: Why Some Juries Judge the System*, LOS ANGELES TIMES, Jan. 24, 1996, at 9 (noting that “growing numbers of jurors deeply distrust the system that they are given the power to control,” in large part because of racial disparities in drug sentencing).

administer the system and those who suffer the consequences of the policy.

SENTENCING HYPOTHETICAL

A middle class white male college student (defendant #1) is arrested for possessing one kilogram of powder cocaine he intended to distribute to some of his fellow students. On the other hand, a black male high school dropout (defendant #2) in the same city is arrested on the same day in an economically depressed neighborhood for possessing with intent to distribute one kilogram of crack cocaine after being stopped for committing a traffic violation. Both young men have no prior criminal records.

The sentencing information for the hypothetical is below:

DEFENDANT #1

Defendant #1 - Defendant possessed with the intent to distribute 1 kilogram of cocaine powder.

Charge: Unlawful Possession with Intent to Distribute 500 Grams or More of Cocaine

{21 U.S.C. § 841(a)(1) and (b)(1)(B)(ii)(II)}

5 years to 40 years confinement and/or \$2,000,000 fine

Offense Level Computation

1. The 2006 edition of the Guidelines Manual has been used in this case.
2. **Base Offense Level:** The base level offense is 26, because the defendant is accountable for at least 500 grams but less than 2 kilograms of cocaine. USSG §2D1.1(c)(7). **26**
3. **Specific Offense Characteristics:** Pursuant to USSG 2D1.1(b)(9), since the defendant meets the criteria set forth in subdivisions (1)-(5) of subsection (a) of 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), the offense level is decreased by 2 levels. **-2**
4. **Victim Related Adjustments:** None. **0**
5. **Adjustment for Role in the Offense:** None. **0**
6. **Adjustment for Obstruction of Justice:** None. **0**
7. **Adjusted Offense Level (Subtotal):** **24**
8. **Chapter Four Enhancements:** None. **0**
9. **Adjustment for Acceptance of Responsibility:** As the defendant demonstrated an acceptance of responsibility for the offense of conviction, the adjusted offense level was decreased by two levels. U.S.S.G 3E1.1(a). In addition, the defendant assisted authorities in the investigation/prosecution of the misconduct by timely notifying authorities of his intent to enter a plea of guilty and the government has filed a motion or indicated it intends to file a motion acknowledging the defendant's actions. As a result, the adjusted offense level was decreased by an additional one level. U.S.S.G. 3E1.1(b). **-3**
10. **Total Offense Level:** **21**

Addendum

SENTENCING HYPOTHETICAL

DEFENDANT #1

TOTAL OFFENSE LEVEL: 21
CRIMINAL HISTORY CATEGORY: I

	<u>STATUTORY PROVISIONS</u>	<u>GUIDELINE PROVISIONS</u>
CUSTODY:	5 years to 40 years	37 to 46 months If 5C1.2 is not applied court must sentence defendant to 60 months pursuant to 5G1.1(b)
PROBATION:	Not Eligible	Not Eligible
SUPERVISED RELEASE:	At least 4 years	At least 4 years
FINE:	\$2,000,000	\$7,500 to \$2,000,000
RESTITUTION:	Not Applicable	Not Applicable
SPECIAL ASSESSMENT:	\$100	\$100

SENTENCING HYPOTHETICAL

DEFENDANT #2

Defendant #2: Defendant possessed with the intent to distribute 1 kilogram of cocaine base.

Charge: Unlawful Possession with Intent to Distribute 50 Grams or More of Cocaine Base {21 U.S.C. § 841(a)(1) and (b)(1)(A)(iii)}

10 years to life confinement and/or \$4,000,000 fine

1. The 2006 edition of the Guidelines Manual has been used in this case.
2. **Base Offense Level:** The base level offense is 36, because the defendant is accountable for at least 500 grams but less than 2 kilograms of cocaine base. USSG §2D1.1(c)(2). 36
3. **Specific Offense Characteristics:** Pursuant to USSG 2D1.1(b)(9), since the defendant meets the criteria set forth in subdivisions (1)-(5) of subsection (a) of 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), the offense level is decreased by 2 levels. -2
4. **Victim Related Adjustments:** None. 0
5. **Adjustment for Role in the Offense:** None. 0
6. **Adjustment for Obstruction of Justice:** None. 0
7. **Adjusted Offense Level (Subtotal):** 34
8. **Chapter Four Enhancements:** None. 0
9. **Adjustment for Acceptance of Responsibility:** As the defendant demonstrated an acceptance of responsibility for the offense of conviction, the adjusted offense level was decreased by two levels. U.S.S.G 3E1.1(a). In addition, the defendant assisted authorities in the investigation/prosecution of the misconduct by timely notifying authorities of his intent to enter a plea of guilty and the government has filed a motion or indicated it intends to file a motion acknowledging the defendant's actions. As a result, the adjusted offense level was decreased by an additional one level. U.S.S.G. 3E1.1(b). -3
10. **Total Offense Level:** 31

SENTENCING HYPOTHETICAL

DEFENDANT #2

TOTAL OFFENSE LEVEL: 31
CRIMINAL HISTORY CATEGORY: I

	<u>STATUTORY PROVISIONS</u>	<u>GUIDELINE PROVISIONS</u>
CUSTODY:	10 years to life	108 to 135 months If 5C1.2 is not applied court must sentence defendant to 120-135 months pursuant to 5G1.1 (c)(2)
PROBATION:	Not Eligible	Not Eligible
SUPERVISED RELEASE:	At least 5 years	At least 5 years
FINE:	\$4,000,000	\$15,000 to \$,4000,000
RESTITUTION:	Not Applicable	Not Applicable
SPECIAL ASSESSMENT:	\$100	\$100

How much powder would defendant #1 have to possess to get defendant #2's equivalent sentence for possession of crack?

In the hypothetical, Defendant #1 possesses one kilogram of cocaine powder. He would have to possess at least **50 to 150 kilograms of cocaine powder** to get a guideline sentence equivalent to Defendant #2 who only possessed **1 kilogram of cocaine base**.

IMPORTANT NOTES

**PUBLIC HEARING ON COCAINE AND FEDERAL
SENTENCING POLICY**

TUESDAY, NOVEMBER 14, 2006

PANEL FIVE

**A View From Medical and
Treatment Communities**

**UNITED STATES SENTENCING COMMISSION
PUBLIC HEARING ON COCAINE SENTENCING POLICY**

WITNESSES AND BIOS

PANEL FIVE: MEDICAL AND TREATMENT COMMUNITIES

Dr. Nora Volkow

Director, National Institute on Drug Abuse

Dr. Harolyn Belcher

Johns Hopkins University



NORA D. VOLKOW, M.D.
Director
National Institute on Drug Abuse
National Institutes of Health

National Institute on Drug Abuse
6001 Executive Boulevard
Bethesda, Maryland 20892

Nora D. Volkow, M.D., was appointed Director of the National Institute on Drug Abuse (NIDA) in May 2003. She is recognized as one of the world's leading experts on drug addiction and brain imaging.

Dr. Volkow's work has been pivotal in demonstrating that drug addiction is a disease of the brain. She pioneered the use of brain imaging to investigate the toxic effects of drugs and the effects of drugs responsible for their addictive properties in the human brain. In addition, she has made important contributions to the neurobiology of obesity, to the neurobiology of the behavioral changes that occur with aging, and to the treatment of ADHD.

Dr. Volkow was born in Mexico, attended the Modern American School, and earned her medical degree from the National University of Mexico in Mexico City where she received the *Premio Robins* award for best medical student of her generation. Her psychiatric residency was at New York University where she earned the *Laughlin Fellowship Award* as one of the 10 Outstanding Psychiatric Residents in the USA.

Dr. Volkow spent most of her professional career at the Department of Energy's Brookhaven National Laboratory (BNL) in Upton, New York where she held several leadership positions including Director of Nuclear Medicine, Chairman of the Medical Department and Associate Director for Life Sciences. In addition, Dr. Volkow was a professor in the Department of Psychiatry and Associate Dean of the Medical School at the State University of New York (SUNY)-Stony Brook.

Dr. Volkow has published more than 330 peer-reviewed articles, more than 50 book chapters and non-peer reviewed manuscripts, and also edited three books on the use of neuroimaging in studying mental and addictive disorders.

Dr. Volkow has been the recipient of numerous awards for significant scientific and public service achievements, is a member of the Institute of Medicine of the National Academy of Sciences, and was named "Innovator of the Year" in 2000 by *US News and World Report*.

Harolyn M. E. Belcher, M.D., M.H.S.

Director of Research, Kennedy Krieger Institute Family Center

Dr. Harolyn M. E. Belcher is a neurodevelopmental pediatrician and research scientist at Kennedy Krieger Institute. She is currently the Director of Research at the Kennedy Krieger Institute Family Center. Dr. Belcher is also jointly in the Department of Pediatrics at Johns Hopkins University School of Medicine and the Department of Mental Health, Johns Hopkins Bloomberg School of Public Health and also holds the rank of Associate Professor at the Johns Hopkins School of Medicine.

Biographical Sketch:

Dr. Belcher received her B.S. degree in zoology from Howard University in Washington, DC in 1980, her M.D. degree in Medicine from Howard University College of Medicine in 1982, and her Master's in Health Science focusing on Mental Hygiene in 2002 from the Johns Hopkins Bloomberg School of Public Health. Dr. Belcher began as a fellow in Developmental Pediatrics at The Kennedy Krieger Institute in 1985. She went on to serve as assistant professor of Pediatrics at George Washington University, Children's National Medical Center in Washington, DC and then at University of South Florida, Department of Pediatrics, Division of Child Development in Tampa, FL from 1987 to 1993. Dr. Belcher continued her career as a developmental pediatrician with The Naval Medical Center in Bethesda, MD from 1993-1995 before returning to Kennedy Krieger Institute as a developmental pediatrician from 1996 to the present. Dr. Belcher was an instructor in the Department of Pediatrics, Johns Hopkins University, School of Medicine from 1996-1997 and an assistant professor from 1998 to 2003. In the last quarter of 2003, Dr. Belcher was promoted to Associate Professor of Pediatrics and lecturer in the Department of Mental Health, Johns Hopkins Bloomberg School of Public Health and assumed the position of Director of Research at The Kennedy Krieger Institute Family Center.

Research Summary:

The Effects of Intrauterine Drug Exposure on the Developing Child: In the United States an estimated 3.3% of newborns, over 130,000 infants, are born to mothers who use illicit drugs during pregnancy. An estimated 17% percent of pregnant women in the United States smoke cigarettes. About 2-12,000 children per year have enough intrauterine alcohol exposure to cause Fetal Alcohol Syndrome. Exposure to drugs, tobacco, and alcohol are a serious cause of preventable cognitive and behavioral disorders.

Over the last ten years, Dr. Belcher has worked in the area of substance abuse prevention, treatment, and outcome. While on faculty at the University of South Florida, Dr. Belcher was instrumental in developing (1) community-based programs integrating prenatal care, substance abuse treatment, parent education, and pediatric follow-up for pregnant drug-dependent women and (2) specialized foster care evaluation and education programs for church-based foster care for HIV positive and drug exposed infants (Wallace & Belcher, 1997). Dr. Belcher is a co-investigator in an on-going NIH study to evaluate the impact of home-based nursing intervention for children with intrauterine drug exposure. Findings from this study suggest that children with intrauterine drug exposure have neuromotor abnormalities in the first year, that improve over

time (Belcher, et al. ,1999). Children with intrauterine drug exposure (IUDE) who receive home-based intervention have fewer behavioral problems and less parental distress than those who did not receive the home intervention (Butz et al, 2001).

Dr. Belcher served as a co-investigator on a community-based Head Start prevention intervention grant funded by the Substance Abuse and Mental Health Services Administration. This grant, the Behavioral Enhancement through Training and Teaching to Expand Resiliency (BETTER) Program endeavored to study the impact of on-site mental health clinicians, parent education, and substance abuse prevention programs at two Baltimore City Head Start sites (Belcher et al., 2001). In addition, Dr. Belcher evaluates children with intrauterine drug exposure in her clinical practice at the Kennedy Krieger Institute.

Dr. Belcher is the Principal Investigator for an Early Head Start Prevention Program, entitled the "Helping-U-Grow study" (HUGS). The HUGS study, funded by the National Institute of Mental Health, uses a randomized design to evaluate the effectiveness of The Parents' Healing curriculum for parents of Early Head Start pupils. Dr. Belcher is also Principal Investigator on a federal grant to evaluate methods to optimize compliance during MRI's and measure the effects of illicit drug exposure on brain development and another grant that created a National Child Traumatic Stress Center at the Kennedy Krieger Institute Family Center to study and improve outcome for children exposed to maltreatment.

Questions for written submission

**Dr Nora Volkow, Director
National Institute on Drug Abuse**

1. What are the pharmacological effects of cocaine? Do they vary depending on whether the cocaine is powder or crack? If so, how? Do they vary depending on the route of administration? If so, how?
2. With respect to cocaine use generally, what are the secondary consequences of its use, in terms of for example: addiction liability, requirements for treatment, risk of relapse? Do any of these vary depending on whether the cocaine is powder or crack? If so, how? Do any of these vary depending on the route of administration? If so, how?
3. What is the impact of fetal exposure to cocaine, in both short term and long term effects? Do these effects vary depending on whether the cocaine is powder or crack? If so, how? Do these effects vary depending on the route of administration? If so, how? How do these effects compare to fetal exposure to other drugs, including alcohol?
4. What is the trend in the prevalence of cocaine use in the United States? How does this trend compare to the prevalence trends of other drugs? Among cocaine users, what proportion inject the drug and what proportion use crack cocaine?
5. Among cocaine users, are there differences in the characteristics of users who insufflate powder cocaine, inject powder cocaine, or smoke crack cocaine? If so, what are these different characteristics?
6. Have there been any changes since the Commission issued its 2002 report on federal cocaine?
7. From your perspective is there a difference in harms associated with the use/trafficking of crack versus powder cocaine:

If there is a difference, should trafficking in one form of the drug be punished more severely than trafficking in the other form of the drug?

If a difference exists but they should be punished identically? Please explain.

If a difference exists and they should be punished differently, what should that specific difference be, and what is the justification for that specific difference?

Testimony

**Nora D. Volkow, M.D.
Director,
National Institute on Drug Abuse
National Institutes of Health
U.S. Department of Health and Human Services**

**United States Sentencing Commission
Public Hearing**

**November 14, 2006
Georgetown University Law Center**

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

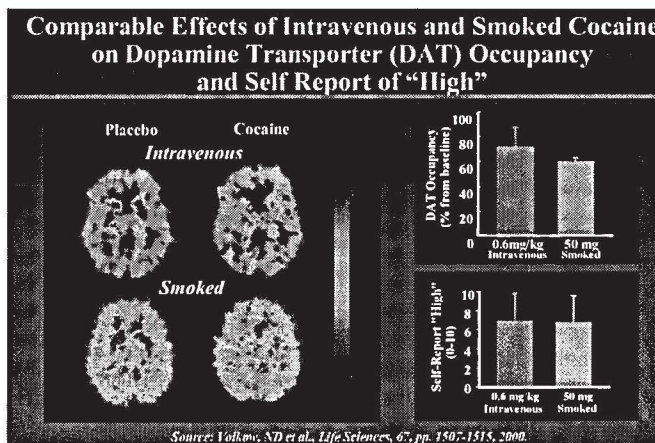
I want to focus my comments today on what our research efforts have taught us about the scope, pharmacology and health consequences of cocaine abuse and addiction, particularly with regards to the differences, or lack thereof, between the two forms of cocaine (namely powder vs. freebase) and the two most effective routes of administration (namely smoking and injection).

Research supported by NIDA has found cocaine to be a powerfully addictive stimulant that directly affects the brain. Like other central nervous system (CNS) stimulants, such as nicotine, amphetamine and methamphetamine, the drug produces alertness and heightens energy. Stimulants, such as cocaine and methamphetamine, continue to be dominant drugs of abuse in this country, despite their known detrimental consequences.

Cocaine, like many other drugs of abuse, produces a feeling of euphoria or “high” by increasing the neurotransmitter dopamine in the brain’s reward circuitry. Cocaine does this by blocking dopamine transporters (DAT), which have the critical task of removing the neurotransmitter from in-between the neurons once a salient or rewarding stimulus is no longer present. Cocaine, in any form, produces similar physiological and psychological effects once it reaches the brain, but the onset, intensity and duration of its effects are related directly to the route of administration and thus how rapidly cocaine enters the brain.

Oral absorption is the slowest form of administration because cocaine has to pass through the digestive tract before it is absorbed into the bloodstream. Intranasal use, or snorting, is the process of inhaling cocaine powder through the nostrils, where it is absorbed into the blood stream through the nasal tissue. Intravenous (IV) use, or injection, introduces the drug directly into the bloodstream and heightens the intensity of its effects because it reaches the brain faster than oral or intranasal administration. Finally, the inhalation of cocaine vapor or smoke into the lungs, where absorption into the bloodstream is as rapid as by injection, produces the quickest and highest peak blood levels in the brain without the risks attendant to IV use such as exposure to HIV from contaminated needles.

Importantly, all forms of cocaine, regardless of route of administration, result in a similar level of DAT blockade in the reward center of the brain (Figure). This is why repeated use of any form and by any route can lead to addiction and other adverse health consequences.



Scope of the Problem

Although marijuana remains the most commonly used illicit drug in the country (an estimated 25 million past year users 12 or older), according to the 2005 Substance Abuse and Mental Health Services Administration's (SAMHSA) National Survey on Drug Use and Health (NSDUH), more than 5.5 million (2.3 percent) persons aged 12 years or older used cocaine in the year prior to the survey and 2.4 million (1 percent) were current (past month) cocaine users. And while the overall prevalence of cocaine use remained stable between 2004 and 2005, past month use of cocaine increased significantly among those 18 to 25 years old, from 2.1 to 2.6 percent (692,000 to 832,000).

In 2005, 1.4 million persons 12 years or older (0.6 percent) used crack in the past year and 682,000 (0.3 percent) were current crack users. Crack was first added to the NSDUH in 1988 and over successive years of the survey, estimates of past month use have never exceeded 0.3 percent of the population 12 and older. However, past month use of crack among blacks 12 or older in 2005, at 0.8 %, reflected a prevalence more than four-fold higher than in the white (0.2 %) or Hispanic (0.2%) populations, although there were no racial differences in these measures for overall cocaine abuse.

Two of the monitoring mechanisms that NIDA supports, the Community Epidemiology Work Group, a network of epidemiologists and researchers from 21 U.S. metropolitan areas who monitor community-level trends in drug use and abuse, and the Monitoring the Future (MTF) study, which tracks drug use among high school students, provide valuable information about the changing patterns of drug abuse in selected populations. The MTF, for example, reports that both lifetime and annual use of cocaine in any form have been essentially unchanged since 2003 among 8th, 10th and 12th graders. Past year abuse of cocaine (including powder and crack) was reported by 5.1% of 12th graders, 3.5% of 10th graders, and 2.2% of 8th graders. For crack cocaine the rates were 1.9%, 1.7%, and 1.4%, respectively.

There has been a decline in the number of people admitted for treatment for cocaine addiction, according to the Treatment Episode Data Set (TEDS; a SAMHSA-supported data system providing information about the number and characteristics of

admissions at State-funded substance abuse treatment programs). Primary cocaine admissions have decreased from approximately 297,000 in 1994 (18 percent of all admissions reported that year) to around 256,000 (14 percent) in 2004. Smoked cocaine (crack) represented 72 percent of all primary cocaine admissions in 2004. Among smoked cocaine admissions, 53 percent were Black, 38% were White, and 7% were Hispanic whereas a reversed pattern was evident among Blacks and Whites (29% and 51%, respectively and 16% were Hispanic) for non-smoked cocaine.

The Two Forms of Cocaine

There are basically two chemical forms of cocaine: the hydrochloride salt and the "base." The hydrochloride salt, or powdered form of cocaine, dissolves in water and, when abused, can be administered intravenously (by vein) or intranasally (through the nose). The "base" forms of cocaine include any form that is *not* neutralized by an acid to make the hydrochloride salt. Depending on the method of production, the base forms can be called "freebase" or "crack". The medical literature is often ambiguous when differentiating between "freebase" and "crack" cocaine, which are actually *the same chemical form of cocaine*. In its "basic" form, cocaine can be effectively smoked because it melts at a much lower temperature (80 °C) than cocaine hydrochloride (180 °C). With the increased availability of "crack", which is made by a simpler process, the abuse of "freebase" has declined. When cocaine is smoked, the abuser experiences a rapid, intense high, virtually identical to the one experienced by injecting dissolved cocaine intravenously. As of 2002, it was estimated that, in spite of all of the attention given to "crack" cocaine, the majority of the cocaine abusers in the United States did not use crack. The more updated picture on route of administration among those currently abusing is still incomplete. However, among those entering treatment in 2004 with cocaine as their primary drug, 72 percent (184,949) were entering for smoked cocaine and 28 percent (71,438) were entering for cocaine used in another form. Of the latter 78 percent reported intranasal as the route of administration, 13 percent reported injection, and 7 percent reported oral. In addition, it is widely accepted that the intranasal route of

administration is often the first way that many cocaine-dependent individuals used cocaine.

Acute Effects of Cocaine

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

The short-term physiological effects of cocaine include constricted blood vessels, dilated pupils, and increased temperature, heart rate, and blood pressure. Larger amounts (several hundred milligrams or more) intensify the abuser's high, but may also lead to erratic, psychotic and even violent behavior. These abusers may experience tremors, vertigo, muscle twitches, paranoia, or, with repeated doses, a toxic reaction closely resembling amphetamine poisoning. Some cocaine abusers report feelings of restlessness, irritability, and anxiety. In rare instances, sudden death can occur on the first use of cocaine or unexpectedly thereafter. Cocaine-related deaths are often a result of cardiac arrest or seizures followed by respiratory arrest. While tolerance to the high can develop, abusers can also become more sensitive to cocaine's local anesthetic and convulsant effects without increasing the dose taken. This increased sensitivity may explain some deaths occurring after relatively low doses of cocaine.

Medical Consequences of Cocaine

There are significant medical complications associated with cocaine abuse. Some of the most frequent complications stem from cardiovascular effects, including disturbances in heart rhythm and heart attacks; respiratory effects such as chest pain and respiratory failure; neurological effects, including strokes, seizures, and headaches; and gastrointestinal complications, including abdominal pain and nausea. Because cocaine

has a tendency to decrease appetite, chronic abusers may also become malnourished. Different modes of administration can induce different adverse effects. Regularly snorting cocaine, for example, can lead to loss of the sense of smell, nosebleeds, problems with swallowing, hoarseness, and a chronically runny nose; and ingesting cocaine can cause severe bowel gangrene due to reduced blood flow.

Research has also revealed a potentially dangerous interaction between cocaine and alcohol, since their combination tends to have greater-than-additive effects on heart rate, equivalent to 30% increased blood cocaine levels. When taken together, the two drugs are converted by the body to cocaethylene, which may potentiate the cardiotoxic effects of cocaine or alcohol alone.

Addiction. Cocaine is a powerfully addictive drug. Cocaine's stimulant and addictive effects are thought to be primarily a result of its effects on the dopamine transporter. But cocaine abusers often develop a rapid tolerance to the "high", sometimes referred to as tachyphylaxis. That is, even while the blood levels of cocaine remain elevated, the pleasurable feelings begin to dissipate, causing the user to crave more. During this process an individual may have difficulty predicting or controlling the extent to which he or she will continue to want or abuse the drug in spite of known serious consequences.

A recent study indicates that about five percent of recent-onset cocaine abusers become addicted to cocaine within 24 months of starting cocaine use. The risk of cocaine addiction, however, is not distributed randomly among recent-onset abusers. For example, female initiates are three to four times more likely to become addicted within two years than males. Also, non-Hispanic Black/African American initiates are an estimated nine times more likely to become addicted to cocaine within 2 years than non-Hispanic Whites. Importantly, this excess risk is not attributable to crack-smoking or injecting cocaine. Estimates also indicate an excess of cocaine addiction among crack-smoking and cocaine-injecting initiates.

Human Immunodeficiency Virus (HIV). Use and abuse of illicit drugs, including cocaine, is one of the leading risk factors for new cases of HIV. Cocaine abusers who inject put themselves at an increased risk for contracting such infectious diseases as HIV/AIDS and hepatitis, through the use of contaminated needles and paraphernalia. Crack smokers constitute another high-risk group for HIV/AIDS and other infectious diseases. Research has long shown the strong epidemiological relationship between crack-cocaine smoking and HIV, which appears to be largely due to the greater frequency of high-risk sexual practices in the population.

Additionally, hepatitis C has spread rapidly among injection drug users; studies indicate approximately 26,000 new acute hepatitis C virus (HCV) infections occur annually, of which approximately 60 percent are estimated to be related to intravenous drug use.

Prenatal Exposure to Drugs of Abuse. Among pregnant women aged 15 to 44 years, 3.9 percent, or 156,000 women, used an illicit drug in the past month, according to combined 2004 and 2005 NSDUH data. Thus an estimated 156,000 babies were exposed to abused psychoactive drugs before they were born. In 2002, compared to non-pregnant admissions, pregnant women aged 15 to 44 entering drug abuse treatment were more likely to report cocaine/crack (22% vs. 17%) as their primary substance of abuse.

Babies born to mothers who abused drugs during pregnancy can suffer varying degrees of adverse health and developmental outcomes. This is likely due to a confluence of interacting factors often associated with drug abuse in pregnant women. Among these are poly-substance abuse, low socio-economic status, poor nutrition and prenatal care, and chaotic lifestyles. These factors have made it difficult to tease out the contribution of the drug itself to the overall outcome for the child.

However, with the development of sophisticated instruments and analytical approaches, several findings have now emerged regarding the impact of in-utero exposure to cocaine—notably, these effects have not been as devastating as originally believed. There is a greater tendency for premature births in women who abuse cocaine.

A neurologic examination at age six reveals no difference between gestational cocaine exposed and control subjects, however, we cannot exclude the possibility of other underlying deficits. Indeed, a more recent follow-up study at age 10, uncovered subtle problems in attention and impulse control, putting exposed children at higher risk of developing significant behavioral problems as cognitive demands increase.

But estimating the full extent of the consequences of maternal cocaine (or any drug) abuse on the fetus and newborn remains a very challenging problem. This is one of the reasons why we must be cautious when searching for causal relationships in this area, especially with a drug like cocaine. NIDA is supporting additional research to understand this relationship and to determine if there are any other subtle, or not so subtle, short or long-term outcomes that can be attributed to prenatal cocaine exposure.

Treatment

Currently the most effective treatments for cocaine addiction are behavioral, and these can be delivered in both residential and outpatient settings. Several approaches have shown efficacy in research-based and community programs—these include cognitive behavioral therapy, which helps patients recognize, avoid, and cope with situations in which they are most likely to abuse drugs; motivational incentives, which uses positive reinforcement such as providing rewards or privileges for staying drug-free, for attending and participating in counseling sessions, etc. to encourage abstinence from drugs; and motivational interviewing which capitalizes on the readiness of individuals to change their behavior and enter treatment,

There are no medications currently approved to treat cocaine addiction. Consequently, NIDA is aggressively evaluating several compounds, including some already in use for other indications (e.g., antiepileptic medications) and a vaccine. These and others have shown promise for treating cocaine addiction and preventing relapse in early clinical studies. Ultimately, it is the integration of both types of treatments—behavioral and pharmacological that will likely prove the most effective approach for treating cocaine (and other) addictions.

Summary

Cocaine abuse remains a significant threat to the health of the public. We posit that science should play a central role in the crafting of smart policies designed to address the root causes of such a serious and multidimensional issue. What do we know regarding the specific questions surrounding powder vs. crack cocaine? Research consistently shows that the crucial variables at play are the immediacy, duration, and magnitude of cocaine's effects, as well as the frequency and amount of cocaine used rather than the form. In other words, the physiological and psychoactive effects of cocaine are similar regardless of whether it is in the form of cocaine hydrochloride or crack cocaine.

However, other factors, such as the ease of administration and cost, also come into play, and may make smoked cocaine a method of delivery that is more likely to be abused.

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

Questions for written submission

Dr Harolyn Belcher

1. What is the impact of fetal exposure to cocaine, in both short term and long term effects? Do these effects vary depending on whether the cocaine is powder or crack? If so, how? Do these effects vary depending on the route of administration? If so, how? How do these effects compare to fetal exposure to other drugs, including alcohol and tobacco?
2. Have there been any changes since the Commission issued its 2002 report on federal cocaine?
3. From your perspective is there a difference in harms associated with the use/trafficking of crack versus powder cocaine:

If there is a difference, should trafficking in one form of the drug be punished more severely than trafficking in the other form of the drug?

If a difference exists but they should be punished identically? Please explain.

If a difference exists and they should be punished differently, what should that specific difference be, and what is the justification for that specific difference?

Panel 5

**Supplemental Questions for Harolyn Beltcher, M.D.
November 14, 2006**

- 1) From your perspective is there a difference in harms associated with the use/trafficking of crack versus powder cocaine?

If there is a difference, should trafficking in one form of the drug be punished more severely than trafficking in the other form of the drug?

If a difference exists, should be punished identically? Please explain.

If a difference exists and they should be punished differently, what should that specific difference be, and what is the justification for that specific difference?

- 2) According to your testimony (p.3) you indicated that there is no evidence that one form of cocaine is biologically more harmful than the other to the fetus and developing child. Does that suggest that there is no such thing as a "crack baby" or no evidence of the differential effects on the fetus from intrauterine crack cocaine exposure versus powdered cocaine exposure?

Summary of Testimony for Harolyn Beltcher, M.D.
The Kennedy Krieger Institute
November 14, 2006

Dr. Beltcher ("KC I"), based on a 2005 National Survey of Drug Use and Health, provides a brief data analysis of the estimated percentage of pregnant women, ages 15-44 years, who used illicit drugs (marijuana/hashish, cocaine (including crack), heroin, hallucinogens, inhalants, and prescribed-type psychotherapeutics use non-medically), in the month prior to the survey. KCI also reports data that compares the majority of individuals who acknowledged powder cocaine use, at 2.4 million (1% of the population) with the 682,000 individuals (0.3% of the population) who admitted crack cocaine use. This comparison, according to KCI, suggests that the rate of powdered cocaine use is three times that of crack use.

KCI states that both forms of cocaine are metabolized into the same chemical compounds and are virtually indistinguishable by traditional drug detection methods. KCI notes that as studies have become more prospective and sophisticated (e.g., adjusting for environmental risk factors), it is apparent that intrauterine cocaine (including "crack") exposure is associated with less risk of adverse health and neuro-developmental outcomes in the child compared to fetal alcohol and cigarette (tobacco) exposure. For a comparison, KCI then provides data on the impact of neuro-developmental outcomes from tobacco and alcohol exposure such as mental retardation, birth defects, the higher incidence of asthma, and growth retardation.

KCI points out that children with intrauterine cocaine/polydrug exposure have similar cognitive outcomes as their socio-economically matched peers. Finally, KCI states that there is no evidence of differential effects on the fetus and child up to 9 ½ years of age from intrauterine crack cocaine exposure versus powdered cocaine exposure. Further, KCI concludes that there is no evidence that one form of cocaine is biologically more harmful than the other to the fetus and developing child and that current sentencing invites disparities.

United States Sentencing Commission
Public Hearing on Cocaine Sentencing Policy
November 14, 2006

The 2005 National Survey of Drug Use and Health estimates that 3.9% of pregnant women, ages 15-44 years, used illicit drugs (marijuana/hashish, cocaine (including crack), heroin, hallucinogens, inhalants, prescribed-type psychotherapeutics used non-medically) in the past month prior to the survey, statistically the same rate as 2002-2003 data ¹. Marijuana was the most commonly used illicit drug, accounting for approximately 74.2% of current illicit drug use. Twelve percent of pregnant women reported current use of alcohol and 16.6% of pregnant women reported current cigarette (tobacco) use during the same period. These rates of fetal exposure accounted for approximately 159,000 infants with illicit drug exposure versus 496,100 alcohol and 680,600 tobacco-exposed infants.

The majority of individuals who acknowledge cocaine use, 2.4 million (1% of the United States population) used powdered cocaine compared to 682,000 (0.3% of United States citizens) who admitted to crack use. These data suggest that the rate of powdered cocaine use is three times that of crack use. In Baltimore City, for instance, less than 5% of the cocaine related emergency department visits were attributable to "crack" ².

Both forms of cocaine are metabolized into the same chemical compounds, including benzoylecgonine, ecgonine methylester, and norcocaine and are virtually indistinguishable by traditional drug detection methods. There are no scientific studies noted in PubMed, to date, that compare the immediate and long term effects of intrauterine powdered cocaine versus crack exposure on child development. As studies have become more prospective and sophisticated (e.g., adjusting for environmental risk factors), it is apparent that intrauterine cocaine (including "crack") exposure is associated with less risk of adverse health and neurodevelopmental outcomes in the child compared to fetal alcohol and cigarette (tobacco) exposure ^{3-7;7;8}.

Children with intrauterine tobacco exposure have an increased risk of low birth weight (birth weight of less than 2500 grams) ⁹. Tobacco exposed infants have a higher incidence of asthma ⁹. Neuropsychological test results demonstrate a longitudinal adverse effect of gestational smoking on learning, memory, problem solving, and eye-hand coordination in exposed children ¹⁰. The literature also suggests an association between increased risk of Conduct Disorder and Attention Deficit Hyperactivity Disorder in children with prenatal tobacco exposure ^{11;12}.

Fetal alcohol syndrome (FAS) is one of the leading identifiable and preventable causes of mental retardation and birth defects, occurring in 0.2-1.5 infants per 1,000 live births in the United States ¹³. FAS occurs in 30-40% of pregnancies in which women drink heavily (greater than one drink of 1.5 ounces of distilled spirits, 5 ounces of wine or 12 ounces of beer per day). Although there is evidence of a dose response effect of alcohol

on the developing fetus, no safe amount of alcohol consumption during pregnancy has been identified.

FAS is associated with physical characteristics including growth retardation, microcephaly, short palpebral fissures, flat midface, long philtrum, and thin upper lip¹³. Central nervous system anomalies may include agenesis of the corpus callosum and cerebellar hypoplasia¹⁴. Multiple studies have demonstrated alcohol's neurobehavioral teratogenic effects. Neuropsychological disorders associated with alcohol exposure include Attention Deficit Hyperactivity Disorder, Depression, Suicidal Ideation, Mental Retardation, and Learning Disabilities^{5;6;15}. Children with intrauterine alcohol exposure are also at risk for poor motor coordination, social functioning and judgment that may place the child at further risk for poor school performance⁵.

The annual U.S. cost of alcohol related disorders ranges from \$75 million to \$249.7 million¹⁶. Approximately 60-75% of the cost is attributable to care of individuals with FAS who have mental retardation. An additional estimated \$75 million dollars per annum is spent for supervised environments for alcohol-exposed individuals with IQ's in the low average to borderline intellectual range¹⁶.

Children with intrauterine cocaine/polydrug exposure have similar cognitive outcomes as their socio-economically matched peers^{4;17}. Subtle effects of cocaine exposure have been noted in language development at 6 and 7 years^{18;19}. These effects were not noted at 9 1/2 years of age¹⁸. Some researchers have reported increased risk of developing externalizing behaviors among boys with intrauterine cocaine exposure²⁰, while other researchers have failed to find adverse behavioral outcomes^{4;21}. Visual attention deficits reported in several studies may place children with cocaine exposure at increased risk of Attention Deficit Hyperactivity Disorder^{22;23}.

In summary, children with a history of intrauterine illicit drug exposure constitute approximately 3.9% of the populations of infants born each year; the majority of these infants are exposed to marijuana. Of the individuals who report cocaine use, three times as many persons use powdered cocaine compared to crack. Many of the children with intrauterine cocaine exposure have exposure to other drugs including marijuana, alcohol and cigarettes. No studies, to date, have documented the health and neurodevelopmental impact of intrauterine powdered cocaine versus crack exposure. Biologically, the rate of drug distribution based on method of administration varies, however the fetal effects of crack and powdered cocaine, once they pass through the placenta, should be identical. The physical and neurotoxic effects of alcohol exposure are significantly more devastating to the developing fetus than cocaine. The documented intrauterine effects of tobacco exposure are similar to cocaine with regard to deficits in attention, however in addition to the adverse attention effects, children with tobacco exposure are also at increased risk for conduct disorders and decreased intellectual test scores^{7;24}.

Importantly, children with intrauterine cocaine exposure benefit from interventions that provide support, education, and medical surveillance and treatment services^{25;26}. Intrauterine cocaine exposure may be a marker to alert the medical, social services, and

child welfare systems of the increased need for family treatment and intervention. The child with intrauterine cocaine exposure may suffer adverse physical, emotional, and developmental effects more from the lack of a stable consistent nurturing (if the caregiver has ongoing drug dependence issues) caregiving environment than from the actual drug exposure.

There is no evidence of differential effects on the fetus and child up to 9 1/2 years of age from intrauterine crack cocaine exposure versus powdered cocaine exposure. There is no evidence that one form of cocaine is biologically more harmful than the other to the fetus and developing child. Current sentencing invites disparities in the implementation of justice.

Respectfully submitted,

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