

**Testimony of  
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Before the  
United States Sentencing Commission  
Public Hearing on Cocaine and Sentencing Policy  
November 14, 2006**

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I wish to thank the United States Sentencing Commission on behalf of the Federal Public and Community Defenders for holding this hearing, and for the opportunity to testify regarding why and how current federal cocaine sentencing policy should be changed.

The harsh sentences for crack cocaine, and the racial disparity they create, have a particularly strong impact in the District of Columbia, where I have been the Federal Defender since 1990. The population of the District of Columbia is approximately 56.8% African American.<sup>1</sup> Its incarcerated population is 92.8% African American.<sup>2</sup> More than 50% of young black males in the District of Columbia are incarcerated or under supervision.<sup>3</sup> When I testified before the Commission in 2002, 55% of our drug cases were crack cases, two and a half times the national average of 21%. By 2005, 58.8% of our drug cases were crack cases, nearly three times the national average of 20.9%.<sup>4</sup>

Federal crack sentencing policy has earned the label of the new Jim Crow law.<sup>5</sup> Judge Oberdorfer has likened the guidelines and mandatory minimums to the Fugitive Slave Law, which inflexibly condoned and facilitated slavery, and identified the

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<sup>1</sup>U.S. Census Bureau, American Community Survey 2005, [http://factfinder.census.gov/servlet/ACSSAFFacts?\\_event=Search&\\_lang=en&\\_sse=on&\\_geo\\_id=04000US11&\\_state=04000US11](http://factfinder.census.gov/servlet/ACSSAFFacts?_event=Search&_lang=en&_sse=on&_geo_id=04000US11&_state=04000US11)

<sup>2</sup> Human Rights Watch, *Incarcerated America*, April 2003, <http://www.hrw.org/backgrounder/usa/incarceration/>.

<sup>3</sup> 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).

<sup>4</sup> U.S. Sentencing Commission, Statistical Information Packet, Fiscal Year 2005, District of Columbia, Figure A, <http://www.ussc.gov/JUDPACK/2005/dc05.pdf>.

<sup>5</sup> *National War on Drugs Symposium, Panel II: Social Justice and the War on Drugs* (2000) (statement of Hon. Robert Sweet), <http://www.pbs.org/wgbh/pages/frontline/shows/drugs/symposium/panel2.html>; Drug Policy Alliance, *Race and the Drug War* (2006).

“discrepancy in the treatment of those who traffic in crack cocaine versus powder cocaine traffickers [as] the most serious vice in the Guidelines today.” Judge Louis F. Oberdorfer, *Mandatory Sentencing: One Judge’s Perspective*, 40 Am. Crim. L. Rev. 11, 13, 16 (2002).

In addition to the racial disparity, the penalty structure for crack cocaine makes no sense. 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 63-78 months 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 5 grams of crack is higher than that for dumping toxic waste knowing that it creates an imminent danger of death, higher than that for theft of over \$7 million, and double that for aggravated assault resulting in permanent or life threatening bodily injury.

There is no scientific, medical, or law enforcement justification for any sentencing differential between crack and powder cocaine. Moreover, anything other than a 1:1 ratio would continue to provide an incentive for agents and informants to manipulate drug quantity and type for the sole purpose of lengthening sentences. We therefore urge the Commission to:

- Equalize guideline penalties for crack and powder cocaine at the powder cocaine level.
- Recommend to Congress that it do likewise with mandatory minimum thresholds, short of abolishing mandatory minimums altogether.
- Address particular harms with existing guideline and statutory provisions.
- Recommend that Congress repeal the mandatory minimum for simple possession of crack.

**I. The Interaction of the 1:100 Ratio with Relevant Conduct Rules, Lack of Procedural Safeguards, and Rewards for Cooperation Create the Perverse and Wasteful Incentive for Law Enforcement Agents and Their Informants to Create More Serious Crimes.**

In 2002, I told the Commission about a recent case in our district in which a DEA agent testified that it was his regular practice, when street dealers tried to sell him powder, to ask them to cook it into crack, in order to obtain the mandatory minimum sentence. I also told the Commission about a recent client who was caught with ½ gram of heroin but was 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, though he had admitted to several murders and robberies, served less than a year in prison

in exchange for his testimony against low-level people including my client who either had no information to give or were afraid to tell it.

The Commission noted in 2004 that drug quantity manipulation and untrustworthy information provided by cooperators are continuing problems in federal drug cases.<sup>6</sup> Based on responses from several Defenders to my inquiry, these problems continue unabated today and may even have worsened.

Undercover agents and eager-to-please informants hold out for higher quantities in a single sale, come back repeatedly for additional sales, and insist that powder be cooked into crack before accepting it. *See, e.g., United States v. Fontes*, 415 F.3d 174 (1<sup>st</sup> Cir. 2005) (at agent's direction, informant rejected two ounces of powder defendant brought 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).

Courts can lower the sentence for entrapment, but they rarely do, assuming that the fact that the defendant *did* ultimately provide crack in the requested amount is proof of predisposition. Cooperating witnesses claim that the defendant sold them crack in certain amounts, knowing full well that they will be rewarded commensurate with the defendant’s sentence. These tactics are easier and produce more bang for the buck in crack cases than in any other kind of drug case because a very small increase in quantity results in a very large increase in the sentence, and because the simple process of cooking powder into crack results in a drastic sentence increase. Cooperators have much to gain and little to lose from exaggeration or lying. The “facts” they provide, often “calculated” by multiplying an estimated number of sales by an estimated quantity, need only be “proved” by a mere preponderance of the un-cross-examined “probably accurate” hearsay. Without procedures designed to ensure accuracy, there is little chance that untruthfulness will be exposed.

This dynamic is encouraged by the relevant conduct rules, which can be manipulated or misapplied to make a low-level participant look like a mid- or high-level participant. First, § 1B1.3(a)(2), which calls for sentencing for additional sales above and beyond those charged and proved, and above mandatory minimum levels, invites agents and informants to arrange repeated sales before an arrest is made, and provides cooperators the opportunity to invent extra sales out of whole cloth. Second, despite application notes attempting to limit jointly undertaken criminal activity under §

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<sup>6</sup> *See* U.S. Sentencing Commission, *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).

1B1.3(a)(1)(B) to that embraced by the defendant's specific agreement, some courts continue to include all amounts allegedly involved in an entire conspiracy on the theory that such amounts are "reasonably foreseeable" from any participant's point of view. How § 1B1.3(a)(1)(B) is applied depends on the judge, the probation officer, and the skill and experience of the defense lawyer.

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.<sup>7</sup> Rather than focusing on existing "major" and "serious" drug traffickers, law enforcement agents and informants often take advantage of the crack/powder disparity, the relevant conduct rules, and the lack of procedural safeguards to *create* more serious offenses for the sole purpose of obtaining longer sentences. This has a racially disparate impact and is a waste of taxpayer dollars.

I can illustrate this abuse with recent examples from cases handled by Federal Defender Offices across the country.

- In a recent case in the District of Columbia, a merely "detectable" amount of crack was found during a search of the apartment the defendant shared with others. The defendant was not indicted until an undercover agent had made 10 purchases of less than 5 grams each over the next year and a half and finally caught him with over 5 grams of crack in his possession, thus subjecting him to the five-year mandatory minimum.
- In a case tried in Louisiana a few months ago, the defendant made an initial sale of less than 30 grams of crack to an undercover agent. The agent admitted on the stand that he went back for a second sale seeking 100 grams in order to obtain a higher sentence. Because the defendant had a prior conviction for possession of a crack pipe with residue in it and another for possession of six joints of marijuana (for neither of which he served any time), 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.
- In a recent case in 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. Although there was no evidence that the defendant had ever sold crack to anyone, the FBI directed the informant to accept only crack, not powder. When the defendant showed up with two ounces of powder cocaine, 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

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<sup>7</sup> H.R. Rep. No. 99-845, 99th Cong., 2d Sess. 1986, 1986 WL 295596 (Background).

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 in directing the informant to buy two ounces of crack rather than two ounces of powder 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 was sentenced to 24 months under a 5K1.1 motion.

- In a recent 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.

## **II. Federal Cocaine Sentencing Policy Has a Devastating Effect on Urban Minority Families and Communities, Undermines Public Confidence in Our Justice System, and Does Not Prevent Drug Crime.**

Faced with the Sentencing Commission's 1995 report that the sentencing distinction between powder and crack cocaine was irrational, and that its starkly disproportionate racial impact on African-American defendants was unwarranted, those members of Congress who voted to reject the Commission's equalization of the cocaine penalties claimed that their purpose was to protect and benefit African-Americans. *See* 104 Cong. Rec. H10256-10283 (daily ed. Oct. 18, 1995).

Now as then, this claim is unsupportable. There are more African American men in prison than in college. One of every fourteen African American children has a parent in prison. Thirteen percent of all African American males are not permitted to vote because of felony convictions.<sup>8</sup> The harsh treatment of federal crack offenders obviously contributes to this destruction of families and communities.

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<sup>8</sup> *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).

Nor has the policy succeeded in reducing drug use or drug crime. John 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 is ineffective in reducing crime while breaking generation after generation of poor minority young men.<sup>9</sup> Indeed, 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.<sup>10</sup> Drug crime is driven by demand, street dealers and couriers are easily replaced, so the crime is simply committed by someone else.<sup>11</sup> Drug use rates have increased over the past few years,<sup>12</sup> teenagers are using drugs at twice the rate they did in the 1980s,<sup>13</sup> and the price of both powder and crack cocaine has substantially declined.<sup>14</sup> 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.<sup>15</sup>

We as Federal Public Defenders see the pointless destruction of our clients' families on a frequent basis. Under the crack guidelines, even a first offender must spend a substantial period of time in prison, cutting off education and meaningful work, often for good. 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 a total of 7 grams of crack on four occasions over a six-month period. He had no prior convictions or even any prior arrests, no history of drug or alcohol abuse,

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<sup>9</sup> Kris Axtman, *Signs of Drug-War Shift*, Christian Science Monitor, May 27, 2005.

<sup>10</sup> 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>.

<sup>11</sup> U.S. Sentencing Commission, *Cocaine and Federal Sentencing Policy* 68 (Feb. 1995) (DEA and FBI reported that dealers were immediately replaced); Fifteen Year Report at 133-34.

<sup>12</sup> *Incarceration and Crime* at 6.

<sup>13</sup> Opinion editorial by Eric E. Sterling and Julie Stewart, *Undo This Legacy of Len Bias' Death*, Washington Post, July 24, 2006.

<sup>14</sup> Office of National Drug Control Policy, *The Price and Purity of Illicit Drugs, 1981 Through the Second Quarter of 2003* at 10 (November 2004), [http://www.whitehousedrugpolicy.gov/publications/price\\_purity/results.pdf](http://www.whitehousedrugpolicy.gov/publications/price_purity/results.pdf).

<sup>15</sup> 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>.

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 that had nothing to do with him. When a cooperator in that investigation, who happened to live in the same housing project, asked our client to get him some crack, he agreed because he needed cash to support his family. The government prosecuted our client in federal court, not because he was involved in the case under investigation, but in order to make a better record for its cooperator. If our client had been prosecuted in superior court, he would have received a sentence of probation. If our client had been prosecuted in federal court for selling 7 grams of powder cocaine, he would have received a sentence of probation. Our client is now serving a prison sentence, while the cooperator, who had a very substantial record, received a sentence of time served.

In a recent case handled by the Federal Defender's Office 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 defendant brought and insisted on four ounces of crack instead. If the government had indicted the defendant 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 defendant would have been working, and his son would have a parent to care for him. Instead, the defendant is now serving a ten-year mandatory minimum sentence.

**III. Even if Incarceration Were an Effective Way to Stop Crack Use, the Effects of Crack Use Would Not Justify a Disparity in Sentences Between Crack and Powder Cocaine.**

Defenders report that crack distribution has no more negative effect on the community in terms of other crimes or level of violence than other addictive drugs such as powder cocaine, heroin and methamphetamine. Actual violence in typical crack cases is very rare.

As the Commission reported in 2002, the physiological and psychotropic effects of crack and powder cocaine are the same. Powder cocaine may be less addictive if snorted, but is just as addictive if injected. While powder cocaine is snorted more often than it is injected, the danger to public health associated with needles, including the spread of AIDS and hepatitis, is more severe than any threat to public health posed by smoking crack. Moreover, injection can result in overdose and death. I have not heard of any case in which someone overdosed or died from smoking crack.

As the Commission noted in its 2002 Report, 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 and less severe than prenatal alcohol exposure. *See* U.S. Sentencing Commission, *Report to Congress – Cocaine and Federal Sentencing Policy* vi, 21-31 (May 2002) (hereinafter “2002 Report”). Further, the small but identifiable effects of prenatal cocaine exposure cannot be separated from the effects of socio-economic disadvantage. *Id.*

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.

Another recent study demonstrates the negative effect on children of the “crack baby” stereotype created by politicians and the media. In this study, trained child development assessors evaluated the development of 163 four-year-olds, then guessed which children were exposed to cocaine *in utero* and which were not. Assessors assumed that children with lower scores were exposed and that those with higher scores were not, resulting in 37% of children who were exposed being misclassified as unexposed and 74% of those who were unexposed incorrectly classified as exposed. *See* Rose-Jacobs, Cabral, Posner, Epstein, Frank, *Do "We Just Know"? Masked Assessors' Ability to Accurately Identify Children with Prenatal Cocaine Exposure*, *Journal of Developmental & Behavioral Pediatrics*, 23(5):340-346, October 2002.

#### **IV. Functions, Quantities, Purity, Prices**

The Commission has asked about distribution patterns, dealer functions, quantities, prices and purity levels. The Commission should not retain or support any sentencing differential between crack and powder cocaine based on assumptions that certain quantities, purities and/or prices are handled by persons occupying certain functions for different forms of cocaine. The Commission should equalize cocaine penalties at the powder cocaine level.

Differences in quantity purportedly corresponding with different functions in crack cases are not meaningful for several reasons. What constitutes a more or less culpable function is unavoidably imprecise and subjective, differences in quantity attributed to different functions are too small, and both the quantity and the type of cocaine are subject to manipulation and happenstance. For its 2002 Report, the Commission defined various offender functions, to some extent independent of quantity, read the narrative in the offense conduct section of the pre-sentence report to determine what function the defendant had, then determined the median quantity for each function. *See* 2002 Report at 36, 45, Table C1. Other than the 2962-gram amount for high-level suppliers, the median quantities for the other functions in crack cases were extremely close to one another. *Id.* at 45, Fig. 10. Given that the differences were so small, that the amount of crack can be easily increased by holding out for a larger amount or stringing together small sales, and that defendants are often led to obtain crack instead of powder



or to convert powder to crack, reliance on distinctions in quantity associated with different subjectively-defined functions at any given time would be a mistake.

For example, the Commission’s 2002 data indicated that the median amount for those defendants it had identified as managers/supervisors was 253 grams. *See* 2002 Report at 36, 45, Table C1. On that basis, I testified that 250 grams should be the cut-off between a mid-level and a low-level dealer. However, a street-level dealer can easily be involved with quantities at or above 250 grams. For example, I currently represent 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 sold 188 grams of crack to an undercover officer in multiple sales over a one-month period. The amount would have been higher, except that my client became suspicious of the undercover officer, at which point he was arrested and charged. Moreover, an undercover agent could easily arrange to buy 250 grams or more from a small-time dealer in one transaction.

Furthermore, a true high-level dealer is a person who imports a large quantity of powder before it is ever cooked into crack. A sentencing differential based on different thresholds for powder and crack would fail to take that into account and therefore perpetuate the inversion problem. Moreover, I do not believe there is a meaningful category of a crack “wholesaler.” Wholesale distribution occurs before the powder is cooked into crack. In discussing with staff what it had in mind by a wholesaler, we were told that it might be a person who sold an ounce of crack at a time and did not supervise others. Defining a “wholesaler” in this way would mean the government could convert a street-level dealer of powder cocaine into a “wholesaler” of crack cocaine by inducing a seller of an ounce of powder cocaine to sell an ounce of crack cocaine, as in the Massachusetts case described above.

The following chart demonstrates that there is no meaningful difference in the number of doses, purity, or price at different quantity levels between crack and powder cocaine. Prices and purity are those for 2003 taken from Tables 1-4 of the Office of National Drug Policy Control’s Report, *The Price and Purity of Illicit Drugs, 1981 Through the Second Quarter of 2003* (November 2004).<sup>16</sup> The number of doses are taken from the Commission’s previous reports.

	<b>Powder</b>	<b>Crack</b>
Quantity	1 gram	1 gram
-Number of doses	5-10	2-10
-Price at this quantity	\$107	\$74
-Purity at this quantity	.70	.69
Quantity	5 grams	5 grams
-Number of doses	25-50	10-50

<sup>16</sup> Available at [http://www.whitehousedrugpolicy.gov/publications/price\\_purity/results.pdf](http://www.whitehousedrugpolicy.gov/publications/price_purity/results.pdf).

-Price at this quantity	$\$70.52 \times 5 = \$353$	$\$74 \times 5 = \$370$
-Purity at this quantity	.67	.69
Quantity	25 grams	25 grams
-Number of doses	125-250	50-250
-Price at this quantity	$\$44 \times 25 = \$1100$	$\$47 \times 25 = \$1175$
-Purity at this quantity	.62	.59
Quantity	50 grams	50 grams
-Number of doses	250-500	100-500
-Price at this quantity	$\$44 \times 50 = \$2200$	$\$47 \times 50 = \$2350$
-Purity at this quantity	.62	.59

Defendants at each quantity level should be sentenced the same, with differences taken into account by the criminal history rules, weapons adjustments or charges, role in the offense, and so on.

#### V. What if anything has changed?

The percentages of black, white and Hispanic defendants being prosecuted for crack offenses has remained essentially the same since 2000: Over 80% of crack defendants are black, less than 10% are white, and less than 10% are Hispanic. *See* U.S. Sentencing Commission, Sourcebook of Federal Sentencing Statistics, Table 34 (2000-2005). As before, though crack offenses involve quantities orders of magnitude lower than powder defendants, *id.*, Table 42, the average sentence length for crack offenders continues to be approximately one and a half times that for crack offenders. *Id.*, Figure J.

Judges have exercised their post-*Booker* discretion to reduce sentences in 14.7% of crack cases, as compared to 6.2% pre-Protect Act and 4.3% post-PROTECT Act. *See* U.S. Sentencing Commission, *Final Report on the Impact of United States v. Booker on Federal Sentencing* at 128 (March 2006). However, the majority of judges decline to do so based on the misunderstanding of some courts of appeals that judges are not free to disagree with policy choices reflected in the guidelines, no matter how misguided the Commission itself says they are.<sup>17</sup>

The percentage of defendants at each quantity level shown in Table 42 of the Sourcebook has stayed fairly constant, except that the percentage of defendants at the highest level of 1500 grams or greater has decreased from 6% in 2000 to about 4-4.5% in succeeding years. The percentage of crack offenders receiving aggravating role adjustments has fallen every year since 2000. *See* U.S. Sentencing Commission, Sourcebook of Federal Sentencing Statistics, Table 40 (2000-2005). This could mean

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<sup>17</sup> If the oral argument in *Cunningham v. California*, No. 05-6551, is any indication, that misunderstanding may soon be dispelled.

that the government is focusing even less on high-level offenders, or that there are fewer high-level offenders.

Table 42 does not indicate whether the 70% of cases not shown there involve less than 50 grams or more than 149 grams, making the data less than useful. Some Defenders report fewer large quantity crack cases. Many Defenders report sentencing manipulation. In my experience, the vast majority of crack offenders are still low-level offenders, regardless of whether their sentences are based on less than 50 grams or more than 149 grams.

## **VI. Public Opinion**

Ten years after the disparate ratio went into effect in the statute and in the guidelines, a public opinion survey conducted on the Commission's behalf showed that the public disagrees with the harshness of drug sentences generally and with the harsher treatment of crack cases. According to the study:

The strongest sentencing disagreements occur over drug trafficking crimes: The guidelines call for drug trafficking sentences that vary according to the type of drug sold, roles played in the crime and the amount of drugs involved. In contrast, respondents did not make such distinctions nor did they weigh these crime elements the same way as do the guidelines. The result is strong differences in sentencing drug trafficking crimes with the guideline sentences being much harsher. . . . [R]espondents did not treat trafficking in heroin, powder cocaine or crack cocaine very differently from each other. . . . Median sentences for trafficking in crack cocaine, powder cocaine, and heroin all topped out at about 12 years, even for defendants with four prior prison terms. . . . For possession of crack cocaine, powder cocaine, and heroin, average sentences were about a year.<sup>18</sup>

With the Bureau of Prisons operating at 40% overcapacity, and with drug sentences the primary cause, I suspect that public support for warehousing non-violent drug offenders of any type, especially under a racially disparate scheme, would be at an all-time low.

## **VII. The States Have Not Adopted the Federal Crack/Powder Sentencing Structure.**

In its 2002 Report, the Commission noted that the vast majority of states do not distinguish between powder and crack cocaine. At that time, there were only fourteen states that had some form of disparity. Since then, in 2005, Connecticut eliminated its

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<sup>18</sup>Peter H. Rossi & Richard A. Berk, U.S. Sentencing Commission, Public Opinion on Sentencing Federal Crimes (1997), [http://www.ussc.gov/nss/jp\\_exsum.htm](http://www.ussc.gov/nss/jp_exsum.htm).

disparity.<sup>19</sup> In 2003, Vermont enacted a statute under which a person convicted of possessing 60 grams or more of powder is subject to a statutory maximum of ten years and a person convicted of possessing 60 grams of crack is subject to a statutory maximum of thirty years.<sup>20</sup> None of the states has a 100:1 disparity except Iowa, which distinguishes for purposes of the statutory maximum only. The disparities in the other thirteen states range from 2:1 to 12:1, with only Missouri anywhere close to the federal disparity at 75:1. It also appears that unlike the federal system, few if any states impose different punishment on crack and cocaine offenders at all quantity levels and for all purposes in both mandatory minimum statutes and sentencing guidelines. *See* 2002 Report at 73-81.

### **VIII. Recommendations**

- Cocaine penalties under the guidelines should be equalized at the powder cocaine level. There is no scientific, medical, or law enforcement justification for any differential. Further, any disparity would continue to provide an incentive for agents and informants to create more serious drug crimes, lengthen sentences, and waste taxpayer dollars.
- The Commission should recommend that Congress equalize the mandatory minimum thresholds as well. In 2002, the Commission recommended that Congress increase the five-year mandatory minimum threshold for crack to at least 25 grams and the ten-year threshold to at least 250 grams. These thresholds are too low. Twenty-five grams of crack is indicative of a low-level dealer. Two hundred and fifty grams is indicative, at most, of a mid-level dealer. Moreover, any disparity creates the incentive for agents and informants to induce their targets to convert relatively small amounts of cocaine powder into crack. That incentive is indefensible and should be removed.
- Particular harms can be addressed by existing guideline provisions. New enhancements should not be added, first because drug sentences are if anything already too high, and second because the Commission has pledged to simplify the guidelines.
  - Dangerous weapons are already covered through the two-level enhancement in § 2D1.1(b)(1), the four-level enhancement in §

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<sup>19</sup> The Real Cost of Prisons Weblog, CT: Gov. Signs Law to Help Correct Racial Injustice in Sentencing, [http://realcostofprisons.org/blog/archives/2005/07/ct\\_gov\\_signs\\_la.html](http://realcostofprisons.org/blog/archives/2005/07/ct_gov_signs_la.html).

<sup>20</sup> 18 V.S.A. § 4231. We note that the ACLU in its report includes Utah as having a disparity. However, it does not appear that Utah punishes possession or distribution of cocaine powder differently from possession or distribution of crack. The statute cited, U.C.A. 1953 § 58-37d-5, provides that under certain circumstances, production of any of a number of controlled substances, *see* U.C.A. 1953 § 58-37d-3, in a clandestine laboratory is a first degree felony, and the sentence may not be probation and may not be suspended.

2K2.1(b)(6), and through a separate § 924(c) charge. The Commission should not include the complex series of adjustments tied to problematic definitions (*e.g.*, brandished, otherwise used, etc.) suggested in the 2002 Report.

- The Commission can suggest a departure for bodily injury. It should not add the complex set of adjustments for various levels of bodily injury suggested in the 2002 Report.
- Use of a minor is covered by § 3B1.4.
- Sales to pregnant women, to minors and in a protected location can be charged under applicable statutes and sentenced under § 2D1.2.
- There is no justification, as suggested in the 2002 Report, for adding any further enhancement for a repeat felony drug trafficking offense. Though African-Americans comprise only 15% of the country's 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.<sup>21</sup> This is an unfortunate result of racial profiling and/or the fact that drugs are sold and used on the street in the inner city, while they are sold and used indoors in the suburbs. *See Fifteen Year Report* at 133-34. As a result, African Americans already have higher criminal history scores, are sentenced more often under the career offender guideline, are subjected to higher mandatory minimums for prior drug trafficking felonies under 21 U.S.C. § 841, and are disqualified from safety valve relief. Adding a further enhancement for a repeat felony drug trafficking offense would double count this form of racial disparity.
- Nor is there any justification for enhancing a sentence for the absence of a mitigating role, as suggested in the 2002 Report.
- The Commission should also recommend that Congress repeal the mandatory minimum for simple possession of crack.

On behalf of the Federal Public and Community Defenders, I thank you again for this opportunity to present our views on why and how federal cocaine sentencing policy should be changed.

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<sup>21</sup> See Interfaith Drug Policy Initiative, *Mandatory Minimum Sentencing Fact Sheet*, [http://idpi.us/dpr/factsheets/mm\\_factsheet.htm](http://idpi.us/dpr/factsheets/mm_factsheet.htm).