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## Testimony of Steven B. Wasserman Vice President for Policy, National Association of Assistant U.S. Attorneys (NAAUSA)

### Before the United States Senate Committee on the Judiciary ‘Examining Federal Sentencing for Crack and Powder Cocaine’ June 22, 2021

Dear Chairman Durbin, Ranking Member Grassley, and Members of the Committee:

I would like to thank Chairman Durbin, Ranking Member Grassley, and Members of the Committee for the opportunity to appear before you today to speak on this critical matter. It is an honor to testify as the Vice President for Policy for the National Association of Assistant U.S. Attorneys (NAAUSA). I am here today solely in my individual capacity with as a representative of NAAUSA and not on behalf of the Department of Justice or my U.S. Attorney Office. I have worked as a prosecutor for the Department of Justice for 25 years, the last 18 of which have been as an Assistant United States Attorney (AUSA) in the District of Columbia. For the last 12 years I have worked as a federal violent crime and narcotics prosecutor. NAAUSA represents our nations more than 6,000 federal prosecutors and civil attorneys across our 94 judicial districts. We stand firmly in alignment with our oath to protect the innocent and prosecute the guilty. We are guided by the Constitution and will always enforce the laws of Congress equally and fairly. To that end, we are not here today to oppose or support any legislation. But rather, provide practical insights on our experience in the field and on the front lines of our nation’s federal system of justice. It is our desire not to write the laws, but to ensure we are able to enforce them in a manner consistent with the principles of public safety and wellbeing.

While the underlying rationale behind the EQUAL Act (S. 79) is that powder cocaine and crack cocaine should be treated the same for purposes of sentencing, make no mistake, powder cocaine and crack cocaine are not “equal.” There are several reasons that support this reality. First, crack cocaine is more addictive than powder cocaine, and therefore, more destructive to the user than powder cocaine. Of equal concern is the significant differences in criminogenic characteristics of those who traffic in crack cocaine compared to those who sell powder cocaine, including criminal history, recidivism rates, and involvement in weapons possession and violent behavior. NAAUSA has other concerns with the legislation as well, including procedural concerns that the bill risks overburdening already under-resourced U.S. Attorney Offices and detracting from focus on meritorious claims, as well as consideration of this legislation during a time of rising overdose and addiction levels. We urge Congress to more forward with caution in light of the very real impacts crack use and crack trafficking has on communities across the country.

## **I. Crack cocaine is more addictive than powder cocaine and thus more destructive.**

First, the manufacturing process for crack cocaine makes the substance more concentrated. Additionally, the method of ingestion – smoking – makes the effects shorter lived. Although chemically, crack and powder cocaine are similar, the intense, short term high produced by crack results in increased binge use, chronic use, and greater risk of overdose compared to powder cocaine.<sup>1</sup> In 2019, 70,630 Americans died from drug overdoses, with over 15,000 of those drug deaths involving cocaine, according to the National Institute on Drug Abuse.<sup>2</sup> These numbers are staggering and have been on the rise for at least 10 years, and more recently fueled by fentanyl. This statistic demonstrates the significant danger that *all* cocaine represents to health and safety, and the more addictive nature of crack only enhances the risks of death and community harm.

## **II. Criminogenic characteristics of crack offenders.**

AUSAs rarely engage on possession cases, which are handled by state/local law enforcement. Instead, federal law enforcement efforts are primarily focused on trafficking and high harm drug offenses. In these cases, there are significant differences in the criminal histories, recidivism rates, and involvement with weapons and violence between those who traffic in powder cocaine and those who traffic in crack.

### **a. Federal crack offenders have more extensive criminal histories.**

According a 2017 report from the U.S. Sentencing Commission, federally prosecuted crack offenders typically had a more serious criminal history than federally prosecuted drug trafficking offenders as a whole, including those who sold powder cocaine. Federal sentencing guidelines outline six criminal history categories. Over 56 percent of federally prosecuted powder cocaine traffickers fell within the lowest category. Comparatively, only 32.5 percent of crack offenders fell within the lowest category. 15.1 percent of crack offenders were in the second lowest, and 23.1 were in the third category. Further, 5.8 percent of crack offenders fell within the highest category and another 5.1 percent were designated as career offenders.<sup>3</sup> Conversely, only 1.8 percent of powder cocaine traffickers fell within the highest category, and 3 percent were designated as career offenders.

### **b. Recidivism rates remain higher for crack than all other drug users and sentencing reforms have resulted in no changes.**

Crack offenders have the highest recidivism rate of all drug offenders. Federally prosecuted powder cocaine traffickers recidivated at a significantly lower rate – 43.8 percent, than crack offenders, who recidivated at a rate of 60.8 percent. For crack traffickers, assault was the most

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<sup>1</sup> [What is Crack Cocaine? Differences Between Crack and Cocaine \(americanaddictioncenters.org\)](https://www.americanaddictioncenters.org/what-is-crack-cocaine-differences-between-crack-and-cocaine)

<sup>2</sup> [Overdose Death Rates | National Institute on Drug Abuse \(NIDA\)](https://www.nida.nih.gov/publications/overdose-death-rates)

<sup>3</sup> [Recidivism Among Federal Drug Trafficking Offenders \(usssc.gov\)](https://www.usssc.gov/research-and-statistics/research-reports/recidivism-among-federal-drug-trafficking-offenders)

prevalent and serious recidivist offense, with a rate of 27.4 percent. Drug trafficking offenses represented the second most prevalent and serious recidivist offense for crack offenders at over 17 percent. By contrast, for powder cocaine traffickers, assault represented the most prevalent and serious recidivist offense at 22 percent, with the second most prevalent and serious recidivist offense being drug trafficking at just over 14 percent.

In a 2014 review of the impact of the 2007 Crack Cocaine Amendment on recidivism, the U.S. Sentencing Commission found that the reforms had no impact on recidivism rates.<sup>4</sup> Whether a federal crack offender serves their full term or is released early, their chances of returning to their community to reoffend, and therefore revictimize, is the same – and higher than traffickers selling other drugs, including powder cocaine. Rather than allowing more individuals to reenter communities earlier only to revictimize their communities, we encourage Congress to focus efforts on preventing recidivism and revictimization prior to release. For example, in 2017 the U.S. Sentencing Commission found crack offenders who received safety valve sentence reductions – indicating they did not have a significant prior criminal history – recidivated at a substantially lower rate. Rather than adjusting sentences as a whole, seeking limited adjustments based on risk of community harm may present a more targeted approach to reforms.

**c. Crack offenders are more closely linked with violence and weapons.**

The link between violence and drug trafficking, drug use, and crack in particular is well known to law enforcement personnel, prosecutors, and judges. Former Attorney General Eric Holder echoed this sentiment regarding the link between the drug trade and violence during a briefing in 2000, while he was then the Deputy Attorney General, in which he stated:

....[T]he violence that we saw in the early '90s, the late '80s was fueled by the rise in sale of crack cocaine and the violence that was connected to it. In Washington, D.C., where I was the U.S. Attorney, we attributed about one-half of all the homicides to the drug trade, and I don't think that's atypical. I think that's probably a pretty consistent figure that you'd see around the country. So if we deal effectively with the drug problem and the sale of drugs, the use of drugs, we'll also have a positive impact on the violence problem.<sup>5</sup>

While the worst violence associated with the crack cocaine epidemic of the 1980's and 1990's has subsided over the last 25 years, in part due to the passage of harsher drug sentences and more aggressive enforcement, federal crack offenders continue to possess weapons at a higher rate than powder cocaine offenders. For example, the U.S. Sentencing Commission reported that in fiscal year 2020, 39.3 percent of crack offenders had their sentences enhanced for possessing a weapon,<sup>6</sup> while only 19.6 percent of powder cocaine traffickers received enhanced sentences for

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<sup>4</sup> [Recidivism Among Offenders Receiving Retroactive Sentence Reductions \(ussc.gov\)](https://www.ussc.gov/recidivism-among-offenders-receiving-retroactive-sentence-reductions)

<sup>5</sup> [Eric Holder : Wanted Return of Mandatory Minimums and Tougher Pot Penalties - TalkLeft: The Politics Of Crime .](#)

<sup>6</sup> [Quick Facts on Crack Cocaine Offenses \(ussc.gov\)](https://www.ussc.gov/quick-facts-on-crack-cocaine-offenses)

weapons possession.<sup>7</sup> This data further demonstrates the marked differences between federal crack cocaine offenders and powder cocaine offenders.

## **II. The EQUAL Act presents procedural concerns that risk overburdening already under resourced U.S. Attorney Offices and detracting from focus on meritorious claims.**

Section 2(c)(2) of the EQUAL Act allows for the retroactive review of cases for resentencing. As currently drafted, this allows defendants who already qualified for and were denied sentence alterations under previous sentencing reform laws to reapply for review. Each time a motion for sentence reduction is made, AUSAs dutifully review the case, pull previous case records, and present arguments to the court. Each time a sentencing reform law is passed, motions for resentencing flood U.S. Attorney Offices and create a demanding workload for AUSAs. The volume of these requests has dramatically increased, particularly since the start of the COVID-19 pandemic which expanded access to compassionate release.

AUSAs dedicate attention to each case to ensure the law is enforced as intended. However, this places real resource constraints on U.S. Attorney Offices and detracts attention from existing and new investigations. We urge the Committee to consider these constraints and their impact on the effective administration of justice.

## **III. The continued rise in drug dependency and death as well as the frequency of cocaine mixed with dangerous substances like fentanyl counsels caution in moving forward with reforms that increase the number of potentially recidivist offenders in communities.**

As this committee is well aware, drug use and overdose deaths are an epidemic deeply damaging to our nation. Cocaine remains one of the most common causes of overdose deaths.<sup>8</sup> Increasingly, cocaine is being mixed with other dangerous drugs – namely, fentanyl and fentanyl analogues. According to the U.S. National Institute on Drug Abuse, between 2012 and 2016 there was a 23-fold increase in the number of deaths involving cocaine in combination with synthetic opioids.<sup>9</sup> Counties across the country have been issuing warnings after strings of fatal overdoses due to fentanyl-laced cocaine.<sup>10</sup> It cannot be stated enough that federal law and federal law enforcement prosecute the most significant and dangerous criminal activity – very rarely drug possession, but overwhelmingly criminal drug trafficking. Reducing sentences for the most common reoffenders and some of the most violent drug traffickers at a time when drug use is so lethal and prevalent is concerning.

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<sup>7</sup> [Quick Facts on Powder Cocaine Offenses \(ussc.gov\)](https://www.uscourts.gov/quick-facts-on-powder-cocaine-offenses)

<sup>8</sup> [Overdose Death Rates | National Institute on Drug Abuse \(NIDA\)](https://www.nida.nih.gov/overdose-death-rates)

<sup>9</sup> [Fentanyl-Laced Crack Cocaine a Deadly New Threat \(webmd.com\)](https://www.webmd.com/health/2016/08/01/fentanyl-laced-crack-cocaine-a-deadly-new-threat)

<sup>10</sup> ['Crisis': Surge in cocaine mixed with fentanyl has communities and law enforcement on edge - ABC News \(go.com\)](https://www.abcnews.com/news/2016/08/01/crisis-surge-in-cocaine-mixed-with-fentanyl-has-communities-and-law-enforcement-on-edge/)

Should Congress ultimately determine that action is warranted to equalize the penalties between powder cocaine and crack cocaine, NAAUSA would urge members to give strong consideration to lowering the quantity thresholds for powder cocaine to match the existing thresholds for crack cocaine, thereby achieving the goal of equality of punishment across the board.

#### **IV. Conclusion**

As the Committee moves forward, we urge you to consider the impact of these decisions on communities as a whole and the possible adverse impact on our citizens, especially those in our minority communities. While those who violate our laws should always be treated fairly and justly, we should never lose sight that our first priority should be to protect and safeguard our law-abiding citizens. We thank the Committee, Chairman Durbin, and Ranking Member Grassley for providing NAAUSA the opportunity to testify about our experience and perspective on crack and powder cocaine as our nation's federal prosecutors.