

Justice Delayed is Justice Denied:
A Plea to Reform Federal Cocaine Sentencing Laws

Submitted by Break the Chains and Members of the
National African American Drug Policy Coalition

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Dear Commissioners:

Twenty-years ago, in response to what appeared at the time to be a serious epidemic of crack cocaine abuse, Congress enacted laws singling out offenses involving crack cocaine for more severe penalties than other drug crimes including a mandatory five year minimum for sale of as little as 5 grams of crack cocaine. Under these provisions crack cocaine offenses are punished 100 times more severely than crimes involving powder cocaine, consequently the threshold amount that would trigger a five year mandatory sentence for powder cocaine is 500 grams. Congress further singled out crack cocaine for special punishment when it required a mandatory minimum sentence of five (5) years for a first offense of mere possession of five grams or more of crack cocaine.¹ There is no federal mandatory minimum sentence for first time possession of powder cocaine or any other currently illicit drug.

In the years since the passage of these laws, there has been a growing chorus of criticism regarding their impact, particularly on African-American defendants and the continuing validity of the 100:1 sentencing disparity. In 1986, before mandatory minimums for crack cocaine offenses became effective, the average federal sentence for black drug offenders was 11% higher than for whites. Four years following the implementation of the crack-powder cocaine sentencing disparity, the average federal sentences for black drug offenders was 49% higher than for whites.² According to the Sentencing Project, between 1994 and 2002, the average time served by African Americans for a drug offense increased by 73%, compared to an increase of 28% for white drug offenders.³ The stiff sentences imposed by these laws were ostensibly intended to provide incentive for federal prosecutors to target major drug traffickers that manage large scale operations moving large amounts of drugs. However, their implementation has had the opposite effect. Because the threshold level quantity of crack cocaine needed to trigger a 5 or 10-year mandatory sentence is so low, prosecutions have focused disproportionately on low-level

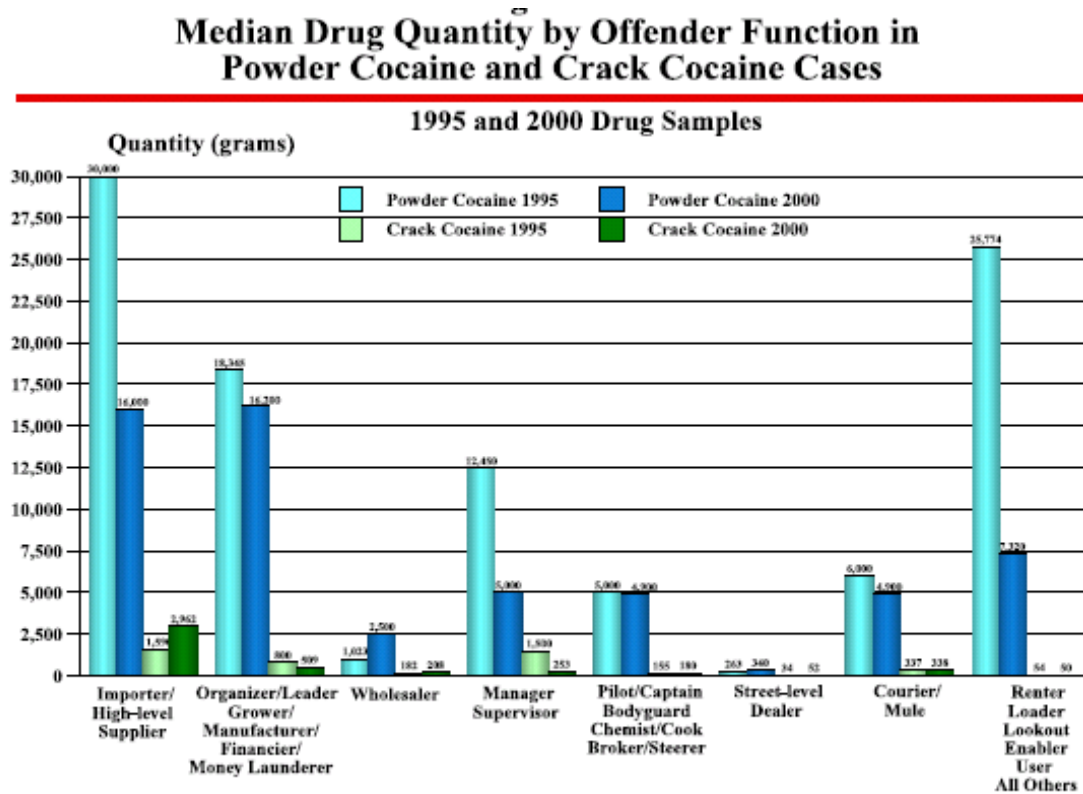
¹Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) and Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988).

²Mierhoefer, Barbara S., *The General Effect of Mandatory Minimum Prison Terms: A Longitudinal Study of Federal Sentences Imposed* (Washington DC: Federal Judicial Center, 1992).

³The Federal Prison Population: A Statistical Analysis, The Sentencing Project, January 2006, <http://www.sentencingproject.org/PublicationDetails.aspx?PublicationID=502>

crack cocaine cases. Between 1995 and 2000 the percentage of federal crack cocaine convictions of street-level dealers rose from almost half (48.4%) to more than two thirds (66.5%).⁴

Because crack cocaine sentences are based primarily on the amount of drugs involved, the 100:1 disparity affects not only street level offenders but also those prosecuted as major distributors or traffickers. The following chart illustrates the disparity in the median amount of drugs involved in various levels of federal cocaine prosecutions.



SOURCE: U. S. Sentencing Commission, 1995 and 2000 Drug Samples.

As the chart above clearly shows, the 5 grams of crack cocaine threshold set by Congress as the trigger for a five-year mandatory sentence is not a quantity associated with mid-level, much less “serious” drug traffickers. The median crack cocaine street level dealer was arrested holding 52 grams of crack cocaine enough to trigger a 10-year mandatory sentence. For powder cocaine, the median street level dealer is charged with holding 340 grams of powder cocaine, not enough even to trigger the 5-year mandatory sentence.⁵ In its 2002 Report to Congress, the Commission recognized the adverse effects of the 100:1 sentencing disparity for crack cocaine offenses –“it has resulted in severely long prison terms for low-level crack cocaine offenders and because sentences are based primarily on the quantity of drugs involved, defendants with different levels of culpability are lumped together.” No where is this effect more pronounced and injurious than

⁴ USSC Report to Congress Cocaine Sentencing Policy, May 2002, p. 53.

http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm

⁵ Coyle, Michael, Race and Class Penalties in Crack Cocaine Sentencing, the Sentencing Project, March, 2006.

in the case of women who are prosecuted as mules or co-conspirators. The problem has become so pervasive that it's known colloquially as "the girlfriend problem".

Federal sentencing laws punish not just those who sell drugs, but also a wide range of people who help or merely associate with those who sell drugs. A woman charged with conspiracy in a drug crime is held legally responsible for the total amount of drugs possessed or sold by everyone in the operation rendering her vulnerable to extremely long mandatory sentences. As a result, even when they have minimal or no involvement whatsoever in the drug trade, women are punished for the act of remaining with a boyfriend or husband engaged in drug activity. The experience of Sandra Lavonne Rucker is illustrative:

At the time of her arrest Sandra was in relationship with a man who ran a drug operation, and allegedly brought a weapon into Sandra's apartment. Although the testimony of a codefendant established that Sandra was not a principal organizer of the operation and she provided credible testimony that she had never sold drugs and was just the man's girlfriend, she was nevertheless convicted of involvement in the drug conspiracy and was held liable for the total amount of drugs involved in the operation – in this case 50 grams or more of crack cocaine – Sandra received a sentence of life imprisonment.⁶

The impact of federal drug sentencing policy on women has been dramatic. Women are now the fastest growing segment of the prison population. Women are now six times more likely to spend time in prison than they were before the passage of mandatory minimum drug sentencing. As a result of federal mandatory minimum drug sentences including the crack-powder sentencing disparity, African-American women are entering prison at rates that are 2 ½ times higher than Hispanic women and 4 ½ times higher than white women.

Sentences for crack cocaine offenses are grossly disproportionate when compared with sentences for other crimes that don't have mandatory minimums. Five grams of crack cocaine is worth about \$400 and represents one fifty-millionth of annual U.S. cocaine consumption, or about two weeks supply for the average user. Compare the five year mandatory sentence for possession of five grams of crack cocaine with the national average time served for homicide of about five years and four months.⁷

Accumulating evidence demonstrates that the punitive sentencing structure enacted two decades ago to combat crack cocaine abuse has not produced benefits commensurate with the harms it is inflicting. Extensive ethnographic and governmental evidence show that despite increased law enforcement focus on cocaine, the street prices of crack and powder cocaine have remained the same over the past decade. Moreover, cocaine purities are as high as they were at the height of the crack era which demonstrates that the strenuous efforts to target street level crack cocaine dealing has had little impact on supply and overall distribution.⁸

⁶ Hameefah Jackson, *When Love is a Crime: Why the Drug Prosecutions and Punishments of Female Non-Conspirators Cannot Be Justified by Retributive Principles*, 46 How.L.J. 517, 520-521 (2003); *United States v. Riley*, 215 F.3d 1323 (4th Cir. 2000).

⁷ Caulkins, Jonathan P., Reuter, Peter, *Reorienting U.S. Drug Policy*, Issues in Science and Technology, Fall 2006 www.issues.org/23.1/caulkins.html

⁸ Johnson, B., Dunlap, E., *Crack Distribution and Abuse in New York* (Monsey, NY: Criminal Justice Press) Crime Prevention Studies, Vol. 11, 2000.

In 1994, Congress directed the Commission to study the impact of the crack-powder disparity in federal cocaine sentencing. In 1995 the Commission recommended a revision of the crack-powder 100:1 sentencing disparity, based on its finding the differential was not justified by any differences between the two forms of the drug and implementation of the laws was having a severely disparate effect on African-American cocaine offenders. The Commission recommended that Congress equalize the ratio to 1:1 based on the quantities set to trigger mandatory sentences for powder cocaine offenses and repeal the 5 year mandatory sentence for possession of crack cocaine. The Commission suggested that Congress could accomplish its goal of punishing violent crime related to crack cocaine distribution more severely by using criteria other than drug type or amount to enhance sentences based on specific behavior (e.g. use of weapon; sales to minors or use of minors in transactions; gang-related drug activity). For the first time in the Commission's history, Congress rejected its recommendation in its entirety and refused to consider any changes to the penalties.⁹

In 1997 the Commission again recommended that Congress reduce the crack-powder sentencing disparity, again by changing the weight amounts that would trigger a mandatory sentence except this time the Commission provided a ratio range of 2:1 – 15:1 to choose from. However, again Congress refused to act on the recommendation. The issue came up again in 2002. This time the Commission recommended reducing the crack-powder disparity ratio to 20:1. Each time the Commission also recommended that Congress repeal the mandatory minimum for simple possession of crack cocaine. Once again, Congress refused to act on the recommendation.

Which brings us to the present. Once again the Commission is holding hearings on the crack-powder sentencing disparity and again experts from the judiciary, academia, criminal defense and prosecution as well as drug treatment and drug policy reform advocates have testified in favor of reforming these laws. Much has already been said regarding the racially disparate impact of these laws. Government surveys have consistently shown that drug use rates are similar among all racial and ethnic groups. For crack cocaine, two-thirds of users in the U.S. are white or Hispanic.¹⁰ Research demonstrates that the majority of drug users purchase their drugs from people who are of the same racial or ethnic background as they are which means that the majority of crack cocaine sellers in the U.S. are white.¹¹ Despite these well known facts African-Americans continue to comprise the bulk of federal crack cocaine defendants. Indeed in 2005, 82.3% of federal crack cocaine defendants were African-American. If these numbers were referencing prosecutions for murder, arson, burglary or car theft, there would be no question of racially skewed law enforcement as there is broad acknowledgment that these crimes cut equally across racial, ethnic and class groupings but when it comes to drug crimes – especially crack cocaine - we are all too willing to accept a racialized view of who the offenders are.

Supporters of the current laws claim that crack cocaine offenses are deserving of harsher penalties because there is greater criminality and violence associated with crack cocaine than with powder cocaine. Furthermore, they argue that crack cocaine sellers tend to congregate in poor inner-city communities, turning neighborhoods into war zones that drive businesses away and leave residents in fear.

⁹ Coyle, Michael, Race and Class Penalties in Crack Cocaine Sentencing, the Sentencing Project, March, 2006.

¹⁰ Substance Abuse and Mental Health Services Administration, 2004 National Survey on Drug Use and Health, Population Estimates 1995 (Washington, DC: Sept. 2005), Table 1.43a.

¹¹ Dorothy Lockwood, Anne E. Pottinger, and James Inciardi, "Crack Use, Crime by Crack Users, and Ethnicity," in Darnell F. Hawkins, ed. Ethnicity, Race and Crime, New York: State University of New York Press, 1995. p. 21.

Testimony the Commission received in November 2006, from experts in drug addiction treatment, criminology and ethnographic research made it clear that whatever validity that position may have had in 1986, it no longer holds today. Dr. Nora Volkow, Director of NIDA testified that there is “no evidence that crack [cocaine] is associated with more violent behavior than intravenous drug use [of cocaine].” “Now can cocaine produce violent behavior?.....yes, cocaine can be associated with violence very much in part driven by the fact that it can induce paranoid thinking in the individual taking the drug. That occurs whether you inject or you smoke, and it even occurs with snorting. The more repeatedly you are doing it, the more likely you are to become paranoid from cocaine.”¹²

Dr. Bruce Johnson of NDRI testified that inner-city African-American youth – especially males - have voluntarily eschewed crack cocaine use which has become heavily stigmatized. He also testified that only a small minority of crack cocaine users in New York City carried guns or used weapons during the past six years. They also had very low incidences of aggravated assault or otherwise caused physical harm to people. It is our belief that similar studies in other jurisdictions would demonstrate the same findings. Another study of criminal activity among heavy or regular crack cocaine users found that their illegal income generating activities were sporadic and tended to be crimes of opportunity as opposed to crimes that involved planning or organized action.¹³

The claim by law enforcement that stronger penalties against crack cocaine are warranted because higher levels of violence are associated with the crack cocaine trade is belied by the available evidence. Two recent studies are of particular note:

In Seattle, Washington, African-Americans account for about 8% of the population but comprised 57% of those arrested for drug crimes in the city. A report analyzing the reasons for such dramatic racial disparities in arrests reached the following conclusions¹⁴:

1. Drug enforcement practices focus on visible street-level markets, which tend to disproportionately involve persons of color, but are not necessarily reflective of all drug markets or even the majority of drug markets.
2. Crime and other ancillary effects are related to all drugs, including those that fall outside the radar of local police. While drug enforcement since the crack epidemic is often characterized as targeting the violence associated with drug markets, it appears that the violence associated with the crack trade has declined significantly and the focus of local policing is more on the quality of life effects of public drug use and markets.
3. Police often claim that they are responding to community complaints and concerns, but the geographic distribution of formal narcotics complaints did not necessarily reflect the concentration of drug arrests – while only 12.5% of drug complaints emanated from the predominantly African-American section of the city, more than 50% of all drug arrests took place there.

¹² U.S.S.C. Public Hearing on Cocaine Sentencing Policy, Tuesday, November 16, 2006, p. 193.

¹³ Cross, J. et al., Supporting the habit: income generation activities of frequent crack users compared with frequent users of other hard drugs, *Drug and Alcohol Dependence* 64 (2000) 191-201.

¹⁴ Beckett, Kathleen. et al. *A Window of Opportunity: Addressing the Complexities of the Relationship Between Drug Enforcement and Racial Disparity in Seattle*, John F. Kennedy School of Government, Harvard University April 2001. <http://www.defender.org/projects/rdp/>

Another report by Drs. Bruce Johnson and John C. Cross begins with the following provocative hypothetical:

“Two young men are selling on the sidewalk on a street in upper Manhattan. Both are hoping to make a sale soon so that they can use the money for something they need. Both are selling a product that they purchased from someone with whom they have a personal relation. Neither one has a license or a permit to sell products on the street, nor has any plans to pay taxes on their earnings. Both keep an eye out for the police. Despite all these similarities, however, there is a world of difference in the type of product they are selling. One is selling sweaters imported from Peru and if he is caught he will probably be placed under administrative arrest for a few hours and fined. The other is selling crack cocaine: if he is caught he could face from five to ten years in prison.”¹⁵

The report ends with the following conclusions:

“In many ways our research on crack [cocaine] dealers showed that they behaved in ways very similar to informal street vendors. Both had marginal skills for primary sector jobs (low social capital); both put in long hours in public locations during which it was often not clear whether they were working or socializing; both used social networks to further their selling repertoire; and in other ways both used similar techniques for risk management used in the legal informal sector.

While illegality may be for some people a form of entrepreneurship, most of the persons immersed in the illegal drug trade did not and could not squeeze a profit out of the commodity they sold. Rather, most were victims of many forms of exploitation by others in the market....While people make choices about their actions, the available choices are radically different for different members of our society. Moreover, those choices are structured by our very legal system. For those who have been excluded from the legal formal economic system, the rules of formality and legality create two disparate paths, fraught with the risk of capture but open with the semblance of opportunity. Thus choices deemed to be negative by society are actually made valuable to these marginal populations by the very legal system itself. If crack were a legal drug, very few people currently involved in its production, distribution and sales would be employed by it”.¹⁶

The disparate focus of drug law enforcement on poor inner-city communities and particularly on young men in those communities only exacerbates the endemic problems of poor performing schools, high unemployment, dysfunctional families and persistent poverty. One recent study of crack cocaine sellers found that “the vast majority of respondents engaged in crack [cocaine] selling were raised in severely distressed households. Their career ‘choices’ and their major life changes largely result from, and are coextensive with, their background and the disturbed family systems in which they were raised and/or currently reside.”¹⁷ A fundamental problem facing New York City and American society is how to develop appropriate social responses and supports for a whole generation of inner-city youth from severely distressed families and communities who have “said no” to heroin injection and crack smoking but will still find

¹⁵ Cross, J., Johnson, B. et al. Expanding Dual Labor Market Theory: Crack Dealers and the Informal Sector, *International Journal of Sociology and Social Policy*, Vol. 20 November 1/ 2 2000, P. 96-133.

¹⁶ *Id.*

¹⁷ Johnson, B., Dunlap, E., *Crack Distribution and Abuse in New York* (Monsey, NY: Criminal Justice Press) Crime Prevention Studies, Vol. 11, 2000.

integration into mainstream society impossible. From their vantage point, they have no opportunities or supports to gain access to decent jobs or conventional roles. Locking up an ever larger number of young black male residents of inner-city neighborhoods constitutes a cost to society, and this cost must be placed alongside the alleged benefits of the policy to determine its effectiveness. The fact that inner-city drug sellers are not choirboys does not mean that imprisoning them at ever increasing rates for long periods of time is an effective way to deal with the drug problem.

Dr. Alfred Blumstein of Carnegie Mellon testified that a significant amount of the violence associated with crack cocaine markets during its early advent was related to the following factors:

- The crack cocaine market in inner city communities was predominantly a street market – making it more visible and vulnerable to violence in comparison to the powder cocaine market which tended to be more indoors, controlled and less prone to violence;
- The rapid popularity of crack cocaine led to increased competition among street level dealers including turf battles and disputes over drugs and/or money.
- Increased law enforcement combined with long mandatory minimums led to a “replacement effect” where young men with minimal impulse control and ready access to guns were recruited to replace older, more experienced dealers.

He further testified that the past ten years have seen a steady decrease in crime and violence related to crack cocaine distribution. Distribution roles in crack cocaine and other drug markets are well known, and easy to access by inner-city youth. For many, participating in the drug trade appears to be the only available economic option. Yet, these youth are apprehensive. Selling drugs requires a wide range of skills they lack, including the ability to recognize undercover police, possess and use guns and deal with rivals.

Dr. Blumstein provided a very salient basis for eliminating the crack-powder sentencing disparity in particular and mandatory minimums in general when he noted: “the appropriateness of mandatory [minimums] decays over time, as I believe it clearly has in the difference between crack and powder cocaine. So that it would appear that mandatory [minimums] are acts of the moment that, when incorporated into statute, keep on forever. It would be desirable, obviously to not impose them on the future. It would be desirable, at a minimum to sunset the mandatory on this particular law and it would be desirable generally to sunset mandatory [minimums] more widely....”¹⁸

The severity of punishment for crack cocaine offenses was based in large part on the perception of crack as the most “powerfully addictive” and “dangerous” drug that posed a significant threat to communities and society. However, the past decade has witnessed the re-emergence of a drug that is considered by all to be more addictive and dangerous than crack cocaine – that drug is methamphetamine. Methamphetamine is a powerful stimulant drug that can be injected, smoked, inhaled or swallowed. In most areas of the country methamphetamine is cheaper than cocaine and for some users more desirable because it metabolizes slowly so the high lasts longer, generally between four to six hours after which users often turn to other drugs to ease the crash that follows.

¹⁸ U.S. Sentencing Commission Public Hearing on Cocaine Sentencing Policy, Tuesday, November 16, 2006, Pgs. 206- 211.

As was true when crack cocaine first emerged, media outlets around the country have reported on methamphetamine as “the most dangerous and addictive drug” in the United States. Unlike prior drug outbreaks that were generally identified with urban inner city communities, methamphetamine abuse has spread from the biker and trucker communities of California to the Pacific Northwest, Mountain states and the rural heartland. Communities that previously had little experience with illicit drug addiction or drug-related crime have seen significant increases in many of the direct and collateral consequences of addiction. As was true with crack cocaine, many of those who have become addicted to methamphetamine are women, often with devastating impact on their lives and families. Methamphetamine abuse is associated with crime, domestic violence, child abuse, erratic behavior, paranoid delusions and rapid physical deterioration. Methamphetamine is comprised of synthetic chemicals that can be easily obtained and “cooked”. These chemicals are extremely volatile, particularly in the hands of non-chemists, consequently areas of methamphetamine production are marked by an increase in chemical explosions of unstable labs causing damage to humans, wildlife and the environment.

Methamphetamine is considered by both scientists and public officials to be more addictive and dangerous than crack cocaine, but so far the Congressional response to rising methamphetamine abuse has not been as punitive as it was towards crack. As noted in a Congressional Quarterly story last year, the primary response to methamphetamine production and use has not focused on punishing and incarcerating low level sellers and users. Instead, according to Rep. Elijah Cummings, "There seems to be more of an emphasis on shutting down these methamphetamine labs and trying to figure out ways to treat these addicts and then get them back into the flow of society".¹⁹

Unfortunately, thus far that compassion has not carried over to our treatment of men and women involved with crack cocaine. Many believe this difference in attitude is because of the demographics of the affected communities. Unlike crack, -- which is associated with poor, inner-city communities of color – methamphetamine is primarily used by white men and women in small cities and rural communities. While crack cocaine is now generally regarded as less dangerous than methamphetamine, crack offenses are still punished more severely. We prefer to think that this time Congress is acting in accordance with evolving knowledge and growing compassion. There is now a Congressional Methamphetamine Caucus with about 135 members. That development along with the recent change in leadership in the House of Representatives and Senate gives us hope that Congress may be ready to give serious consideration to recommendations from the Commission regarding changes in federal cocaine sentencing.

Reforming the current crack cocaine sentencing scheme would allow federal judges the flexibility to give shorter sentences to street level drug sellers; police to de-emphasize the arrest of users for simple possession; and government to shift some resources from punishment into prevention and treatment. The fear of appearing “soft” on crime or the drug issue has had a

¹⁹ Stern, Seth, Meth vs. Crack – Different Legislative Approaches, Congressional Quarter Weekly, June 5, 2006 – Page 1548

deleterious effect on the quality of public debate in this area. The research illustrates that for many white crack cocaine users and sellers drugs are already effectively decriminalized since the risk of apprehension and incarceration for them is negligible. Hopefully, Congress will decide to rethink its adherence to drug enforcement strategies that do little to impact drug use and crime but cause considerable harm to communities of color.

“The racially disproportionate nature of the war on drugs is not just devastating to black Americans. It contradicts faith in the principles of justice and equal protection of the laws that should be the bedrock of any constitutional democracy; it exposes and deepens the racial fault lines that continue to weaken the country and belies its promise as a land of opportunity; and it undermines faith among all races in the fairness and efficacy of the criminal justice system. Urgent action is needed, at both the state and federal level, to address this crisis for the American nation.”²⁰

We urge the Commission to reaffirm its 1995 recommendation - repeal of the mandatory five year sentence for simple crack possession, and eliminating the crack-powder cocaine sentencing disparity by raising the threshold amount that triggers a mandatory minimum for crack cocaine offenses to equal the amount established for powder cocaine offenses. Let’s demonstrate compassion for people caught in the net of drugs and addiction regardless of their drug of choice. Twenty years of racial injustice is too long - justice delayed is justice denied.

²⁰ Key Recommendations from Punishment and Prejudice: Racial Disparities in the War on Drugs (Washington, DC: Human Rights Watch, June 2000), <http://www.hrw.org/campaigns/drugwar/key-reco.htm>