



Testimony of Marc Mauer Executive Director The Sentencing Project

**Prepared for the House Judiciary
Subcommittee on Crime, Terrorism, and
Homeland Security**

**Hearing on Unfairness in Federal Cocaine
Sentencing: Is it time to Crack the 100 to 1
Disparity?**

May 21, 2009

Thank you for the opportunity to testify on the issue of the sentencing disparity between crack cocaine and powder cocaine. I am Marc Mauer, Executive Director of The Sentencing Project, a national non-profit organization engaged in research and advocacy on criminal and juvenile justice policy issues. In the area of drug and sentencing policy, I have published broadly, engaged with policymakers nationally, and have frequently presented testimony before Congress and state legislative bodies.

The Sentencing Project has long been engaged in research and policy advocacy regarding federal cocaine sentencing. Our organization has published a series of policy analyses on the issue, delivered testimony before the United States Sentencing Commission (“Commission”), and submitted two amicus briefs to the United States Supreme Court on issues of sentencing in crack cocaine cases. I would like to take the opportunity in this written testimony to identify the fundamental inequities that uniquely exist within the federal drug laws for crack cocaine, as well as the inefficiencies in enforcement operations that result from these laws. I urge the members of this Committee and Congress to pass legislation to restore faith and fairness to a sentencing policy that has garnered near universal condemnation for more than two decades.

PRISON POPULATION EXPANDS WITH CHANGES IN DRUG POLICY

For more than a quarter century the “war on drugs” has exerted a profound impact on the structure and scale of the criminal justice system. The changes in sentencing and enforcement for drug offenses have been a major contributing factor to the historic rise in the prison population. From a figure of about 40,000 people incarcerated in prison or jail for a drug offense in 1980, there has since been an 1100% increase to a total of 500,000 today. To place some perspective on that change, the number of people incarcerated for a drug offense is now greater than the number incarcerated for *all* offenses in 1980.

The increase in incarceration for drug offenses has been fueled by sharply escalated law enforcement targeting of drug law violations, often accompanied by enhanced penalties for such offenses. Many of the mandatory sentencing provisions adopted in both state and federal law have been focused on drug offenses. At the federal level, the most notorious of these are the penalties for crack cocaine violations, whereby low-level crack offenses are punished far more severely than powder cocaine offenses, even though the two substances are pharmacologically identical. Despite changes in federal sentencing guidelines, the mandatory provisions still in place require that anyone convicted of possessing as little as five grams of crack cocaine (the weight of two sugar packets) receive a five-year prison term for a first-time offense.

The dramatic escalation of incarceration for drug offenses has been accompanied by profound racial and ethnic disparities. African Americans comprise 13 percent of the United States’ population and 14 percent of monthly illegal drug users, but represent 37 percent of persons arrested for a drug offense and 56 percent of persons in state prison for a drug conviction.

Despite the recent findings in The Sentencing Project's report, "The Changing Racial Dynamics of the War on Drugs," that between 1999 and 2005 state incarceration of African Americans for drug offenses declined 21.6 percent, perhaps due to a decline in the crack cocaine market, the same is not true for the federal system. Indeed, the number of federal prosecutions for crack offenses remains substantial, and the overall number of people in federal prison for a drug offense rose by 32.7% from 1999 to 2005. Racial disparities persist, with African Americans constituting more than 80% of the people convicted of a federal crack cocaine offense.

THE CASE OF CRACK COCAINE

In 1986 when Congress passed the Anti-Drug Abuse Act, the stated intent of the cocaine sentencing structure was to ensure mandatory sentences for major and serious traffickers – heads of drug organizations and those involved in preparing and packaging crack cocaine in “substantial street quantities.” Congress calibrated the sentencing structure based on drug quantities that were believed to reflect the different roles in the drug trade, but in its effort to swiftly address rising concern over crack cocaine, the penalty structure became dramatically skewed. The rationale voiced at the time was that the smokable form of cocaine was more addictive, presented greater long-term consequences of use, and had a stronger association with violence in its distribution than the powder cocaine market. History has proven these concerns to be unfounded, yet Congress has remained silent.

Indeed, the actual differences between the two substances are far more subtle. Crack and powder cocaine share the same pharmacological roots, but crack cocaine is cooked with water and baking soda to create a smokable, rock-like substance. Crack cocaine is sold in small quantities and is a cheaper alternative to powder cocaine. However, crack and powder are both part of the same distribution continuum. Crack is, by definition, at the lower-level end of the distribution spectrum where small batches of powder cocaine are processed and sold in an inexpensive, smokable form.

The emergence of the crack cocaine market in the 1980s in a number of major urban areas was accompanied by massive media attention paid toward the drug’s meteoric rise and its associated dangers. A core component of the media coverage was the thinly-veiled (and unfounded) link between the drug’s use and low-income communities of color. In a matter of weeks, crack cocaine was widely believed by the American public to be a drug that was sold and used exclusively by poor African Americans. This framing of the drug in class and race-based terms provides important context when evaluating the legislative response.

The resulting federal legislation punished crack cocaine with historically punitive sanctions. Crack cocaine is the only drug in which simple possession can result in a mandatory sentence to prison. A defendant convicted with five grams of crack cocaine – between 10 and 50 doses – will receive a five-year mandatory minimum sentence. To receive the same sentence for a powder cocaine violation, a defendant would have to have been involved in an offense involving 500 grams – between 2,500 and 5,000 doses. This is commonly referred to as the “100-to-1 sentencing disparity.” In order to trigger a 10-year mandatory sentence, a defendant would need to be charged with 50 grams of crack cocaine – between 100 and 500 doses – or 5,000 grams of powder cocaine – up to 50,000 doses. The quantity levels associated with the two drugs codify an equivalency of punishment for low-level crack cocaine sellers and high-level powder cocaine traffickers.

On average, crack cocaine defendants do not play a sophisticated role in the drug trade. Nearly two-thirds (61.5 percent) of crack cocaine defendants were identified as a street-level dealer, courier, lookout, or user. Among powder cocaine defendants, this proportion was 53.1 percent. Although the distribution of offender roles is similar between the two substances, the median quantity and applicable mandatory minimum are vastly different. The median quantity for a crack cocaine street-level dealer is 52 grams, which triggers a ten-year mandatory sentence. For a powder cocaine street-level dealer, the median quantity is 340 grams, which would not even expose a defendant to a five-year mandatory sentence. This disparity has led the Sentencing Commission to conclude that crack cocaine penalties “apply most often to offenders who perform low-level trafficking functions, wield little decision-making authority, and have limited responsibility.” The Commission has further remarked that “[r]evising the crack cocaine thresholds would better reduce the [sentencing] gap than any other single policy change, and it would dramatically improve the fairness of the federal sentencing system.”

Harsher penalties for crack cocaine offenses are sometimes supported because of the perception that crack is more likely to be associated with violence than powder cocaine. However, this is not supported by the evidence and subverts the goal of

proportionality in sentencing. While there was a significant level of violence associated with crack after its introduction to urban areas in the 1980s, that violence was a function of the new drug markets and “turf battles,” rather than any effect of the drug itself. Additionally, because of inappropriate assumptions about crack cocaine and violence being implicit in the statute, crack cocaine defendants are essentially sentenced for conduct in which they did not engage or face a penalty that takes into consideration the same conduct twice.

Data from the Sentencing Commission now document that a majority of both crack and powder cocaine offenders do not engage in any associated violence, such as bodily injury or threats, and any distinction between the two drugs is not sufficient to warrant additional penalties. An analysis of federal cocaine cases for 2005 demonstrates that 73% of powder cocaine offenses and 57.3% of crack cocaine offenses did not involve a weapon, and that only in a small number of cases (0.8% for powder and 2.9% for crack) were weapons used by the offender.

Violent behavior by drug offenders should be treated seriously, but the sentencing guidelines already provide sufficient opportunity for judges to penalize such conduct. By making the inappropriate assumption that a crack cocaine offense is categorically linked with violent behavior, the statutory penalty leads to one of two key errors. First, individuals who have not engaged in any associated violent conduct are subjected to a penalty structure that presumes uncommitted conduct. Second, for persons who have been charged with a concurrent violent offense, the 100:1 ratio is tantamount to a “double counting” of the charged conduct, thereby exposing defendants to disproportionately severe punishments. The federal criminal code already has a wide range of penalties and enhancements for violent conduct at the disposal of prosecutors and the circumstances of the individual case should govern their applicability.

CRACK COCAINE AND THE AFRICAN AMERICAN COMMUNITY

The impact of crack cocaine policy on the African American community has been devastating. While two-thirds of regular crack cocaine users in the United States are either white or Latino, 80 percent of persons sentenced in federal court for a crack cocaine offense are African American. Thus, African Americans disproportionately face the most severe drug penalties in the federal system.

These racial inequities have come as the result of deliberate decisions by policymakers and practitioners. When crafting mandatory minimum sentences, Congress had sought to establish generalized equivalencies in punishment across drug types by controlling for the perceived severity of the drug via the adjustment of quantity thresholds. However, in practice, sentences are frequently disproportionately severe relative to the conduct for which a person has been convicted because mandatory minimum sentences rely upon the quantity of the charged substance as a proxy for the degree of involvement of a defendant in the drug offense. Thus, the sentencing statutes function as blunt instruments of punishment that are ineffective at appropriately assessing and calibrating sentences based on the specific circumstances of the charged crime.

Since their introduction, mandatory minimum sentences have consistently been shown to have a disproportionately severe impact on African Americans. A study by the Sentencing Commission found that African Americans were 21 percent more likely to receive a mandatory minimum sentence than white defendants facing an eligible charge. A separate study by the Federal Judicial Center also concluded that African Americans faced an elevated likelihood of receiving a mandatory minimum sentence relative to whites. More recently, the Commission, in a 15-year overview of the federal sentencing system, concluded that “mandatory penalty statutes are used inconsistently” and disproportionately affect African American defendants. As a

result, African American drug defendants are 20 percent more likely to be sentenced to prison than white drug defendants.

The Commission observed that federal sentencing changes in the 1980s, notably in the guise of mandatory minimum sentencing and sentencing guidelines, have had “a greater adverse impact on Black offenders than did the factors taken into account by judges in the discretionary system immediately prior to guidelines implementation” and that there is some question as to “whether these new policies are necessary to achieve any legitimate purpose of sentencing.” In other words, the cure has proven to be worse than the disease.

CONCLUSION

Although federal crack cocaine laws were forged with the intent of targeting high-level traffickers engaged in international and interstate drug distribution, an enterprise ill-suited for state and local law enforcement for obvious jurisdictional reasons, more than two decades of practice have clearly demonstrated that the laws are excessive and ineffective. The small quantity triggers for crack cocaine mandatory sentences subject street-level sellers of crack cocaine to sentences similar to those for interstate powder cocaine dealers. And those convicted with slightly higher quantities of crack cocaine, although still considered local sellers, receive average sentences longer than international powder cocaine traffickers.

Restoring fairness to the cocaine sentencing structure requires Congress to equalize the penalties for crack and powder offenses without increasing the current mandatory sentences. Harsh mandatory drug penalties have not protected communities or stopped drug addiction. Moreover, the Commission cautioned Congress in 2007 against any reduction in the quantity trigger for the powder cocaine mandatory minimum, “as there is no evidence to justify such an increase in quantity-based penalties for powder cocaine offenses.” Legislative efforts to address sentencing reform with incremental approaches that do not root out the fundamental unfairness of the cocaine disparity will fall short of justice. I urge this Committee and the entire Congress to support elimination of the 100 to 1 sentencing disparity and to end the harsh mandatory minimum penalties for low-level crack cocaine offenses.



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