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Subcommittee on Crime and Drugs**

Restoring Fairness to Sentencing: Addressing the Crack-Powder Disparity

Chairman Durbin and Members of the Subcommittee:

Thank you for holding a hearing on restoring fairness to the federal criminal justice system and giving us this opportunity to provide you with information on behalf of the Federal Public and Community Defenders regarding the need to reform federal sentencing laws, particularly those that disproportionately impact people of color. The Defenders represent clients in 90 of 94 federal judicial districts. We represent thousands of people charged with federal offenses, including those charged with federal crack cocaine offenses, 82% of whom are African American.¹

People of color are dramatically overrepresented in the federal criminal justice system. Blacks and African Americans represent only 12.4% of the U.S. population.² Yet, they represent 39% of the Bureau of Prisons (“BOP”) inmate population.³ The rate of incarceration for Hispanics is also disproportionate. Hispanics or Latinos (of any race) represent 14.7% of the U.S. population,⁴ but account for 32% of the BOP inmate population.⁵

The reasons people of color are so overrepresented in the federal prison population are many. Here, our focus is on just a few of the federal sentencing provisions that adversely impact minorities without sufficient penological justification and perpetuate disparities found at earlier

¹ USSC, *Cocaine and Federal Sentencing Policy* at 16 (May 2007).

² U.S. Census Bureau, *2005-2007 American Community Survey 3-Year Estimates*, available at <http://factfinder.census.gov>.

³ *Quick Facts about the Bureau of Prisons*, available at <http://www.bop.gov/news/quick.jsp#2>.

⁴ U.S. Census Bureau, *2005-2007 American Community Survey 3-Year Estimates*, available at <http://factfinder.census.gov>.

⁵ *Quick Facts about the Bureau of Prisons*, available at <http://www.bop.gov/news/quick.jsp#2>.

points in the criminal justice system. We limit our focus to the penalties for crack cocaine, certain mandatory minimum sentencing provisions, recidivist sentencing statutes, and drug distribution in a protected zone.

The Defenders support the following reforms:

1. Penalties for offenses involving the same quantity of crack and powder cocaine should be equalized at a level no greater than the current level for powder cocaine.
2. Differences among offenses and offenders should be taken into account by the sentencing judge in the individual case. Aggravating circumstances should not be built into every sentence for crack cocaine, but should affect the sentence only if they exist in the individual case, as with all other drug types.
3. The mandatory minimum for simple possession of crack cocaine should be repealed.
4. Mandatory minimums should be repealed.
5. Recidivist sentencing enhancements should be narrowly tailored to minimize their disparate impact on people of color.
6. Enhanced penalties for drug distribution near protected zones should be repealed.

I. The Current Cocaine Penalty Structure Undermines the Purposes of Sentencing and Results in Unjustified Disparities.

The severity of crack cocaine penalties remains the single greatest contributor to racial disparity in federal sentencing. As well-documented by the U.S. Sentencing Commission in its four reports to Congress beginning in 1995, the severity of crack cocaine penalties based on drug type is unjustified and unfair, has a disproportionate impact on African Americans, and creates the widely held perception that the penalty structure promotes unwarranted disparity based on race.⁶

Both the Sentencing Commission and the Supreme Court of the United States have acknowledged the unfairness of the current penalty structure. The Sentencing Commission has taken a first step to “somewhat alleviate” these “urgent and compelling problems.”⁷ With the overwhelming support of the Judiciary, U.S. Probation, the Federal Defenders, the private defense bar, and community groups, the Commission promulgated a two-level reduction, which became law on November 1, 2007 with congressional approval. On December 11, 2007, after receiving over 33,000 letters from the public in support of making the amendment retroactive, the Commission voted unanimously to do so, as with prior amendments benefiting offenders of other races and more serious offenders.

⁶ USSC, *Cocaine and Federal Sentencing Policy* (February 1995); USSC, *Cocaine and Federal Sentencing Policy* (April 1997); USSC, *Cocaine and Federal Sentencing Policy* (May 2002); USSC, *Cocaine and Federal Sentencing Policy* (May 2007).

⁷ USSC, *Cocaine and Federal Sentencing Policy* at 9 (May 2007).

The amended guideline range now includes, but no longer exceeds, the mandatory minimum penalty at the two statutory quantity levels for an offender in Criminal History Category I (defendants with no or only one minor prior conviction). Guideline ranges above, between and below the two statutory quantity levels continue to be keyed to the mandatory minimum penalties.⁸ Before the amendment, guideline sentences for crack were three to over six times longer than for powder cocaine;⁹ now they are two to five times longer.¹⁰ In the Commission’s view, the amendment is “only a partial remedy to some of the problems associated with the 100-to-1 drug quantity ratio,” those problems require a “comprehensive solution” from Congress, and the guidelines can be further amended at that time.¹¹

Like the Sentencing Commission, the Supreme Court recognized in December 2007, and repeatedly since then, that the sentencing guidelines for crack undermine the purposes of sentencing and create unwarranted disparity, even as amended. Thus, a sentencing court may impose a below-guideline sentence for those reasons.¹² Again, however, a sentencing court’s discretionary authority to impose a lower sentence is only a partial remedy. Many judges remain hesitant to sentence outside the guideline range. For those judges willing to do so, mandatory minimum sentences often stand in the way.¹³ A judge cannot sentence below a mandatory minimum unless the government asks for a lesser sentence based on the defendant’s substantial assistance to the government,¹⁴ or the defendant qualifies under the narrow provisions of the “safety-valve.”¹⁵

Thus, notwithstanding the Commission’s amendments and the Supreme Court’s decisions, racial disparities persist in federal sentencing. Recent data show that on the state level in 2005, Black offenders comprised a smaller percentage of drug offenders than they did in 1999.¹⁶ No such decline appears on the federal level. Instead, for the same time period, Black

⁸ USSC, *Cocaine and Federal Sentencing Policy* at 9-10 (May 2007).

⁹ *Id.* at 3.

¹⁰ USSG § 2D1.1 (Nov. 1, 2007).

¹¹ USSC, *Cocaine and Federal Sentencing Policy* at 9-10 (May 2007).

¹² *Kimbrough v. United States*, 128 S.Ct. 558 (2007); *Spears v. United States*, 129 S.Ct. 840 (2009); *Nelson v. United States*, 129 S.Ct. 890 (2009).

¹³ *See* 21 U.S.C. § 841.

¹⁴ 18 U.S.C. § 3553(e).

¹⁵ 18 U.S.C. § 3553(f).

¹⁶ Marc Mauer, *The Sentencing Project, Changing Racial Dynamics of the War on Drugs* 4 (2009) (in 1999, 57.6% of drug offenders in state prison were Black; in 2005, the number had dropped to 44.8%).

offenders have consistently represented 43% of the drug offenders in federal prison.¹⁷ Because of these persistent racial disparities in the federal system, prompt legislative action is critical.¹⁸

A. Penalties for Offenses Involving the Same Quantity of Crack and Powder Cocaine Should Be Equalized at a Level No Greater Than the Current Level for Powder Cocaine.

Nothing justifies using drug type as a basis for punishing crack cocaine offenders any more severely than powder cocaine offenders. Crack and powder cocaine have the same effects. Crack cocaine was once powder. Persons higher in the distribution chain generally deal with the drug in its powder form. Yet, the current penalty structure often punishes low, street-level crack cocaine offenders more severely than wholesale level powder cocaine offenders. Because low level street dealers are easy targets and prosecutors and law enforcement agents are incentivized by the high penalties, the majority of crack cocaine prosecutions are of low level street dealers. Such prosecutions divert law enforcement resources from high level offenders and contribute to the overcrowding of federal prisons with people who do not need to be there. At the same time, it does not prevent or deter drug crime. Instead, it destroys individuals, families and communities, contributes to recidivism, and undermines confidence in the justice system.

1. The Current Cocaine Penalty Structure Often Results in Punishment That is More Severe for Low Level Offenders Than for High Level Offenders, Serving No Legitimate Law Enforcement Goal and Wasting Resources.

A “major goal” of the Anti-Drug Abuse Act of 1986 was “to give greater direction to the DEA and the U.S. Attorneys on how to focus scarce law enforcement resources” on “major” and “serious” drug traffickers.¹⁹ In practice, low level offenders, *i.e.*, street level dealers of crack cocaine and couriers of powder cocaine, are prosecuted far more often than higher level offenders.²⁰ This misplaced focus is particularly serious in crack cocaine prosecutions, as 55.4% of all crack cocaine offenders are street level dealers, while 33.1% of powder cocaine offenders are couriers.²¹

In 2006, over 35% of all crack cocaine cases involved less than 25 grams,²² and nearly 50% involved less than 50 grams.²³ The numbers are skewed toward low-level offenders

¹⁷ *Id.* at 6 (in 1999, 43.3% of drug offenders in federal prison were Black; in 2005, 42.9% were Black).

¹⁸ *Id.* at 20; *see also Sentencing Project’s Criminal Justice Priorities, Policy Priorities for the 111th Congress* (2009).

¹⁹ H.R. Rep. No. 99-845, 99th Cong., 2d Sess. 1986, 1986 WL 295596 (Background).

²⁰ USSC, *Cocaine and Federal Sentencing Policy* at 21, 85 (May 2007).

²¹ *Id.* at 20-21, Figures 2-5 & 2-6.

²² *See* USSC, *Cocaine and Federal Sentencing Policy* 112, Table 5.3 (May 2007).

²³ *Id.* at 25, Figure 2.10.

because “sellers at the retail level are the most exposed and easiest targets for law enforcement, provide an almost unlimited number of cases for prosecution, and are easily replaced.”²⁴

The current policy of focusing on small-time dealers and users is ineffective in reducing crime, while breaking generation after generation of poor minority young men, according to John P. Walters, former Director of the Office of National Drug Control Policy.²⁵ As the Sentencing Commission has found, “retail-level drug traffickers are readily replaced by new drug sellers so long as the demand for a drug remains high. Incapacitating a low level drug seller prevents little, if any, drug selling; the crime is simply committed by someone else.”²⁶

Focusing law enforcement resources on low level crack offenders is particularly irrational since “virtually all cocaine is imported in powder form.”²⁷ Powder cocaine is a necessary ingredient of crack cocaine without which crack cocaine cannot be made. Yet, high level powder dealers are punished less severely than low level crack dealers. A person with no criminal history who possesses 5 grams of crack (10-50 doses or the weight of two sugar packets), whether for personal use or sale, is subject to a guideline sentence of 51-63 months (after the 2007 amendment) and a mandatory minimum of five years. Five grams of powder converts to about 4 ½ grams of crack cocaine by simply adding baking soda, water and heat. But a person possessing 5 grams of powder (25-50 doses) with intent to distribute receives a guideline sentence of only 10-16 months, or if for personal use, no more than 12 months. To receive a five-year mandatory minimum sentence, a powder cocaine offender must distribute 500 grams, or 2,500-5,000 doses.²⁸

Comparing sentences for crack cocaine offenses with other offenses further shows the irrationality of current penalties for crack cocaine. The five-year sentence for possessing or distributing 5 grams or 10-50 doses of crack, estimated to be worth on average less than \$350,²⁹ is the same as the guideline sentence for dumping toxic waste knowing that it creates an imminent danger of death, the same as that for theft of \$7 million, and the same as for frauds involving \$2.5-\$7 million. It is double that for aggravated assault resulting in bodily injury.³⁰ The ten-year sentence for distributing 50 grams or 100-500 doses of crack is far greater than any

²⁴ *Id.* at 85.

²⁵ Kris Axtman, *Signs of Drug-War Shift*, Christian Science Monitor (May 27, 2005).

²⁶ USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 134 (2004). See also USSC, *Cocaine and Federal Sentencing Policy* 68 (Feb. 1995) (DEA and FBI reported that dealers were immediately replaced).

²⁷ *Id.* at 85.

²⁸ USSC, *Cocaine and Federal Sentencing Policy* at 63 (May 2007).

²⁹ Institute for Defense Analysis, *Technical Report for the Price and Purity of Illicit Drugs, 1981-2007* (July 2008), available from www.whitehousegrugpolicy.gov/publications/price_purity/price_purity07.pdf. Table B-2 price per pure gram in 2007 Q4, estimated at the 5 g purchase quantity.

³⁰ See USSG §§ 2A2.2, 2B1.1 2Q1.1.

of those, and the same as frauds involving \$50-100 million, slightly more than that for voluntary manslaughter, and the same as that for theft of \$50 million.³¹

Additional evidence of the unfairness of crack penalties is provided by comparing the relative street prices of the amount of drugs involved in drug trafficking offenses receiving sentences at the two mandatory minimum guideline offense levels:³²

Level 24: 51-63 months, Criminal History Category I	
Crack: 5 grams @ \$68.44/gram	\$342
Powder: 400 grams @ \$73.46/gram	\$29,384
Marijuana: 80 kg. @ \$16.22 gram	\$1,297,600
Heroin: 80gm @ \$218.04 gram	\$17,443
Level 30: 97-121 months, Criminal History Category I	
Crack: 50 grams @ \$68,44/gram	\$3,422
Powder: 3.5 kg. @ \$73.46/gram	\$257,110
Marijuana: 700 kg. @ \$16.22/gram	\$11,354,000
Heroin: 700g @ 218.04/gram	\$152,628

As one example of the vast disparities among drugs at the five year mandatory minimum level, offenders must sell 500 grams of cocaine power, with a street value of \$36,730 to be subject to a five year mandatory minimum. A marijuana dealer must sell 100 kg. marijuana with a 2007 street value of \$1,622,000 to be subject to the same sentence. A crack dealer need sell only \$342 worth of the drug to be subject to a mandatory minimum five-year term.

These disparity problems cannot be resolved with changes that would continue to punish crack offenders more harshly than powder cocaine offenders. Anything other than a 1-to-1 ratio would perpetuate existing problems. For example, a 20-to-1 ratio, in which 25 grams of crack cocaine would be subject to a five-year sentence and 250 grams would be subject to a ten-year sentence, would still focus law enforcement resources on low level offenders rather than kingpins or major traffickers. Because street-level offenses typically involve quantities greater than 25 grams of crack, setting the five-year sentence at that level would cast the net too wide.³³ The 250 gram level would suffer similar flaws. A 250 gram quantity is more commonly associated with offenders in such lowly roles as cook or courier,³⁴ rather than high level

³¹ See USSG §§ 2A1.3, 2B1.1, 2E1.1.

³² Prices were taken from Price and Purity, supra note 28, Tables B-1 to B-5. Estimated prices (EPH) for all drugs and quantities were based on 2007Q4 single transaction sizes of 2.5-5 grams of pure drug. See Table I-1.

³³ USSC, *Cocaine and Federal Sentencing Policy* at 45, Figure 10 (May 2002) (median drug weight for street level crack dealers was 52 grams in 2000).

³⁴ *Id.* (median weight of crack in 2000 for managers was 253 grams, for cooks was 180 grams, and for couriers was 338 grams).

suppliers who may deal in quantities at least ten times that amount.³⁵ As these figures suggest, quantity is a poor and imprecise measure of culpability.

Additionally, both quantity and type are subject to happenstance and manipulation.³⁶ A typical street level dealer who supervises no one and makes little profit may continue to sell small quantities of crack to an informant until he is arrested. That he is arrested after selling 250 grams of crack to an informant over the course of weeks or months does not make him a major drug trafficker. The Commission has found that drug quantity manipulation and untrustworthy information provided by informants are continuing problems in federal drug cases.³⁷ These problems are particularly pronounced in cocaine cases because the simple process of cooking powder into crack results in a dramatically higher sentence. To compound the problem, a very small increase in the quantity of crack severely lengthens the term of imprisonment. The result is that agents and eager-to-please informants insist that powder be cooked into crack, arrange to buy the threshold amount in a single sale, or make additional buys, all for the purpose of arriving at the higher crack sentence.³⁸ Rather than encouraging law enforcement to focus on existing “major” and “serious” drug traffickers, the unfortunate fact is that the crack/powder disparity lends itself to abuse, creating long sentences for low level offenders who have no information to offer while more culpable offenders receive shorter sentences in return for their cooperation. This is the very definition of unwarranted disparity, wastes taxpayer dollars, and should be eliminated from the federal cocaine sentencing laws.

2. All of the Evidence Supports Equal Punishment for Equal Quantities of Crack and Powder Cocaine at a Level No Greater Than the Current Level for Powder Cocaine.

Addiction and other medical effects on the user are the same for crack and powder cocaine and less serious in many respects than those of heroin, nicotine and alcohol. Crack and powder cocaine cause identical physiological and psychotropic effects regardless of the method of ingestion.³⁹ In any form, cocaine is potentially addictive.⁴⁰ While snorting powder

³⁵ *Id.* (median weight for high level supplier of crack was 2962 grams in 2000).

³⁶ Jeffrey L. Fisher, *When Discretion Leads to Distortion: Recognizing Pre-Arrest Sentence-Manipulation Claims under the Federal Sentencing Guidelines*, 94 Mich L. Rev.2385 (1996).

³⁷ USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 50, 82 (2004).

³⁸ See, e.g., *United States v. Fontes*, 415 F.3d 174 (1st Cir. 2005) (at agent’s direction, informant rejected two ounces of powder defendant delivered and insisted on two ounces of crack); *United States v. Williams*, 372 F.Supp.2d 1335 (M.D. Fla. 2005) (“[I]t was the government that decided to arrange a sting purchase of crack cocaine [producing an offense level of 28]. Had the government decided to purchase powder cocaine (consistent with Williams’ prior drug sales), the base criminal offense level would have been only 14.”); *United States v. Nellum*, 2005 WL 300073 (N.D. Ind. Feb. 3, 2005) (defendant could have been arrested after the first undercover sale, but agent purchased the same amount on three subsequent occasions, doubling the guideline sentence from 87-108 months to 168-210 months).

³⁹ USSC, *Cocaine and Federal Sentencing Policy* at 62-64 (May 2007).

⁴⁰ *Id.* at 65.

cocaine is less addictive than smoking crack or injecting powder, “powder cocaine that is injected is more harmful and more addictive than crack cocaine.”⁴¹ The risk and severity of addiction to any drug are significantly affected by the way they are ingested,⁴² but no drug other than crack is punished more severely based on the most common method of ingestion.

One reason cocaine is smoked more often than it is injected is that smoking is safer given the risk of infection from sharing needles.⁴³ The danger to public health associated with needles, including the spread of AIDS and hepatitis, is more severe than the threat to public health posed by smoking crack. “People who inject cocaine can experience severe allergic reactions and, as with all injecting drug users, are at increased risk for contracting HIV and other blood-borne diseases.”⁴⁴

The number of deaths, emergency room visits, and treatment admissions associated with crack cocaine do not justify disproportionately high penalties. In 2004, opioid painkiller deaths outnumbered the total deaths from heroin or cocaine.⁴⁵ Emergency room admissions are highest, and approximately equal, for alcohol and any kind of cocaine.⁴⁶ The highest rate of treatment admissions is for alcohol abuse, followed by marijuana, heroin, crack cocaine, methamphetamine, and powder cocaine.⁴⁷ Cocaine addiction appears to be more treatable than heroin or alcohol addiction. *See, e.g.,* Drug and Alcohol Services Information Report, *Admissions with 5 or More Prior Episodes: 2005* (of people seeking treatment in 2005 who had 5 or more prior treatment episodes, 37% were addicted to opiates, 36% to alcohol, and only 16% to cocaine). According to one study, it is more difficult to quit using nicotine or heroin than to quit using cocaine, withdrawal symptoms are more severe for alcohol and heroin than for cocaine, and the level of intoxication is greater for alcohol and heroin than for cocaine.⁴⁸

Nor does the rate of use for crack cocaine justify higher penalties. The rate of use has remained constant notwithstanding years of harsh penalties. The most recently available data for

⁴¹ USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 132 (2004).

⁴² USSC, *Cocaine and Federal Sentencing Policy* at 65 (May 2007).

⁴³ *Id.* at 66 (May 2007).

⁴⁴ National Institute on Drug Abuse, *NIDA InfoFacts: Crack and Cocaine*, available at <http://www.nida.nih.gov/Infofacts/cocaine.html>.

⁴⁵ Testimony of Dr. Leonard J. Paulozzi, Medical Epidemiologist, Centers for Disease Control and Prevention, before Committee on Energy & Commerce, U.S. House of Representatives (Oct. 24, 2007) (emphasis added), available at <http://www.cdc.gov/washington/testimony/2007/t20071024.htm>.

⁴⁶ USSC, *Cocaine and Federal Sentencing Policy* at 77-78 (May 2007).

⁴⁷ *Id.* at 79.

⁴⁸ Phillip J. Hilts, *Relative Addictiveness of Drugs*, New York Times, Aug. 2, 1994 (study by Dr. Jack E. Henningfield of the National Institute on Drug Abuse and Dr. Neal L. Benowitz of the University of California at San Francisco ranked six substances based on five problem areas), available at <http://www.tfy.drugsense.org/tfy/addictvn.htm>.

persons 12 years of age and older reporting past month use of crack cocaine shows no significant difference between 2002 and 2007.⁴⁹

Negative effects of prenatal exposure are mild and identical for crack and powder cocaine and less severe than for other substances including alcohol. The negative effects of prenatal crack cocaine exposure are identical to the negative effects of prenatal powder cocaine exposure, which are significantly less severe than previously believed, are similar to prenatal tobacco exposure, less severe than heroin or methamphetamine exposure, and far less severe than prenatal alcohol exposure. The 2005 National Survey of Drug Use and Health estimated that of all infants exposed to illicit drugs in utero, 7% were exposed to powder cocaine, 2% were exposed to crack cocaine, 73% were exposed to marijuana, and 34% were exposed to unauthorized prescription drugs.⁵⁰ A recent study found no differences in growth, IQ, language or behavior between three-year-olds who were exposed to cocaine in the womb and those who were not. See Kilbride, Castor, Cheri, *School-Age Outcome of Children With Prenatal Cocaine Exposure Following Early Case Management*, *Journal of Developmental & Behavioral Pediatrics*, 27(3):181-187, June 2006.

The incidence of violence is low, steadily decreased after the 1980s, and is addressed, if it occurred, through available enhancements in individual cases. In 2005, 94.5% of the crack cases involved no actual violence and 89.6% involved no violence or threat of violence. Death occurred in only 2.2% of cases, injury occurred in only 3.3% of cases, and a threat was made in just 4.9% of cases.⁵¹ Only 2.9% of crack offenders in 2005 used a weapon. “Weapon enhancement rates were nearly equal for powder cocaine offenders and crack cocaine offenders at the low-level functions of street-level dealer (23.8% for powder cocaine offenses versus 22.4% for crack cocaine offenses), courier/mule (2.0% for powder cocaine offenses versus 0.0% crack cocaine offenses), and renter/loader/lookout/enabler/user/all others (13.1% for powder cocaine offenses versus 12.7% crack cocaine offenses).”⁵²

The violence associated with crack has declined since 1992. According to the Commission, reduced levels of violence are consistent with the aging of the crack cocaine user and trafficker populations.⁵³ “By the early 1990s . . . the relationship between crack and unwelcome social outcomes had largely disappeared. . . . After property rights were established

⁴⁹ Substance Abuse and Mental Health Services Administration, *Results from the 2007 National Survey on Drug Use and Health: National Findings* at 17 (2008) (“The number of past month crack users was also similar over this period (610,000 in 2007 vs. 702,000 in 2006 and 567,000 in 2002”).

⁵⁰ USSC, *Cocaine and Federal Sentencing Policy* at 68-71 (May 2007).

⁵¹ *Id.* at 33, 38.

⁵² *Id.* at 36.

⁵³ *Id.* at 83, 87.

and crack prices fell sharply reducing the profitability of the business, competition-related violence among drug dealers declined.”⁵⁴

Rather than set high penalties across the board on the erroneous assumption that crack offenses are more violent or potentially dangerous than other drug offenses, violence or weapon involvement should be taken into account through enhancements in individual cases. The federal sentencing guidelines provide for a higher sentence for offenders who possessed a dangerous weapon, including a firearm, during the offense. USSG § 2D1.1(b)(1). The guidelines also invite upward departure if death or serious bodily injury resulted from the offense, or if a weapon was used in a particularly dangerous way. USSG § 5K2.1, 5K2.2, 5K2.6. Section 924(c) of title 18 provides for a series of graduated penalties for individuals who possessed, brandished, or discharged a firearm during and in relation to a drug trafficking crime. Section 924(j) of title 18 (which incorporates first-degree murder, second-degree murder, and manslaughter) applies if death results from the 924(c) offense. In light of these various sentencing provisions, it is wholly unnecessary and unjustifiable to increase sentences for *any* quantity of crack cocaine on the assumption that weapon possession or violence is associated with *every* case. Setting penalties high across the board punishes offenders for conduct that did not occur or double counts it when it did occur.

Rather than continue to punish *all* offenders as if they were violent offenders, it would be far more effective to promote “focused deterrence” strategies where violent dealers are arrested and prosecuted, but nonviolent dealers are offered support services and encouraged by community members and the police to stop dealing. Such programs, which engage the community, police, and nonviolent offenders in a collaborative process, have produced promising results in reducing violent and drug-related crime.⁵⁵

Recidivism is relatively low and is addressed if it exists through the criminal history score and other enhancements in the individual case. For Criminal History Categories II and higher, drug offenders have the *lowest* rate of recidivism of all offenders⁵⁶ Further, across all criminal history categories and for all offenders, the largest proportion of “recidivating events” that count toward rates of recidivism are supervised release revocations, which are based on anything from failing to file a monthly report to failing to report a change of address.⁵⁷ Drug

⁵⁴ Roland G. Fryer, Jr., Paul S. Heaton, Steven D. Leavitt, Kevin M. Murphy, National Bureau of Economic Research, *Measuring the Impact of Crack Cocaine* (May 2005), available at <http://pricetheory.uchicago.edu/levitt/Papers/FryerHeatonLevittMurphy2005.pdf>.

⁵⁵ See Keyuanda Evans and K. Michelle Smawley, *New Program Reforms Drug-Torn Neighborhood*, ABC Primetime (August 20, 2008), available at <http://abcnews.go.com/TheLaw/Story?id=5612013&page=1>. For more information on how these programs operate, see Bureau of Justice Assistance, *Drug-Market Intervention Training Initiative*, available at <http://www1.cj.msu.edu/~outreach/psn/DMI/dmiresources9basicsteps.pdf>.

⁵⁶ USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* at 13 & Ex. 11 (May 2004).

⁵⁷ *Id.* at 4, 5 & Exs. 2, 3, 13.

trafficking accounts for only a small fraction – as little as 4.1% – of recidivating events for all offenders.⁵⁸

While it is true that crack cocaine offenders generally have higher criminal history categories than powder cocaine offenders,⁵⁹ as the Commission has explained, “African-Americans have a higher risk of conviction for a drug trafficking crime than do similar White drug traffickers” because of “the relative ease of detecting and prosecuting offenses that take place in open-air drug markets, which are most often found in impoverished neighborhoods.”⁶⁰ Indeed, though African Americans comprise only 15% of drug users, they comprise 37% of those arrested for drug offenses, 59% of those convicted, and 74% of those sentenced to prison for a drug offense.⁶¹

Because African Americans have a higher risk of conviction than similar White offenders, they already (1) have higher criminal history scores and thus higher guideline ranges, (2) are sentenced more often under the career offender guideline, (3) are subjected to higher mandatory minimums for prior drug trafficking felonies under 21 U.S.C. § 841, and (4) are more often disqualified from safety valve relief. In short, criminal history is already accounted for in a host of ways in individual cases. Building it into every crack cocaine sentence effectively double counts criminal history and exacerbates racial disparity.

No evidence supports raising powder cocaine penalties. We join the Commission in urging Congress to “reject addressing the 100-1 drug quantity ratio by decreasing the . . . threshold quantities for powder cocaine offenses.” As the Commission has found, “there is no evidence to justify an increase in quantity-based penalties for powder cocaine offenses.”⁶² Further, reducing the powder threshold would have a disproportionate impact on Latino offenders who are overrepresented among powder cocaine offenders.⁶³

3. The Harsh Federal Penalties for Crack Cocaine Offenses Destroy Individuals, Families and Communities, Undermine Public Confidence in the Justice System, and Create a Greater Risk of Recidivism.

Over 32% of Black males born in 2001 are expected to go to prison during their lifetimes if current incarceration rates continue. In 2001, the percentage of Black males in prison was

⁵⁸ *Id.* at Ex. 13.

⁵⁹ USSC, *Cocaine and Federal Sentencing Policy* at 44 (May 2007).

⁶⁰ USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 134 (2004).

⁶¹ See Interfaith Drug Policy Initiative, *Mandatory Minimum Sentencing Fact Sheet*, http://idpi.us/dpr/factsheets/mm_factsheet.htm.

⁶² See USSC, *Cocaine and Federal Sentencing Policy* at 8 (May 2007).

⁶³ National Council of La Raza, *Drug Sentencing and Its Effects on the Latino Community* at 6 (February 2002), available at http://www.nclr.org/files/38305_file_Drug_Sentencing_USSC_testimony_2.pdf.

twice that of Hispanic males and six times that of White males.⁶⁴ In 2003, African Americans were incarcerated in federal prison at a rate 4.5 times that of Whites.⁶⁵ One of every fourteen African American children has a parent in prison, and thirteen percent of all African American males are not permitted to vote because of felony convictions.⁶⁶ The harsh treatment of federal crack offenders has contributed to this deplorable situation.

The persistent removal of persons from the community for lengthy periods of incarceration weakens family ties and employment prospects, and thereby contributes to increased recidivism.⁶⁷ Reputable studies show that if a small portion of the budget currently dedicated to incarceration were used for drug treatment, intervention in at-risk families, and school completion programs, it would reduce drug consumption by many tons and save billions of taxpayer dollars.⁶⁸

Defenders see the pointless destruction of our clients' lives and families on a frequent basis. Under the statute and guidelines, even a first offender must spend a substantial period of time in prison, cutting off education and meaningful work, and greatly diminishing prospects for the future. As one example, the Defender in the District of Columbia represented a 22-year-old young man who was working toward his GED and taking a weekly class in the plumbing trade when he was sentenced to prison for selling 7 grams of crack to a cooperating informant. He had no prior convictions or even any prior arrests, no history of drug or alcohol abuse, was in a stable relationship, and had two small children to whom he was devoted. He was a random casualty of an investigation of a serious drug trafficking conspiracy in which he was not involved. A cooperator in that investigation, who happened to live in the same housing project, approached the young man to get him some crack, and he unwisely agreed in order to get cash to support his family. The government prosecuted the client in federal court, not because he was involved in the conspiracy under investigation, but to make a track record for its cooperator. If the client had been prosecuted in superior court, he would have received a sentence of probation. If he had been prosecuted in federal court for selling 7 grams of powder cocaine, he would have received a

⁶⁴ U.S. Department of Justice, Bureau of Justice Statistics, *Special Report: Prevalence of Imprisonment in the U.S. Population, 1974-2001* (August 2003).

⁶⁵ Christopher Hartney and Linh Vuong, National Council on Crime and Delinquency, *Created Equal: Racial and Ethnic Disparities in the U.S. Criminal Justice System* at 19 (March 2009).

⁶⁶ See American Civil Liberties Union, *Cracks in the System: Twenty Years of the Unjust Federal Crack Cocaine Law* at 3-4, October 2006; Justice Policy Institute, *Cellblocks or Classrooms?: The Funding of Higher Education and Corrections and its Impact on African American Men* at 10 (2002); Human Rights Watch & the Sentencing Project, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States* at 8 (1998).

⁶⁷ The Sentencing Project, *Incarceration and Crime: A Complex Relationship* at 7-8 (2005) (hereinafter "*Incarceration and Crime*"), available at <http://www.sentencingproject.org/pdfs/incarceration-crime.pdf>.

⁶⁸ Caulkins, Rydell, Schwabe & Chiesa, *Mandatory Minimum Sentences: Throwing Away the Key or the Taxpayers' Money?* at xvii-xviii (RAND 1997); Rydell & Everingham, *Controlling Cocaine: Supply Versus Demand Programs* (RAND 1994); Aos, Phipps, Barnoski & Lieb, *The Comparative Costs and Benefits of Programs to Reduce Crime* (Washington State Institute for Public Policy 2001), <http://www.nicic.org/Library/020074>.

sentence of probation. He is now serving a prison sentence, while the cooperator, who had a very substantial record, was sentenced to time served.

In a case handled by the Defender in Los Angeles, the client was just finishing up a sentence for being a felon in possession of a firearm. He had completed the 500-hour drug treatment program, had served as a suicide watch companion in prison for over a year, had been released to a halfway house, was working full time, and was about to regain custody of his son. On the eve of his return home and just before the statute of limitations would have expired, the government indicted him for a sale of four ounces of crack to a confidential informant, which had occurred seven months *before* the felon in possession offense. In that case, the informant, at the direction of law enforcement officers, rejected the four ounces of powder cocaine the client brought him and insisted on four ounces of crack instead. If the government had indicted the client for both offenses at once, he would have received a concurrent sentence. If the informant had not insisted on crack, the entire sentence would be wrapped up, the client would be working, and his son would have a parent to care for him. Instead, he is now serving a ten-year mandatory minimum sentence.

In a case handled by the Defender in the Southern District of Alabama, a forty year old mother of three and grandmother of two with no criminal history was convicted of conspiring to distribute crack. The only evidence against her was the uncorroborated testimony of serious drug dealers, one a former boyfriend, who had gun charges dismissed and received lower sentences in return. Her lawyer moved for a mistrial when he learned that the cooperators were placed in the same holding cell and were coordinating their testimony. The witnesses assured the judge that they did not discuss their testimony and the motion was denied. The woman was sentenced to twenty years in prison. Her 20-year-old daughter was forced to leave college to support and care for the family.

B. Aggravating Circumstances, Rather Than Being Built Into Every Sentence for Crack Cocaine Offenses, Should Affect the Sentence Only If Present In The Individual Case, as With Any Other Drug Type.

The aggravating circumstances once thought to be particularly prevalent in or unique to crack cocaine offenses are already available in existing guidelines and statutes applicable to all drug cases.⁶⁹ As discussed in the section I(A)(2), numerous sentencing enhancements exist for violence and weapon involvement. Other guidelines provide for increased sentences for individuals who play aggravating roles in drug trafficking, USSG § 3B.1.1, or commit drug offenses as part of their livelihood, USSG § 4B1.3 Thus, under the current penalty structure, for crack cocaine offenders, this means that they are being punished once based on an assumption that aggravating circumstances exist in every case even if they do not exist in the individual case, and twice if the aggravating circumstance is actually present in the case.

⁶⁹ See USSG § 2D1.1(b)(1) (actual possession of a weapon by the defendant or access to a weapon by an unindicted participant); 18 U.S.C. § 924(c) (consecutive mandatory minimum if weapon was possessed, used or brandished); USSG § 4B1.3 (offense was part of a pattern of criminal livelihood); USSG Chapter Four (criminal history score); USSG § 3B1.4 (use of a minor); USSG § 3B1.1 (aggravating role); USSG § 2D1.2 (sales to pregnant women, minors, or in protected locations); USSG § 2D1.1(a) (death or serious bodily injury); USSG § 5K2.1 (death); USSG § 2K2.2 (bodily injury); USSG § 3C1.1 (obstruction of justice).

As with all other drug types, any additional harm in a crack cocaine offense should not be addressed through the blunt instrument of a higher penalty built into the punishment at every quantity level, but by enhancements that may or may not exist in individual cases. Those enhancements are already available under current law. *See* footnote 69, *supra*.

C. The Mandatory Minimum for Simple Possession of Crack Cocaine Should Be Repealed.

Like the penalties for felony drug offenses, the mandatory minimum penalty for the simple possession of crack cocaine has a racially disparate impact that bears no rational relationship to legitimate penological objectives. As the Commission has unanimously and repeatedly recommended, the mandatory minimum for simple possession of crack should be eliminated. Under 21 U.S.C. § 844, the possession of 5 grams of crack for personal use triggers a mandatory minimum of five years – a felony offense. Possession of any other drug (except flunitrazepam)⁷⁰ in the same or even greater quantities is a misdemeanor offense. To saddle a crack user with a felony conviction and to remove him from society for a minimum term of five years does nothing to deal with the critical issue fueling the offense – drug addiction. Punitive incarceration rather than treatment decreases the chances of the offender becoming a successful and productive member of society and often has deleterious consequences for his family. The collateral consequences of a felony conviction are many. Such persons can no longer vote and may be denied such basic benefits as food stamps and access to services designed for their children – the neediest and least protected members of society.⁷¹ The unavailability of such services not only increases the offender’s risk of recidivism, but places family members at risk of engaging in criminal or anti-social behavior.

II. Mandatory Minimum Sentencing Statutes Should Be Repealed.

Seventeen years ago, the Sentencing Commission found that mandatory minimums create unwarranted disparity and unwarranted uniformity, and transfer sentencing power from impartial judges to interested prosecutors.⁷² Mandatory minimum statutes result in sentences that are unfair, disproportionate to the seriousness of the offense and the risk of re-offense, and racially discriminatory.⁷³ The Commission, in its Fifteen Year Report, detailed many of these problems with support from many sources, including evidence from the Department of Justice “that mandatory minimum statutes [are] resulting in lengthy imprisonment for many low-level, non-

⁷⁰ Possession of flunitrazepam carries a maximum penalty of three years with no mandatory minimum. 21 U.S.C. § 844(a).

⁷¹ 21 U.S.C. § 862a.

⁷² *See* USSC, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (1991).

⁷³ *See* Families Against Mandatory Minimums and National Council of La Raza, *Disparate Impact of Federal Mandatory Minimums on Minority Communities in the United States* (March 2006).

violent, first-time drug offenders.”⁷⁴ The Commission concluded: “Today’s sentencing policies, crystallized into sentencing guidelines and mandatory minimum statutes have a greater adverse impact on Black offenders than did the factors taken into account by judges in the discretionary system in place immediately prior to guidelines implementation.”⁷⁵

The Commission recently reported that in 2006, Black offenders were the only racial group comprising a greater percentage of offenders convicted under a mandatory minimum statute (32.9%) than their percentage in the overall offender population (23.8%). In drug cases, only Hispanics and Blacks comprised a greater percentage of offenders convicted under a mandatory minimum statute (42.4% and 32% respectively) than their percentage in all drug cases (41.7% and 29.2% respectively).⁷⁶ Because Native Americans are subject to federal law and not state law, they too bear a disproportionate burden of the 190 plus mandatory minimum provisions scattered throughout the federal criminal code.

Data from fiscal year 2007 show the same pattern of racially disparate impact of mandatory minimum drug penalties. Black defendants represented 25.7 percent of offenders for whom race and mandatory penalty information were available.⁷⁷ However, black offenders represented 33.6 percent of those receiving a mandatory minimum drug penalty.

Today, there is a solid consensus in opposition to mandatory minimums among an ideologically diverse range of judges, governmental bodies and organizations dedicated to policy reform, including the Judicial Conference of the United States, the U.S. Conference of Mayors, The Constitution Project’s Sentencing Initiative, the American Bar Association’s Justice Kennedy Commission, and Justice Kennedy himself.⁷⁸ One of the many reasons why the Judicial Conference opposes mandatory minimums is that they create unwarranted sentencing disparity.⁷⁹

⁷⁴ See USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 51 (2004), citing U.S. Department of Justice, *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories*, Executive Summary (February 4, 1994).

⁷⁵ *Id.* at 135.

⁷⁶ See Statement of Ricardo H. Hinojosa, Chair, United States Sentencing Commission, Before the Subcommittee on Crime, Terrorism and Homeland Security of the House Judiciary Committee 3, 12 (June 26, 2007).

⁷⁷ USSC FY2007 Monitoring Dataset, available from the Interuniversity Consortium of Political and Social Research, at <http://www.icpsr.umich.edu>. Offenders were classified for this analysis using the MONRACE variable, which divides offenders into white, black, and other groups. Hispanics are classified as either white, black or other and are not counted separately. Mandatory drug penalty information was obtained using the DRUGMIN variable.

⁷⁸ See Statement of Hon. Paul J. Cassell Before the Subcommittee on Crime, Terrorism and Homeland Security of the House Judiciary Committee on Behalf of the Judicial Conference of the United States (June 26, 2007); U.S. Conference of Mayors, *Resolution Opposing Mandatory Minimum Sentences* at 47-48 (June 2006); Constitution Project, *Sentencing Initiative, Principles for the Design and Reform of Sentencing Systems: A Background Report* (June 7, 2005); American Bar Association, *Report of the ABA Justice Kennedy Commission* (June 23, 2004); Associate Justice Anthony M. Kennedy, *Speech at the*

III. Mandatory Minimum Statutes Based on Criminal History Should Be Repealed and other Sentencing Provisions, like the Safety-Valve, that Depend on Criminal History Should Be Revisited.

The federal criminal code contains numerous provisions for enhanced sentences based on prior convictions. Our clients are most affected by recidivist sentencing provisions in the drug statutes, 21 U.S.C. §§ 841 and 851, the federal firearms fifteen year mandatory minimum for persons who unlawfully possess firearms and have three previous convictions for, among other things, a “serious drug offense,” 18 U.S.C. § 924(e), the recidivist 25 year mandatory minimum for possession, use, or carrying of a firearm during a drug tracking crime, 18 U.S.C. § 924(c), and the sentencing enhancements for illegal reentry after being deported for certain felony and misdemeanor offenses. 8 U.S.C. § 1326(b). Even if these statutes appear race neutral, they have a significant adverse impact on people of color that is not needed to accomplish a legitimate sentencing purpose.

For those with federal criminal justice contact, the proportion of Black offenders with prior convictions is greater than that of White offenders. Data from the Commission show that offenders in criminal history categories II through VI “are more likely (41.8%) to be Black than are offenders in categories I.”⁸⁰ While Hispanic offenders are more equally represented across criminal history categories, those with misdemeanor convictions or a single aggravated felony (broadly defined to include theft, criminal trespass, and failure to appear) are punished severely under 8 U.S.C. § 1326 and the sentencing guidelines if they reenter the country after sustaining those convictions.

Black offenders come into the federal criminal justice system with lengthier criminal histories not because they pose greater risks of recidivism or threats to public safety, but because of racial/ethnic/socio-economic disparities existing elsewhere. These disparities manifest themselves in several ways. A few examples demonstrate the point. First, minorities are more likely to have contact with the criminal justice system and experience higher rates of conviction and incarceration than White offenders because law enforcement officers concentrate their efforts in certain areas – predominantly poor minority neighborhoods.⁸¹

Second, people of color in poorer communities are more likely to sit in jail pending trial and must rely on underfunded and inadequate systems of indigent defense for legal

American Bar Association Annual Meeting at 4 (Aug. 9, 2003); Leadership Conference on Civil Rights, *Justice on Trial* (2000); Federal Judicial Center, *The Consequences of Mandatory Prison Terms* (1994).

⁷⁹ See Letter of Criminal Law Committee, Judicial Conference of the United States, March 2007, available at http://www.ussc.gov/hearings/03_20_07/walton-testimony.pdf.

⁸⁰ USSC, *Recidivism and the First Offender* at 7 (May 2004).

⁸¹ USSC, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 134 (2004). See also Michael Tonry, *Malign Neglect – Race, Crime, and Punishment in America*. New York: Oxford University Press (1995).

representation.⁸² Anxious to resolve the charges against them, uninformed about the collateral consequences of doing so, and lacking faith in the system's ability to dispense justice, they often accept plea bargains with shorter sentences or time served rather than challenge the police conduct leading to their arrest or contest their guilt. The result is that many may be convicted of state misdemeanor drug offenses or other crimes that are considered federal felonies because they carry a *potential* punishment of more than one year.

Third, Black youth are waived into the adult system at an alarming rate compared to their White counterparts.⁸³ Recent research shows that “[t]he proportion of White youth waived to the adult system is just 75% of their proportion in the general population, while the proportion of African American youth waived is 200% of their proportion in the general population.”⁸⁴ For youth charged with drug offenses, African-Americans are “substantially more likely than their white counterparts to be tried as adults.”⁸⁵ Hispanic and Native Americans youth are also overrepresented in the adult criminal justice system.⁸⁶

Although Black offenders may come into the federal criminal justice system with lengthier criminal histories, the empirical evidence does not show that they are more dangerous or serious offenders. Indeed, for crack offenders, the Commission's data shows that criminal history category appears unrelated to the offender's role in the offense.⁸⁷ Thus, lower level offenders with criminal histories are being sentenced to long periods of incarceration, but without any proof that removing them from the street will protect the community and in the face of substantial evidence that they will be readily replaced by others.⁸⁸

As a result of their disproportionately high representation at earlier points in the criminal justice process, Black offenders are also denied relief from mandatory minimum punishments under the “safety-valve” at 18 U.S.C. § 3553(f), which applies only in drug cases. Only offenders in criminal history category I are eligible for safety-valve relief. In 2007, however, only 21 percent of crack cocaine offenders (who are predominantly Black) satisfied this

⁸² See generally Norman Lefstein and Robert Spagener, *The Constitutional Project, Justice Denied, America's Continuing Neglect of our Constitutional Right to Counsel*, Ch. 2 (2009).

⁸³ See generally Barry C. Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative “Backlash*,” 87 Minn. L. Rev. 1447, 1451 (2003). Christopher Hartney and Linh Vuong, National Council on Crime and Delinquency, *Created Equal: Racial and Ethnic Disparities in the U.S. Criminal Justice System* at 18 (March 2009) (Native Americans held in federal prison at 2.6 times the rate of Whites).

⁸⁴ *Id.* at 34; Amanda Burgess-Proctor, et.al., Campaign for Youth Justice, *Youth Transferred to Adult Court: Racial Disparities* (2006).

⁸⁵ *Id.* at 9.

⁸⁶ Hartney, *supra* n. 78.

⁸⁷ USSC, *Cocaine and Federal Sentencing Policy* at 55 (May 2007).

⁸⁸ USSC, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 134 (2004).

requirement.⁸⁹ While we believe that Congress should repeal all mandatory minimums, an interim step toward fairer sentences would be to expand safety-valve eligibility.

Immigration offenses that carry enhanced penalties based on prior convictions fall disproportionately on Hispanic offenders. In 2007, almost half (48.4%) of Hispanic offenders were sentenced for violating immigration law.⁹⁰ Virtually all of these offenders were sentenced to prison.⁹¹ Both the illegal reentry statute, 8 U.S.C. § 1326, and the applicable sentencing guidelines, USSG § 2L1.2 provide for significant penalties for persons unlawfully entering or remaining in the United States after being convicted of certain specified offenses. 8 U.S.C. § 1101(a)(43). A defendant convicted of one type of aggravated felony – a *single* drug distribution charge with a sentence over 13 months -- receives a 16 level enhancement in his sentence under the guidelines. Because Hispanics are more likely to be arrested and charged with drug offenses, held in jail pretrial, and then given longer sentences than White defendants, they are disproportionately burdened by this penalty structure.⁹² Even a defendant convicted of another type of aggravated felony -- a minor shoplifting charge -- faces an 8 level enhancement under the guidelines and a statutory maximum of twenty years. In contrast, a defendant with no prior conviction faces a statutory maximum of two years. 8 U.S.C. § 1326(a). No empirical evidence suggests that the mass incarceration of the Hispanic population, and the devastating effect that incarceration has on families and children, serves the purposes of sentencing or deters undocumented persons from entering the United States.

IV. Enhanced Penalties for Drug Distribution Near School and other Protected Zones Have Disproportionate Impacts on Racial and Ethnic Minorities

Congress enacted special penalty provisions for those who distribute drugs near schools, playgrounds, public housing, and other protected locations. 21 U.S.C. § 860. These laws have a disproportionate impact on racial and ethnic minorities who tend to be concentrated in urban areas.⁹³ While seeking to protect school children from being sold drugs, the laws have not accomplished their purpose. Anyone distributing in the school zone is subject to prosecution regardless of the intended target of the distribution and whether or not a child is the buyer or even nearby. One study of school zone legislation in New Jersey – legislation similar to the federal statute – showed that it had a “a devastatingly disproportionate impact on New Jersey’s minority community” and “failed entirely to accomplish their primary objective of driving drug activity away from schools and schoolchildren. The study found that the law had no measurable

⁸⁹ *Id.* at 44.

⁹⁰ Mark Lopez, Pew Hispanic Center, *A Rising Share: Hispanics and Federal Crime* at 4 (Feb. 2009).

⁹¹ *Id.* at 7 (96% of Latino offenders were sentenced to prison in 2007)

⁹² National Council of La Raza, *Drug Sentencing and Its Effects on the Latino Community* at 5 (February 2002), available at http://www.nclr.org/files/38305_file_Drug_Sentencing_USSC_testimony_2.pdf.

⁹³ Marc Mauer, *Racial Impact Statements: Changing Policies to Address Disparities*, 23 Criminal Justice (2009); see also L. Buckner Innis, *Moving Violation? Hypercriminalized Spaces and Fortuitous Presence in Drug Free School*, 8 Tex. F. on C.L. & C.R. 51, 74-75 (2003).

deterrent effect and was not being used to sanction individuals that sell drugs to children.”⁹⁴ Consequently, policymakers in New Jersey and elsewhere “are moving to reform or replace drug-free zone laws with more effective measures.”⁹⁵ In New Jersey, 96% of offenders jailed for violating protected zone laws were Black or Hispanic.⁹⁶ In a Massachusetts study, researchers found a disturbing trend. “While roughly 80 percent of all arrests took place within a school zone (meeting the first eligibility criteria), only 15 percent of whites were charged with an eligible offense (distribution or possession with intent) compared to 52 percent of non-white defendants.”⁹⁷

Given the proven adverse impacts of school and protected zone statutes on minority communities and the ineffectiveness of such laws in deterring crime, Congress should revisit 21 U.S.C. § 860. If any individual defendant actually distributes drugs to a child, then such conduct may be considered by the district judge in assessing culpability. Across the board increases for persons distributing drugs within a protected zone should be repealed.

In conclusion, thank you again for holding this hearing and permitting us to share with you our views on the immediate and compelling need for meaningful sentencing reform that reduces the disproportionate impact of the present system on people of color, their families, and their communities.

⁹⁴ Justice Policy Institute, *Disparity by Design: How Drug-free Zone Laws Impact Racial Disparity and Fail to Protect Youth* at 4 (March 2006).

⁹⁵ *Id.* at 44.

⁹⁶ *Id.* at 14.

⁹⁷ *Id.* at 15.