

Testimony of
James Felman

February 12, 2008

TESTIMONY OF
JAMES E. FELMAN
ON BEHALF OF THE
AMERICAN BAR ASSOCIATION
BEFORE THE
SUBCOMMITTEE ON CRIME AND DRUGS
COMMITTEE ON THE JUDICIARY
OF THE
UNITED STATES SENATE
FOR THE HEARING ON

"Federal Cocaine Sentencing Laws: Reforming the 100:1 Crack Powder Disparity"

February 12, 2008

Chairman Biden, Ranking Member Graham and distinguished Members of the Subcommittee:

Good afternoon. My name is James Felman. Since 1988 I have been engaged in the private practice of federal criminal defense law with a small firm in Tampa, Florida. I am appearing today on behalf of the American Bar Association for which I serve as Co-Chair of the Criminal Justice Section Committee on Sentencing.

The crack-powder disparity is simply wrong and the time to fix it is now. It has been more than a decade since the American Bar Association joined an ever-growing consensus of those involved in and concerned about criminal justice issues that the disparity in sentences for crack and powder cocaine offenses is unjustifiable and plainly unjust. We applaud this Subcommittee and its leadership for conducting this hearing as an important step in ending once and for all this enduring and glaring inequity.

The American Bar Association is the world's largest voluntary professional organization, with a membership of over 400,000 lawyers (including a broad cross-section of prosecuting attorneys and criminal defense counsel), judges and law students worldwide. The ABA continuously works to improve the American system of justice and to advance the rule of law in the world. I appear today at the request of ABA President William H. Neukom to reiterate to this Subcommittee the ABA's position on sentencing for cocaine offenses.

In 1995 the House of Delegates of the American Bar Association, after careful study, overwhelmingly approved a resolution endorsing the proposal submitted by the United States

Sentencing Commission that would have resulted in crack and powder cocaine offenses being treated similarly and would have taken into account in sentencing aggravating factors such as weapons use, violence, or injury to another person. The American Bar Association has never wavered from the position that it took in 1995.

The Sentencing Commission's May 2002 Report to the Congress: Cocaine and Federal Sentencing Policy confirms the ABA's considered judgment that there are no arguments supporting the draconian sentencing of crack cocaine offenders as compared to powder cocaine offenders. The Sentencing Commission's 2002 Report provides an exhaustive accounting of the research, data, and viewpoints that led to the Commission's recommendations for crack sentencing reform. The recommendations include:

- ? Raising the crack cocaine quantities that trigger the five-year and ten-year mandatory minimum sentences in order to focus penalties on serious and major traffickers;
- ? Repeal of the mandatory minimum penalty for simple possession of crack cocaine; and
- ? Rejection of legislation that addresses the drug quantity disparity between crack and powder cocaine by lowering the powder cocaine quantities that trigger mandatory minimum sentences.

Unfortunately, the Sentencing Commission's 2002 recommendations were not addressed. Recognizing the enduring unfairness of current policy, the Sentencing Commission returned to the issue and recently took an important, although limited, first step toward addressing these issues by reducing crack offense penalties by two offense levels in its 2007 amendments to the Sentencing Guidelines. As the Sentencing Commission explained in its report accompanying the amendment, Report to the Congress: Cocaine and Federal Sentencing Policy (May 2007), the Commission felt its two-level adjustment was as far as it should go given its inability to alter Congressionally established mandatory minimum penalties and its recognition that establishing federal cocaine sentencing policy ultimately is Congress's prerogative. But it is critical to understand that this "minus-two" amendment is only a first step in addressing the inequities of the crack-powder disparity. The Sentencing Commission's 2007 Report made it plain that it views its recent amendment "only as a partial remedy" which is "neither a permanent nor a complete solution." As the Sentencing Commission noted, "[a]ny comprehensive solution requires appropriate legislative action by Congress."

The federal sentencing policies at issue in the 2002 and 2007 Sentencing Commission Reports were enacted in the Anti-Drug Abuse Act of 1986, which created a 100 to 1 quantity sentencing disparity between crack and powder cocaine, pharmacologically identical drugs. This means that crimes involving just five grams of crack, 10 to 50 doses, receive the same five-year mandatory minimum prison sentence as crimes involving 500 grams of powder cocaine, 2,500 to 5,000 doses. The 100-1 ratio yields sentences for crack offenses three to six times longer than those for powder offenses involving equal amounts of drugs. Many myths about crack were perpetuated in the late 1980's that claimed, for example, that crack cocaine caused violent behavior or that it was instantly addictive. Since then, research and extensive analysis by the Sentencing Commission has revealed that such assertions are not supported by sound evidence and, in retrospect, were exaggerated or simply false.

Although the myths perpetuated in the 1980s about crack cocaine have proven false, the disparate impact of this sentencing policy on the African American community continues to grow. The 1995 ABA policy, which supports treating crack and powder cocaine offenses similarly, was developed in recognition that the different treatment of these offenses has a "clearly discriminatory effect on minority defendants convicted of crack offenses." According to the 2007 Report by the Sentencing Commission, African Americans constituted 82% of those sentenced under federal crack cocaine laws. This is despite the fact that 66% of those who use crack cocaine are Caucasian or Hispanic. This prosecutorial disparity between crack and powder cocaine results in African Americans spending substantially more time in federal prisons for drug offenses than Caucasian offenders. Indeed, the Sentencing Commission reported that revising the crack cocaine threshold would do more to reduce the sentencing gap between African Americans and Caucasians "than any other single policy change," and would "dramatically improve the fairness of the federal sentencing system." The ABA believes that it is imperative that Congress act quickly to finally correct the gross unfairness that has been the legacy of the 100 to 1 ratio. Enactment of S.1711 would take that much needed step to end unjustifiable racial disparity and restore fundamental fairness in federal drug sentencing.

It is important that I emphasize, however, that the ABA not only opposes the crack-powder differential, but also strongly opposes the mandatory minimum sentences that are imposed for all cocaine offenses. The ABA believes that if the differential penalty structure is modified so that crack and powder offenses are dealt with in a similar manner, the resulting sentencing system would remain badly flawed as long as mandatory minimum sentences are prescribed by statute.

At its 2003 annual meeting, Supreme Court Justice Anthony Kennedy challenged the legal profession to begin a new public dialogue about American sentencing practices. He raised fundamental questions about the fairness and efficacy of a justice system that disproportionately imprisons minorities. Justice Kennedy specifically addressed mandatory minimum sentences and stated, "I can neither accept the necessity nor the wisdom of federal mandatory minimum sentences." He continued that "[i]n too many cases, mandatory minimum sentences are unwise or unjust."

In response to Justice Kennedy's concerns, the ABA established a Commission (the ABA Justice Kennedy Commission) to investigate the state of sentencing in the United States and to make recommendations on how to address the problems Justice Kennedy identified. One year to the day that Justice Kennedy addressed the ABA, the ABA House of Delegates approved a series of policy recommendations submitted by the Kennedy Commission. These recommendations included the repeal of all mandatory minimum statutes and the expanded use of alternatives to incarceration for non-violent offenders.

Mandatory minimum sentences raise serious issues of public policy and routinely result in excessively severe sentences. Mandatory minimum sentences are also frequently arbitrary, because they are based solely on "offense characteristics" and ignore "offender characteristics." They are a large part of the reason why the average length of sentence in the United States has increased threefold since the adoption of mandatory minimums. The United States now imprisons its citizens at a rate roughly five to eight times higher than the countries of Western

Europe, and twelve times higher than Japan. Roughly one-quarter of all persons imprisoned in the entire world are imprisoned here in the United States.

Thus, the ABA strongly supports the repeal of the existing mandatory minimum penalty for mere possession of crack. Under current law, crack is the only drug that triggers a mandatory minimum for a first offense of simple possession. We would urge the Congress to go farther, however, and repeal mandatory minimum sentences across the board.

We also strongly support the appropriation of funds for developing effective alternatives to incarceration, such as drug courts, intensive supervised treatment programs, and diversionary programs. We know that incarceration does not always rehabilitate - and sometimes has the opposite effect. Drug offenders are peculiarly situated to benefit from such programs, as their crimes are often ones of addiction. That is why last year, after considerable study, research, and public hearings by the ABA's Commission on Effective Sanctions, the ABA's House of Delegates approved a resolution - joined in by the National District Attorneys Association - calling for federal, state, and local governments to develop, support, and fund programs to increase the use of alternatives to incarceration, including for the majority of drug offenders. We are encouraged to see the appropriation of such funds in S.1711, and hope that this appropriation can be expanded to reach federal as well as state programs.

In conclusion, for well over a decade the ABA has agreed with the Sentencing Commission's careful analysis that the 100 to 1 quantity ratio is unwarranted and results in penalties that sweep too broadly, apply too frequently to lower-level offenders, overstate the seriousness of the offenses, and produce a large racial disparity in sentencing. Indeed, as the Sentencing Commission noted in its 2007 Report, federal cocaine sentencing policy "...continues to come under almost universal criticism from representatives of the Judiciary, criminal justice practitioners, academics, and community interest groups ... [I]naction in this area is of increasing concern to many, including the Commission."

We applaud the leadership of the Congress in addressing this important issue and hope that decisive and rapid action will be possible. The ABA firmly supports passage of S.1711 as proposed by Senator Biden, and cosponsored by Senator Feingold on the Subcommittee, among others. We also commend the leadership of Senators Hatch, Kennedy, Feinstein and Specter and Senator Sessions for their introduction of alternative bills to address the crack-powder disparity. Clearly there is growing, bipartisan recognition of the urgency for reform of this law. The ABA strongly supports S.1711 because it fully embraces the key principles for reform enunciated repeatedly by the Sentencing Commission. S.1711 would rectify the unwarranted disparity between crack and powder cocaine sentences, and would do so without raising the already severe penalties for powder offenses. The bill would also address aggravating factors such as weapons use, violence, or injury to another person while providing much needed mitigating adjustments for those who play minor roles and those whose involvement was wholly a product of impulse, fear, friendship or affection where the defendant was otherwise unlikely to commit such an offense. S.1711 is also strongly supported by a broad coalition of criminal justice reform, civil rights, community and faith-based organizations.

Enactment of S.1711 would restore fairness and a sound foundation to federal sentencing policy regarding cocaine offenses by ending the disparate treatment of crack versus cocaine offenses

and by refocusing federal policy toward major drug traffickers involved with weapons and violence. We hope the Subcommittee will support S.1711 so that it may be considered and passed by the full Senate.

On behalf of the American Bar Association, thank you for considering our views on an issue of such consequence for achieving justice in federal sentencing.