

Testimony of
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Chairman Biden, Senator Graham, and members of the Subcommittee, I appreciate the opportunity to appear before you today to discuss federal cocaine sentencing policy.

As you are aware, the United States Sentencing Commission has been considering cocaine sentencing issues for a number of years and has worked closely with Congress to address the sentencing disparity that exists between the penalties for powder cocaine and crack cocaine offenders. Although the Commission took action this past year to address some of the disparity existing in the federal sentencing guideline penalties for crack cocaine offenses, the Commission is of the opinion that any comprehensive solution to the problem of federal cocaine sentencing policy requires revision of the current statutory penalties and therefore must be legislated by Congress. The Commission encourages Congress to take legislative action on this important issue, and it views today's hearing as an important step in that process.

Part I of this statement briefly summarizes the statutory and guideline penalty structure for crack cocaine offenses. Part II describes some of the findings of the Commission's May 2007 Report on Cocaine and Federal Sentencing Policy (the "May 2007 Report"). Part III sets forth the Commission's recommendations for statutory penalty revisions contained in the May 2007 report.

I. Statutory and Guideline Penalty Structure

The Anti-Drug Abuse Act of 1986 established the basic framework of statutory mandatory minimum penalties currently applicable to federal drug trafficking offenses. The quantities triggering those mandatory minimum penalties differ for various drugs and, in some cases (including cocaine), for different forms of the same drug.

In establishing the mandatory minimum penalties for cocaine, Congress differentiated between two principal forms of cocaine - cocaine hydrochloride (commonly referred to as "powder cocaine") and cocaine base (commonly referred to as "crack cocaine") - and provided significantly higher punishment for crack cocaine offenses based on the quantity of the drug involved in the offense. As a result of the 1986 Act, federal law requires a five-year mandatory minimum penalty for a first-time trafficking offense involving five grams or more of crack cocaine, or 500 grams or more of powder cocaine, and a ten-year mandatory

minimum penalty for a first-time trafficking offense involving 50 grams or more of crack cocaine, or 5,000 grams or more of powder cocaine. Because it takes 100 times more powder cocaine than crack cocaine to trigger the same mandatory minimum penalty, this penalty structure is commonly referred to as the "100-to-1 drug quantity ratio."

When Congress passed the 1986 Act, the Commission was in the process of developing the initial sentencing guidelines. The Commission responded to the legislation by generally incorporating the statutory mandatory minimum sentences into the guidelines and extrapolating upward and downward to set guideline sentencing ranges for all drug quantities. Offenses involving five grams or more of crack cocaine or 500 grams or more of powder cocaine, as well as all other drug offenses carrying a five-year mandatory minimum penalty, were assigned a base offense level of 26, corresponding to a sentencing guideline range of 63 to 78 months for a defendant in Criminal History Category I. Similarly, offenses involving 50 grams or more of crack cocaine or 5,000 grams or more of powder cocaine, as well as all other drug offenses carrying a 10-year mandatory minimum penalty, were assigned a base offense level of 32, corresponding to a sentencing guideline range of 121 to 151 months for a defendant in Criminal History Category I. Crack cocaine and powder cocaine offenses for quantities above and below the mandatory minimum penalty threshold quantities were set proportionately using the same 100-to-1 drug quantity ratio.

In addition, unlike for any other drug, in 1988 Congress enacted statutory mandatory minimum penalties for simple possession of crack cocaine. In fiscal year 2007, there were 109 federal cases for simple possession of crack cocaine, in which 20 offenders were subject to a statutory mandatory minimum penalty of five years or more. In fiscal year 2006, there were 132 such cases, in which 24 offenders were subject to a statutory mandatory minimum punishment.

II. The Commission's May 2007 Report

The Commission has given much consideration to the issue of federal cocaine sentencing policy, releasing its first report to Congress on federal cocaine sentencing policy in 1995 in response to a directive from Congress to study the issue. In that report, the Commission concluded that the Congress's objectives with regard to punishing crack cocaine trafficking could be achieved more effectively "without relying on the current federal sentencing scheme for crack cocaine offenses that includes the 100-to-1 quantity ratio." In 1997, again at the request of Congress, the Commission submitted a report that recommended to Congress that it "revise the federal statutory penalty scheme for both crack and powder cocaine offenses." In 2002, the Commission issued another comprehensive report on federal cocaine sentencing policy that set forth recommendations to Congress on this issue.

In the 2006-2007 guideline amendment cycle, the Commission again undertook an extensive review of the issues associated with federal cocaine sentencing policy. The Commission examined sentencing data from fiscal years 2005 and 2006 (including comparing findings derived from that data with findings from the Commission's previous reports to Congress on federal cocaine sentencing policy), surveyed state cocaine sentencing policy, conducted two public hearings, received considerable written public comment, and reviewed relevant scientific and medical literature. Comment received in writing and at the public hearings showed that federal cocaine sentencing policy, insofar as it provides substantially heightened penalties for

crack cocaine offenses, continues to come under almost universal criticism from representatives of the Judiciary, criminal justice practitioners, academics, and community interest groups.

The Commission's efforts culminated in the issuance of its fourth report to Congress on the subject in May 2007. Some of the key findings of the May 2007 report are summarized below. Where possible, the Commission has updated the tables and figures from its May 2007 report to include information through fiscal year 2007.

A. Federal Cocaine Offenders and Average Sentence Length

Powder cocaine and crack cocaine offenses together historically have accounted for nearly half of the federally-sentenced drug trafficking offenders. In fiscal year 2006, for example, of 25,007 total drug trafficking cases, there were 5,744 powder cocaine cases (23% of all drug trafficking cases) and 5,397 crack cocaine cases (22% of all drug trafficking cases). According to the Commission's preliminary fiscal year 2007 data, of 24,750 total drug trafficking cases, there were 6,175 powder cocaine cases (25% of all drug trafficking cases) and 5,239 crack cocaine cases (21% of all drug trafficking cases).

Updated Figure 2-1

Trend in Number of Powder Cocaine and Crack Cocaine Offenders
FY1992-Preliminary FY2007

Only cases sentenced under USSG §2D1.1 (Drug Trafficking) with a primary drug type of powder cocaine or crack cocaine are included in this figure. This figure excludes cases with missing information for the variables required for analysis.

SOURCE: U.S. Sentencing Commission, 1992-2006 and Preliminary 2007 Datafiles, MONFY92 - USSCFY06 and Pre20_OPAFY07 .

Federal crack cocaine offenders consistently have received substantially longer sentences than powder cocaine offenders, and the difference in sentence length between these two groups of offenders has widened since 2002. Data presented in the May 2007 report, compiled from the Commission's fiscal year 2006 datafile, indicated that the average sentence length for crack cocaine offenders was approximately 122 months, whereas the average sentence length for powder cocaine offenders was approximately 85 months. The differences in sentences between powder cocaine offenses and crack cocaine offenses have increased over time. In 1992, crack cocaine sentences were 25.3 percent longer than those for powder cocaine. As indicated in Updated Figure 2-3, in 2006, the difference was 43.5 percent.

Preliminary data, as set forth in updated Figure 2-2, indicate that, for fiscal year 2007, the average sentence length for crack cocaine offenders was approximately 129 months, whereas the average sentence length for powder cocaine offenders was approximately 86 months. This increase in the average sentence length for crack cocaine offenders may be attributable to three factors. First, as indicated in section B below, the median drug quantity for crack cocaine offenses increased in fiscal year 2007 to 53.5 grams as compared to 51.0 grams in fiscal year 2006.

Second, most cocaine offenders in the federal system are convicted of statutes carrying a five-year or ten-year mandatory minimum penalty. According to preliminary fiscal year 2007 data, 83.0 percent of crack cocaine offenders were convicted of statutes carrying mandatory minimum terms of imprisonment, compared to 79.1 percent of such offenders in fiscal year 2006. Exposure to mandatory minimum sentences contributes to longer average sentence length and crack cocaine offenders are less likely to receive the benefit of statutory or guideline mechanisms designed for low-level offenders to be sentenced without regard to the statutory mandatory minimums. According to preliminary fiscal year 2007 data, 13.5 percent of crack cocaine offenders received benefit of a safety valve provision, either as set forth at 18 U.S.C. § 3553(f) or through the federal sentencing guidelines, as compared to 14.0 percent in fiscal year 2006. By comparison, preliminary fiscal year 2007 data indicate that 44.6 percent of powder cocaine offenders qualified for the safety valve compared to 45.5 percent in fiscal year 2006.

Third, while offense severity (based on drug type and quantity) is the preliminary determinant of the sentencing guideline range, an offender's criminal history also plays a significant role. The Commission's preliminary data for fiscal year 2007 also suggests that the average number of criminal history events counted under the guidelines may have increased for crack cocaine offenders compared to the average number of such events counted for crack cocaine offenders in fiscal year 2006, even though in both fiscal years, the average criminal history category for these offenders was Criminal History Category III. In comparison, the average criminal history category for powder cocaine offenders was Criminal History Category II in fiscal years 2006 and 2007. These factors taken together may account for the increase in average sentence length for crack cocaine offenses in fiscal year 2007.

Updated Figure 2-2

Trend in Prison Sentences for Powder Cocaine and Crack Cocaine Offenders
FY1992-Preliminary FY2007

Only cases sentenced under USSG §2D1.1 (Drug Trafficking) with a primary drug type of powder cocaine or crack cocaine are included in this figure. Cases with sentences of probation, or any sentence of intermittent confinement, community confinement, or home detention, are not included in this figure. Cases with sentences greater than 470 months were included in the sentence average computation as 470 months. This figure excludes cases with missing information for the variables required for analysis. This figure also excludes cases sentenced on or after the Supreme Court's June 24, 2004 decision in *Blakely v. Washington*, 542 U.S. 296 (2004) and before its January 12, 2005 decision in *United States v. Booker*, 543 U.S. 220 (2005), as the Commission determined it could not rely on the assumption that the federal sentencing guidelines had been uniformly applied during that period. See U.S. Sentencing Commission Final Report on the Impact of *United States v. Booker* on Federal Sentencing at 53 (March 2006).

SOURCE: U.S. Sentencing Commission, 1992-2006 and Preliminary 2007 Datafiles, MONFY92 - USSCFY06 and Pre20_OPAFY07, 2004 Pre-*Blakely* Only Cases (October 1, 2003 - June 24, 2004), and 2005 Post-*Booker* Only Cases (January 12, 2005 - September 30, 2005).

Updated Figure 2-3
Trend in Proportional Differences Between Average Cocaine Sentences
FY1992-Preliminary FY2007

Only cases sentenced under USSG §2D1.1 (Drug Trafficking) with a primary drug type of powder cocaine or crack cocaine are included in this figure. Cases with sentences of probation, or any sentence of intermittent confinement, community confinement, or home detention, are not included in this figure. Cases with sentences greater than 470 months were included in the sentence average computation as 470 months. This figure excludes cases with missing information for the variables required for analysis. This figure also excludes cases sentenced on or after the Supreme Court's June 24, 2004 decision in *Blakely v. Washington*, 542 U.S. 296 (2004) and before its January 12, 2005 decision in *United States v. Booker*, 543 U.S. 220 (2005), as the Commission determined it could not rely on the assumption that the federal sentencing guidelines had been uniformly applied during that period. See U.S. Sentencing Commission Final Report on the Impact of *United States v. Booker* on Federal Sentencing at 53 (March 2006). The figure shows, for each year, the percentage difference between prison sentences for crack cocaine and powder cocaine. For example, in Fiscal Year 1992, crack cocaine sentences were 25.3 percent greater than powder cocaine sentences. The percentage was calculated by dividing the difference between the average crack cocaine sentence and the average powder cocaine sentence by the average powder cocaine sentence.

SOURCE: U.S. Sentencing Commission, 1992-2006 and Preliminary 2007 Datafiles, MONFY92 - USSCFY06 and Pre20_OPAFY07, 2004 Pre-*Blakely* Only Cases (October 1, 2003 - June 24, 2004), and 2005 Post-*Booker* Only Cases (January 12, 2005 - September 30, 2005).

B. Demographics

African-Americans still comprise the majority of crack cocaine offenders, but that is decreasing, from 91.4 percent in 1992 to 82.2 percent, according to preliminary fiscal year 2007 data. White offenders comprise 8.3 percent of crack cocaine offenders, compared to 3.2 percent in 1992.

Powder cocaine offenders are now predominantly Hispanic. Hispanics accounted for 55.9 percent of powder cocaine offenders, according to preliminary fiscal year 2007 data. African-Americans accounted for 27.5 percent of powder cocaine offenders, and white offenders comprised 15.4 percent of these cases.

Updated Table 2-1
Demographic Characteristics of Federal Cocaine Offenders
Fiscal years 1992, 2000 & 2007

This table excludes cases missing information for the variable required for analysis.

SOURCE: U.S. Sentencing Commission, 1992, 2002, and Preliminary 2007 Datafiles, MONFY92, USSCFY00 and Pre20_OPYFY07.

C. Offender Function

In its May 2007 report, the Commission determined the offender's function in the offense by a review of the narrative of the offense conduct section of the Presentence Report independent of any application of sentencing guideline enhancements, reductions, or drug quantity. Offender function was assigned based on the most serious trafficking function performed by the offender in the offense and, therefore, provides a measure of culpability based on the offender's level of participation in the offense, independent of the offender's quantity-based offense level in the Drug Quantity Table in the drug trafficking guideline.

To provide a more complete profile of federal cocaine offenders, particularly their function in the offense, the Commission undertook a special coding and analysis project using a sample of fiscal year 2005 federal offenders. Each offender was assigned a separate function category based on his or her most serious conduct described in the Presentence Report. The function category with the largest portion of powder cocaine offenders was couriers/mules (33.1 percent), which was consistent with the Commission's findings in 2002. The largest portion of crack cocaine offenders fell within the street-level dealer category (55.4 percent). This portion of crack offenders whose most serious conduct was as a street-level dealer is lower than reported in 2002 (66.5 percent).

The sources of the two drug types likely account for these differences in offender functions. Powder cocaine is produced outside the United States and must be imported. In contrast, with rare exception, crack cocaine is produced and distributed domestically. This is demonstrated by Commission data, which suggest that 42.0 of powder cocaine offenses are international in scope whereas 56.6 percent of crack cocaine offenses may be classified at the neighborhood level.

The Commission's data analysis also is consistent with the presence of a pyramid structure in drug trafficking, with the largest number of federal cocaine offenders performing lower-level functions.

D. Drug Quantity and Dosages

Drug type and quantity are the two primary factors that determine offense levels under the federal sentencing guidelines, combining to establish the base offense level for drug trafficking offenses. According to the Commission's analysis, in fiscal year 2006, the median drug weight for powder cocaine offenses was 6,000 grams. The median drug weight for crack cocaine offenses was 51 grams. According to preliminary fiscal year 2007 data, the median drug weights increased to 6,240 grams for powder cocaine offenses and 53.5 grams for crack cocaine offenses.

With respect to doses, one gram of powder cocaine generally yields five to ten doses, whereas one gram of crack cocaine yields two to ten doses. Thus, 500 grams of powder cocaine - the quantity necessary to trigger the five-year statutory mandatory minimum penalty - yields between 2,500 and 5,000 doses. In contrast, five grams of crack cocaine - the quantity necessary to trigger the five-year statutory mandatory minimum penalty - yields between ten and 50 doses.

E. Offender Conduct

According to the Commission's analysis, only a minority of powder cocaine offenses and crack cocaine offenses involve the most egregious aggravating conduct. As categorized by the Commission, aggravating conduct includes weapon involvement, violence, and aggravating role in the offense. Such conduct does continue to appear more frequently associated with crack cocaine offenses than powder cocaine offenses, but its presence in both offenses occurs in less than seven percent of the cases.

Weapon involvement is the most common aggravating conduct in both crack cocaine and powder cocaine offenses. According to the Commission's fiscal year 2005 data sample, weapon involvement, broadly defined, occurred in 27.0 percent of powder cocaine offenses and 42.7 percent of crack cocaine offenses. Under a narrower definition of weapon enhancement (i.e., one that relies exclusively on offender conduct and excludes weapon involvement of others), 15.7 percent of powder cocaine offenders had access to, possessed, or used a weapon, compared to 32.4 percent of crack cocaine offenders in the Commission's fiscal year 2005 drug sample. Further limiting the analysis to cases in which a guideline or statutory weapon enhancement applied, in fiscal year 2006, 8.2 percent of powder cocaine offenders received a weapon enhancement under the guidelines, and 4.9 percent were convicted pursuant to 18 U.S.C. § 924(c). By comparison, 15.9 percent of crack cocaine offenders received the guideline weapon enhancement, and 10.9 percent were convicted pursuant to 18 U.S.C. § 924(c).

According to the Commission's analysis, the prevalence of violence, as indicated by the occurrence of any injury, death, and threats of injury or death, has decreased for both powder and crack cocaine since the Commission's review of cocaine sentencing in 2002. It continues to occur in only a minority of offenses. According to the Commission's fiscal year 2005 data sample, 93.8 percent of powder cocaine offenses did not have violence associated with them, as compared to 89.6 percent of crack cocaine offenses. Death was associated with 1.6 percent of powder cocaine cases and 2.2 percent of crack cocaine offenses. Any injury occurred in 1.5 percent of powder cocaine offenses and 3.3 percent of crack cocaine offenses. The threat of violence occurred in 3.2 percent of the powder cocaine offenses and 4.9 percent of the crack cocaine offenses.

III. Recommendations

The Commission believes that there is no justification for the current statutory penalty scheme for powder and crack cocaine offenses. The Commission remains committed, however, to its recommendation in 2002 that any statutory ratio be no more than 20-to-1. Specifically, consistent with its May 2007 Report, the Commission strongly and unanimously recommends that Congress:

? Increase the five-year and ten-year statutory mandatory minimum threshold quantities for crack cocaine offenses to focus the penalties more closely on serious and major traffickers as described generally in the legislative history of the 1986 Act.

? Repeal the mandatory minimum penalty provision for simple possession of crack cocaine under 21 U.S.C. § 844.

? Reject addressing the 100-to-1 drug quantity ratio by decreasing the five- year and ten-year statutory mandatory minimum threshold quantities for powder cocaine offenses, as there is no evidence to justify such an increase in quantity-based penalties for powder cocaine offenses.

The Commission further recommended in its May 2007 report that any legislation implementing these recommendations include emergency amendment authority for the Commission to incorporate the statutory changes in the federal sentencing guidelines. Emergency amendment authority would enable the Commission to minimize the lag between any statutory and guideline modifications for cocaine offenders.

The Commission believes that sentencing guidelines continue to 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, and the Commission recommends to Congress that any concerns it has about harms associated with cocaine drug trafficking are best captured through the sentencing guideline system.

IV. Conclusion

The Commission is strongly and unanimously committed to working with Congress to address the statutorily mandated disparities that currently exist in federal cocaine sentencing. The Commission also is committed to working with Congress on all other issues related to maintaining just and effective national sentencing policy in a manner that preserves the bipartisan principles of the Sentencing Reform Act.

Thank you for the opportunity to testify before you today and I look forward to answering your questions.