

**Statement of The Honorable Asa Hutchinson
Governor of Arkansas**

Before the U.S. Senate Committee on the Judiciary

“Examining Federal Sentencing for Crack and Powder Cocaine”

Tuesday, June 22, 2021

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

It is a privilege to be asked to testify before this Committee regarding the difference between the ways in which our nation's federal criminal sentencing laws punish crack cocaine offenses versus powder cocaine offenses and whether it is time to change that approach.

I have long supported reducing the non-evidence based sentencing disparity between these two forms of the same drug. In fact, in April of 2009, I appeared before this Committee to testify on this very subject. The following year, Congress passed the Fair Sentencing Act, which reduced but did not eliminate the disparity, in bipartisan fashion. The Fair Sentencing Act was so noncontroversial that it passed the Senate and the House by voice vote. I am here again before this Committee to urgently request that you take the last step necessary to finally create equal justice under the law.

As a former U.S. Attorney appointed under the Reagan Administration, a former Republican Member of Congress, and a former Administrator of the Drug Enforcement Administration appointed by President George W. Bush, I have viewed our criminal justice system through a number of lenses. During those experiences, I was never known as someone who was "soft" on crime. When I served in Congress, I did not shy away from supporting significant punishments for drug-related crimes. And as a prosecutor, I aggressively pursued everyone from drug offenders to violent white supremacists. From all these various vantage points, however, I have come to the same conclusion – this sentencing disparity approach rarely led to the incarceration of drug kingpins as its proponents hoped. Instead, the majority of those incarcerated were mere street-level users and sellers. And in addition to not working to bring a meaningful end to the use or sale of this drug, Congress's disparate approach of treating one type of cocaine more harshly than another type has only led to fundamental unfairness, and it has undermined confidence in our justice system. That erosion in any community's faith in the rule of law makes it more difficult for the hard-working men and women of law enforcement to do their jobs.

I hope that we can all agree that our nation's understanding of crack cocaine has grown significantly since Congress created the original 100-to-1 sentencing disparity in the Anti-Drug Abuse Act of 1986. Back then, the news frightened us each night with images of the harm that this drug – one that many of us had never heard of – was causing to our communities. Congress felt compelled to act and to act quickly to do something to ameliorate this harm. As a result, in 1986, Congress determined that a person convicted of a first offense of possessing five (5) grams of crack cocaine (equal to a few sugar packets) would receive the same mandatory minimum prison sentence as a powder cocaine user who used 100 times that amount of cocaine.

There is nothing in the legislative history of the Anti-Drug Abuse Act to indicate that the 100-to-1 disparity was based on science, because the science does not support punishing these two

drugs differently. These substances are chemically the same. Instead, the sentencing disparity was entirely arbitrary. In recognition of this, in 2010, Congress passed the Fair Sentencing Act to reduce the disparity between crack cocaine and powder cocaine to a lower ratio, and I supported the enactment of such a reform. This landmark law was the product of a bipartisan realization that the sentencing disparity between crack cocaine and powder cocaine was fundamentally unfair and caused disproportionate harm, particularly in communities of color.

The proof of disproportionate harm to communities of color is cemented by data. U.S. Sentencing Commission data show that in FY 2009, 79 percent of defendants in crack cocaine cases were Black,¹ then 78.5 percent in FY 2010,² and 83 percent in FY 2011.³ More recently, in FY 2019⁴ and FY 2020,⁵ 81.1 percent and 76.8 percent of defendants were Black. Yet survey data show that, in fact, crack cocaine users are predominately White.⁶ This mismatch between who uses drugs versus who is incarcerated for their use of drugs leads many to reasonably question this country's commitment to equal protection under the law.

In December of 2018, Congress took a tremendous step forward with the passage of the First Step Act. This generational legislation not only included prison reforms designed to reduce recidivism, but it also included incredibly modest sentencing reforms, including retroactive application of the Fair Sentencing Act. By now, more than 3,300 people have benefitted from this relief under the First Step Act,⁷ 91.6 percent of whom are Black.

Although Congress has taken steps to reduce the disparity and provide some retroactive relief, any sentencing disparity between two substances that are chemically the same weakens the foundation of our system of justice. Congress now has the opportunity to build on the bipartisan

¹ U.S. Sentencing Commission, "Race of Drug Offenders in Each Drug Type, Fiscal Year 2009," available at <https://www.uscc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2009/Table34.pdf>.

² U.S. Sentencing Commission, "Race of Drug Offenders in Each Drug Type, Fiscal Year 2010," available at <https://www.uscc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2010/Table34.pdf>

³ U.S. Sentencing Commission, "Race of Drug Offenders in Each Drug Type, Fiscal Year 2011," available at <https://www.uscc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2011/Table34.pdf>

⁴ U.S. Sentencing Commission, "Race of Drug Trafficking Offenders, Fiscal Year 2020," available at <https://www.uscc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2019/TableD2.pdf>

⁵ U.S. Sentencing Commission, "Race of Drug Trafficking Offenders, Fiscal Year 2020," available at <https://www.uscc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2020/TableD2.pdf>

⁶ Substance Abuse and Mental Health Services Administration, "Results from the 2018 National Survey on Drug Use and Health: Detailed Tables," Table 1.31A, June 2020, <https://www.samhsa.gov/data/sites/default/files/cbhsq-reports/NSDUHDetailedTabs2018R2/NSDUHDetailedTabs2018.pdf>.

⁷ U.S. Sentencing Commission, "First Step Act of 2018 Resentencing Provisions Retroactivity Report," October 2020, <https://www.uscc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/first-step-act/20201019-First-Step-Act-Retro.pdf>.

successes of the Fair Sentencing Act and the First Step Act by eliminating the sentencing disparity between crack cocaine and powder cocaine once and for all. The strength of our justice system is dependent on the perception of fundamental fairness.

One of the main focuses of the recently-enacted First Step Act was the need to reduce recidivism. This has been at the heart of criminal justice reforms I have overseen as Governor of Arkansas. My leading concern is public safety, which is why we have increasingly focused our resources on punishing violent crime and repeat offenses, while addressing low-level, nonviolent crime through diversion programs. Importantly, the U.S. Sentencing Commission has studied recidivism of those individuals who were granted retroactive relief through their Guideline amendment. The study found that the three-year recidivism rate of those granted relief was the same recidivism rate as the control group of crack cocaine offenders who had served their entire sentence.⁸ Of note, the most serious recidivist behavior reported was a court or supervision violation – not an additional serious violent or drug-related crime.

Importantly, few states have instituted a sentencing disparity between crack cocaine and powder cocaine offenses like the federal government has.⁹ Arkansas is one of the many states that does not. In addition, we offer nonviolent drug offenders an opportunity to avoid prison time by breaking their addiction by graduating from our drug court programs. These drug courts, which save our state \$45 million annually, allow us to focus our law enforcement resources on violent crime, where such resources are needed.

One of the concerns expressed by skeptics of equalization of the treatment of these two substances is that there is a greater level of violence associated with crack cocaine. The general concern about violence associated with drug use and sales is justified, but we must recognize that prosecutors have sentencing enhancements and Guideline enhancements at their disposal to address aggravating factors, including violent and recidivist behavior. Moreover, judges are required to take a number of factors into account under federal law when considering whether to resentence someone, including the seriousness of the offense and the need to protect the public from further crimes.

As a nation, we should not rely on incarceration as the first, best, or only response to drug offenses. Incarceration is one of the most severe and most expensive tools at our disposal in the criminal justice system. The American public understands that we are not reaping the societal benefits that we previously hoped might come with an incarceration-first model and they are

⁸ U.S. Sentencing Commission, “Recidivism Among Federal Offenders Receiving Retroactive Sentence Reductions: The 2011 Fair Sentencing Act Guideline Amendment,” March 2018, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180328_Recidivism_FSA-Retroactivity.pdf.

⁹ FAMM, “Crack Cocaine Disparity Reform in the States,” available at <https://fammm.org/wp-content/uploads/Crack-Disparity-in-the-States.pdf>.

looking to this nation's state and federal leaders to adjust their approach and find evidence-based solutions that work.¹⁰

In 2017, I was proud to sign the Criminal Justice Efficiency and Safety Act into law as a part of my state's Justice Reinvestment Initiative.¹¹ The law was designed to reinvest cost savings at the front end of our justice systems by diverting those who have health concerns, such as a mental illness, away from prisons and jails and into treatment services. The same can be done for issues such as addiction, which can lead to increased involvement in the justice system.

My views in support of certain criminal justice reforms are informed by a lifetime of service to the public and my decades long commitment to public safety and the rule of law. During my time as the head of America's Drug Enforcement Administration, I saw firsthand how this current unjust drug sentencing disparity undermined our law enforcement agents' ability to be effective in their anti-drug operations. The efficacy of law enforcement is dependent upon the community's trust and confidence that our justice system is fair and equitable. Yet under the current disparity, the credibility of our entire drug enforcement system is weakened. Especially considering today's climate, we should be taking active steps to strengthen trust between law enforcement and our many communities across this country. The EQUAL Act is a rational and much-needed step in that direction.

I urge the distinguished members of this Committee to support the principles of fairness, justice, compassion, and fiscal responsibility. I appreciate the opportunity to appear before the Committee to offer testimony, and I look forward to answering your questions.

¹⁰ According to the Bureau of Prisons, the average cost of incarceration for one individual in FY 2018 was \$37,449, which is roughly over \$100 per day. 84 FR 63891, available at <https://www.federalregister.gov/documents/2019/11/19/2019-24942/annual-determination-of-average-cost-of-incarceration-fee-coif>.

¹¹ SB 136, "Criminal Justice Efficiency and Safety Act of 2017," 91st General Assembly (2017), available at <https://www.arkleg.state.ar.us/Acts/Document?type=pdf&act=423&ddBienniumSession=2017%2F2017R>.