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 tenyear 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 disproportionally 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."

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." 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,

ORGANIZATIONS

Lorenzo Jones Executive Director A Better Way Foundation

Caroline Fredrickson Director, Washington Legislative Office American Civil Liberties Union

Beth Moten Legislative and Political Director American Federation of Government Employees

Deborah Small
Executive Director
Break the Chains, Communities of Color
and the War on Drugs

Esmeralda Simmons, Esq. Executive Director Center for Law and Social Justice Medgar Evers College, CUNY

Divine Pryor, Ph.D.
Deputy Executive Director
Center for NuLeadership
on Urban Solutions

Stephen J. Steurer, Ph.D. Executive Director Correctional Education Association

Ronald S. Sullivan, Jr. Director

Criminal Justice Institute *Harvard Law School Ethan Nadelmann Executive Director Drug Policy Alliance

David Borden Executive Director Drug Reform Coordination Network

Raymond Coates Edgewood/Brookland Family Support Collective

Julie Stewart President and Founder Families Against Mandatory Minimums

Kenny Linn Chairman FedCURE

Jim Winkler General Secretary General Board of Church and Society, United Methodist Church

Maria Woltjen Director Immigrant Child Advocacy Project at the University of Chicago

Dr. Ron Daniels Executive Director Institute of the Black World 21st Century

Jane Browning
Executive Director, International
Community Corrections Association

Charles Sullivan Executive Director International CURE Kristen Millnick Associate Director Interfaith Drug Policy Initiative

Tracy Velazquez Executive Director Justice Policy Institute

Kemba Smith
President
Kemba Smith Foundation

Barbara Arnwine Executive Director Lawyers' Committee for Civil Rights Under Law

Jack A. Cole Executive Director Law Enforcement Against Prohibition

Wade Henderson Executive Director Leadership Conference on Civil Rights

Gabrielle de la Gueronniere Director of National Policy Legal Action Center

Gabriel Schlaback Legislative Assistant for Domestic Affairs Mennonite Central Committee Washington Office

Arthur Burnett, Sr.
National Executive Director
National African American Drug Policy
Coalition, Inc.

Addie Richburg President National Alliance of Faith and Justice

Sarah Bryer Director National Juvenile Justice Network John Payton Director-Counsel and President NAACP Legal Defense and Educational Fund

Hilary Shelton Vice President of Advocacy and Director, Washington Bureau National Association for the Advancement of Colored People

Peter Hayden President National Black Alcoholism and Addictions Council

Ron Hampton Executive Director National Black Police Association

Rodney G. Moore President National Bar Association

Jeffrey Edison Chair, Drug Sentencing Task Force National Conference of Black Lawyers

Cassandra Villanueva Legislative Analyst, Criminal & Juvenile Justice Policy National Council of La Raza

Fay Lassiter President, National Association of Blacks in Criminal Justice

John Wesley Hall President National Association of Criminal Defense Lawyers

Elizabeth J. Clark, PhD, ACSW & MPH Executive Director National Association of Social Workers Veronica F. Coleman-Davis President/CEO National Institute for Law and Equity

Richard C. Goemann Director, Defender Legal Services National Legal Aid & Defender Association

Stephen Rickard Executive Director Open Society Policy Center

Alvin J. Bronstein President, Penal Reform International/ The Americas

Onaje Muid Clinical Associate Director Reality House, Inc.

Malika Saada Saar Executive Director Rebecca Project for Human Rights

Rabbi David Saperstein, Director, Religious Action Center of Reform Judaism, Union for Reform Judaism/Central Conference of American Rabbis

Yvonne Blackmond President Restoring Dignity, Inc.

Becky Vaughn Executive Director State Associations of Addiction Services

Kris Krane Executive Director Students for Sensible Drug Policy

Rosalyn I. Trotman Program Coordinator Community Folk Art Center *Syracuse University Patricia Beauchemin, Executive Director Therapeutic Communities of America

Marc Mauer Executive Director The Sentencing Project

Teresa Mathis Executive Director WA Association of Criminal Defense Lawyers

Roger Goodman State Representative, 45th District Washington State Legislature President, Voluntary Committee of Lawyers King County Bar Association

Law Professors

Adjoa A. Aiyetoro Associate Professor of Law *UALR – William H. Bowen School of Law

Angela A. Allen-Bell Visiting Assistant Professor of Legal Writing and Analysis *Southern University Law Center

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

Paul Butler Professor, *George Washington University Law School

Andre Douglas Pond Cummings Professor of Law *West Virginia University College of Law Angela J. Davis

Professor,*American University Washington College of Law

J. Soffiyah Elijah Deputy Director Criminal Justice Institute *Harvard Law School

Craig B. Futterman Clinical Professor of Law *University of Chicago Law School

Bernadette Hartfield Associate Professor of Law *Georgia State University College of Law

Paula C. Johnson Professor *Syracuse University College of Law

Jeffrey Leslie Clinical Professor of Law *University of Chicago Law School

Pedro A. Malavet Professor of Law The University of Florida *Fredric G. Levin College of Law

Dr. Doris Marie Provine School of Justice & Social Inquiry *Arizona State University

Vernellia R. Randall Professor of Law *University of Dayton School of Law

Judith A.M. Skully Professor of Law *Stetson University College of Law Alison Siegler Director, Federal Criminal Justice Project Mandel Legal Aid Clinic Professor, *University of Chicago Law School

Randolph N. Stone Clinical Professor of Law Edwin F. Mandel Legal Aid Clinic *University of Chicago Law School

Rosalyn I. Trotman Program Coordinator Community Folk Art Cetner *Syracuse University

Emily Garcia Uhrig Assistant Professor of Law *University of the Pacific, McGeorge School of Law

Darryl C. Wilson Professor *Stetson University College of Law

Evelyn L. Wilson Professor, *Southern University Law Center

Maria Woltjen Director, Immigrant Child Advocacy Project at the University of Chicago*

Malcolm Young
Adjunct Professor, Bluhm Legal Clinic
*Northwestern School of Law

^{*} for identification purposes only