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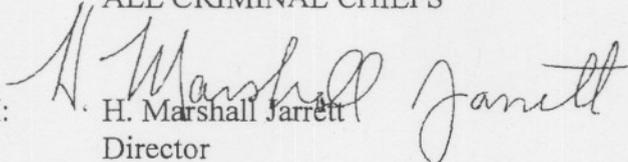
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MEMORANDUM - Sent via Electronic Mail

DATE: May 1, 2009

TO: ALL UNITED STATES ATTORNEYS
ALL FIRST ASSISTANT UNITED STATES ATTORNEYS
ALL APPELLATE CHIEFS
ALL CRIMINAL CHIEFS

FROM: 
H. Marshall Jarrett
Director

SUBJECT: Department Policies and Procedures Concerning
Sentencing for Crack Cocaine Offenses

ACTION REQUIRED: None.

CONTACT PERSON: David L. Smith
Counsel for Legal Initiatives
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Please find attached a memorandum from the Deputy Attorney General, providing guidance on Department policies and procedures for the handling of crack cocaine cases.

Attachments

cc: ALL UNITED STATES ATTORNEYS' SECRETARIES



U.S. Department of Justice

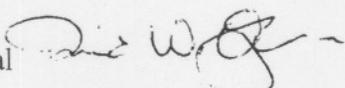
Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

May 1, 2009

MEMORANDUM FOR ALL FEDERAL PROSECUTORS

FROM: David W. Ogden
Deputy Attorney General 

SUBJECT: Department Policies and Procedures
Concerning Sentencing for Crack Cocaine Offenses

In 1986, Congress passed the Anti-Drug Abuse Act, which substantially increased penalties for drug trafficking and established three levels of maximum and minimum sentences based on the type and quantity of drug involved. In setting the quantities required to trigger higher sentencing ranges, the Act used a 100:1 ratio for powder and crack cocaine. Thus, the threshold for a sentence of ten years to life imprisonment is five kilograms of powder but 50 grams of crack, and the threshold for a sentence of five to forty years of imprisonment is 500 grams of powder but five grams of crack. 21 U.S.C. § 841(b). The United States Sentencing Commission incorporated the 100:1 ratio into the sentencing guidelines for cocaine offenses. See USSG §2D1.1(c) (1987). In the past 15 years, the Sentencing Commission has studied the effect of the 100:1 ratio on the criminal justice system and has urged Congress to revisit the ratio based on, among other things, statistics relating to the relative health risks posed by powder and crack and statistics about the violence associated with each different version of cocaine. In 2007, the Commission amended the guidelines to reduce the offense levels applicable to crack cocaine offenses, while maintaining sentencing ranges that are consistent with the statutory mandatory minimums. Guidelines, App. C, amend. 706, 711.

The President and Attorney General believe Congress should eliminate the sentencing disparity between crack cocaine and powder cocaine. (See attached testimony of Assistant Attorney General Lanny A. Breuer, setting forth the Administration's position.) The Attorney General has asked me to form and lead a working group on federal sentencing and corrections policy to develop proposals for tough, predictable, and fair sentencing laws that will eliminate the disparity, but that will also contain appropriate enhancements for those who use weapons in drug trafficking crimes, use minors to commit those crimes, injure or kill someone in relation to a drug trafficking offense, or are involved in other aggravating conduct. That effort is underway.

We will work with Congress and the Sentencing Commission to implement a revised system. While our policy is to seek a revision of the law to eliminate the disparity, we have not yet developed a comprehensive proposal to do so. Additionally, no change has been enacted as

legislation by Congress or as amended guidelines by the Sentencing Commission. Accordingly, prosecutors should be guided by the following principles in crack cocaine cases:

Charging Decisions

Until and unless Congress makes changes to the current statutes, courts are bound by statutory mandatory minimums, and prosecutors should urge sentencing courts to adhere to them (absent the applicability of the safety valve, 18 U.S.C. § 3553(f), or a motion for a departure based on substantial assistance, 18 U.S.C. § 3553(e)). Prosecutors should continue to charge threshold quantities of crack cocaine required to trigger mandatory minimum sentences (and higher maximum sentences) where those quantities are readily provable.¹

Sentencing Hearings

The advisory guidelines of course remain in effect, and courts must continue to calculate the guidelines range for crack offenses as before. The guidelines are advisory under *United States v. Booker*, 543 U.S. 220 (2005), and courts must impose sentences that are sufficient, but not greater than necessary, to achieve the purposes of sentencing, after consideration of the factors set forth in 18 U.S.C. § 3553(a). Sentencing courts have the legal authority to disagree with policy judgments reflected in the current guidelines, and that authority includes the discretion to substitute a lesser crack/powder ratio. *See generally Spears v. United States*, 129 S. Ct. 840 (2009) (per curiam); *Kimbrough v. United States*, 552 U.S. —, 128 S. Ct. 558 (2008).

Prosecutors should inform courts that the Administration believes Congress and the Commission should eliminate the crack/powder disparity, but that Congress has not yet determined whether or how to achieve a more appropriate sentencing scheme for crack and powder offenses. Until Congress acts, courts must exercise their discretion under existing case law to fashion a sentence that is consistent with the objectives of 18 U.S.C. § 3553(a). Prosecutors should be governed by the facts and circumstances of individual cases and existing law. They may indicate that they will not object to a reasonable variance in an average case. As appropriate, prosecutors may oppose a variance based on case-specific aggravating facts (such as the use of violence, the presence of firearms, or recidivism) under the factors set out at 18 U.S.C. § 3553(a). United States Attorneys should ensure that prosecutors seek supervisory guidance

¹ Most courts of appeals have held that statutory minimum terms under the drug statute do not implicate the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and, accordingly, the court at sentencing must determine the drug quantity involved in the offense and must apply any applicable mandatory minimum, whether or not the government has charged that quantity or proved it to the jury (or obtained an admission during the guilty plea colloquy). *See, e.g., United States v. Webb*, 545 F.3d 673, 678 (8th Cir. 2008); *United States v. Kelly*, 519 F.3d 355, 363 & n.3 (7th Cir. 2008). In contrast, the Second and Ninth Circuits have held that threshold quantities must be alleged in the indictment in order to trigger the mandatory minimums under Section 841. *See United States v. Gonzalez*, 420 F.3d 111 (2d Cir. 2005); *United States v. Velasco-Heredia*, 319 F.3d 1080 (9th Cir. 2003).

within their offices in making these determinations to ensure consistent and appropriate sentencing recommendations concerning such variances. These principles should also be used in negotiating plea agreements in crack cocaine cases.

Motions for Sentence Correction Under Federal Rule of Criminal Procedure 35(a)

This effort to seek legislative reform does not provide a legal basis for a court to revisit a sentence under Federal Rule of Criminal Procedure 35(a), which authorizes district courts, within seven days after the sentencing hearing, to "correct a sentence that resulted from arithmetical, technical, or other clear error." See Fed. R. Crim. P. 35, advisory comm. note (1991) ("very narrow" provision "is not intended to afford the court the opportunity to reconsider the application or interpretation of the sentencing guidelines or for the court simply to change its mind about the appropriateness of the sentence").

Appeals

Nor does this effort to seek legislative reform require prosecutors to concede on appeal that sentences for crack offenses that were based on the application of existing law are unreasonable. *Kimbrough* and *Spears* make clear that district courts have broad discretion under 18 U.S.C. § 3553(a)(6) to consider "any unwarranted disparity created by the crack/powder ratio" and to weigh that factor against the other Section 3553(a) factors. *Kimbrough*, 128 S. Ct. at 574. Nothing in those decisions requires courts to vary from the guidelines range in sentencing crack offenders. Prosecutors who believe that it may be appropriate to confess error in a particular case should consult with the Appellate Section before conceding error. See USAM § 9-2.170.

Motions for Sentence Reduction under 18 U.S.C. § 3582(c)(2)

An otherwise-final sentence may be modified only in limited circumstances, most notably where the Sentencing Commission has revised a guideline and declared the amendment retroactive. See 18 U.S.C. § 3582(c)(2). Such circumstances have not occurred. Thus, this effort to seek legislative reform does not provide legal authority for a retroactive reduction in sentence.

Since March 2008, many inmates convicted of crack offenses have been eligible for sentencing reductions pursuant to Amendment 706, which reduced the offense levels for crack offenses. With the exception of the Ninth Circuit, every appellate court to address the issue has held (and the Department agrees) that a court that grants a reduction in sentence based on a retroactive application of Amendment 706 may not vary below the offense level indicated by the Commission's policy statements. See, e.g., *United States v. Starks*, 551 F.3d 839 (8th Cir. 2009); *United States v. Dunphy*, 551 F.3d 247 (4th Cir. 2009); *United States v. Rhodes*, 549 F.3d 833 (10th Cir. 2008); but see *United States v. Hicks*, 472 F.3d 167 (9th Cir. 2007). Accordingly, the

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Subject: Department Policies and Procedures
Concerning Sentencing for Crack Cocaine Offenses

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change in Department policy does not authorize reductions in previously imposed crack cocaine sentences beyond those authorized by 18 U.S.C. § 3582(c)(2) and USSG §1B1.10 and Amendments 706 & 713.

Collateral Review

This effort to seek legislative reform also provides no grounds for a defendant to claim any legal error in the sentence, let alone an error that would be cognizable on collateral attack. As every court of appeals has concluded, defendants whose convictions are final have no right to resentencing under *Booker* on collateral review under 28 U.S.C. § 2255. See *Cirilo-Muñoz v. United States*, 404 F.3d 527, 532-533 (1st Cir. 2005); *Guzman v. United States*, 404 F.3d 139, 141-144 (2d Cir. 2005); *Lloyd v. United States*, 407 F.3d 608, 613-616 (3d Cir. 2005); *United States v. Morris*, 429 F.3d 65, 66-67 (4th Cir. 2005); *United States v. Gentry*, 432 F.3d 600, 602-605 (5th Cir. 2005); *Humphress v. United States*, 398 F.3d 855, 860-863 (6th Cir. 2005); *McReynolds v. United States*, 397 F.3d 479, 481 (7th Cir. 2005); *Never Misses A Shot v. United States*, 413 F.3d 781, 783-784 (8th Cir. 2005); *United States v. Cruz*, 423 F.3d 1119, 1121 (9th Cir. 2005); *United States v. Bellamy*, 411 F.3d 1182, 1188 (10th Cir. 2005); *Varela v. United States*, 400 F.3d 864, 867-868 (11th Cir. 2005); *In re Fashina*, 486 F.3d 1300, 1306 (D.C. Cir. 2007).

Attachment



Department of Justice

STATEMENT OF

LANNY A. BREUER
ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE

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

HEARING ENTITLED

“RESTORING FAIRNESS TO FEDERAL SENTENCING:
ADDRESSING THE CRACK-POWDER DISPARITY”

PRESENTED

APRIL 29, 2009

Introduction

Mr. Chairman, Senator Graham, distinguished members of the Subcommittee — thank you for giving the Department of Justice the opportunity to appear before you today to share our views on the important issue of disparities in federal cocaine sentencing policy.

The Obama Administration firmly believes that our criminal and sentencing laws must be tough, predictable, fair, and not result in unwarranted racial and ethnic disparities. Criminal and sentencing laws must provide practical, effective tools for federal, state, and local law enforcement, prosecutors, and judges to hold criminals accountable and deter crime. The certainty of our sentencing structure is critical to disrupting and dismantling the threat posed by drug trafficking organizations and gangs that plague our nation's streets with dangerous illegal drugs and violence; it is vital in the fight against violent crime, child exploitation, and sex trafficking; and it is essential to effectively punishing financial fraud.

Ensuring fairness in the criminal justice system is also critically important. Public trust and confidence are essential elements of an effective criminal justice system — our laws and their enforcement must not only be fair, but they must also be perceived as fair. The perception of unfairness undermines governmental authority in the criminal justice process. It leads victims and witnesses of crime to think twice before cooperating with law enforcement, tempts jurors to ignore the law and facts when judging a criminal case, and draws the public into questioning the motives of governmental officials.

Changing these perceptions will strengthen law enforcement through increased public trust and cooperation, coupled with the availability of legal tools that are both tough and fair. This Administration is committed to reviewing criminal justice issues to ensure that our law enforcement officers and prosecutors have the tools they need to combat crime and ensure public safety, while simultaneously working to root out any unwarranted and unintended disparities in the criminal justice process that may exist.

There is no better place to start our work than with a thorough examination of federal cocaine sentencing policy. Since the United States Sentencing Commission first reported 15 years ago on the differences in sentencing between crack and powder cocaine, a consensus has developed that the federal cocaine sentencing laws should be reassessed. Indeed, over the past 15 years, our understanding of crack and powder cocaine, their effects on the community, and the public safety imperatives surrounding all drug trafficking has evolved. That refined understanding, coupled with the need to ensure fundamental fairness in our sentencing laws, policy, and practice, necessitates a change. We think this change should be addressed in this Congress, and we look forward to working with you and other Members of Congress over the coming months to address the sentencing disparity between crack and powder cocaine.

In committing ourselves to pursuing federal cocaine sentencing policy reform, we do not suggest in any way that our prosecutors or law enforcement agents have acted improperly or imprudently during the last 15 years. To the contrary, they have applied

the laws as passed by Congress to address serious crime problems in communities across the nation.

Most in the law enforcement community now recognize the need to reevaluate current federal cocaine sentencing policy – and the disparities the policy creates. Chief Timoney, Administrator Hutchison, and many other enforcement leaders have repeatedly and clearly indicated that the current federal cocaine sentencing policy not only creates the perception of unfairness, but also has the potential to misdirect federal enforcement resources. They have stressed that the most effective anti-drug enforcement strategy will deploy federal resources to disrupt and dismantle major drug trafficking organizations and drug organizations that use violence to terrorize neighborhoods.

For these and others reasons I will describe in the remainder of my testimony, we believe now is the time for us to re-examine federal cocaine sentencing policy – from the perspective of both fundamental fairness and public safety.

Background

A. The Drug Trafficking Threat

Cocaine and other illegal drugs pose a serious risk to the health and safety of Americans. The National Drug Intelligence Center's 2009 National Drug Threat Assessment identifies cocaine as the leading drug threat to society. Cocaine is a dangerous and addictive drug, and its use and abuse can be devastating to families regardless of economic background or social status. Statistics on abuse, emergency room

visits, violence, and many other indicators tell the story of tremendous harms caused by cocaine. We must never lose sight of these harms, their impact on our society, and our responsibility to reduce cocaine use and abuse.

Moreover, drug trafficking organizations and gangs have long posed an extremely serious public health and safety threat to the United States. The Administration is committed to rooting out these dangerous organizations. Whether it is Mexican or Colombian drug cartels moving large quantities of powder cocaine into and through the United States, or local gangs distributing thousands of individual rocks of crack in an American community, we will focus our resources on dismantling these enterprises – and disrupting the flow of money both here and abroad – to help protect the American public.

In the fight against illegal drugs, we also recognize that vigorous drug interdiction must be complemented with a heavy focus on drug prevention and treatment. Many state and federal inmates struggle with drug addiction, and not all get the treatment they need. The result is that many prisoners are unprepared to return to society. They not only re-offend, but they feed the lucrative black market for drugs. We cannot break this cycle of recidivism without increased attention to prevention and treatment, as well as comprehensive prisoner reentry programs.

It is only through a balanced approach – combining tough enforcement with robust prevention and treatment efforts – that we will be successful in stemming both the

demand and supply of illegal drugs in our country. Strong and predictable sentencing laws are part of this balanced approach.

B. The Enactment of the Current Cocaine Sentencing Scheme

In the 1980s, crack cocaine was the newest form of cocaine to hit American streets. As this Committee well knows, in 1986, in the midst of this exploding epidemic, Congress passed the Anti-Drug Abuse Act, which set the current federal penalty structure for crack and powder cocaine trafficking.¹

In doing so, Congress established the five- and ten-year mandatory minimum sentencing regime still in effect today. Under the law, selling five grams of crack cocaine triggers the same five-year mandatory minimum sentence as selling 500 grams of powder cocaine; those who sell 50 grams of crack are sentenced to the same ten-year mandatory minimum as those selling 5,000 grams of powder cocaine. Pursuant to its mandate to ensure that the federal sentencing guidelines are consistent with all federal laws, the U.S. Sentencing Commission in 1987 applied this same “100-to-1” ratio to the sentencing guidelines.

Leading up to the enactment of this law, Congress was confronted with heightened public attention on the scourge of illegal drugs and high profile drug overdose deaths, including that of Len Bias, a National Collegiate Athletic Association basketball star drafted by the Boston Celtics. Proposals for making crack penalties more severe than

¹ In 1988, Congress also established a five gram, five-year mandatory minimum sentence for simple possession of crack cocaine, the only federal mandatory minimum penalty for a first offense of simple possession of a controlled substance. Anti-Drug Abuse Act of 1988, P.L., 100-690.

powder penalties ranged from the Reagan Administration's proposed 20-to-1 ratio to the late-Senator Chiles' 1000-to-1 disparity.

The legislative history does not provide definitive evidence for the rationale behind the adoption of the 100-to-1 ratio. What we do know from floor statements and reports on earlier versions of the enacted legislation is that during this debate, Congress sought to focus the tough five- and ten-year mandatory minimum penalties on "serious" and "major" traffickers—the traffickers who keep the street markets operating and the heads of drug trafficking organizations, responsible for delivering very large quantities of drugs. With stiff mandatory minimum penalties for crack cocaine set at levels as low as five grams, many have questioned whether these policy goals were achieved. An analysis by the Sentencing Commission using Fiscal Year 2005 data shows that 55 percent of federal crack defendants were street-level dealers. This compares with only 7.3 percent of powder defendants who were street-level dealers. And while both crack and powder offenders are concentrated in lower-level functions, crack cocaine offenders continue to be dominated by street-level dealers.

C. The Science of Cocaine: One Drug, Two Forms

Since the time Congress passed the crack cocaine penalties, much of the information on the different impact and effects of crack cocaine as compared to powder cocaine has come under scrutiny. We have since learned that powder cocaine and crack cocaine produce similar physiological and psychological effects once they reach the

brain. Whether in its powder or crack form, both types of cocaine are addictive and both pose serious health risks.

According to the National Institute on Drug Abuse (NIDA), the key difference in cocaine's effects depends on how it is administered – by snorting, inhaling, or injecting. The intensity and duration of cocaine's effects – in any form – depend on the speed with which it is absorbed into the bloodstream and delivered to the brain. Smoking or injecting cocaine produces a quicker, stronger high than snorting it. For that reason, the user who is smoking or injecting the drug may need more of it sooner to stay high. Because powder cocaine is typically snorted, while crack is most often smoked, crack smokers can potentially become addicted faster than someone snorting powder cocaine. Notably, however, the NIDA has found that smoked cocaine is absorbed into the bloodstream as rapidly as injected cocaine, both of which have similar effects on the brain.

D. The Policy Debate

For nearly two decades, the 100-to-1 disparity has been the subject of dynamic debate and discussion among policymakers, academics, criminal justice organizations, and others.

The supporters of the current cocaine penalty structure believe that the disparity is justified because it accounts for the greater degree of violence and weapon possession or

use associated with some crack offenses, and because crack can be potentially more addictive than powder, depending on the usual method of use.

This Administration shares these concerns about violence and guns used to commit drug offenses and other crimes associated with such offenses. We recognize that data suggests that weapons involvement and violence in the commission of cocaine-related offenses are generally higher in crack versus powder cases: a 2007 Sentencing Commission report found that weapons involvement for cocaine offenses was 27 percent for powder cocaine and 42.7 percent for crack. The same sample found that some form of violence occurred in 6.3 percent of powder cocaine crimes and in 10.4 percent of crack cocaine crimes.

Violence associated with any offense is a serious crime and must be punished; we think that the best way to address drug-related violence is to ensure the most severe sentences are meted out to those who commit violent offenses. However, increased penalties for this conduct should generally be imposed on a case-by-case basis, not on a class of offenders the majority of whom do not use any violence or possess a weapon. We support sentencing enhancements for those who use weapons in drug trafficking crimes, or those who use minors to commit their crimes, or those who injure or kill someone in relation to a drug trafficking offense. We also support charging separate weapons offenses to increase a sentence when an offender uses a weapon in relation to a drug trafficking offense.

But we cannot ignore the mounting evidence that the current cocaine sentencing disparity is difficult to justify based on the facts and science, including evidence that crack is not an inherently more addictive substance than powder cocaine. We know of no other controlled substance where the penalty structure differs so dramatically because of the drug's form.

Moreover, the Sentencing Commission has documented that the quantity-based cocaine sentencing scheme often punishes low-level crack offenders far more harshly than similarly situated powder cocaine offenders. Additionally, Sentencing Commission data confirms that in 2006, 82 percent of individuals convicted of federal crack cocaine offenses were African American, while just 9 percent were White. In the same year, federal powder cocaine offenders were 14 percent White, 27 percent African American, and 58 percent Hispanic. The impact of these laws has fueled the belief across the country that federal cocaine laws are unjust. We commend the Sentencing Commission for all of its work on this issue over the last 15 years. The Sentencing Commission reports are the definitive compilation of all of the data on federal cocaine sentencing policy. We cannot ignore their message.

Moving Forward: A Tide of Change

Since 1995, at Congress's request, the Commission has called for legislation to substantially reduce or eliminate the crack/powder sentencing disparity. Most recently, in 2007, the Commission called the crack/powder disparity an "urgent and compelling" issue that Congress must address. Both chambers of Congress have held multiple

hearings on the topic, and legislation to substantially reduce or eliminate the disparity has been introduced by members of both political parties.

In addition, the overwhelming majority of states do not distinguish between powder cocaine and crack cocaine offenses.

For the reasons outlined above, this Administration believes that the current federal cocaine sentencing structure fails to appropriately reflect the differences and similarities between crack and powder cocaine, the offenses involving each form of the drug, and the goal of sentencing serious and major traffickers to significant prison sentences. We believe the structure is especially problematic because a growing number of citizens view it as fundamentally unfair. The Administration believes Congress's goal should be to completely eliminate the sentencing disparity between crack cocaine and powder cocaine.

Earlier this month the Attorney General asked the Deputy Attorney General to form and chair a working group to examine federal sentencing and corrections policy. The group's comprehensive review will include possible recommendations to the President and Congress for new sentencing legislation affecting the structure of federal sentencing. In addition to studying issues related to prisoner reentry, Department policies on charging and sentencing, and other sentencing-related topics, the group will also focus on formulating a new federal cocaine sentencing policy; one that completely eliminates the sentencing disparity between crack and powder cocaine but also fully accounts for

violence, chronic offenders, weapon possession and other aggravating factors associated – in individual cases – with both crack and powder cocaine trafficking. It will also develop recommendations for legislation, and we look forward to working closely with Congress and the Sentencing Commission on this important policy issue and finding a workable solution.

Until a comprehensive solution – one that embodies new quantity thresholds and perhaps new sentencing enhancements – can be developed and enacted as legislation by Congress and as amended guidelines by the Sentencing Commission, federal prosecutors will adhere to existing law. We are gratified that the Sentencing Commission has already taken a small step to ameliorate the 100:1 ratio contained in existing statutes by amending the guidelines for crack cocaine offenses. We will continue to ask federal courts to calculate the guidelines in crack cocaine cases, as required by Supreme Court decisions. However, we recognize that federal courts have the authority to sentence outside the guidelines in crack cases or even to create their own quantity ratio. Our prosecutors will inform courts that they should act within their discretion to fashion a sentence that is consistent with the objectives of 18 U.S.C. § 3553(a) and our prosecutors will bring the relevant case-specific facts to the courts' attention.

Conclusion

As the history of this debate makes clear, there has been some disagreement about whether federal cocaine sentencing policy should change, and, if so, how it should change. This Administration and its components, including the Justice Department and

the Office of National Drug Control Policy, look forward to working with this Committee and members of Congress in both chambers to develop sentencing laws that are tough, smart, fair, and perceived as such by the American public. We have already begun our own internal review of sentencing and the federal cocaine laws. Our goal is to ensure that our sentencing system is tough and predictable, but at the same time promotes public trust and confidence in the fairness of our criminal justice system. Ultimately, we all share the goals of ensuring that the public is kept safe, reducing crime, and minimizing the wide-reaching, negative effects of illegal drugs.

Thank you for the opportunity to share the Administration's views, and I welcome any questions you may have.