Witness List

Hearing before the Subcommittee on Crime and Drugs of the Senate Committee on the Judiciary

on

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

Tuesday, February 12, 2008
Dirksen Senate Office Building Room 226
2:30 p.m.

Gretchen Shappert
United States Attorney
Western District of North Carolina
U.S. Department of Justice

The Honorable Ricardo H. Hinojosa
Chair
U.S. Sentencing Commission
Washington, DC

The Honorable Reggie B. Walton
United States District Judge
Member, Criminal Law Committee
Federal Judicial Conference
Washington, DC

Nora Volkow, M.D.
Director
National Institute on Drug Abuse
U.S. Department of Health & Human Services
Washington, DC

James Felman
Co-Chair
Sentencing Committee
Criminal Justice Section
American Bar Association
The United States Attorney's Office
Western District of North Carolina

U.S. Attorney Gretchen C. F. Shappert

Ms. Shappert is the U.S. Attorney for the Western District of North Carolina with her headquarters office in Charlotte and a fully staffed branch office in Asheville, North Carolina. Ms. Shappert has served as an Assistant U.S. Attorney in this office for the past 14 years. Before coming to work as a federal prosecutor, Ms. Shappert served as an Assistant District Attorney for Mecklenburg County (Charlotte area) North Carolina for two years.

Ms. Shappert completed her undergraduate studies at Duke University and received her Juris Doctor from Washington and Lee University School of Law in 1980. Having been assigned to the Western District’s Organized Crime Drug Enforcement Task Force for many years, Ms. Shappert has successfully prosecuted numerous drug trafficking organizations on drug violations as well as the firearms violations and violent crime associated with those organizations. In fact, Ms. Shappert has prosecuted literally hundreds of gun cases. Because of her vast experience and aggressive prosecution style, she is a popular speaker at law enforcement seminars, specifically with regard to the federal firearms laws and successful preparation of firearms cases for presentation in U.S. District Court. She was nominated by President Bush to be the United States Attorney for the Western District of North Carolina and has been U.S. Attorney since June 1, 2004.
Department of Justice

STATEMENT OF

GRETCHEM C. F. SHAPPERT
UNITED STATES ATTORNEY
WESTERN DISTRICT OF NORTH CAROLINA
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CRIME AND DRUGS

CONCERNING

"FEDERAL COCAINE SENTENCING LAWS:
REFORMING THE 100-1 CRACK/POWDER DISPARITY"

PRESENTED

February 12, 2008
Mr. Chairman, members of the Subcommittee –

Thank you for inviting the Department of Justice to appear before you today to discuss federal cocaine sentencing policy. My name is Gretchen Shappert, and I am the United States Attorney for the Western District of North Carolina. I have been in public service most of my professional life, both as a prosecutor and as an assistant public defender. Last week, I completed 4 ½ consecutive weeks of trial, including two trials in my district involving crack cocaine distribution. Indeed, much of my professional career has been defined by the ravages of crack cocaine, both as a defense attorney and as a prosecutor.

The Department of Justice recognizes that the penalty structure and quantity differentials for powder and crack cocaine created by Congress as part of the Anti-Drug Abuse Act of 1986 are seen by many as empirically unsupportable and unfair because of their disparate impact. As this subcommittee knows, since the mid-1990s, there has been a great deal of discussion and debate on this issue. There have been many proposals but little consensus on exactly how these statutes should be changed.

We remain committed to that effort today and are here in a spirit of cooperation to continue working toward a viable solution. We continue to insist upon working together on this issue that we get it right not just for offenders, but also for the law-abiding people whom we are sworn to serve and protect.
It has been said, and certainly it has been my experience, that whereas cocaine powder destroys an individual, crack cocaine destroys a community. The emergence of crack cocaine as the major drug of choice in Charlotte during the late 1980’s dramatically transformed the landscape. We saw an epidemic of violence, open-air drug markets, and urban terrorism unlike anything we had experienced previously. The sound of gunfire after dark was not uncommon in some communities. Families were afraid to leave their homes after dark and frightened individuals literally slept in their bathtubs to avoid stray bullets.

I have also seen the dramatic results when federal prosecutors, allied with local law enforcement and community leaders, make a commitment to take back neighborhoods from the gun-toting drug dealers who have laid claim to their communities. The successes of our Project Safe Neighborhoods (PSN) initiatives, combined with Weed & Seed, have literally transformed neighborhoods. In Shelby, North Carolina, for example, federal prosecutions of violent crack-dealing street gangs have slashed the crime rate and have enabled neighborhood groups to begin a community garden, truancy initiatives, and sports programs for young people. Traditional barriers are breaking down, and Shelby is thriving as an open and diverse small southern city. This transformation would not have been possible without an aggressive and collaborative approach to the systemic crack cocaine problem in that community.

In the jury trial I completed last Wednesday night, the jury convicted the remaining two defendants in a seventy-person drug investigation that originated in the furniture manufacturing community of Lenoir, North Carolina. Several years ago, street drug dealers literally halted
traffic to solicit crack cocaine customers in several Lenoir communities. At trial, the jury heard of an episode where drug dealers kidnapped and held for ransom one of their coconspirators, demanding repayment of a drug debt. After pistol-whipping their hostage, they finally released him. This is the kind of violent activity we have come to expect from crack cocaine traffickers, even in relatively tranquil small communities.

I am pleased to be able to tell you that we used the tools that Congress gave us to stop these dealers. We built strong cases against them. Local law enforcement officers, in conjunction with federal agents, have seized substantial quantities of crack and firearms from these dealers and dismantled their operations. It is a testament to the courage of people who live in these communities that they have been willing to cooperate with law enforcement and testify. Our most powerful witnesses are the citizens who have been victimized by crack-related violence. Cooperation from citizens in these communities is based upon their trust in our ability to prosecute these violent offenders successfully and send them away for lengthy federal prison sentences.

I know from my conversations with state and federal prosecutors from around the country that our experience in North Carolina is not unique or uncommon. When considering reforms to cocaine sentencing, we must never forget that honest, law-abiding citizens are also affected by what these dealers do. Unlike the men and women who chose to commit the crimes that terrorized our neighborhoods, the only choice many of the residents of these neighborhoods have is to rely on the criminal justice system to look out for them and their families. Let us make sure
the rules we make at the federal level allow us to continue to do so.

Toward that end, we believe that any reform to cocaine sentencing must satisfy two important conditions. First, any reforms should come from the Congress and not the United States Sentencing Commission. Second, any reforms, except in very limited circumstances, should apply only prospectively. I will discuss the reasons necessitating each condition in turn.

First, bringing the expertise of the Congress to this issue will give the American people the best chance for a well-considered and fair result that takes into account not just the differential between crack and powder on offenders, but the implications of crack and powder cocaine trafficking on the communities and citizens whom we serve. Congress struck the present balance in 1986. Since then, although there have been many policy objections raised in debate, these statutes have been repeatedly upheld as constitutional. As a federal prosecutor, I have done my best to enforce these laws for the benefit of our communities.

Cleared of hyperbole, what we are talking about is whether the current balance between the competing interests in drug sentencing is appropriate. We are trying to ascertain what change will ensure that prosecutors have the tools to effectively combat drug dealers like those who terrorized western North Carolina while addressing the concerns about the present structure’s disparate impact on African-American offenders. That is a decision for which Congress and this Subcommittee are made. At some level, the United States Sentencing Commission itself recognized that when it delayed retroactive implementation of the reduced
crack cocaine guideline until March 3, 2008, thereby giving Congress a short window to review and consider the broader implications of their policy choice.

In considering options, we continue to believe that a variety of factors fully justify higher penalties for crack offenses. In the cases I have prosecuted, I have seen the greater violence at the local level associated with the distribution of crack as compared to powder. United States Sentencing Commission data and reports confirm what I have seen, as they show that in federally prosecuted cases, crack offenders are more frequently associated with weapons use than powder cocaine offenders. According to the United States Sentencing Commission 2007 report on Crack Cocaine, powder cocaine offenders had access to, possession of, or used a weapon in 15.7 percent of cases in 2005. In contrast, crack cocaine offenders had access to, possession of, or used a weapon in 32.4 percent of cases in 2005.

That said, we understand that questions have been raised about the quantity differential between crack and powder cocaine, particularly because African-Americans constitute the vast majority of federal crack offenders. The Department of Justice is open to discussing possible reforms of the differential that are developed with victims and public safety as the foremost concerns, and that would both ensure no retreat from the success we have had fighting drug trafficking and simultaneously increase trust and confidence in the criminal justice system.

Second, reforms in this area, except in very limited circumstances, should apply prospectively. Notwithstanding the wide differences in the bills addressing the crack-powder
differential, there is one great commonality. Across the board, they are all drafted to apply only prospectively.

Without finality, the criminal law is deprived of much of its deterrent effect. Even where the Supreme Court has found constitutional infirmities affecting fundamental rights of criminal defendants, it rarely has applied those rules retroactively. For example, the United States Supreme Court has not made its constitutional decision in United States v. Booker, the most fundamental change in sentencing law in decades, retroactive.

The shortcomings of retroactive application of new rules are illustrated starkly in the Sentencing Commission's recent decision to extend eligibility for its reduced crack penalty structure retroactively to more than 20,000 crack dealers already in prison.

Proponents of retroactivity argue that we should not be worried about the most serious and violent offenders being released too early because a federal judge will still have to decide whether to let such offenders out. But that misses an important point. The litigation and effort to make such decisions in so many cases forces prosecutors, probation officers, and judges to marshal their limited resources to keep in prison defendants whose judgments were already made final under the rules as all the parties understood them and reasonably relied on them to be.

The swell of litigation triggered by the Commission's decision will affect different districts differently. Where it will have the most impact, however, will be in those districts that
have successfully prosecuted the bulk of crack cases over the past two decades. Fifteen districts will bear a disproportionate 42.8 percent of the estimated eligible offenders. Similarly, more than 50 percent of the cases will have to be handled by the Fourth, Fifth, and Eleventh Circuits. The 536 estimated offenders in my district who are eligible for resentencing is the equivalent of 66 percent of all criminal cases handled in my district in 2006.

The litigation, furthermore, is likely to be greater than that envisioned by the Commission. Notwithstanding strict guidance to the contrary, the federal defenders already have issued guidance telling defense counsel to argue that the Supreme Court’s decision in *United States v. Booker* applies and that, therefore, every court should consider not only the two-level reductions authorized by the Commission but conduct a full resentencing at which any and all mitigating evidence may be considered. If courts accept this argument, the administrative and litigation burden will far exceed the estimates the Commission relied upon in making their new rule retroactive and will create the anomalous result that only crack defendants – many of whom are among the most violent of all federal defendants - will get the benefit of the retroactive effect of *Booker*.

With retroactivity, many of these offenders, probably at least 1600 at a minimum, will be eligible for immediate release. Others will have their sentences cut in such a fashion that they may not have the full benefit of the Bureau of Prison’s pre-release programs to prepare them to come back to their communities. I am deeply concerned that the success we are experiencing in some of our most fragile, formerly crack-ravaged communities will be seriously interrupted if
these communities are forced to absorb a disproportionate number of convicted felons, who are statistically among the most likely persons to re-offend.

Because Congress only has until March 3, 2008 to have a say in that decision, Attorney General Mukasey last week asked Congress to quickly enact legislation to prevent the retroactive application of the United States Sentencing Commission amendments. Specifically, he asked Congress to ensure that serious and violent offenders remain incarcerated for the full terms of their sentences. In calling for action, he emphasized that “we are not asking this Committee to prolong the sentences of those offenders who pose the least threat to their communities, such a first-time, non-violent offenders. Instead, [he said,] our objective is to address the Sentencing Commission’s decision in a way that protects public safety and addresses the adverse judicial and administrative consequences that will result.”

The Federal Sentencing Guidelines assign to each offender one of six criminal history categories. The categorization is based upon the extent of an offender’s past convictions and the recency of those convictions. Criminal History Category I is assigned to the least serious criminal record and includes many first-time offenders. Criminal History Category VI is the most serious category and includes offenders with the lengthiest criminal records. The Sentencing Commission’s data shows that nearly 80 percent of the offenders who will be eligible for early release have a criminal history category of II or higher. Many of them will also have received an enhanced sentence because of a weapon or received a higher sentence because of their aggravating role in the offense.
Almost none of these offenders were new to the criminal justice system. The data shows that 65.2 percent of potentially eligible offenders had a criminal history category of III or higher. That fact alone tells us that these offenders will pose a much higher risk of recidivism upon their release.

The Sentencing Commission’s 2004 recidivism study shows that offenders with a criminal history category of III have a 34.2 percent chance of recidivating within the first two years of their release. Those with criminal history category of VI have a 55.2 percent chance of recidivating within the first two years of their release.

Our concern about the early release of these offenders is amplified by the fact that retroactive application of the crack amendment would result in many prisoners being unable to participate in specific pre-release programs provided by the Bureau of Prisons (BOP). Preparation to reenter society intensifies as the inmate gets closer to release. As part of this process, BOP provides a specific release preparation program and works with inmates to prepare a variety of documents that are needed upon release, such as a resume, training certificates, education transcripts, a driver’s license, and a social security card. BOP also helps the inmate identify a job and a place to live. Finally, many inmates receive specific pre-release services afforded through placement in residential re-entry centers at the end of their sentences.
With no adjustments to BOP's prisoner re-entry processes, any reductions in sentence such as those contemplated by the retroactive application of the guideline may reduce or eliminate inmates’ participation in the Bureau’s re-entry programs. Without that, the offender’s chance of re-offending will likely increase.

Mr. Chairman, the Department of Justice is open to addressing the differential between crack and powder penalties as part of an effort to resolve the retroactivity issue. It is our hope that as we work together we can make sure that there is no retreat in the fight against drug trafficking and no loss in the public’s trust and confidence in our criminal justice system.

I would ask that the written portion of my statement be made a part of the record. I would be happy to answer any questions you may have. Thank you.
JUDGE RICARDO H. HINOJOSA who has served on the U.S. District Court for the Southern District of Texas since 1983, has also served as an adjunct professor at the University of Texas School of Law. From 1976 until 1983, he was an attorney with the Ewers & Toothaker Law Firm, and was a partner at the time he became a judge. He graduated Phi Beta Kappa and with honors from the University of Texas at Austin in 1972, and earned his law degree from Harvard Law School in 1975. Judge Hinojosa received the Distinguished Alumnus Award from the University of Texas Ex-Students’ Association in 2001. He served as member (1979-83) and Chairman (1981-83) of the Pan American University Board of Regents and in 1986 he received the Distinguished Service Award from the Pan American University Alumni Association.
Statement of Ricardo H. Hinojosa
Chair, United States Sentencing Commission
Before the Senate Judiciary Committee
Subcommittee on Crime and Drugs

February 12, 2008

Chairman Biden, Senator Graham, and members of the Subcommittee, I appreciate the opportunity to appear before you today to discuss federal cocaine sentencing policy.

As you are aware, the United States Sentencing Commission has been considering cocaine sentencing issues for a number of years and has worked closely with Congress to address the sentencing disparity that exists between the penalties for powder cocaine and crack cocaine offenders. Although the Commission took action this past year to address some of the disparity existing in the federal sentencing guideline penalties for crack cocaine offenses, the Commission is of the opinion that any comprehensive solution to the problem of federal cocaine sentencing policy requires revision of the current statutory penalties and therefore must be legislated by Congress. The Commission encourages Congress to take legislative action on this important issue, and it views today’s hearing as an important step in that process.


I. Statutory and Guideline Penalty Structure

The Anti-Drug Abuse Act of 1986\(^1\) established the basic framework of statutory mandatory minimum penalties currently applicable to federal drug trafficking offenses. The quantities triggering those mandatory minimum penalties differ for various drugs and, in some cases (including cocaine), for different forms of the same drug.

In establishing the mandatory minimum penalties for cocaine, Congress differentiated between two principal forms of cocaine – cocaine hydrochloride (commonly referred to as “powder cocaine”) and cocaine base (commonly referred to as “crack cocaine”) – and provided significantly higher punishment for crack cocaine offenses based on the quantity of the drug involved in the offense. As a result of the 1986 Act, federal law requires a five-year mandatory minimum penalty for a first-time trafficking offense involving five grams or more of crack cocaine, or 500 grams or more of powder cocaine, and a ten-year mandatory minimum penalty for a first-time trafficking offense involving 500 grams or more of powder cocaine.

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trafficking offense involving 50 grams or more of crack cocaine, or 5,000 grams or more of powder cocaine. Because it takes 100 times more powder cocaine than crack cocaine to trigger the same mandatory minimum penalty, this penalty structure is commonly referred to as the “100-to-1 drug quantity ratio.”

When Congress passed the 1986 Act, the Commission was in the process of developing the initial sentencing guidelines. The Commission responded to the legislation by generally incorporating the statutory mandatory minimum sentences into the guidelines and extrapolating upward and downward to set guideline sentencing ranges for all drug quantities. Offenses involving five grams or more of crack cocaine or 500 grams or more of powder cocaine, as well as all other drug offenses carrying a five-year mandatory minimum penalty, were assigned a base offense level of 26, corresponding to a sentencing guideline range of 63 to 78 months for a defendant in Criminal History Category I. Similarly, offenses involving 50 grams or more of crack cocaine or 5,000 grams or more of powder cocaine, as well as all other drug offenses carrying a 10-year mandatory minimum penalty, were assigned a base offense level of 32, corresponding to a sentencing guideline range of 121 to 151 months for a defendant in Criminal History Category I. Crack cocaine and powder cocaine offenses for quantities above and below the mandatory minimum penalty threshold quantities were set proportionately using the same 100-to-1 drug quantity ratio.

In addition, unlike for any other drug, in 1988 Congress enacted statutory mandatory minimum penalties for simple possession of crack cocaine. In fiscal year 2007, there were 109 federal cases for simple possession of crack cocaine, in which 20 offenders were subject to a statutory mandatory minimum penalty of five years or more. In fiscal year 2006, there were 132 such cases, in which 24 offenders were subject to a statutory mandatory minimum punishment.

II. The Commission’s May 2007 Report

The Commission has given much consideration to the issue of federal cocaine sentencing policy, releasing its first report to Congress on federal cocaine sentencing policy in 1995 in response to a directive from Congress to study the issue. In that report, the Commission concluded that the Congress’s objectives with regard to punishing crack cocaine trafficking could be achieved more effectively “without relying on the current federal sentencing scheme for crack cocaine offenses that includes the 100-to-1 quantity ratio.” In 1997, again at the request of Congress, the Commission submitted a report that recommended to Congress that it “revise the federal statutory penalty scheme for both crack and powder cocaine offenses.” In 2002, the Commission issued another comprehensive report on federal cocaine sentencing policy that set forth recommendations to Congress on this issue.

In the 2006-2007 guideline amendment cycle, the Commission again undertook an extensive review of the issues associated with federal cocaine sentencing policy. The

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Commission examined sentencing data from fiscal years 2005 and 2006 (including comparing findings derived from that data with findings from the Commission’s previous reports to Congress on federal cocaine sentencing policy), surveyed state cocaine sentencing policy, conducted two public hearings, received considerable written public comment, and reviewed relevant scientific and medical literature. Comment received in writing and at the public hearings showed that federal cocaine sentencing policy, insofar as it provides substantially heightened penalties for crack cocaine offenses, continues to come under almost universal criticism from representatives of the Judiciary, criminal justice practitioners, academics, and community interest groups.

The Commission’s efforts culminated in the issuance of its fourth report to Congress on the subject in May 2007. Some of the key findings of the May 2007 report are summarized below. Where possible, the Commission has updated the tables and figures from its May 2007 report to include information through fiscal year 2007.

A. Federal Cocaine Offenders and Average Sentence Length

Powder cocaine and crack cocaine offenses together historically have accounted for nearly half of the federally-sentenced drug trafficking offenders. In fiscal year 2006, for example, of 25,007 total drug trafficking cases, there were 5,744 powder cocaine cases (23% of all drug trafficking cases) and 5,397 crack cocaine cases (22% of all drug trafficking cases). According to the Commission’s preliminary fiscal year 2007 data, of 24,750 total drug trafficking cases, there were 6,175 powder cocaine cases (25% of all drug trafficking cases) and 5,239 crack cocaine cases (21% of all drug trafficking cases).
Federal crack cocaine offenders consistently have received substantially longer sentences than powder cocaine offenders, and the difference in sentence length between these two groups of offenders has widened since 2002. Data presented in the May 2007 report, compiled from the Commission’s fiscal year 2006 datafile, indicated that the average sentence length for crack cocaine offenders was approximately 122 months, whereas the average sentence length for powder cocaine offenders was approximately 85 months. The differences in sentences between powder cocaine offenses and crack cocaine offenses have increased over time. In 1992, crack cocaine sentences were 25.3 percent longer than those for powder cocaine. As indicated in Updated Figure 2-3, in 2006, the difference was 43.5 percent.

Preliminary data, as set forth in updated Figure 2-2, indicate that, for fiscal year 2007, the average sentence length for crack cocaine offenders was approximately 129 months, whereas the average sentence length for powder cocaine offenders was approximately 86 months. This increase in the average sentence length for crack cocaine offenders may be attributable to three factors. First, as indicated in section B below, the median drug quantity for crack cocaine offenses increased in fiscal year 2007 to 53.5 grams as compared to 51.0 grams in fiscal year 2006.

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5 See Updated Fig. 2-2.
Second, most cocaine offenders in the federal system are convicted of statutes carrying a five-year or ten-year mandatory minimum penalty. According to preliminary fiscal year 2007 data, 83.0 percent of crack cocaine offenders were convicted of statutes carrying mandatory minimum terms of imprisonment, compared to 79.1 percent of such offenders in fiscal year 2006. Exposure to mandatory minimum sentences contributes to longer average sentence length and crack cocaine offenders are less likely to receive the benefit of statutory or guideline mechanisms designed for low-level offenders to be sentenced without regard to the statutory mandatory minimums. According to preliminary fiscal year 2007 data, 13.5 percent of crack cocaine offenders received benefit of a safety valve provision, either as set forth at 18 U.S.C. § 3553(t) or through the federal sentencing guidelines, as compared to 14.0 percent in fiscal year 2006. By comparison, preliminary fiscal year 2007 data indicate that 44.6 percent of powder cocaine offenders qualified for the safety valve compared to 45.5 percent in fiscal year 2006.

Third, while offense severity (based on drug type and quantity) is the preliminary determinant of the sentencing guideline range, an offender’s criminal history also plays a significant role. The Commission’s preliminary data for fiscal year 2007 also suggests that the average number of criminal history events counted under the guidelines may have increased for crack cocaine offenders compared to the average number of such events counted for crack cocaine offenders in fiscal year 2006, even though in both fiscal years, the average criminal history category for these offenders was Criminal History Category III. In comparison, the average criminal history category for powder cocaine offenders was Criminal History Category II in fiscal years 2006 and 2007. These factors taken together may account for the increase in average sentence length for crack cocaine offenses in fiscal year 2007.

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7 The “safety valve” provides a mechanism by which only drug offenders who meet certain statutory criteria may be sentenced without regard to the otherwise applicable drug mandatory minimum provisions. Enacted in 1994, the safety valve provision was created by Congress to permit offenders “who are the least culpable participants in drug trafficking offenses, to receive strictly regulated reductions in prison sentences for mitigating factors” recognized in the federal sentencing guidelines.
8 The Commission uses “safety valve” to refer to cases that received either the 2-level reduction pursuant to USSG §2D1.1(b)(7) and USSG §5C1.2, or relief from the statutory mandatory minimum sentence pursuant to 18 U.S.C. § 3553(f), or both.
9 A defendant’s criminal history category is determined pursuant to USSG §4A1.1.
Updated Figure 2-2
Trend in Prison Sentences for Powder Cocaine and Crack Cocaine Offenders
FY1992-Preliminary FY2007

Only cases sentenced under USSG §2D1.1 (Drug Trafficking) with a primary drug type of powder cocaine or crack cocaine are included in this figure. Cases with sentences of probation, or any sentence of intermittent confinement, community confinement, or home detention, are not included in this figure. Cases with sentences greater than 470 months were included in the sentence average computation as 470 months. This figure excludes cases with missing information for the variables required for analysis. This figure also excludes cases sentenced on or after the Supreme Court’s June 24, 2004 decision in Blakely v. Washington, 542 U.S. 296 (2004) and before its January 12, 2005 decision in United States v. Booker, 543 U.S. 220 (2005), as the Commission determined it could not rely on the assumption that the federal sentencing guidelines had been uniformly applied during that period. See U.S. Sentencing Commission Final Report on the Impact of United States v. Booker on Federal Sentencing at 33 (March 2006).

Updated Figure 2-3

Trend in Proportional Differences Between Average Cocaine Sentences
FY1992-Preliminary FY2007

Only cases sentenced under USSG §2D1.1 (Drug Trafficking) with a primary drug type of powder cocaine or crack cocaine are included in this figure. Cases with sentences of probation, or any sentence of intermittent confinement, community confinement, or home detention, are not included in this figure. Cases with sentences greater than 470 months were included in the sentence average computation as 470 months. This figure excludes cases with missing information for the variables required for analysis. This figure also excludes cases sentenced on or after the Supreme Court's June 24, 2004 decision in Blakely v. Washington, 542 U.S. 296 (2004) and before its January 12, 2005 decision in United States v. Booker, 543 U.S. 220 (2005), as the Commission determined it could not rely on the assumption that the federal sentencing guidelines had been uniformly applied during that period. See U.S. Sentencing Commission Final Report on the Impact of United States v. Booker on Federal Sentencing at 53 (March 2006). The figure shows, for each year, the percentage difference between prison sentences for crack cocaine and powder cocaine. For example, in Fiscal Year 1992, crack cocaine sentences were 25.3 percent greater than powder cocaine sentences. The percentage was calculated by dividing the difference between the average crack cocaine sentence and the average powder cocaine sentence by the average powder cocaine sentence.


B. Demographics

African-Americans still comprise the majority of crack cocaine offenders, but that is decreasing, from 91.4 percent in 1992 to 82.2 percent, according to preliminary fiscal year 2007 data. White offenders comprise 8.3 percent of crack cocaine offenders, compared to 3.2 percent in 1992.10

Powder cocaine offenders are now predominantly Hispanic. Hispanics accounted for 55.9 percent of powder cocaine offenders, according to preliminary fiscal year 2007 data. African-Americans accounted for 27.5 percent of powder cocaine offenders, and white offenders comprised 15.4 percent of these cases.

10 See Table 2-1, USSC 2007 Cocaine Report.
### Updated Table 2-1
Demographic Characteristics of Federal Cocaine Offenders

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<td>White</td>
<td>2,113 32.3</td>
<td>932 17.8</td>
<td>952 15.4</td>
<td>74 3.2</td>
<td>209 5.6</td>
<td>435 8.3</td>
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<td>Black</td>
<td>1,778 27.2</td>
<td>1,596 30.5</td>
<td>1,693 27.5</td>
<td>2,096 91.4</td>
<td>4,069 84.7</td>
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<td>Hispanic</td>
<td>2,601 39.8</td>
<td>2,662 50.8</td>
<td>3,441 55.9</td>
<td>121 5.3</td>
<td>434 9</td>
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<tr>
<td>Other</td>
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<td>49 0.9</td>
<td>78 1.3</td>
<td>3 0.1</td>
<td>33 0.7</td>
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<td>U.S. Citizen</td>
<td>4,499 67.7</td>
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<td>6,161 100</td>
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<td>4,800 100</td>
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<th>Gender</th>
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<th>2007 N %</th>
<th>1992 N %</th>
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<tr>
<td>Female</td>
<td>787 11.8</td>
<td>722 13.8</td>
<td>584 9.5</td>
<td>270 11.7</td>
<td>476 9.9</td>
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<td>Male</td>
<td>5,859 88.2</td>
<td>4,518 86.2</td>
<td>5,575 90.5</td>
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<td>4,330 90.1</td>
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This table excludes cases missing information for the variable required for analysis.


## C. Offender Function

In its May 2007 report, the Commission determined the offender’s function in the offense by a review of the narrative of the offense conduct section of the Presentence Report, independent of any application of sentencing guideline enhancements, reductions, or drug quantity. Offender function was assigned based on the most serious trafficking function performed by the offender in the offense and, therefore, provides a measure of culpability based on the offender’s level of participation in the offense, independent of the offender’s quantity-based offense level in the Drug Quantity Table in the drug trafficking guideline.

To provide a more complete profile of federal cocaine offenders, particularly their function in the offense, the Commission undertook a special coding and analysis

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11 The Presentence Report is one of the five documents courts are required to submit to the Commission pursuant to 28 U.S.C. § 994(w). The other documents are: (1) the charging document; (2) the judgment and commitment order; (3) the plea agreement (if there is one); and (4) the Statement of Reasons form. It is from these five documents that the Commission extracts the data necessary to analyze and report on national sentencing trends and practices.

12 See May 2007 Report at 17. Enhancements for aggravating conduct, such as possession of a dangerous weapon, distribution in protected places or to protected persons, aggravating role, and criminal history, including career offender status, are available within the sentencing guidelines for application in drug trafficking offenses.

project using a sample of fiscal year 2005 federal offenders. Each offender was assigned a separate function category based on his or her most serious conduct described in the Presentence Report. The function category with the largest portion of powder cocaine offenders was couriers/mules (33.1 percent), which was consistent with the Commission’s findings in 2002. The largest portion of crack cocaine offenders fell within the street-level dealer category (55.4 percent). This portion of crack offenders whose most serious conduct was as a street-level dealer is lower than reported in 2002 (66.5 percent).

The sources of the two drug types likely account for these differences in offender functions. Powder cocaine is produced outside the United States and must be imported. In contrast, with rare exception, crack cocaine is produced and distributed domestically. This is demonstrated by Commission data, which suggest that 42.0 of powder cocaine offenses are international in scope whereas 56.6 percent of crack cocaine offenses may be classified at the neighborhood level.

The Commission’s data analysis also is consistent with the presence of a pyramid structure in drug trafficking, with the largest number of federal cocaine offenders performing lower-level functions.

D. Drug Quantity and Dosages

Drug type and quantity are the two primary factors that determine offense levels under the federal sentencing guidelines, combining to establish the base offense level for drug trafficking offenses. According to the Commission’s analysis, in fiscal year 2006, the median drug weight for powder cocaine offenses was 6,000 grams. The median drug weight for crack cocaine offenses was 51 grams. According to preliminary fiscal year 2007 data, the median drug weights increased to 6,240 grams for powder cocaine offenses and 53.5 grams for crack cocaine offenses.

With respect to doses, one gram of powder cocaine generally yields five to ten doses, whereas one gram of crack cocaine yields two to ten doses. Thus, 500 grams of powder cocaine — the quantity necessary to trigger the five-year statutory mandatory
minimum penalty – yields between 2,500 and 5,000 doses. In contrast, five grams of

crack cocaine – the quantity necessary to trigger the five-year statutory mandatory
minimum penalty – yields between ten and 50 doses.22

E. Offender Conduct

According to the Commission’s analysis, only a minority of powder cocaine

offenses and crack cocaine offenses involve the most egregious aggravating conduct. As
categorized by the Commission, aggravating conduct includes weapon involvement,
vioance, and aggravating role in the offense. Such conduct does continue to appear
more frequently associated with crack cocaine offenses than powder cocaine offenses,
but its presence in both offenses occurs in less than seven percent of the cases.

Weapon involvement is the most common aggravating conduct in both crack

cocaine and powder cocaine offenses. According to the Commission’s fiscal year 2005
data sample, weapon involvement, broadly defined,23 occurred in 27.0 percent of
powder cocaine offenses and 42.7 percent of crack cocaine offenses.24 Under a narrower
definition of weapon enhancement (i.e., one that relies exclusively on offender conduct
and excludes weapon involvement of others), 15.7 percent of powder cocaine offenders
had access to, possessed, or used a weapon, compared to 32.4 percent of crack cocaine
offenders in the Commission’s fiscal year 2005 drug sample.25 Further limiting the
analysis to cases in which a guideline or statutory weapon enhancement applied, in fiscal
year 2006, 8.2 percent of powder cocaine offenders received a weapon enhancement
under the guidelines, and 4.9 percent were convicted pursuant to 18 U.S.C. § 924(c). By
comparison, 15.9 percent of crack cocaine offenders received the guideline weapon
enhancement, and 10.9 percent were convicted pursuant to 18 U.S.C. § 924(c).26

According to the Commission’s analysis, the prevalence of violence, as indicated
by the occurrence of any injury, death, and threats of injury or death,27 has decreased for
both powder and crack cocaine since the Commission’s review of cocaine sentencing in
2002. It continues to occur in only a minority of offenses. According to the
Commission’s fiscal year 2005 data sample, 93.8 percent of powder cocaine offenses did
not have violence associated with them, as compared to 89.6 percent of crack cocaine
offenses. Death was associated with 1.6 percent of powder cocaine cases and 2.2
percent of crack cocaine offenses. Any injury occurred in 1.5 percent of powder cocaine
offenses and 3.3 percent of crack cocaine offenses. The threat of violence occurred in
3.2 percent of the powder cocaine offenses and 4.9 percent of the crack cocaine

23 See May 2007 Report at 31. For purposes of this analysis, “weapon involvement” was defined as
weapon involvement by any participant, ranging from weapon use by the offender to access to a weapon
by an un-identified co-participant. Id.
24 See May 2007 Report at Figure 2-15.
25 See May 2007 Report at 33; figure 2-16.
26 See May 2007 Report at Table 2-2. For a more detailed analysis of application of weapons
enhancements, see May 2007 Report at pages 31-36.
27 See May 2007 Report at 38; Figure 2-20.
28 See May 2007 Report at Fig. 2-20.
III. Recommendations

The Commission believes that there is no justification for the current statutory penalty scheme for powder and crack cocaine offenses. The Commission remains committed, however, to its recommendation in 2002 that any statutory ratio be no more than 20-to-1. Specifically, consistent with its May 2007 Report, the Commission strongly and unanimously recommends that Congress:

- Increase the five-year and ten-year statutory mandatory minimum threshold quantities for crack cocaine offenses to focus the penalties more closely on serious and major traffickers as described generally in the legislative history of the 1986 Act.


- Reject addressing the 100-to-1 drug quantity ratio by decreasing the five-year and ten-year statutory mandatory minimum threshold quantities for powder cocaine offenses, as there is no evidence to justify such an increase in quantity-based penalties for powder cocaine offenses.

The Commission further recommended in its May 2007 report that any legislation implementing these recommendations include emergency amendment authority for the Commission to incorporate the statutory changes in the federal sentencing guidelines. Emergency amendment authority would enable the Commission to minimize the lag between any statutory and guideline modifications for cocaine offenders.

The Commission believes that sentencing guidelines continue to provide Congress a more finely calibrated mechanism to account for variations in offender culpability and offense seriousness than was available at the time the 100-to-1 drug quantity ratio was established in 1986, and the Commission recommends to Congress that any concerns it has about harms associated with cocaine drug trafficking are best captured through the sentencing guideline system.

IV. Conclusion

The Commission is strongly and unanimously committed to working with Congress to address the statutorily mandated disparities that currently exist in federal cocaine sentencing. The Commission also is committed to working with Congress on all other issues related to maintaining just and effective national sentencing policy in a manner that preserves the bipartisan principles of the Sentencing Reform Act.

Thank you for the opportunity to testify before you today and I look forward to answering your questions.

29 "Emergency amendment authority" allows the Commission to promulgate amendments outside of the normal amendment cycle described in footnote 3, supra.
REGGIE B. WALTON

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. In May, 2007, Chief Justice John Roberts appointed Judge Walton to serve as a Judge of the United States Foreign Intelligence Surveillance Court, which is a 7-year appointment.

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, a Leadership in Education Award, from the American University, Washington Semester Program (2007), 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.
JUDICIAL CONFERENCE OF THE UNITED STATES

STATEMENT OF

JUDGE REGGIE B. WALTON
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

BEFORE

THE SUBCOMMITTEE ON CRIME AND DRUGS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ON

“FEDERAL COCAINE SENTENCING LAWS”

February 12, 2007
Thank you for affording me the opportunity to appear before you today on behalf of the Judicial Conference of the United States and to convey my own experience and perspectives on this very important matter. The disparity between sentences imposed for powder-form cocaine and cocaine base ("crack") is one of the most serious challenges facing the federal criminal justice system today, and I am grateful for the chance to share the views of the courts.

Most informed commentators now agree that the infamous 100-to-1 ratio between crack and powder is unwarranted,\(^1\) but legislative remedies have proved elusive. Some believe that the answer lies in reducing the penalties associated with crack; others believe that the answer lies in increasing the penalties associated with powder; others believe that the penalties associated with powder should be increased and that crack penalties should be reduced. Any of these approaches, if adopted by Congress, will have reverberating consequences for the criminal justice system: while the Sentencing Commission estimates that there are 19,500 inmates eligible for sentence reduction, there are more than 26,383 inmates in the custody of the Bureau of Prisons whose offenses involved crack\(^2\) (approximately 13 percent of the total prison population).\(^3\)


Federal cocaine sentencing policy, insofar as it provides substantially heightened penalties for crack cocaine offenses, continues to come under almost universal criticism from representatives of the Judiciary, criminal justice practitioners, academics, and community interest groups, and inaction in this area is of increasing concern to many, including the Commission.

Id. at 2.


\(^3\)Federal Bureau of Prisons, Inmate Population as of December 29, 2007, was 199,616 http://www.bop.gov/news/quick.jsp. In 2006, there were 5,397 individuals sentenced in federal
In recent years, the disparity between crack and powder cocaine sentences is a subject that has captured the attention of the Criminal Law Committee (of which I am a member) and the Judicial Conference. In June 2006, the Criminal Law Committee discussed the fact that 100 times as much powder cocaine as crack is required to trigger the same five-year and ten-year mandatory minimum penalties, resulting in crack sentences that are 1.3 to 8.3 times longer than their powder equivalents. The Committee concluded that the disparity between sentences was unacceptably large, and that it undermined public confidence in the courts. Upon the Committee’s recommendation, in September 2006, the Judicial Conference voted to “oppose the existing differences between crack and powder cocaine sentences and support the reduction of that difference.” I conveyed that view on behalf of the Criminal Law Committee at a Sentencing Commission hearing on cocaine sentencing policy in November 2006. In 2007, the Sentencing Commission, implementing the policy conclusions that follow from its series of special congressional reports on cocaine and sentencing policy, amended downward the guideline for courts for crack, compared to 5,744 sentenced for powder cocaine. Between 1996 and 2006, the number of sentenced crack offenders ranged from 4,350 to 5,397. U.S. SENTENCING COMM’N, 2007 REPORT, supra note 1, at 12 (Figure 2-1).


5JCUS-SEP 06, p. 18.


7The Commission has repeatedly condemned the crack-powder disparity in its reports to Congress. See, e.g., U.S. SENTENCING COMM’N, 1995 SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (Feb. 1995); U.S. SENTENCING COMM’N, 1997 SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (Apr. 1997); U.S. SENTENCING COMM’N, 2002
crack cocaine. And Congress, with virtually no debate or opposition, permitted the amendment to move forward and become effective on November 1, 2007.

Soon thereafter, I testified before the Commission on the issue of retroactive application of its guideline amendment for crack. The Criminal Law Committee of the Judicial Conference recommended that the amendment should be made retroactive, and on December 11, 2007, the Commission voted unanimously to apply the guideline retroactively. This was a courageous and promising first step in ameliorating the disparity that exists between crack and powder sentences. But as the Commission itself acknowledges, the promulgation of the guideline amendment was only a partial solution to a much-larger problem, and the ultimate solution lies with Congress.

Congress established the crack-powder disparity with the passage of the Anti-Drug Abuse Act of 1986. Legislative history suggests that it did so not out of contempt for the Sentencing Reform Act of 1984 (which, inter alia, sought to eliminate unwarranted sentencing disparity in

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REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (May 2002); U.S. SENTENCING COMM’N, 2007 REPORT, supra note 1.


the federal courts), but because it held a particular set of beliefs about crack cocaine. For example, the record reflects Congress’s concern that crack cocaine was uniquely addictive, was associated with greater levels of violence than was powder cocaine, and was especially damaging to the unborn children of users.

I understand the circumstances under which Congress passed the 1986 Act because many of those same beliefs about crack cocaine were in force during the late 1980s, when I served as the White House’s Associate Director of the Office of National Drug Control Policy. But twenty years of experience have taught us all that many of the beliefs used to justify the 1986 Act were wrong. Research has shown that the addictive properties of crack have more to do with the fact that crack is typically smoked than with its chemical structure. The national epidemic of crack

13See, e.g., 18 U.S.C. § 3553(a)(6)(2007) (“The Court, in determining the particular sentence to be imposed, shall consider...the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct”); 28 U.S.C. § 991(b)(1)(B)(2007) (“The purposes of the United States Sentencing Commission are to...provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct”).

14See, e.g., U.S. SENTENCING COMM’N, 2002 REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (May 2002) 93, available at http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm (“Crack cocaine can only be readily smoked, which means that crack cocaine is always in a form and administered in a manner that puts the user at the greatest potential risk of addiction.”).

15See, e.g., id. at 100 (“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.”).

16See, e.g., id. at 94 (“During the congressional debates surrounding the 1986 Act, many members voiced concern about the increasing number of babies prenatally exposed to crack cocaine and the devastating effects such exposure causes.”).

17See, e.g., U.S. SENTENCING COMM’N, 2007 REPORT, supra note 1, at 63 (linking risk of addiction to mode of administration).
use that many of us feared never actually materialized,¹⁸ and recent studies suggest that levels of violence associated with crack are stable or even declining.¹⁹

Because experience has shown that many of the foundations of the 1986 Act were flawed, and because the existing disparity may actually frustrate (instead of advance) the goals of the Sentencing Reform Act,²⁰ there is now widespread support by many in the United States to reduce the existing sentencing disparity between crack and powder cocaine.²¹

The federal courts must be fundamentally fair, but that is not enough: they must also be perceived as fair by the public. And today, that is not always the case. More than once, I have had citizens refuse to serve on a jury in my courtroom because they are familiar with the existing disparity between crack and powder sentences, and believed that federal statutes (and the courts that interpret those statutes) are racist.

I do not believe that the 1986 Act was intended to have a disparate impact on minorities, but while African-Americans comprise approximately only 12.3 percent of the United States population in general,²² they comprise approximately 81.8 percent of federal crack cocaine

¹⁸See id. at 72-76 (noting that use of crack has been very stable in recent years).

¹⁹See id. at 86-87 (reporting research showing declining levels of actual violence).

²⁰See id. at 8 ("[T]he Commission maintains its consistently held position that the 100-to-1 drug quantity ratio significantly undermines the various congressional objectives set forth in the Sentencing Reform Act.").


offenders, but only 27 percent of federal cocaine powder offenses.\textsuperscript{23} (Hispanics, though, account for a growing proportion of powder cocaine offenders. "In 1992, Hispanics accounted for 39.8 percent of powder cocaine offenders. This proportion increased to over half (50.8\%) by 2000 and continued increasing to 57.5 percent in 2006."\textsuperscript{24}) Furthermore, because crack offenses carry longer sentences than equivalent powder cocaine offenses,\textsuperscript{25} African-American defendants sentenced for cocaine offenses wind up serving prison terms that are greater than those served by other cocaine defendants.\textsuperscript{26} I have a concern that disparate impact of crack sentencing on African-American communities shapes social attitudes. When large segments of the African-American population believe that our criminal justice system is racist, it presents the courts with serious practical problems. People come to doubt the legitimacy of the law—not just the law associated with crack, but \textit{all} laws. I have experienced citizens refusing to serve on juries, and there are reports of juries refusing to convict defendants.\textsuperscript{27} Skepticism about the judiciary also

\textsuperscript{23}U.S. SENTENCING COMM’N, 2007 REPORT, supra note 1, at 15 (“Historically the majority of crack cocaine offenders are black, but the proportion steadily has declined since 1992: 91.4 percent in 1992, 84.7 percent in 2000, and 81.8 percent in 2006.”).

\textsuperscript{24}Id. at 15.

\textsuperscript{25}See supra note 4 (noting crack sentences that are 1.3 to 8.3 times longer than their powder equivalents).

\textsuperscript{26}See, e.g., U.S. SENTENCING COMM’N, 2007 REPORT, supra note 1, at B-18 (“In 1986, before the enactment of the federal mandatory minimum sentencing for crack cocaine offenses, the average federal drug sentence for African Americans was 11 percent higher than for whites. Four years later, the average federal drug sentence for African Americans was 49 percent higher than for whites.”).

\textsuperscript{27}See William Spade, Jr., \textit{Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy}, 38 ARIZ. L. REV. 1233, 1282 (1996) (“Moreover, the 100:1 ratio is causing juries to nullify verdicts. Anecdotal 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.” (citing Jeffrey
presents us with symbolic problems. The facade of the Supreme Court of the United States is an evocative image, an icon that connotes the rule of law. It is important that the federal courts are recognized as places in which the citizens stand as equals before the law. If, instead, some segments of the population view the courts with scorn and derision, as institutions that mete out unequal justice, the moral authority of the federal courts is dimmed.

The Judicial Conference strongly supports legislation to reduce the unsupportable sentencing disparity between crack and powder cocaine. The Criminal Law Committee and the Judicial Conference have no established view on whether the disparity should be reduced by raising penalties for powder, reducing penalties for crack, or through some combination of both approaches, but Congress may find it prudent to reconsider whether existing minimum penalties are necessary to achieve the goals of sentencing. This would be consistent with the parsimony provision of the Sentencing Reform Act.

Although the Judicial Conference does not have an established view on how to reduce the disparity, it does have an established and longstanding opposition to mandatory minimum penalties. For more than thirty years, it has been the view of the Judicial Conference that mandatory sentences unnecessarily prolong the sentencing process, increase the number of


 28 For specific legislative recommendations, see, e.g., U.S. SENTENCING COMM’N, 2007 REPORT, supra note 1, at 8-9.


 30 See, e.g., JCUS-OCT 71, p. 40; JCUS-APR 76, p. 10; JCUS-SEP 81, pp. 90, 93; JCUS-MAR 90, p. 16; JCUS-SEP 91, p. 56; JCUS-MAR 93, p. 13; JCUS-SEP 93, p. 46; JCUS-SEP 94, p. 42; JCUS-SEP 95, p. 47 (all opposing mandatory minimum sentences).
criminal trials and engender additional appellate review, and increase the expenditure of public funds without a corresponding increase in benefits.\footnote{JCUS-APR 76, p. 10; JCUS-SEP 81, pp. 90, 93.} Accordingly, as a general matter, the Conference favors legislation that leaves sentencing decisions to judges, those individuals best situated to apply general rules to the particular circumstances. Crack legislation that increases the drug weights required to trigger mandatory minimum penalties would be more consistent with Judicial Conference policy inasmuch as they narrow the pool of defendants subjected to mandatory minimum provisions.

I would like to thank you for the opportunity to testify before you today. The disparity in crack and powder sentences is an important issue with both symbolic and practical consequences for the federal courts. I believe that existing cocaine policy in general, and the 100-to-1 ratio in particular, has a corrosive effect upon the public’s confidence in the federal courts. As a representative of the Judicial Conference and as a sentencing judge who is regularly called upon to impose sentences on crack defendants, I encourage Congress to pass legislation that would reduce the disparity between crack and powder cocaine sentences.

I thank you for your attention and would be happy to answer any questions that you might have.
NORA D. VOLKOW, M.D.
Director
National Institute on Drug Abuse
National Institutes of Health
U.S. Department of Health and Human Services

Nora D. Volkow, M.D., became Director of the National Institute on Drug Abuse (NIDA) at the National Institutes of Health in May 2003. NIDA supports most of the world’s research on the health aspects of drug abuse and addiction.

Dr. Volkow’s work has been instrumental in demonstrating that drug addiction is a disease of the human brain. As a research psychiatrist and scientist, Dr. Volkow pioneered the use of brain imaging to investigate the toxic effects of drugs and their addictive properties. Her studies have documented changes in the dopamine system affecting the actions of frontal brain regions involved with motivation, drive, and pleasure and the decline of brain dopamine function with age. She has also made important contributions to the neurobiology of obesity, ADHD, and the behavioral changes that occur with aging.

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 380 peer-reviewed articles and more than 60 book chapters and non-peer reviewed manuscripts, and has also edited three books on the use of neuroimaging in studying mental and addictive disorders.

During her professional career, Dr. Volkow has been the recipient of multiple awards, including her selection for membership in the Institute of Medicine in the National Academy of Sciences. She was recently named one of Time Magazine’s "Top 100 People Who Shape our World", and was included as one of the 20 people to watch by Newsweek magazine in its "Who's Next in 2007" feature. She was also named "Innovator of the Year" by U.S. News & World Report in 2000.
Testimony
Before the Subcommittee on Crime and Drugs
Committee on the Judiciary
United States Senate

Scientific Research on the Scope, Pharmacology, and Health Consequences of Cocaine Abuse and Addiction

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

For Release on Delivery
Expected at 2:00 p.m.
Tuesday, February 12, 2008
Thank you, Mr. Chairman and members of the Subcommittee, for the opportunity to contribute to this important discussion. I am Dr. Nora Volkow, Director of the National Institute on Drug Abuse (NIDA), a component of the National Institutes of Health, an agency of the Department of Health and Human Services (HHS). NIDA is the world's leading supporter of research on the health aspects of all drugs of abuse. The research we fund 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 has taught us about the scope, pharmacology, and health consequences of cocaine abuse and addiction, particularly with regard to two forms of cocaine—powder and freebase (aka “crack”)—and the effects of various routes of administration. My testimony will support the scientific view that cocaine’s effects vary depending on how it is administered. My testimony will also make it clear that cocaine in all its forms poses serious health risks, including addiction.

Research supported by NIDA has found cocaine to be a powerfully addictive stimulant. Like other central nervous system (CNS) stimulants, such as amphetamine and methamphetamine, cocaine produces alertness and heightens energy. 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. It does this by blocking dopamine transporters (DAT), which have the critical task of removing dopamine from in between neurons, thereby shutting off the neural signal once a rewarding stimulus is no longer present. The normal functioning of DAT is critical to the healthy operation of the brain’s reward system, which allows us to register pleasure from everyday rewards. 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 directly related to the route of administration and to 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—the process of inhaling cocaine powder through the nostrils—leads to quicker absorption through the nasal tissue. Intravenous (IV) use, or injection, is faster still, introducing the
drug directly into the bloodstream and heightening the intensity of effects. Finally, and similar to injection, the inhalation of cocaine vapor or smoke into the lungs is also a very effective method of delivering the drug into the bloodstream. Compared to the injection route, however, smoking produces quicker and higher peak blood levels in the brain—hence, a faster euphoria—and is devoid of 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 (see 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 25.4 million past-year users 12 or older), according to the 2006 National Survey on Drug Use and Health (NSDUH), administered by HHS’s Substance Abuse and Mental Health Services Administration's (SAMHSA), more than 6 million (2.5 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. This percentage has remained fairly intractable for the past 5 years, with little variance occurring among persons aged 12 or older.

In 2006, roughly 1.5 million persons 12 years or older (0.6%) used crack (cocaine freebase) in the past year, and 702,000 (0.3%) were current (past month) 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% of the population 12 and older. However, past-month use of crack among Blacks 12 or older in 2006, at 0.8%, reflects a prevalence much higher than in the White (0.2%) or Hispanic (0.3%) populations, although American Indians/Alaska Natives have a higher percentage (2.7%) than any other race/ethnic group.

The NIDA-supported Monitoring the Future (MTF) study, an annual survey that elicits information about drug use and attitudes among high school students, provides valuable information about the changing patterns of drug use in selected populations. The MTF reports that past year use of cocaine in any form has been essentially unchanged since 2003 among 12th, 10th, and 8th graders. Past-year abuse of cocaine (including powder and crack) was reported by 5.2% of 12th graders, 3.4% of 10th graders, and 2.0% of 8th graders in 2007. For crack cocaine, the rates were 1.9%, 1.3%, and 1.3%, respectively.

A decline has occurred in the number of people admitted to 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 278,000 in 1995 (17% of all admissions reported that year) to around 256,000 (14%) in 2005. Smoked cocaine (crack) represented 72% of all primary cocaine admissions in 2005. Among smoked cocaine admissions, 52% were Black, 38% White, and 8% Hispanic, whereas a reverse pattern was evident among
Blacks and Whites (28% and 52%, respectively, and 17% were Hispanic) for non-smoked cocaine.

In contrast to the generally downward or stable trends reflected in most nationally conducted surveys, other indicators appear to suggest that cocaine abuse may be on the rise in some localities. For example, one study looking at cocaine deaths in the State of Florida revealed a dangerous upward trend, with cocaine-related deaths nearly doubling from 2001 to 2005, from 1,000 to 2,000. The study also showed dramatic increases in the popularity of cocaine among the young and affluent, by all routes of drug administration. In addition, Department of Justice statistics demonstrate that the percentage of state and local law enforcement agencies that reported methamphetamine as their greatest drug threat declined between 2004 and 2007, but the percentage of these agencies that reported cocaine as their greatest drug threat increased overall during that time. These indicators are of grave concern to NIDA.

**The Two Forms of Cocaine**

The two forms of cocaine—powder and crack—correspond to two chemical compositions: the hydrochloride salt and the base form, respectively. The hydrochloride salt, or powdered form of cocaine, dissolves in water and when abused can be administered intravenously (by vein), intranasally, designated insufflation (through the nose), or orally. 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 free-base or "crack". The medical literature is often ambiguous when differentiating between these two forms, which actually share similar properties when vaporized. In its "base" forms (freebase and crack), cocaine can be effectively smoked because it vaporizes at a much lower temperature (80°C) than cocaine hydrochloride (180°C). The higher temperature can result in chemical degradation of cocaine.

With regard to route of administration, the picture is not complete. Among those entering treatment in 2005 with cocaine as their primary drug, 72% (185,236) were in treatment for smoked cocaine (inhalation), and 28% (71,255) for cocaine used in another form. Of the latter, 81% reported insufflation as the route of administration, and 11% reported injection, so it is clear that powder cocaine is overwhelmingly inhaled. Moreover, it is widely accepted that the intranasal route of administration is often the first way that many cocaine-dependent individuals use cocaine.

**Acute Effects of Cocaine**

Cocaine's stimulant effects appear almost immediately after a single dose and fade away within minutes to hours, depending on route of administration and dose. Taken in small amounts (up to 100 milligrams), 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 adverse psychological or physiological effects with repeated doses.

Medical Consequences of Cocaine

Cocaine abuse can cause significant medical complications, both acutely and after repeated use. Some of the most common 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 insufflating ("snorting") cocaine, for example, can lead to loss of the sense of smell, nosebleeds, problems with swallowing, hoarseness, a chronically runny nose, and damage to the nasal septum; 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, as evidenced by enhanced negative consequences when these substances are taken in combination.

Cocaine abuse can cause addiction. Cocaine is a powerfully addictive drug. Cocaine's stimulant and addictive effects are thought to be mainly a result of its effects on the dopamine transporter, a brain protein that regulates dopamine concentrations in the vicinity of nerve cells. Cocaine blocks the transport system, leading to a supraphysiological excess of dopamine in the brain. With repeated use, adaptation to the surge of dopamine sets in, and 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. This effect often leads to the compulsive pursuit and use of the drug, despite devastating consequences—the essence of addiction. Indeed, a recent study indicates that about 5% 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, in one study looking at a 2-year period, female initiates were three to four times more likely to become addicted to cocaine than males, and non-Hispanic Black/African American initiates were approximately nine times more likely to become addicted to cocaine than non-Hispanic Whites. Importantly, this excess risk was not attributable to crack-smoking or injecting cocaine.
The use and abuse of illicit drugs, including cocaine, is one of the leading risk factors for new cases of HIV. Cocaine abusers who inject the drug put themselves at 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 due mainly to the greater frequency of high-risk sexual practices in the population.

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

Prenatal exposure to cocaine requires urgent attention. Among pregnant women aged 15 to 44 years, 4%, or 100,000 women, used an illicit drug in the past month, according to combined 2005 and 2006 NSDUH data. Thus, an estimated 100,000 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 than other illicit drugs (22% vs. 17%) as their primary substance of abuse.

Babies born to mothers who abuse drugs during pregnancy can suffer varying degrees of adverse health and developmental outcomes. This is likely due to a confluence of interacting factors that frequently characterize pregnant drug abusers. Among these are poly-substance abuse, low socioeconomic 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. They include a greater tendency for premature births in women who abuse cocaine. In addition, recent follow-up study of 10-year-old children who were prenatally exposed uncovered subtle problems in attention and impulse control, placing them at greater risk of developing significant behavioral problems as cognitive demands increase. Still, estimating the full extent of the consequences of maternal cocaine (or any drug) abuse on the fetus and newborn remains a challenging problem, one reason 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 any other subtle, or not so subtle, short- or long-term outcomes can be attributed to prenatal cocaine exposure.

Treatment

Currently, the most effective treatments for cocaine addiction are behavioral therapies, which can be delivered in both residential and outpatient settings. Several approaches
have shown efficacy in research-based and community programs, including (1) cognitive behavioral therapy, which helps patients recognize, avoid, and cope with situations in which they are most likely to abuse drugs; (2) motivational incentives, which use positive reinforcement, such as providing rewards or privileges, for staying drug free or for engaging in activities, such as attending and participating in counseling sessions, to encourage abstinence from drugs; and (3) motivational interviewing, which capitalizes on the readiness of individuals to change their behavior and enter treatment, performed at intake to enhance internal motivation to actively engage in treatment.

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

The same treatment principles that have proven effective in the general population should also be applied among incarcerated individuals. Approximately half of federal and state prisoners are beset with drug abuse or addiction problems (a rate more than 4 times that of the general population), and yet fewer than 20 percent of those who need treatment get it. We know from research that the enforced abstinence that occurs in prison does not “cure” a drug-addicted person, and that treatment within the criminal justice system, particularly when followed by ongoing care during the transition back to the community, reduces drug abuse and criminal recidivism and offers the best alternative for interrupting the vicious cycle of drug abuse and crime which is associated with economic costs and societal burden.

Summary

Cocaine abuse remains a significant threat to the public health. Regarding specific questions surrounding powder versus crack cocaine, research consistently shows that the form of the drug is not the crucial variable; rather it is the route of administration that accounts for the differences in its behavioral effects.

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

James E. Felman was born in Chester, Pennsylvania, and raised in Gainesville, Florida. He is a graduate of Wake Forest University, B.A. cum laude, 1984, and Duke University, M.A. Phil. and J.D. with high honors (Order of the Coif), 1987, where he was Administrative Editor of the Journal of Law and Contemporary Problems. Following law school, Mr. Felman was a law clerk to Judge Theodore McMillian of the United States Court of Appeals for the Eighth Circuit in St. Louis, Missouri.

Mr. Felman was awarded the 2006 George C. Carr Memorial Award for excellence in federal practice and distinguished service to the Federal Bar. He is listed in The Best Lawyers in America for non-white-collar criminal defense, white-collar criminal defense, and appellate law, and in Leading American Attorneys for criminal defense law.

Mr. Felman has handled numerous complex criminal appeals, including United States v. Hassan, 966 F.2d 1415 (11th Cir. 1992) (conviction reversed for insufficient evidence of guilt); United States v. Crutchfield, 26 F.3d 1098 (11th Cir. 1994) (conviction reversed due to prosecutorial misconduct); United States v. Siegel, unpublished (11th Cir. 2000) (sentence vacated); State v. Hayden, 760 So. 2d 1031 (Fla. 2d DCA 2000) (conviction reversed due to discovery error); State v. Acker, 787 So. 2d 77 (Fla. 2d DCA 2001) (petition for post-conviction relief granted; remanded for new trial); United States v. Burns, unpublished (11th Cir. 2001) (conviction reversed due to evidentiary error); United States v. Liss, 265 F.3d 1220 (11th Cir. 2001) (restitution order and sentence vacated); United States v. Gepp, unpublished (11th Cir. 2001) (restitution order vacated); United States v. Sigma International, 244 F.3d 841 (11th Cir. 2001), reh’g en banc granted, opinion vacated, 287 F.3d 1325 (11th Cir. 2002) (panel opinion reversed convictions due to prosecutorial misconduct; case settled after court agreed to rehear en banc); Pierce v. State, 873 So. 2d 618 (Fla. 2d DCA 2004) (ordering disqualification of trial judge); and Behanna v. State, ___So. 2d ___, 2007 WL 4270591, 32 Fla. L. Weekly D2909 (Fla. 2d DCA Dec. 7, 2007) (conviction reversed due to evidentiary error). He has been involved in numerous complex investigations regarding alleged financial and environmental crimes, health care fraud, and public corruption.


For the last ten years, Mr. Felman has organized and moderated the Annual National Seminar on the Federal Sentencing Guidelines, which is jointly sponsored by the Federal Bar Association and the United States Sentencing Commission. From 1998 to 2002 he served as co-chair of the Practitioners’ Advisory Group (PAG) to the Sentencing Commission. The PAG is the national organization which advises the Commission on amendments to the Federal Sentencing Guidelines from the perspective of the criminal defense bar. Mr. Felman has also testified on a variety of topics relating to sentencing law before Congress and the United States Sentencing Commission.
Mr. Felman is the co-chair of the Committee on Sentencing of the American Bar Association (ABA). He is a past co-chair of the ABA’s Committee on Corrections and Sentencing, and a former member of the ABA’s Special Task Force on Blakely v. Washington. He also served as a member of The Sentencing Initiative of The Constitution Project, a bi-partisan blue ribbon panel on federal sentencing reform.

Mr. Felman has formerly chaired both the Trial Lawyers Section and the Criminal Law Section of the Committee for Hillsborough County Bar Association. He has served on the Local Rules Advisory Committee for the United States District Court for the Middle District of Florida from 2005 to 2007. He also serves on the Board of Directors of the Hillsborough County Association of Criminal Defense Lawyers, and on the Advisory Board of the NACDL CHAMPION. He is also a master in The Herbert G. Goldberg Criminal Law American Inn of Court. Mr. Felman is a former Adjunct Professor of federal criminal law at the Stetson University College of Law, and is a past chairman of Grievance Committee 13A of The Florida Bar.

TESTIMONY OF

JAMES E. FELMAN

on behalf of the

AMERICAN BAR ASSOCIATION

before the

SUBCOMMITTEE ON CRIME AND DRUGS

COMMITTEE ON THE JUDICIARY

of the

UNITED STATES SENATE

for the hearing on

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

February 12, 2008
Chairman Biden, Ranking Member Graham and distinguished Members of the Subcommittee:

Good afternoon. My name is James Felman. Since 1988 I have been engaged in the private practice of federal criminal defense law with a small firm in Tampa, Florida. I am appearing today on behalf of the American Bar Association for which I serve as Co-Chair of the Criminal Justice Section Committee on Sentencing.

The crack-powder disparity is simply wrong and the time to fix it is now. It has been more than a decade since the American Bar Association joined an ever-growing consensus of those involved in and concerned about criminal justice issues that the disparity in sentences for crack and powder cocaine offenses is unjustifiable and plainly unjust. We applaud this Subcommittee and its leadership for conducting this hearing as an important step in ending once and for all this enduring and glaring inequity.

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 William H. Neukom to reiterate to this Subcommittee the ABA’s position on sentencing for cocaine offenses.

In 1995 the House of Delegates of the American Bar Association, after careful study, overwhelmingly approved a resolution endorsing the proposal submitted by the United States Sentencing Commission that 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 never
wavered from the position that it took in 1995.

The Sentencing Commission’s May 2002 *Report to the Congress: Cocaine and Federal Sentencing Policy* confirms the ABA’s considered judgment that there are no arguments supporting the draconian sentencing of crack cocaine offenders as compared to powder cocaine offenders. The Sentencing Commission’s 2002 *Report* provides an exhaustive accounting of the research, data, and viewpoints that led to the Commission’s recommendations for crack sentencing reform. The recommendations include:

- Raising the crack cocaine quantities that trigger the five-year and ten-year mandatory minimum sentences in order to focus penalties on serious and major traffickers;
- Repeal of the mandatory minimum penalty for simple possession of crack cocaine; and
- Rejection of legislation that addresses the drug quantity disparity between crack and powder cocaine by lowering the powder cocaine quantities that trigger mandatory minimum sentences.

Unfortunately, the Sentencing Commission’s 2002 recommendations were not addressed. Recognizing the enduring unfairness of current policy, the Sentencing Commission returned to the issue and recently took an important, although limited, first step toward addressing these issues by reducing crack offense penalties by two offense levels in its 2007 amendments to the Sentencing Guidelines. As the Sentencing Commission explained in its report accompanying the amendment, *Report to the Congress: Cocaine and Federal Sentencing Policy* (May 2007), the Commission felt its two-level adjustment was as far as it should go given its inability to alter Congressionally established mandatory minimum penalties and its recognition that establishing
federal cocaine sentencing policy ultimately is Congress's prerogative. But it is critical to understand that this "minus-two" amendment is only a first step in addressing the inequities of the crack-powder disparity. The Sentencing Commission's 2007 Report made it plain that it views its recent amendment "only as a partial remedy" which is "neither a permanent nor a complete solution." As the Sentencing Commission noted, "[a]ny comprehensive solution requires appropriate legislative action by Congress."

The federal sentencing policies at issue in the 2002 and 2007 Sentencing Commission Reports were enacted in the Anti-Drug Abuse Act of 1986, which created a 100 to 1 quantity sentencing disparity between crack and powder cocaine, pharmacologically identical drugs. This means that crimes involving just five grams of crack, 10 to 50 doses, receive the same five-year mandatory minimum prison sentence as crimes involving 500 grams of powder cocaine, 2,500 to 5,000 doses. The 100-1 ratio yields sentences for crack offenses three to six times longer than those for powder offenses involving equal amounts of drugs. Many myths about crack were perpetuated in the late 1980's that claimed, for example, that crack cocaine caused violent behavior or that it was instantly addictive. Since then, research and extensive analysis by the Sentencing Commission has revealed that such assertions are not supported by sound evidence and, in retrospect, were exaggerated or simply false.

Although the myths perpetuated in the 1980s about crack cocaine have proven false, the disparate impact of this sentencing policy on the African American community continues to grow. The 1995 ABA policy, which supports treating crack and powder cocaine offenses similarly, was developed in recognition that the different treatment of these offenses has a "clearly discriminatory effect on minority defendants convicted of crack offenses." According to the 2007 Report by the Sentencing Commission, African Americans constituted 82% of those
sentenced under federal crack cocaine laws. This is despite the fact that 66% of those who use crack cocaine are Caucasian or Hispanic. This prosecutorial disparity between crack and powder cocaine results in African Americans spending substantially more time in federal prisons for drug offenses than Caucasian offenders. Indeed, the Sentencing Commission reported that revising the crack cocaine threshold would do more to reduce the sentencing gap between African Americans and Caucasians "than any other single policy change," and would "dramatically improve the fairness of the federal sentencing system." The ABA believes that it is imperative that Congress act quickly to finally correct the gross unfairness that has been the legacy of the 100 to 1 ratio. Enactment of S.1711 would take that much needed step to end unjustifiable racial disparity and restore fundamental fairness in federal drug sentencing.

It is important that I emphasize, however, that the ABA not only opposes the crack-powder differential, but also strongly opposes 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 2003 annual meeting, Supreme Court Justice Anthony Kennedy challenged the legal profession to begin a new public dialogue about American sentencing practices. 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 in the United States and to make recommendations on how to address 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. These recommendations included the repeal of all mandatory minimum statutes and the expanded use of alternatives to incarceration for non-violent offenders.

Mandatory minimum sentences raise serious issues of public policy and routinely result in excessively severe sentences. Mandatory minimum sentences are also frequently arbitrary, because they are based solely on “offense characteristics” and ignore “offender characteristics.” They are a large part of the reason why the average length of sentence in the United States has increased threefold since the adoption of mandatory minimums. The United States now imprisons its citizens at a rate roughly five to eight times higher than the countries of Western Europe, and twelve times higher than Japan. Roughly one-quarter of all persons imprisoned in the entire world are imprisoned here in the United States.

Thus, the ABA strongly supports the repeal of the existing mandatory minimum penalty for mere possession of crack. Under current law, crack is the only drug that triggers a mandatory minimum for a first offense of simple possession. We would urge the Congress to go farther, however, and repeal mandatory minimum sentences across the board.

We also strongly support the appropriation of funds for developing effective alternatives to incarceration, such as drug courts, intensive supervised treatment programs, and diversionary programs. We know that incarceration does not always rehabilitate – and sometimes has the opposite effect. Drug offenders are peculiarly situated to benefit from such programs, as their
crimes are often ones of addiction. That is why last year, after considerable study, research, and public hearings by the ABA’s Commission on Effective Sanctions, the ABA’s House of Delegates approved a resolution – joined in by the National District Attorneys Association – calling for federal, state, and local governments to develop, support, and fund programs to increase the use of alternatives to incarceration, including for the majority of drug offenders. We are encouraged to see the appropriation of such funds in S.1711, and hope that this appropriation can be expanded to reach federal as well as state programs.

In conclusion, for well over a decade the ABA has agreed with the Sentencing Commission’s careful analysis that the 100 to 1 quantity ratio is unwarranted and results in penalties that sweep too broadly, apply too frequently to lower-level offenders, overstate the seriousness of the offenses, and produce a large racial disparity in sentencing. Indeed, as the Sentencing Commission noted in its 2007 Report, federal cocaine sentencing policy “...continues to come under almost universal criticism from representatives of the Judiciary, criminal justice practitioners, academics, and community interest groups ... [I]naction in this area is of increasing concern to many, including the Commission.”

We applaud the leadership of the Congress in addressing this important issue and hope that decisive and rapid action will be possible. The ABA firmly supports passage of S.1711 as proposed by Senator Biden, and cosponsored by Senator Feingold on the Subcommitte, among others. We also commend the leadership of Senators Hatch, Kennedy, Feinstein and Specter and Senator Sessions for their introduction of alternative bills to address the crack-powder disparity. Clearly there is growing, bipartisan recognition of the urgency for reform of this law. The ABA strongly supports S.1711 because it fully embraces the key principles for reform enunciated repeatedly by the Sentencing Commission. S.1711 would rectify the unwarranted disparity
between crack and powder cocaine sentences, and would do so without raising the already severe penalties for powder offenses. The bill would also address aggravating factors such as weapons use, violence, or injury to another person while providing much needed mitigating adjustments for those who play minor roles and those whose involvement was wholly a product of impulse, fear, friendship or affection where the defendant was otherwise unlikely to commit such an offense. S.1711 is also strongly supported by a broad coalition of criminal justice reform, civil rights, community and faith-based organizations.

Enactment of S.1711 would restore fairness and a sound foundation to federal sentencing policy regarding cocaine offenses by ending the disparate treatment of crack versus cocaine offenses and by refocusing federal policy toward major drug traffickers involved with weapons and violence. We hope the Subcommittee will support S.1711 so that it may be considered and passed by the full Senate.

On behalf of the American Bar Association, thank you for considering our views on an issue of such consequence for achieving justice in federal sentencing.