

Written Statement
of over
Seventy-Five Organizations & Law Professors
in Support of
the Complete Elimination of the Crack-Powder Disparity

Submitted to
The Senate Committee on the Judiciary,
Subcommittee on Crime and Drugs
April 29, 2009 Hearing

**“Restoring Fairness to Federal Sentencing:
Addressing the Crack-Powder Disparity”**

We write to express our support for the complete elimination of the cocaine sentencing disparity and the refocus of federal law enforcement resources on high-level and international drug traffickers, instead of the largely low-level crack cocaine offenses punished under current federal sentencing law. Decades of research and data demonstrate that the current penalty structure for low-level crack cocaine offenses is excessive and ineffective. The undersigned applaud the convening of this critical hearing, and urge the expeditious enactment of legislation that completely ends this disparity by equalization at the current level for powder cocaine.

It has been 23 years since Congress enacted the Anti-Drug Abuse Act of 1986 which differentiated between two forms of cocaine – powder and crack – and singled out low-level crack cocaine offenses for dramatically harsher punishment. Two years later Congress further distinguished crack cocaine from both powder cocaine and every other drug by creating a mandatory felony penalty of five years in prison for first-time simple possession of five grams (the weight of two sugar packets) of crack cocaine. In what has come to be known as the 100-to-1 ratio, it takes 100 times more powder cocaine than crack cocaine to trigger severe five-and ten-year mandatory minimum sentences.

Government data for FY 2005 reveal that nearly two-thirds (61.5%) of all federal crack cocaine cases have been brought against the lowest level participants, with only 8.4% targeted against the

highest level traffickers.¹ In FY 2006, federal crack cocaine defendants were prosecuted for an average quantity of 51 grams of crack – the weight of an ordinary candy bar.² For decades people convicted of low level crack cocaine offenses, many with no previous criminal history, have been punished far more severely than those who are wholesale traffickers of the drug in powder form. These results do not reflect Congress’s intent to stem the traffic in cocaine and these prosecutorial practices have been unsuccessful in ending drug abuse.

Moreover, this sentencing structure has had an enormous racially discriminatory impact. Federal law enforcement’s focus on inner city communities has resulted in African Americans and Latinos being disproportionately impacted by the facially neutral, yet unreasonably harsh, mandatory minimum cocaine penalties. Of all drug defendants, crack defendants are most likely to receive a sentence of imprisonment as well as the longest average period of incarceration. In 2007, 82.7% of those sentenced federally for crack cocaine offenses were black, despite the fact that only about 25% of crack cocaine users in the U.S. are African American.³ The United States Sentencing Commission has noted that revising this one sentencing rule would better reduce the sentencing gap between blacks and whites “than any other single policy change,” and would “dramatically improve the fairness of the federal sentencing system.”⁴

We recognize that over two decades ago, little was known about crack cocaine, other than unsubstantiated fears that this new derivative form of cocaine was more dangerous than its original powder form, would significantly threaten public health, and greatly increase drug-related violence. Since then, copious documentation and analysis by the U.S. Sentencing Commission, criminologists and medical researchers have revealed that many assertions were not supported by sound data and, in retrospect, were exaggerated or simply incorrect. Crack cocaine and powder cocaine are pharmacologically identical and have similar physiological effects, differing only in manner of ingestion. Research indicates that the negative effects of both prenatal crack and powder cocaine exposure are identical, and no more severe than the impact of alcohol or tobacco on the fetus. Significantly less trafficking-related violence is associated with crack than was previously assumed, and any cases involving weapons are subject to the stiff mandatory minimum sentence for use of a weapon in connection with a drug trafficking offense, or otherwise enhanced sentences under the guidelines.

Attention to reform of crack cocaine sentences has gained significant momentum. Four reports from the independent U.S. Sentencing Commission have consistently appealed for a change in the mandatory minimum crack cocaine statutes, a change only Congress can accomplish. On November 1, 2007 the bipartisan Commission reduced the guideline sentence for crack cocaine by two levels – as low as the guideline could go and still be consistent with the mandatory minimum statute. In December 2007 the U.S. Supreme Court held that federal judges may consider the unfairness of the 100-to-1 ratio between crack and powder cocaine penalties and impose a sentence below the crack guideline in cases where they deem the guideline sentence is

¹ United States Sentencing Commission [USSC], *Report to Congress: Cocaine and Federal Sentencing Policy* 21 (Fig. 2-6) (2007), based on FY 2005 data. “Lowest level participants” include street-level dealers, courier/mule, and lookouts; “Highest level traffickers” include importers, organizers, & financiers.

² USSC, *Report to Congress: Cocaine and Federal Sentencing Policy* 108-110 (Table 5-2) (2007).

³ See <http://oas.samhsa.gov/NSDUH/2k7NSDUH/tabs/Sect1peTabs34to38.pdf>

⁴ USSC, *Fifteen Years of Guidelines Sentencing* 132 (2004).

too severe. Again, however, neither the Sentencing Commission guideline change nor the Supreme Court ruling can eliminate or significantly alleviate the long, harsh mandatory minimum sentences that many people are serving for small quantity crack cocaine offenses. Only Congress can “crack the disparity” and eliminate the statutory 100-to-1 ratio in sentencing structure between crack and powder cocaine.⁵

The undersigned agree with the pronouncement of President Obama and Vice President Biden that “the disparity between sentencing crack and powder-based cocaine is wrong and should be completely eliminated.”⁶ Indeed, Vice President Biden was the sponsor of a bill last term that equalized crack and powder cocaine penalties, which was co-sponsored by then Senator Obama.

⁵ Reducing the quantity threshold for powder cocaine to that of crack cocaine is an option that was unanimously rejected by the U.S. Sentencing Commission in 2002 as likely to exacerbate, rather than ameliorate, the problems with cocaine sentencing. Such an approach would not cause a shift in focus from bit players to drug “kingpins,” but would lead to dramatically increased levels of federal incarceration, further burdening the federal system at a great cost to taxpayers.

⁶ The President’s civil rights agenda can be found at http://www.whitehouse.gov/agenda/civil_rights/.

We strongly encourage you to support and pass legislation that completely eliminates the crack-powder disparity by equalizing at the current level for powder cocaine.

Sincerely,

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