

Testimony of

The Honorable Diana E. Murphy

May 22, 2002

Chairman Biden, members of the Subcommittee, I am Diana Murphy, Chair of the United States Sentencing Commission (the "Commission") and a judge on the Eighth Circuit Court of Appeals. I appreciate the opportunity to testify today about federal cocaine sentencing policy, and the Subcommittee should be commended for holding this important hearing. Although Congress and the Commission have been considering cocaine sentencing issues for a number of years, federal sentencing policy for cocaine traffickers has remained essentially unchanged since the current penalty structure was established by the Anti-Drug Abuse Act of 1986 (the "1986 Act").¹ This year the Commission placed this difficult issue on our agenda, in part because federal cocaine sentencing policy continues to be criticized by many, and in part because we sensed a renewed interest by members of Congress in exploring possible changes to the penalty structure. We received a letter from Senator Leahy and Senator Hatch specifically requesting the Commission to study the issues presented and to report back on its findings and recommendations. The Commission is also familiar with legislation introduced by Senator Sessions and Senator Hatch, Senate Bill 1847, the Drug Sentencing Reform Act of 2001, which would change the penalties for both powder cocaine and crack cocaine offenses.

In the course of our work this year, the Commission (i) reviewed findings from recent literature on specific issues such as the addictiveness of cocaine and the consequences of prenatal cocaine exposure; (ii) conducted an extensive empirical study of federal cocaine offenders sentenced in fiscal year 2000 and compared those results with the findings in the Commission's 1995 special report to Congress on federal cocaine sentencing policy;² (iii) surveyed state sentencing policies; (iv) considered public comment on the appropriateness of current federal cocaine sentencing policy; and (v) heard testimony at three separate public hearings from the medical and scientific communities, federal and local law enforcement officials, including the Department of Justice, criminal justice practitioners, academics, and civil rights organizations.

After carefully considering all of the information available, the Commission unanimously concluded that the cocaine penalty structure can be improved significantly to achieve more effectively the various congressional objectives outlined in the Sentencing Reform Act of 1984, the 1986 Act, and the 1995 legislation³ disapproving the prior Commission's guideline amendment addressing cocaine sentencing.⁴

Having reached that substantive conclusion, we faced the difficult threshold decision of determining how best to proceed. We considered promulgating an amendment to the guidelines and submitting it to Congress with the other guideline amendments we sent for congressional review on May 1, 2002. After consulting with a number of sources, including several members of the Subcommittee, the Commission unanimously agreed that at this time we can best facilitate congressional consideration of the proposed statutory and guideline changes by submitting recommendations to Congress first, and then working with Congress to implement appropriate modifications to the penalty structure. We believe Congress and the Commission now have the tools to effect even more appropriate and proportionate penalties for cocaine offenses. These

resources include a well settled sentencing guideline system that can account in a calibrated manner for variations in offender culpability and offense seriousness and updated comprehensive data about crack cocaine and crack cocaine offenders.

In that spirit we submit today a comprehensive report on federal cocaine sentencing policy and a number of concrete recommendations for congressional consideration regarding statutory and guideline modifications. The Commission recommends that Congress adopt the following three-pronged approach to revise federal cocaine sentencing policy:

(1) Increase the five year mandatory minimum threshold quantity for crack cocaine offenses to at least 25 grams, and the ten year threshold quantity to at least 250 grams (and repeal the mandatory minimum for simple possession of crack cocaine).

(2) Direct the Commission to provide appropriate sentencing enhancements in the primary drug trafficking guideline, USSG §2D1.1, to account for certain aggravating conduct.

(3) Maintain the mandatory minimum penalties for powder cocaine offenses at their current levels, with the understanding that the proposed guideline sentencing enhancements would apply to powder cocaine offenses.

With that background, I will highlight the Commission's most important findings, outline our recommendations and the estimated impact, and describe the amendment to the drug trafficking guideline submitted to Congress on May 1, 2002.

Background

Currently, 21 U.S.C. § 841(b)(1) requires a five year mandatory minimum sentence for trafficking five grams or more of crack cocaine or 500 grams of powder cocaine, and a ten year mandatory minimum sentence for trafficking 50 grams or more of crack cocaine or 5,000 grams of powder cocaine. In other words, it takes 100 times more powder cocaine than crack cocaine to trigger the same mandatory minimum penalties. It is this 100-to-1 drug quantity ratio that lies at the heart of the debate surrounding cocaine sentencing.

When the mandatory minimum penalties were first established, the Commission was still in the process of developing and promulgating a guideline system. The Commission responded to the 1986 Act by assigning sentencing guideline base offense levels which corresponded to the mandatory minimum penalties with adjustments upward or downward to account for all drug quantities.⁵ This approach caused the Commission to use the statutory 100-to-1 drug quantity ratio to set base offense penalties in the guidelines for all quantities of powder cocaine and crack cocaine.

Findings

The Commission concludes that the 100-to-1 drug quantity ratio is problematic for a number of reasons. The legislative history of the 1986 Act indicates that Congress generally intended that five year penalties would apply to "serious" traffickers, and ten year penalties would apply to "major" traffickers.⁶ Congress recognized that all drug trafficking offenses cannot be prosecuted at the federal level, and it established the mandatory minimum structure in part to create incentives to federal law enforcement to direct its "most intense focus" on major and serious traffickers.⁷

Contrary to the intent of Congress, the five and ten year mandatory minimum penalties most often apply to low level crack cocaine traffickers, rather than to serious or major traffickers. Commission sentencing data indicate that in 2000 the majority of federal crack cocaine offenders - two-thirds - were street-level dealers. (See Figure 1.) In contrast, only 5.9% of federal crack cocaine offenders performed trafficking functions (manager, supervisor) most consistent with those described in the legislative history of the 1986 Act as warranting a five year penalty. Only 15.2% performed trafficking functions (importer, high-level supplier, organizer, leader, wholesaler) most consistent with the functions described as warranting a ten year penalty. The relatively small quantity of crack cocaine required to trigger the mandatory minimum penalties appears to draw away prosecution of low level crack cocaine offenders from the states to the federal authorities. For both crack cocaine and powder cocaine, few cases involve drug quantities below the five year mandatory minimum threshold quantities. Cases tend to cluster around quantities that receive five and ten year penalties, but crack cocaine cases cluster at the ten year quantities to a significantly greater degree than powder cocaine cases. Of the 4,195 crack cocaine cases sentenced in 2000, 735 cases involved five to twenty grams, the quantities that receive a guideline base offense level that corresponds to the five year mandatory minimum penalty, and 1,148 cases involved 50 to 150 grams, the quantity that receives a guideline base offense level that corresponds to the ten year mandatory minimum penalty. In 2000, 1,083 federal crack cocaine offenses - representing over one-quarter (28.5%) of federal crack cocaine offenses - involved less than 25 grams of the drug. The importance of the five year trigger quantity in prosecutorial decisions is underscored by the fact that 72.7% (747) of those crack cocaine cases involving less than 25 grams involved between five and twenty grams, the quantities that receive the sentencing guideline range that corresponds to the five year mandatory minimum penalty. In contrast, only 2.7% of federal powder cocaine offenses involved less than 25 grams of the drug, no doubt influenced by the fact that the mandatory minimum penalties do not apply to offenses involving such small quantities of powder cocaine. Particularly problematic is the fact that crack cocaine offenders who traffick relatively small drug quantities receive especially disparate penalties in comparison to similar powder cocaine offenders. The Department of Justice recently reported that "crack defendants received higher average sentences than powder defendants, and that the ratio of crack to powder sentences was greater for lower amounts of cocaine than for higher amounts of the drug."⁸ Specifically, the Department reports that defendants convicted of trafficking less than 25 grams of crack cocaine received an average sentence 4.8 times longer than the sentence received by an equivalent powder cocaine defendant.⁹ Discussion of a "penalty ratio" masks the real and significant impact that the 100-to-1 drug quantity ratio has on sentences for those traffickers of relatively small quantities. Defendants convicted of trafficking less than 25 grams of powder cocaine received an average sentence of 14 months, just over one year. (See Figure 2.) In contrast, defendants convicted of trafficking an equivalent amount of crack cocaine received an average sentence of 65 months, over five years. Moreover, what is termed the "penalty ratio" widens even further to 8.3 to 1 for crack cocaine and powder cocaine offenders with the lowest drug quantities and the least criminal history (Criminal History Category I).¹⁰ For those offenders, the 100-to-1 drug quantity ratio results in average sentences of 33 months for crack cocaine offenders compared to four months for powder cocaine offenders with equivalent drug quantities. The Department reports that this heightened differential affected 1,637 crack cocaine defendants sentenced between 1996 and 2000. The Commission strongly believes that sentencing differentials of this magnitude are inappropriate

for the category of least culpable offenders and result in an ineffective use of limited federal prison space.

The legislative history of the 1986 Act also indicates that Congress established the 100-to-1 drug quantity ratio in part to account for certain more harmful conduct believed to be widespread in crack cocaine offenses, particularly systemic violence associated with its trafficking.

Commission sentencing data indicate, however, that certain aggravating conduct occurs in only a small minority of crack cocaine offenses. In fact, as Figure 3

demonstrates, the prevalence of many aggravating factors in crack cocaine offenses is infrequent and does not differ substantially from the prevalence in powder cocaine offenses.

For example, an important basis for the establishment of the 100-to-1 drug quantity ratio was the understanding that crack cocaine trafficking was highly associated with violence. More recent data indicate that significantly less systemic violence, as measured by weapon use and bodily injury, is associated with crack cocaine trafficking than was reported earlier. In 2000,

Commission sentencing data indicate that approximately two-thirds of crack cocaine offenders had no personal weapon involvement. (See Figure 3.) Even when crack cocaine offenders possessed weapons, they were rarely actively used (2.3%). Bodily injury of any type occurred in 7.9% of crack cocaine offenses in 2000. (See Figure 3.)

Recent Commission sentencing data on protected classes of individuals and locations also do not support previous concerns about the high prevalence of other aggravating conduct in crack cocaine offenses. In 2000, only 4.2% of crack cocaine cases involved minors in the offense, and very few - 0.5% - involved the sale of the drug to a minor. Only 4.5% of crack cocaine offenses occurred in protected locations such as near schools and playgrounds, and sales of crack cocaine to pregnant women were never documented. (See Figure 3.)

This data raises two principal concerns. First, to the extent that the 100-to-1 drug quantity ratio was designed to account for the type of harmful conduct described above, it sweeps much too broadly by treating all crack cocaine offenders as if they commit such

harmful acts, even though Commission sentencing data indicate most crack cocaine offenders in fact do not.

A second related problem is that because the current penalty structure focuses on drug quantity to account for culpability, the primary drug trafficking guideline lacks specific sentencing enhancements to target those offenders with aggravated conduct for especially severe penalties (with the exception of an existing 2-level sentencing enhancement for possession of a dangerous weapon). As a result, the penalty structure does not provide adequate sentencing proportionality. Put another way, the most serious crack cocaine offenders may not be getting the proportionate sentences that they deserve.

The Commission also believes that the 100-to-1 drug quantity ratio exaggerates the relative harmfulness of the two forms of cocaine. Cocaine is a powerful stimulant and in any form produces the same physiological and psychotropic effects. The two forms of the drug pose different typical risks of addiction, however. Smoking or injecting any drug, including cocaine, produces the greatest risk of addiction. Because powder cocaine usually is snorted, it tends to pose a lesser risk of addiction to the typical user than crack cocaine, which is smoked. However, injecting cocaine produces the same risk of addiction as smoking crack cocaine.¹¹ Differences in the addictive potential of the two forms of cocaine do not by themselves appear to warrant the 100-to-1 drug quantity ratio.

Congress also provided heightened penalties for crack cocaine offenses because of widespread

concerns regarding "crack baby syndrome." Recent research shows that the negative effects of prenatal crack cocaine exposure are identical to the negative effects of prenatal powder cocaine exposure and significantly less devastating than previously believed.¹² The negative effects associated with prenatal cocaine exposure are in fact similar to those associated with prenatal exposure to other illegal and legal substances, such as tobacco and alcohol. Since recent research reports no difference between the negative effects from prenatal crack cocaine and powder cocaine exposure, no differential based on this particular heightened harm appears to be warranted. In any event, sentencing proportionality would be better achieved by imposing enhanced sentences directly on the small minority of offenders who knowingly distribute drugs to pregnant women.

Congress also set heightened penalties for crack cocaine offenses because it feared that the drug's potency, low cost per dose, and ease with which it is manufactured and administered were leading to its widespread use, particularly by youth. Recent data indicate that the feared epidemic of crack cocaine use by youth never materialized. Crack cocaine use among 18 to 25 year old adults has historically been low. Between 1994 and 1998, on average less than 0.4% of those young adults reported using crack cocaine in the prior 30 days.¹³ Similar findings are reported for crack cocaine use by high school seniors. Between 1987 and 2000, on average less than 1.0% of high school seniors reported crack cocaine use within the prior 30 days.¹⁴ The Commission believes that persons selling any dangerous drug to our youth should receive appropriately severe penalties. But the small number of crack cocaine offenders identified as distributing to youth indicates that sentencing proportionality would be improved by imposing enhanced guideline sentences on the small minority of offenders who sell any type of drug to juveniles or distribute in areas likely to be frequented by juveniles (e.g., near schools and playgrounds).

Another key issue surrounding the debate concerning the different penalty structures for crack cocaine offenses and powder cocaine offenses relates to the racial composition of federal crack cocaine offenders. The overwhelming majority of offenders subject to the heightened crack cocaine penalties are African American, 84.2% in 2000. (See Figure 4.) This has contributed to a perception widely held in some communities that the current penalty structure for federal cocaine offenses promotes unwarranted disparity based on race.

The Commission is unable to evaluate this assertion scientifically. Nevertheless, the Commission finds even the perception of racial disparity to be problematic because it fosters disrespect for and lack of confidence in the criminal justice system among those very groups that Congress intended would benefit from the heightened penalties for crack cocaine offenses. One of the primary concerns of Congress was to protect poor and minority neighborhoods that were heavily afflicted by crack cocaine trafficking and its associated secondary harms. To the extent that many of those communities and their representatives now seek change in the federal penalty structure, that suggests a critical reexamination of the penalty structure is warranted.

Recommendations

(1) Increase the five year mandatory minimum threshold quantity for crack cocaine offenses to at least 25 grams, and the ten year threshold quantity to at least 250 grams (and repeal the mandatory minimum penalty for simple possession).

The Commission has unanimously concluded that the five year mandatory threshold quantity for crack cocaine offenses should be increased to at least 25 grams, and the ten year threshold quantity to at least 250 grams. The Commission believes that the penalty structure for crack cocaine offenses should more closely reflect the overall penalty structure established by the 1986

Act. Increasing the five year threshold quantity to at least 25 grams would provide a penalty structure significantly more consistent with the penalty structure of other major drugs which are abused.

If Congress were to increase the five year trigger quantity to 25 grams of crack cocaine, the sentencing guidelines would then assign a base offense level of 26 to offenses involving 25 to 100 grams of crack cocaine. Offense level 26 provides a guideline sentencing range of 63 to 78 months for defendants with minimal or no criminal history, and this would correspond to the five year mandatory minimum penalty. Federal law enforcement representatives have reported that mid-level crack cocaine traffickers deal in ounce or multi-ounce quantities and one ounce equals 28.5 grams.¹⁵ The Commission therefore believes that the trigger quantity of 25 grams and a base offense level of 26 would more closely fit serious traffickers as described in the legislative history of the 1986 Act.

Such a change could result in a more desirable distribution of federal cases by drug quantity, with a significant proportion of cases then involving more substantial quantities. The Commission also recommends that (1) Congress repeal the mandatory minimum penalty for drug possession that is unique to simple possession of crack cocaine, and (2) conform the statutory definition of cocaine base to the sentencing guideline definition.

(2) Direct the commission to provide appropriate sentencing enhancements to target offenders who actually engage in certain more harmful conduct, and to make those enhancements applicable to offenses across all drug types.

Sentencing guidelines provide Congress a more finely calibrated mechanism to account for variations in offender culpability and offense seriousness than was available at the time the 100-to-1 drug quantity ratio was established in 1986. Commission sentencing data indicate that many of the heightened harms that in part formed the basis for the 100-to-1 drug quantity ratio are committed by a small minority of crack cocaine offenders. These harms warrant additional punishment and the sentencing guideline system could target those individuals who engage in this aggravated conduct and substantially increase their prison sentences. The Commission believes that adding sentencing enhancements to the drug trafficking guideline to address those harms will better achieve sentencing proportionality than accounting for them in quantity-based penalties. Specifically, we recommend that Congress direct the Commission to provide appropriate sentencing enhancements for:

(1) Involvement of a dangerous weapon (including a firearm);

(2) Bodily injury resulting from violence;

(3) An offense under 21 U.S.C. §§ 849 (Transportation Safety Offenses); 859 (Distribution to Persons Under Age Twenty-One), 860 (Distribution or Manufacturing in or Near Schools and Colleges), and 861 (Employment or Use of Persons Under 18 Years of Age);

(4) Repeat felony drug trafficking offenders; and

(5) Importation of drugs by offenders who do not perform mitigating roles.

The Commission also proposes that these sentencing enhancements apply across all drug types, including powder cocaine, and not just to crack cocaine offenses.

(3) Maintain the mandatory minimum penalties for powder cocaine offenses at their current levels, with the understanding that the proposed enhancements would apply to powder cocaine offenses.

The Commission also unanimously concludes that a restructuring of federal cocaine sentencing policy should not include an increase in the mandatory minimum penalties for powder cocaine offenses. Some have proposed increasing the powder cocaine mandatory minimum penalties as a way to address the differential treatment of the two forms of cocaine, and others have suggested doing so to reflect more adequately the harmfulness of the drug and its status as the necessary precursor to crack cocaine.

After considering all of the information available, however, the Commission finds there is no persuasive evidence that the current quantity-based penalties for powder cocaine offenses are inadequate. At the Commission's public hearing on cocaine sentencing on March 19, 2002, Deputy Attorney General Larry Thompson agreed that he was not aware of any specific information indicating that existing powder cocaine penalties are too low.¹⁶

If powder cocaine penalties for some offenders should be raised, the Commission believes that the proposed enhancements would both increase penalties and promote sentencing proportionality. Those enhancements, if adopted, would increase the average sentences for those most culpable powder cocaine offenders who engage in such aggravating conduct by 29 months, from 79 months to 108 months.

Finally, the Commission is also mindful of the impact an increase in the mandatory minimum penalties for powder cocaine would have on minority populations, particularly Hispanics. One-half of federal powder cocaine offenders in 2000 were Hispanic, and 30.3% were African American. (See Figure 4.) The Commission does not want to create perceptions that could undermine confidence in a restructured federal cocaine sentencing policy.

Impact

The Commission believes that its suggestions are a modest proposal that would significantly improve the effectiveness of federal cocaine sentencing policy. The guideline sentencing ranges based solely on drug quantity for crack cocaine offenses still would be significantly longer (approximately two to four times longer) than for powder cocaine offenses involving equivalent drug quantities, depending on the precise quantity involved. The Commission finds that this differential is appropriate to account for certain systemic crime more often linked to crack cocaine than powder cocaine, such as prostitution.

The Commission estimates that the difference in average sentences for crack cocaine and powder cocaine offenses would narrow because of the effect of the decrease in average crack cocaine penalties and a corresponding increase in powder cocaine penalties. Specifically, the Commission estimates that the average sentence for crack cocaine would decrease from 118 months to 95 months, and the average sentence for powder cocaine offenses would increase from 74 months to 83 months.

Sentences for crack cocaine offenses would still remain the longest of the major drugs of abuse. (See Figure 5). Furthermore, the recommendations would not alter the current hierarchy of average sentences by drug type. Average sentences currently are the longest for crack cocaine offenses, followed by methamphetamine, powder cocaine, heroin, and marijuana offenses, respectively. The recommendation would preserve this order.

Conclusion

The Commission intends by the report it submits today to contribute in a meaningful way to the

ongoing assessment of cocaine sentencing policy by Congress. The Commission is eager to continue its work with you to develop the most appropriate and effective federal cocaine sentencing policy possible. We hope you will agree that our report and recommendations are significant steps toward that end.