

Testimony of

The Honorable Charles J. Hynes

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Mr. Chairman and members of the Committee good morning and thank you for the invitation to testify about this very important criminal justice issue.

For the record, my name is Charles J. Hynes, and I have served as the elected District Attorney of Kings County, in Brooklyn, New York since 1990. By way of brief background my county has a population of 2 and ½ million people. It is the most populous county of New York State's 62 counties, and the seventh largest county in the United States. Last year my office prosecuted over 6,000 felony cases, and although approximately 2,150 were for the possession or sale of drugs, a large percentage of the nearly 4000 other felony cases were drug related. With me is my Counsel Anne Swern, who is the Director of our Drug Treatment Alternative to Prison Program, and Hillel Hoffman, my Legislative Director.

My mandate as a State Prosecutor in narcotics enforcement is to prosecute crimes under New York's Rockefeller Drug Laws.

Our history with drug enforcement parallels that of Sections 841, 844 and 961 of 21 U.S. Code. Mr. Chairman, I have no doubt that when Congress amended these sections to impose lengthy sentences for crack cocaine, it was reacting to the sheer horror of the crack epidemic, which had devastated so many inner city communities. Our Legislature also amended the Penal Law in 1988 to include crack cocaine in our Rockefeller Drug Laws.

The Rockefeller Drug Laws, created in 1973, with several sentences of life imprisonment for possession or sale tied to the weight of a narcotic substance, are reputed to be among the toughest drug laws in the nation. But the Rockefeller Drug Laws do not treat first time crack offenders with the same severity as federal law.

Under the Rockefeller Drug Laws the possession of 500 milligrams of crack cocaine is a class D felony, punishable by up to seven years in state prison. However, for a first offense the court the court has several options - it can place the defendant on probation or it can impose a definite sentence of one year in a local jail.

A New York defendant who is convicted of possessing five grams of crack would be guilty of a C felony, with a maximum penalty of five to fifteen years. But unlike an offender convicted under Section 844, a first time offender would also be eligible for a sentence of probation, and most first offenders receive this sentence.

In order for a first time offender in New York to receive a mandatory prison sentence for simple possession of cocaine, the aggregate weight of the substance containing cocaine must be at least one-half of an ounce, enough to produce 220 ten dollar vials or ziplocks of crack for a street sale value of \$2200. And this amount is almost three times greater than the five grams required under

the federal statute for a mandatory minimum sentence of five years. Or, the defendant can be convicted of possessing a lesser weight with intent to sell it. But the minimum penalty for these drug crimes, a B felony under our law, is a sentence of one to three years, or if the defendant is cooperating with the prosecution, a lifetime sentence of probation.

It is only when a first time New York defendant possesses much larger quantities of drugs that the longer sentences kick in.

For example, a New York defendant who is convicted of possessing two ounces of a substance containing cocaine will be subject to a minimum sentence of at least three years to life imprisonment, although no one serves a life sentence for that amount.

A defendant who is convicted of possessing four ounces of a substance containing cocaine (or for selling two ounces) will be subject to a minimum sentence of at least fifteen years to life imprisonment. It is this last category that has caused much of the controversy about the Rockefeller Drug Laws because it has resulted in drug mules and other middle level people receiving very long prison sentences. In a typical case in Brooklyn, a middle level dealer is someone who sells a few ounces, not kilos. Of course, even 4 ounces of cocaine can produce 1,600 ten-dollar vials or ziplocks of crack - for a street value of sixteen thousand dollars.

The New York picture changes significantly when a drug defendant is convicted of a second felony because our second felony offender law requires mandatory sentences of imprisonment for lower level weights.

So, for example, a New York defendant who is convicted of possessing 500 milligrams of crack cocaine, and who has a prior felony conviction for any crime, must receive a prison sentence of at least two to four years. A New York defendant whose second felony conviction is for possessing one-eighth of an ounce of a substance containing cocaine faces a mandatory prison sentence of at least three to six years. And a defendant whose second felony conviction is for possessing one-half of an ounce of a substance containing cocaine faces a mandatory sentence of at least 4 1/2 to 9 years in prison.

But despite these sentences which were in effect since 1973, by 1990 the crack epidemic had led Brooklyn to become the fifth most violent municipality, per capita, in the United States. One out of every 16 of our residents was the victim of a felony crime. In 1989, 686 people were murdered in Brooklyn, and in 1990 the number increased to 765. In one year alone, 1991, 151 children were murdered in Brooklyn, 129 of them by gunfire.

I can understand that as late as 1995 the Congress and President Clinton were reluctant to change the mandatory 5 year minimum prison sentence out of a concern that crack still had, and still does have, a devastating effect on communities.

But just as the passage of time has given us in New York State a new perspective about the Rockefeller Drug Laws, I would agree that a new perspective is needed about the federal drug laws.

Raising the threshold level for crack cocaine in the federal statutes to a higher amount for a minimum five year sentence, and keeping a one year sentence for lesser amounts, would place the federal statutes roughly on a par with the most serious drug offenses in New York State. Raising the threshold would also alleviate the same criticism of the federal statutes that has been leveled at the Rockefeller Drug Laws: that stiff sentences for small quantities of drugs have had a disproportionate impact on poor people in general and people of color in particular. As you are aware, Mr. Chairman, the Bureau of Justice Statistics Study of Federal Drug Offenders found that in 1997 about 86 percent of crack offenders in federal prisons were African-American and eight percent were Hispanic.

The United States Sentencing Commission figures for 2000 show that 84.7% of crack cocaine offenders were African American and nine percent were Hispanic. These figures also show that 66.5% of the crack offenders were street level dealers, and only ten percent were leaders, growers, manufacturers, financiers or money launderers.

These percentages roughly correlate to the percentages in New York State where it is estimated that 94 percent of the 19,000 drug offenders in our prisons - most of whom sold or possessed small quantities of drugs - are African American or Hispanic. Among the 3,100 women in the New York State prison system, the vast majority are also women of color who have been convicted of drug offenses.

This racial disparity cannot be ignored in administering our state and federal criminal justice systems. And whether it is the 100 to 1 ratio based on the weight of powdered cocaine versus crack cocaine (500 grams of powdered vs. 5 grams of crack - with the same sentence), or (the 5.4 to 1 ratio the Justice Department maintains on the basis of sentences for similar amounts of crack or powdered cocaine), the simple fact is that minority drug defendants are serving substantially longer prison sentences than non-minority defendants, although both populations have similar rates of drug abuse. The Sentencing Commission figures for 2000 show that an average sentence for crack cocaine is ten years, while the average sentence for powdered cocaine is six years five months.

And I do not believe that this problem will be solved by reducing the weight of powdered cocaine from 500 grams to a lesser amount for a five year sentence. This will not alleviate the unnecessarily long sentences served by low level street dealers, who comprise two-thirds of all crack offenders in the federal system.

By supporting the proposal to raise the weight for the five year minimum for crack cocaine I do not wish to suggest for one moment that possession of drugs should not continue to have serious criminal consequences. Drug dealing is an unacceptable outrage and I have no sympathy for drug dealers whose only motive is to make money out of other people's misery. In my County I do not plea-bargain with drug traffickers. I prosecute them to the fullest extent available under the Rockefeller Drug Laws.

I also believe that there can be a justification for mandatory sentences for drug offenses, if not used unfairly or harshly. In New York State the existence of mandatory prison sentences for second offenders has enabled me to establish a highly successful Drug Treatment Alternative to Prison Program called DTAP.

We started our program in 1990 with one of the toughest criminal populations to rehabilitate: chronic drug offenders who sold drugs to support their habit. We took this revolving door population and gave them a second chance to straighten out their lives if they were willing to undergo 15 to 24 months of rigorous, intensive residential drug treatment. I want to emphasize that this program is totally controlled by us. We carefully screen - accepting only about a 1/3rd of the applicants- we require a guilty plea, typically 3 to 6 years, and if a defendant fails the program, we have the sentence imposed.

Today, we can point with pride to the success of our program. More than 900 drug offenders have been helped by DTAP. Six hundred six have graduated and 308 are still in treatment. Our graduates have generated \$23 million of economic benefits to the taxpayers of New York State by lowering health, welfare and recidivism costs and by becoming taxpayers themselves.

At our annual graduation ceremony three weeks ago our guest speaker, Asa Hutchinson, the Director of the federal Drug Enforcement Agency, was visibly moved by the eloquence of our DTAP graduates. When Director Hutchinson was a member of Congress, he co-sponsored a DTAP bill that is similar to the DTAP section of your S. 304, the omnibus drug education, treatment and prevention bill which you, Mr. Chairman, Mr. Leahy, Mr. Hatch and other members of the Judiciary Committee have sponsored.

Our DTAP experience has proven that a tough, prosecution run treatment alternative can be operated with no threat to public safety. We have an enforcement team which apprehends 95% of our absconders within a median time of 14 days. We have a one year retention rate that is now as high as 80%, far above the national average. And the recidivism rate of our graduates is one-half the rate for eligible defendants who did not participate in the program and were sentenced to state prison.

I have always maintained that it makes no sense to warehouse nonviolent drug abusers in prison for long periods of time, only to have them return to a life of crime and drugs when they are released to the community. It is my hope that the Congress will enact our DTAP proposals this year and use them as a model for federal alternative programs as well as state alternative programs.

I think that any legislative changes which are contemplated in the federal statutes for a drug population that consists primarily of addicts who possess or sell drugs to support their habit should be accompanied by the enactment of mandated treatment alternatives to help rehabilitate this population.

Again, thank you for this invitation. I would be happy to respond to any questions.