



Written Statement of
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on behalf of the
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

before the
Committee on the Judiciary
United States Senate

“Federal Cocaine Sentencing Laws:
Reforming the 100-to-1 Crack/Powder Disparity”

February 12, 2008

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. Former Chief Justice William Rehnquist opined that “mandatory minimum sentences are perhaps a good example of the law of unintended consequences,” and nothing demonstrates this better than the crack cocaine sentencing regime. Despite countless reports by academics, interest groups, the U.S. Sentencing Commission and other government agencies documenting these problems and debunking the rationales for any disparity between crack and powder sentences, actual reform has remained elusive.

We welcome this hearing and the committee members’ support for diverse legislation as a clear sign that reform is finally within reach. We urge the committee to make the most of this window of opportunity.

The Federal Bureau of Prisons’ inmate population has swelled to more than 200,000, 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 Every year, at least 5,000 more offenders are sentenced under the disproportionately severe crack cocaine laws. 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 adverse impact of excessive and disparate crack sentences.

Eighty-one percent of defendants sentenced in the federal system for crack cocaine are black, and their sentences are 50 percent longer than those for cocaine powder. This is true even though two-thirds of crack defendants are low-level street dealers. Also troubling is the fact that the average sentence for crack cocaine is far longer than the average sentences for violent crimes such as robbery and sexual abuse.

While we fully recognize the harmful effects of crack cocaine distribution on inner-city communities, the negative social and economic impact of the uniquely severe sentencing scheme must also be taken into account. “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 lifetime, and their families experience incalculable damage and suffering. Excessive sentences greatly exacerbate all of these harms.

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.

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 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 current 100:1 ratio undermines effective law enforcement.

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 Similarly, the Sentencing Commission reports document that the profit generated from the sale of crack and powder cocaine is equally disproportionate to the sentence imposed. As many have noted, this is at odds with Congress’s intended targets for the 5- and 10-year terms of imprisonment, mid-level managers and high-level suppliers, respectively.

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. At the very least, the penalties likely discourage cooperation with law enforcement. And some stakeholders have suggested that the notoriety of the crack/powder sentencing disparity may actually discourage jury service, permeate jury deliberations and affect trial outcomes.

III. 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 set forth in the Sentencing Commission’s 2007 report, 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.⁴ Many of the supposed crack-

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.

⁴ Even the number of doses per gram is 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*

related harms referenced by Congress in 1986 have proven false or have subsided considerably over time. For example, recent Commission data reveals that 88% of crack cases do not involve violence, 74% of crack offenders have no weapon involvement, and rarely is a weapon ever brandished or used in a crack offense. 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 Sentencing Commission proposed in its 1995 report, and we believe it is the most principled approach.

IV. Congress should not undercut this long-overdue reform by ratcheting up sentences in other areas or by encouraging the Sentencing Commission to do so.

Current sentences for powder cocaine and drug offense-related enhancements are more than sufficient. NACDL opposes any proposal to reduce the 100:1 ratio by increasing powder cocaine penalties. Raising already harsh powder cocaine sentencing levels is no answer to the problem of disproportionate and discriminatory crack sentences. There is no credible evidence that powder cocaine penalties, which are generally much longer than heroin or marijuana sentences, are insufficiently harsh. Given that 85% 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.

Likewise, there is absolutely no need to amend the Sentencing Guidelines so as to add or increase sentencing enhancements. The majority of crack cases do not involve aggravating circumstances, and current laws provide sufficient enhancements for the most common aggravating factors; in addition, sentencing judges have discretion to consider unmentioned factors. 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 the Commission to consider new enhancements, as directed by the pending bills. It bears mentioning, however, that S. 1711 sets forth general, as opposed to specific, directives that do not mandate new and unnecessary enhancements. This language is vastly superior to other pending legislation that would mandate enhancements.

V. Conclusion.

The Sentencing Commission took action last year to reduce its crack guidelines without deviating from the mandatory minimum statutes passed by Congress. At the same time, the Commission called on Congress to enact a more comprehensive solution. While we strongly support legislation that would completely abolish the sentencing disparity without increasing

current sentences, we commend all the Committee members who have devoted attention to this injustice by sponsoring corrective legislation.

On behalf of NACDL, I urge you to help complete the unfinished reform process and approve the “Drug Sentencing Reform and Cocaine Kingpin Trafficking Act.”

Thank you for considering our views.

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The National Association of Criminal Defense Lawyers (NACDL) is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL’s 12,000-plus direct members in 28 countries – and 90 state, provincial and local affiliate organizations totaling more than 40,000 attorneys – include private criminal defense lawyers, public defenders, military defense counsel, law professors and judges committed to preserving fairness and promoting a rational and humane criminal justice system.

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Carmen Hernandez is the President of the National Association of Criminal Defense Lawyers. 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 has lectured nationally, written articles and testified before Congress regarding federal sentencing.