

STATEMENT OF

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SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND
SECURITY

HEARING ENTITLED
“UNFAIRNESS IN FEDERAL COCAINE SENTENCING: IS IT TIME TO
CRACK THE 100 TO 1 DISPARITY?”

PRESENTED
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To Chairmen Conyers and Scott, and the distinguished members of this Subcommittee – thank you for giving me the opportunity to appear before you today to share my view on the important issue of the disparities in our federal cocaine sentencing laws.

I practiced law for over 30 years, 25 of those years in the criminal justice system. I have served as an assistant public defender, private defense attorney, assistant district attorney general, juvenile court referee judge and as United States Attorney for the Western District of Tennessee (1993-2001). In 2001 along with 12 of my former U.S. Attorney colleagues as my board of directors, I founded the National Institute for Law and Equity (NILE), a public policy institute whose mission is raising discussion and understanding of our criminal and juvenile justice systems and their impact on us as a society. Given the knowledge that we have today about crack and powder cocaine it is our belief that the current disparity in sentencing should be reduced to a 1:1 ratio. This is not only consistent with good policy, but also good politics.

I recognize that this committee has received substantial data and anecdotal information about the impact of the sentencing disparity between crack and powder cocaine. But, not much has been said about the impact on the African American community and I hope that through these hearings we will begin to understand how devastating this has been on generations of children in the African American community and that too many now view incarceration as a normative rite of passage. We not only need to end the disparate sentences but we also need to ensure some means of prevention, intervention and healing for those affected by incarcerated parents. Having said that, my remarks here today are limited to my experiences in the criminal justice system and not the juvenile justice system.

Prior to leaving the U.S. Attorney's Office, I was invited to participate in a Department of Justice National Institute of Justice think tank on "Why people don't trust the justice system?" I was the only U.S. Attorney in the session and the majority of participants were from the education and civic communities. On the subject of drug prosecutions, the think tank participants discussed the disparity in crack and powder cocaine cases as

posing a major reason for the lack of trust in the justice system within the minority community. When it was pointed out that there appeared to be two separate paradigms in drug prosecutions: a law enforcement paradigm for African Americans and other minorities and a health care paradigm for whites, a senior researcher for the group, not only agreed that our system of justice is based upon those two separate paradigms in drug prosecutions, but generally for all crimes.

It is unfortunate that it is in the minority communities where crime generally and low level sales particularly are a plague on the law abiding citizens. As a result, while residents did not like the criminal activity in their neighborhoods they were often reluctant to call upon the police because they knew that the enforcement of the laws were unfairly focused on minorities, especially when it came to cocaine. And we ask "Why don't people trust the justice system?" We all agreed that systemic distrust is unhealthy for a safe and just society.

I have worked with many law enforcement officers over the years who are dedicated to protecting and serving their communities. But, let's look at the practical side of the life of a police officer or federal agent assigned to drug task forces. They want to do their jobs and if they are measured by the numbers of arrests they make, they will make a lot of arrests. There are strong incentives for cops to make large numbers of arrests to demonstrate that they are doing what the citizenry demands, knowing that these efforts will do little or nothing to stop drug trafficking.

I have witnessed drug stings that were solely focused on housing projects where sales were to people driving up in cars from outside of that community. And, arresting low level street dealers selling crack is like shooting fish in a barrel. On the other hand, going after major sellers and users of powder cocaine often means taking the time to develop leads in order to obtain search warrants for upscale homes and then face long drawn out court battles with highly paid attorneys which meant lower arrest stats and questions from the citizenry about not going after the really bad guys...a euphemism for blacks... instead of those afflicted with addiction...a euphemism for whites.

The joint task forces also had the added leverage of giving the low level dealer a choice between state and federal prosecution if he/she were willing to lead them to the "kingpin". The problem with this strategy was that low level street dealers seldom knew the top dealers, so, the lowest level dealers received some of the harshest sentences. If they could give up someone above them in the food chain, then they would likely receive consideration on their sentence. Most could not and the harsh sentence in the federal system sent first offenders with 5 grams of crack to 5 years in prison instead of probation...the likely sentence in the state system for a first offender with the same quantity of drugs.

As U.S. Attorney and chief law enforcement officer for 22 counties, I worked with all of the law enforcement agencies, local, state and federal, to ensure that our limited federal resources were focused on the most pressing problems in our communities. I recognized early in my tenure, that we were spending considerable attorney resources on street drug crimes that I prosecuted as an Assistant District Attorney and not the serious and major drug traffickers that were the intended targets under the Federal Anti-Drug Abuse Act of 1986 and 1988. After reviewing the issues with the Chief Assistant United States Attorney of our drug task force, some of our judges and our district's DEA's Special Agent in Charge, I made the decision that our office would not take 5 gram crack cases that were prosecutable in state courts. We increased our minimum prosecution guidelines of crack cases to 50 grams. Notwithstanding the fact that our efforts focused on major drug dealers including cartels, even the 50 gram guideline paled in comparison to the large quantity of drugs that is shipped into our country on a daily basis.

And, yes, I was challenged by one reporter of not prosecuting as many cases as some of my predecessors. I pointed out to him the number of defendants on a single indictment demonstrated reaching the organization as opposed to pursuing ten indictments against low level individuals. As an Assistant District Attorney and as the U.S. Attorney I was known as being both tough and fair. I firmly believe that it is not the duty of a prosecutor to simply obtain convictions by the numbers, but to do justice. As U.S. Supreme Court

Justice Sutherland, in *Berger v. United States*, 295 U.S. 78, 88 (1935) said:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor — indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

The pressure to obtain convictions in order to appear to be tough on crime is not doing justice. It may be good politics to stand before the public and parade a hundred defendants who possessed 5 grams of crack cocaine and claim that their 5 year mandatory minimum sentence was going to make the community safer. But, it is not good public policy when you know that the average defendant is poor, black, undereducated, and unskilled and will return to the community angry at the obvious disparity in the prison and jails and unable to get a job no matter how much he/she wishes to earn a living by legal means.

And to add insult to injury, we no longer forgive people who have “paid their debt to society”. So, what exactly do we expect them to do?

To those citizens in our communities who are unsympathetic with the fact that someone goes to jail for a crime, let me be clear, I was never called soft on crime. I am the first to say that people who commit crimes should be punished for their criminal activity. But, bringing criminals to the bar of justice also means treating them fairly and equally. Therefore, I do not believe that the average citizen, given what we know today, would agree that there is equal justice in sending one person to prison for 5 years for possessing 5 grams of crack cocaine and another receiving the same sentence for possessing 500 grams of powder cocaine.

How much longer will it take to correct a by now well known and understood mistake in our system of justice? After more than 20 years, multiple studies debunking the myths, recommendations from the United States Sentencing Commission and at least two generations of

families and children torn by the systemic imposition of imprisonment for one 100th the amount of cocaine than their white counterparts, it is surely not only good policy but also good politics to correct this injustice.

Or, from a former prosecutor's perspective the elimination of this unjust disparity is what Truth dictates and Justice demands.

Thank you for conducting these hearings and allowing me to speak to this important issue.