

STATEMENT OF A. J. KRAMER
Federal Defender for the District of Columbia
On Behalf of the Federal Public and Community Defenders

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

February 12, 2008 Hearing
Federal Cocaine Sentencing Laws: Reforming the 100-to-1 Crack/Powder Disparity

Mr. Chairman and Members of the Subcommittee:

Thank you for holding this hearing and for the opportunity to provide this written statement on behalf of the Federal Public and Community Defenders regarding reform of the federal cocaine sentencing laws. The Defenders have offices in 90 of 94 federal judicial districts. We represent thousands of people charged with federal crack cocaine offenses, 82% of whom are African American.¹ In the District of Columbia, where I have been the Federal Defender since 1990, 52% of the federal drug cases are crack cases, two and a half times the national average.² The injustice of federal crack cocaine sentencing laws is acutely felt in the District of Columbia, where the population is 55.4% African American,³ 92.8% of the incarcerated population is African American,⁴ and well over 50% of young black males are incarcerated or under supervision.⁵

As well-documented by the Sentencing Commission in its four reports to Congress, the severity of crack cocaine penalties based on drug type is unjustified and

¹ USSC, Cocaine and Federal Sentencing Policy 16, May 2007.

² U.S. Sentencing Commission, Statistical Information Packet, Fiscal Year 2005, District of Columbia, Figure A, <http://www.ussc.gov/JUDPACK/2005/dc05.pdf>.

³U.S. Census Bureau, American Community Survey 2006, http://factfinder.census.gov/servlet/ACSSAFFacts?_event=Search&_lang=en&_sse=on&_geo_id=04000US11&_state=04000US11.

⁴ Human Rights Watch, *Incarcerated America*, April 2003, <http://www.hrw.org/background/usa/incarceration/>.

⁵ By 1997, the percentage was 50%. See Eric Lotke, *National Center on Institutions and Alternatives, Hobbling a Generation: Young African American Men in D.C.'s Criminal Justice System Five years Later* (August 1997), available at <http://66.165.94.98/stories/hobblgen0897.html>. The national incarceration population has grown 3.4% annually since then. See U.S. Dept. of Justice, Bureau of Justice Statistics, Bulletin NCJ 213133, *Prison and Jail Inmates at Midyear 2005*, p. 2 (May 2006) (Table 1).

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

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 Defenders, and community groups, it promulgated a two-level reduction, effective November 1, 2007, with congressional acquiescence. On December 11, 2007, as with prior amendments benefiting offenders of other races and more serious offenders, the Commission voted unanimously for a policy statement making the amendment retroactive.⁸ At the two mandatory minimum quantity levels for an offender in Criminal History Category I, the amended guideline range now includes, but no longer exceeds, the mandatory minimum penalty; guideline ranges continue to be keyed to the mandatory minimum penalties above, between and below the mandatory minimum quantity levels.⁹ Before the amendment, guideline sentences for crack were three to over six times longer than for powder cocaine;¹⁰ now they are two to five times longer.¹¹ 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,” and requires a “comprehensive solution” from Congress, at which time the guidelines can be further amended.¹²

On December 10, 2007, the Supreme Court recognized that the sentencing guidelines for crack undermine the purposes of sentencing and create unwarranted disparity, even as amended, based on the Sentencing Commission’s findings. Thus, a sentencing court does not abuse its discretion when it imposes a below-guideline sentence for those reasons.¹³ Again, however, this is only a partial remedy. A judge cannot sentence below a mandatory minimum, and many courts remain hesitant to sentence outside the guidelines.

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 9 (May 2007).

⁸ Amendments to the LSD and marijuana guidelines, impacting mostly White offenders, were made retroactive, as was the lowering of the maximum base offense for trafficking in all types of drugs from 42 to 38.

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

¹⁰ *Id.* at 3.

¹¹ 72 Fed. Reg. 28558, 28571-72 (2007).

¹² USSC, Cocaine and Federal Sentencing Policy 9-10 (May 2007).

¹³ *Kimbrough v. United States*, 128 S. Ct. 558 (2007).

Thus, until Congress acts, the cocaine penalty structure continues to undermine the purposes of sentencing and create unjustified disparity. A person with no criminal history who possesses 5 grams of crack, 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. A person possessing the same amount of powder cocaine with intent to distribute receives a guideline sentence of only 10-16 months, or if for personal use, no more than 12 months. That amount of powder cocaine converts to about 4 ½ grams of crack cocaine by simply adding baking soda, water and heat. The sentence for possessing or distributing 5 grams of crack 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 double that for aggravated assault resulting in bodily injury.

For the reasons below, the Defenders urge Congress to adopt the following reforms:

1. Penalties for crack and powder cocaine should be equalized at the current powder cocaine quantity level.
2. The Sentencing Commission should be directed to review, and if appropriate, amend the guidelines applicable to all drug types, to account for aggravating and mitigating circumstances that may or may not be present in individual cases.
3. The mandatory minimum for simple possession of crack cocaine should be repealed.
4. Mandatory minimums for all drug offenses should be repealed.
5. A pilot program for federal substance abuse courts should be established.
6. If Congress authorizes the appropriation of funds for additional salaries and expenses for the prosecution of a substantial number of additional drug trafficking cases, it should authorize the appropriation of additional funds for the defense of such cases.

I. Equalization At The Current Powder Cocaine Quantity Level, With Aggravating and Mitigating Circumstances Taken Into Account If They Are Present In Individual Cases, Is The Right Solution.

A. Based on the Evidence, a 1:1 Ratio at the Current Powder Cocaine Quantity Level is the Only Correct Remedy.

Although the Commission has proposed different possible quantity ratios, ranging from 1:1 to 20:1, the consistent import of its actual findings has been that *if* there is any additional harm in crack cocaine offenses, it should not be addressed through the blunt

instrument of higher penalties based on the type of cocaine, but by enhancements that may or may not exist in individual cases.¹⁴

A 20:1 ratio, in which 25 grams would be subject to a five-year sentence and 250 grams would be subject to a ten-year sentence, would not focus law enforcement resources on kingpins or major drug traffickers. A quantity of 25 grams of crack is half that associated with a mere street-level dealer.¹⁵ A quantity of 250 grams is orders of magnitude less than that associated with a high-level supplier or organizer/leader,¹⁶ is in the neighborhood of that associated with such lowly roles as manager and cook, and is far less than that associated with a mere courier.¹⁷

As these figures suggest, quantity is a poor and imprecise measure of culpability, and both quantity and type are subject to happenstance and manipulation. For example, I represented a defendant on appeal who can only be described as a small time street dealer. He is mentally ill, supervised no one, and made little profit from selling crack. He was convicted of selling 188 grams of crack to an undercover officer in multiple sales over a one-month period. The amount could have reached 250 grams, except that my client became suspicious of the undercover officer and refused to sell him any more, at which point he was arrested and charged.

A true high-level dealer is one who imports a large quantity of powder before it is ever cooked into crack. A sentencing differential based on different quantities of powder and crack would perpetuate the inversion problem.

Congress should “reject addressing the 100-1 drug quantity ratio by decreasing the . . . threshold quantities for powder cocaine offenses, as” the Commission has found that “there is no evidence to justify an increase in quantity-based penalties for powder cocaine offenses.”¹⁸

B. Any Sentence Disparity Based on Drug Type Invites Manipulation of Type and Quantity, Resulting in Longer Sentences for Low Level Offenders and Shorter Sentences for Serious Offenders.

¹⁴ See Reports, *supra* note 6; 60 Fed. Reg. at 25,077.

¹⁵ USSC, Cocaine and Federal Sentencing Policy at 45, Figure 10 (May 2002) (median drug weight for street-level crack dealers was 34 grams in 1995, 52 grams in 2000).

¹⁶ *Id.* (median weight for high-level supplier of crack was 590 grams in 1995, 2962 grams in 2000).

¹⁷ *Id.* (median weight of crack for managers was 253 grams in 2000; for cooks was 155 grams in 1995 and 180 grams in 2000; for couriers was 337 grams in 1995 and 338 grams in 2000).

¹⁸ See USSC, Cocaine and Federal Sentencing Policy 8 (May 2007).

The Commission has found that drug quantity manipulation and untrustworthy information provided by informants are continuing problems in federal drug cases.¹⁹ These problems are particularly pronounced in cocaine cases because the simple process of cooking powder into crack results in a drastic sentence increase, and because a very small increase in the quantity of crack results in a very large increase in the sentence. 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.²⁰

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.²¹ Rather than encouraging law enforcement to focus on existing “major” and “serious” drug traffickers, the unfortunate fact is that agents and informants often take advantage of the crack/powder disparity to create long sentences for low-level offenders while more culpable offenders receive shorter sentences in return. This is the very definition of unwarranted disparity, wastes taxpayer dollars, is indefensible, and should be excised from the federal cocaine sentencing laws.

Defenders see this on a regular basis. In a case in my district, a DEA agent testified that it was his regular practice, when street dealers offered to sell him powder, to ask them to cook it into crack, in order to obtain the mandatory minimum sentence. A recent client of mine was caught with ½ gram of heroin but is serving a 17 ½ year sentence based on the uncorroborated testimony of a gang leader that my client had once sold him 62 grams of crack. The gang leader served less than a year in prison in exchange for his testimony against petty street dealers, including my client, who had no information to give.

In a case in the District of Massachusetts, an informant facing state charges after being caught with 50 grams of powder cocaine began cooperating with the FBI. He and a close friend, the eventual defendant, had occasionally sold each other powder cocaine, never crack. The informant asked the defendant to get him two ounces of cocaine. The

¹⁹ 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).

²⁰ 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).

²¹ H.R. Rep. No. 99-845, 99th Cong., 2d Sess. 1986, 1986 WL 295596 (Background).

FBI directed the informant to accept only crack, not powder, though the defendant had never sold crack to anyone. When the defendant showed up with two ounces of powder, the informant refused to accept it, insisting on crack. The defendant returned the powder to the supplier, who eventually replaced it with two ounces of crack. The agent testified at the sentencing hearing that he directed the informant to buy only crack because it would result in a higher sentence. The sentence for two ounces of cocaine powder would have been 30-37 months with no mandatory minimum. The sentence for two ounces of crack carried a guideline sentence of 140-175 months and a mandatory minimum of ten years. The district court found that the FBI agent's primary purpose was to procure the highest possible penalty, which was not a legitimate law enforcement purpose. The district court reduced the guideline sentence by fourteen months and imposed a sentence of 126 months. The state charges against the informant were dismissed, he was charged federally, and received a sentence of only 24 months for his cooperation in creating a crack trafficking case.

In a case in Los Angeles, a female informant, at the government's direction, twice sought to buy crack from the defendant, but the defendant brought powder cocaine instead. The informant requested crack a third time, and the defendant again showed up with powder. By then, the informant had established a sexual relationship with the defendant. At her insistence, the defendant cooked the powder into crack. For the fourth transaction, the defendant again showed up with powder, and again, at the informant's insistence, cooked the powder into crack. In this way, the government purposely doubled the defendant's guideline range from 84-105 months to 168-210 months and subjected him to a ten-year mandatory minimum sentence rather than a five-year mandatory minimum. By the time the defendant was indicted, three years had passed since the last sale, he had established his own plumbing company, and he had a stable home life with his fiance and their daughter.

In a case tried in the Eastern District of Louisiana, the defendant made an initial sale of less than 30 grams of crack to an undercover agent. The agent acknowledged on the stand that he could have arrested the defendant then and there, but went back for a second sale in order to obtain a higher mandatory minimum sentence. Because the defendant had a prior conviction for possession of a crack pipe with residue in it and another for possession of six marijuana cigarettes (for neither of which he received a prison or jail sentence), he was sentenced to mandatory life in prison. Absent the second sale, the defendant would have been subject to a mandatory minimum of ten years.

C. While Devastating Individuals, Families and Communities and Undermining Public Confidence in the Justice System, the Harsh Federal Penalties for Crack Offenses Do Not Prevent Drug Crime.

John P. Walters, the Director of the Office of National Drug Control Policy, told Congress in early 2005 that the current policy of focusing on small-time dealers and users was ineffective in reducing crime, while breaking generation after generation of poor minority young men.²² As the Sentencing Commission has found, "retail-level drug

²² Kris Axtman, *Signs of Drug-War Shift*, Christian Science Monitor, May 27, 2005.

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.”²³

At the same time, 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.²⁴ 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.²⁵

Though some have said that higher penalties for crack offenses protect and benefit African American communities, this claim is unsupported. 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 twice that of Hispanic males and six times that of White males.²⁶ 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.²⁷ The harsh treatment of federal crack offenders has contributed to this deplorable situation.

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

²³ 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).

²⁴ The Sentencing Project, *Incarceration and Crime: A Complex Relationship* 7-8 (2005) (hereinafter “*Incarceration and Crime*”), available at <http://www.sentencingproject.org/pdfs/incarceration-crime.pdf>.

²⁵ 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>.

²⁶ U.S. Department of Justice, Bureau of Justice Statistics, *Special Report: Prevalence of Imprisonment in the U.S. Population, 1974-2001* (August 2003).

²⁷ See American Civil Liberties Union, *Cracks in the System: Twenty Years of the Unjust Federal Crack Cocaine Law* 3-4, October 2006; Justice Policy Institute, *Cellblocks or Classrooms?: The Funding of Higher Education and Corrections and its Impact on African American Men* 10 (2002); Human Rights Watch & the Sentencing Project, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States* 8 (1998).

greatly diminishing prospects for the future. My office recently 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 our client to get him some crack, and he unwisely agreed to get cash to support his family. The government prosecuted our client in federal court, not because he was involved in the conspiracy under investigation, but to make a record for its cooperator. If our 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 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 recent 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.

II. Aggravating Circumstances, Rather Than Being Built Into Every Crack Sentence, Should Affect the Sentence Only If Present In The Individual Case.

The Sentencing Commission should be directed to review, and if appropriate, amend the guidelines applicable to all drug types, to account for aggravating and mitigating circumstances that may or may not be present in individual cases. This directive should give the Commission the leeway to independently determine which circumstances should be added and how much they should affect the guideline range. Many of the aggravating circumstances identified in the pending legislative proposals are already available under the guidelines and various statutes. The Commission is in the best position to determine if additional ones are needed and to what extent.

A. An Assumption of Violence Cannot Be Built Into the Penalty for All Crack Offenses Because Crack Offenses are Predominantly Non-Violent.

The Commission defines “violence” as the occurrence of death, any injury, or a threat. In crack cases in 2005, death occurred in 2.2% of cases, any injury occurred in 3.3% of cases, and a threat was made in 4.9% of cases.²⁸ Thus, 94.5% of cases involved no actual violence, and 89.6% involved no violence or threat of violence. Only 2.9% of crack offenders in 2005 used a weapon.²⁹

The Commission also found that although “weapon involvement, by the broadest of definitions,” *i.e.*, ranging from weapon use by the defendant to mere access to a weapon by an un-indicted co-participant, “has increased since 2002 in both powder cocaine and crack cocaine offenses, the rate of actual *violence* involved in the offense, *already relatively low*, has declined further during this period.”³⁰ Further, the crack cocaine population is aging without replacement by younger users, and older users are less violent.³¹

Weapon involvement and violence, if it occurred, should be taken into account through enhancements in individual cases.

B. An Assumption of Recidivism Cannot Be Built Into the Penalty for All Crack Offenses Because This Would Over-punish Offenders With a Low Risk of Recidivism, Would Double Count Criminal History, and Would Exacerbate Racial Disparity.

²⁸ *Id.* at 38.

²⁹ *Id.* at 33.

³⁰ *Id.* at 87 (emphasis in original and added).

³¹ *Id.*

For Criminal History Categories II and higher, drug offenders have the lowest rate of recidivism of all offenders.³² 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.³³ Drug trafficking accounts for only a small fraction – as little as 4.1% – of recidivating events for all offenders.³⁴

While it is true that crack cocaine offenders generally have higher criminal history categories than powder cocaine offenders,³⁵ 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.”³⁶ 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.³⁷

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 would effectively double count criminal history and exacerbate racial disparity.

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

³² USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* at 13 & Ex. 11 (May 2004).

³³ *Id.* at 4, 5 & Exs. 2, 3, 13.

³⁴ *Id.* at Ex. 13. “[S]erious violent offenses,” which include domestic violence and weapon possession, account for up to no more than 16.8% of recidivating events for all offenders. *Id.*

³⁵ USSC, *Cocaine and Federal Sentencing Policy* 44 (May 2007).

³⁶ 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).

³⁷ See Interfaith Drug Policy Initiative, *Mandatory Minimum Sentencing Fact Sheet*, http://idpi.us/dpr/factsheets/mm_factsheet.htm.

Congress should repeal the mandatory minimum for simple possession of crack, so that the penalty for simple possession of crack is the same as that for simple possession of powder cocaine, as the Commission has unanimously and repeatedly recommended.

IV. Mandatory Minimums for All Drug Offenses 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.³⁸ 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 American Bar Association's Justice Kennedy Commission, and Justice Kennedy himself.³⁹ According to the Constitution Project's Sentencing Initiative, chaired by former Attorney General Edwin Meese III, "Experience has shown that mandatory minimum penalties are at odds with a sentencing guideline structure."⁴⁰

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. 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-violent, first-time drug offenders."⁴¹ 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

³⁸ See USSC, Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (1991).

³⁹ 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 47-48 (June 2006); American Bar Association, Report of the ABA Justice Kennedy Commission (June 23, 2004); Associate Justice Anthony M. Kennedy, Speech at the 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).

⁴⁰ Constitution Project, Sentencing Initiative, Principles for the Design and Reform of Sentencing Systems: A Background Report 12 (June 7, 2005).

⁴¹ 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).

account by judges in the discretionary system in place immediately prior to guidelines implementation.”⁴²

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).⁴³

V. A Pilot Program For Federal Substance Abuse Courts As A Sentencing or Diversion Option Should be Established.

We urge Congress to establish a pilot program for federal substance abuse courts that would be available as a sentencing or pretrial diversion option. We believe that this should take priority over funding state drug courts or prison treatment programs.

Substance abuse or addiction is the cause not only of drug possession and trafficking offenses, but many other federal crimes. Recidivism rates are lower for offenders who have not used, abused or been addicted to drugs in the recent past, for offenders who are or were employed, and for offenders who have some level of education. Thus, rehabilitation programs that require a combination of substance abuse treatment and employment or the pursuit of a degree have a high cost-benefit value.⁴⁴

Many states have adopted substance abuse court programs as a way to reduce both recidivism and the cost of unnecessary incarceration.⁴⁵ These programs are used on the front end, as an alternative to a lengthy prison sentence. The person may be sentenced to probation with successful completion of substance abuse court as a condition, followed by no incarceration or a shorter term of incarceration, or the case may be held in abeyance and eventually dismissed upon successful completion. The purpose and effect is to reduce recidivism, keep offenders employed and with their families and in their communities, and save taxpayer dollars that need not be wasted on ineffective incarceration.

⁴² *Id.* at 135.

⁴³ 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).

⁴⁴ USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* at 12-13, 15-16 & Ex. 10 (May 2004).

⁴⁵ Ryan S. King, *Changing Direction? State Sentencing Reforms 2004-2006* (March 2007), <http://www.sentencingproject.org/Admin/Documents/publications/sentencingreformforweb.pdf>.

The only similar rehabilitative program available in federal court operates at the supervised release stage, after the offender has already completed what is usually a lengthy prison sentence. Substance abuse courts are currently in operation in three districts, and “re-entry courts” are in operation in two other districts.⁴⁶ Participation is voluntary and results in a reduced term of supervised release upon successful completion of a total of twelve months. Participants meet regularly as a group with the federal magistrate and/or district court judge in charge of the program. The judge assigns each person goals to achieve between meetings, and each person must account for those goals to the judge and the entire group. They must, among other things, remain sober and be employed. When issues arise, treatment may be changed (e.g., the person may be required to live in a sober house because her home environment does not support recovery), and/or graduated sanctions imposed, ranging from writing an essay to a brief period in jail. Judges, Defenders and Probation Officers report that individual attention from the judge and peer pressure from others who are succeeding in the face of the same problems are what make these programs work. Judges and Probation Officers are so enthusiastic about these programs that six other district courts are opening similar programs within the next few months, and proposals are pending in four other districts.

The success of these programs demonstrates that prison first, drug courts only later, is not the answer. Participants are still addicted when released from prison. Spending years in prison makes recidivism more likely by breaking up families and making offenders less employable. If offenders were given the tools and incentives to overcome bad habits, work, and live in the community on the front end, recidivism would be reduced at less cost.

If Congress believes that substance abuse courts are a good idea, it should take the lead and establish them in the federal system. Funding more state drug courts without creating federal substance abuse courts would increase unwarranted federal/state disparity, and do nothing positive for the federal system. The existence of drug courts in the state system but not the federal system in the same district creates unwarranted disparity. Federal authorities can and do take cases from state court, where sentences are generally lower and drug courts are available. As often as not, this has nothing to do with the seriousness of the offense. If drug courts were established in the federal system, this source of unwarranted disparity would be removed. Funding more state drug courts without creating the same option in federal court would exacerbate the problem.

The Department of Justice claims that federal drug courts are inappropriate because the federal system “deals overwhelmingly with drug trafficking defendants who have committed more serious drug trafficking offenses, are often violent, and are not eligible for, or amenable to, drug-court-type programs.” DOJ Report to Congress on the Feasibility of Federal Drug Courts 1 (June 2006). While serious and violent drug trafficking may be what Congress had in mind for the federal system, the reality is that

⁴⁶ No legislation was needed for these programs. They were implemented by Probation Offices, District Courts, and Defenders, with the assent of U.S. Attorneys. Legislation is needed, however, to create such programs at the front end.

most federal drug defendants are low-level, non-violent street dealers, couriers, and users.⁴⁷ These offenders are amenable to substance abuse treatment, and so are other types of federal offenders (*e.g.*, fraud offenders) who suffer from addiction and whose crimes are often the result of addiction.

The Department also claims that “state drug court programs as well as federal programs during pretrial release, incarceration, and supervised release, are already available as an alternative to a new federal drug court program.” *Id.* As noted above, there is no effective federal drug court program available on the front end where it could do the most good and save the most resources, and the existence of state drug court programs creates unwarranted disparity and does not rehabilitate federal offenders or save federal dollars.

The Department’s claim that treatment is available during incarceration as an alternative to federal drug courts is not accurate. In January 2005, BOP unilaterally terminated the boot camp program enacted by Congress in 1990. The only study of the federal boot camp program showed it to be effective and efficient. Nonetheless, BOP terminated it, without congressional consultation or approval, depriving judges of a mitigating sentencing option that benefited first time non-violent offenders,⁴⁸ the very ones DOJ concluded in its own study were receiving unnecessary time and wasting taxpayer dollars.⁴⁹ Similarly, after Congress created the residential drug and alcohol program, the BOP, by unilateral regulation, placed many restrictions on the ability to obtain the accompanying one-year sentence reduction, thus removing the incentive to participate. Those convicted of being a felon-in-possession, no matter how non-violent, are ineligible. Those who received the two-level weapon enhancement under the guidelines are ineligible, thus excluding many people who were convicted of a drug offense in which a gun was merely possessed or accessible to someone other than the defendant. Anyone with certain crimes of violence in his criminal history, no matter how old, *e.g.*, a 30-year-old bar fight, is ineligible for the reduction.

⁴⁷ Over 51% of federal drug offenders have 0-1 criminal history points and over 83% had no “weapon involvement,” broadly defined as anything from use by the defendant to mere access to a weapon by an un-indicted co-participant. *See* U.S. Sentencing Commission, 2006 Sourcebook, Tables 37, 39. The largest proportion of powder cocaine offenders are mules and the largest proportion of crack cocaine offenders are street level dealers. *See* USSC, Cocaine and Federal Sentencing Policy 19 (May 2007). A study by the Department in 1994 found that a substantial number of federal drug offenders played minor functional roles, had engaged in no violence, and had minimal or no prior contacts with the criminal justice system, and that this was a waste of taxpayer dollars. U.S. Department of Justice, *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories*, Executive Summary (February 4, 1994), available at http://fd.org/pdf_lib/1994%20DoJ%20study%20part%201.pdf.

⁴⁸ Update on BOP Issues Affecting Clients Before And After Sentencing at 5-6, <http://or.fd.org/BOPNotesOnIssuesJan07.pdf>.

⁴⁹ U.S. Department of Justice, *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories*, Executive Summary (February 4, 1994), available at http://fd.org/pdf_lib/1994%20DoJ%20study%20part%201.pdf.

VI. The Need for Parity Between Prosecution and Defense.

Section 10 of S. 1711 would authorize the appropriation of \$46,000,000 for salaries and expenses for the prosecution of high-level drug offenders. This would result in many additional cases for Defenders and CJA counsel. Defenders handle 75% of federal criminal cases at the trial level. Of the other 25%, the majority are multi-defendant cases, typically drug cases, in which the Defender represents one of the defendants and CJA counsel is appointed for the others.

Prosecutors have vast investigative support outside of their agency and outside of their budget, and have the ability to bring witnesses to their offices. Defense counsel must perform all or much of the investigation themselves. They frequently meet with clients and witnesses in far flung jails and correctional institutions. They may spend an entire day for a brief meeting with a client or one witness. For these and other reasons, it takes more lawyer time to defend a case than to prosecute it. Because of budgetary constraints and hiring freezes, there has been no appreciable increase in Defender hires over the past few years, as our caseload increases annually.

The Sixth Amendment guarantees every indigent defendant the right to appointed counsel and every defendant the right to effective assistance of counsel. *See Gideon v. Wainwright*, 372 U.S. 335 (1963); *Strickland v. Washington*, 466 U.S. 668 (1984). Defender Offices, already strained, cannot provide effective representation if their caseloads are substantially increased. Thus, if the prosecution's budget for drug cases is increased, a corresponding increase for the defense is necessary.

VII. Retroactivity

Finally, I would like to briefly address the Attorney General's recent statements regarding prisoners who are eligible for release under the retroactive crack guideline amendment.

If the government believes that any particular prisoner poses a public safety risk, it is invited to bring this to the judge's attention, and judges are required to consider this factor whether or not the government raises it. *See* USSG 1B1.10, comment. (n.1(B)). Each prisoner released will be under supervision. If the government wishes to request some additional form of re-entry preparation for a particular prisoner, it can do so. For those prisoners due for immediate release, the government should be bringing any concerns in this regard to the attention of the sentencing judge now.

There should be few such concerns, however, because the Attorney General's claim that retroactive guideline "will pose significant public safety risks" is contrary to the evidence showing that this population is predominantly non-violent. *See* Part II, *supra*. The Attorney General's claim that "many" of the 1600 or so prisoners eligible for immediate release are "among the most serious and violent offenders in the federal system" is refuted by data recently prepared by Commission staff, which is available

upon request from the Commission. Moreover, most prisoners due for immediate release are quite a bit older than when they committed the offense, and both violence and recidivism decline markedly with age.⁵⁰ By the Attorney General's logic, no one should ever be released from prison.

The Attorney General also claims that retroactive application would be "difficult for the legal system to administer." This rings hollow, given that District Court Judges, Probation Officers, Defenders, the Bureau of Prisons and U.S. Attorneys' Offices have been working in a spirit of cooperation for the past two months to ensure an efficient and fair process. U.S. Probation has held two summits attended by hundreds of judges, probation officers, defenders, prosecutors and prison officials. Information and ideas were shared, and consensus on issues of consequence was reached. DOJ representatives announced that they would cooperate in the process. It would be a massive waste of resources and goodwill to derail the process now, as the Attorney General suggests.

In conclusion, I again thank you for your attention to the urgent and compelling need for reform of the federal cocaine sentencing laws. Please do not hesitate to contact me should you have any questions or need further information.

⁵⁰ USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* at 12 & Exhibit 9 (May 2004); USSC, *Cocaine and Federal Sentencing Policy 87* (May 2007).