

TESTIMONY OF THE UNITED STATES DEPARTMENT OF JUSTICE

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FEDERAL COCAINE SENTENCING POLICY

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BEFORE THE UNITED STATES SENTENCING COMMISSION

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NOVEMBER 14, 2006

INTRODUCTION

Judge Hinojosa, members of the Commission –

Thank you for inviting the Administration to appear before you today to discuss the important issue of federal cocaine sentencing policy. With me today is Joseph T. Rannazzisi, Deputy Assistant Administrator at the Drug Enforcement Administration, and he and I are available to answer any questions you may have. This testimony represents the Administration's view on federal cocaine sentencing policy and addresses many issues that we know are of concern to you.

For well over a decade, federal cocaine sentencing policy has been the subject of extensive debate at the Sentencing Commission, in Congress, the Judiciary, academia, and beyond. Since 1994, when Congress for the first time directed the Commission, in the Violent Crime Control and Law Enforcement Act of 1994, to report on federal cocaine sentencing policy, there has been disagreement about whether federal cocaine sentencing policy should change, and if so, how it should change. A few things, though, have remained unchanged in all of that time and through all of the discussions. First, the devastation that cocaine has on individuals, families, and communities

has not changed. Cocaine – both crack and powder cocaine – are very dangerous substances and trafficking in these substances is a very serious crime. Second, the route of administration of cocaine continues to be a significant factor in the extent to which cocaine impacts the brain of the user. Smoking crack has a different impact than snorting powder cocaine. And third, there continue to be major differences in the trafficking patterns of powder and crack cocaine, resulting in very different effects on individual communities and requiring a range of law enforcement responses.

In the Commission’s 1995 report, and in subsequent reports on the issue, the Commission recognized the devastatingly destructive impact of cocaine on users of the drug, the families of those users, and the neighborhoods in which cocaine abuse and trafficking occur. Systemic violence including murder, injury to and neglect of children, HIV and STD transmission are all real and common effects of cocaine use. Moreover, the Commission has documented significant differences between powder and crack cocaine use and trafficking, including the differences in the pharmacology as a result of these drugs’ routes of administration, rates of addiction and other serious societal harms, violence associated with their respective trafficking, and much more.

Since 1995, commissioners and members of Congress have recommended many different changes to federal cocaine sentencing policy. Some have suggested lowering crack penalties dramatically. Others have suggested raising powder penalties. Still others have suggested different combinations of the two. During this same period of almost 12 years, Congress and the Commission have increased drug trafficking penalties on a number of occasions for a number of different drugs, including setting the amount of methamphetamine that triggers a five or ten year

mandatory minimum sentence at the same levels currently set for crack cocaine. These penalty increases have been part of a consistent and bipartisan national drug control policy that has included a commitment to treatment for users, but at the same time, has shown no tolerance for drug trafficking and no retreat from the ongoing struggle against illegal drugs.

In 2002, Deputy Attorney General Larry Thompson testified before the Commission on behalf of the Administration opposing proposals, then under consideration, to lower penalties for crack cocaine. The existing policy that includes both the mandatory minimum sentencing scheme and sentencing guidelines has been an important part of the Federal government's efforts to hold traffickers of both crack and powder cocaine accountable, including violent gangs and other organizations that traffic in crack cocaine and operate in open air crack markets that terrorize neighborhoods, especially minority neighborhoods. However, the Administration recognizes that the Commission and many others have been especially concerned because the 100-to-1 quantity ratio appears to many to be an example of unwarranted racial disparity in sentencing. It may very well be appropriate to address the ratio between the drug weight triggers for mandatory minimum sentences for the trafficking of crack and powder cocaine, and we hope over the next months, the Commission, the Administration, and the Congress will work together to study this issue further and to determine whether any changes are indeed warranted. We think this collective work is especially critical in light of larger, systemic changes taking place in federal sentencing, and we are committed to participating in this collective work. Creating a sensible, predictable, and strong federal sentencing system is necessary to keeping the public safe and keeping crime rates at historic lows. Addressing the debate over federal cocaine sentencing policy is part of this effort.

It is important to stress too that changes to federal cocaine sentencing policy, as with systemic changes to federal sentencing more generally, must take place first and foremost in Congress. Existing statutes embody federal cocaine sentencing policy and represent the democratic will of the Congress. While we look forward to continuing this dialogue, we would oppose guidelines that do not adhere to enacted statutes clearly defining the penalty structure for federal cocaine offenses.

THE PRESIDENT'S NATIONAL DRUG CONTROL STRATEGY

We are guided in all of our work on drug policy by the President's comprehensive national strategy to fight illegal drug use. Over the past six years, the President's strategy has expanded the national drug treatment system and anti-drug education programs while recognizing the vital role of law enforcement and the essential need to continually disrupt drug markets at the international, wholesale, and local levels.

Unfortunately, drug abuse continues to plague this country at unacceptably high levels. According to estimates from the National Survey on Drug Use and Health, 19.7 million Americans were current illegal drug users in 2005; 2.4 million Americans were current cocaine users; and 680,000 were current crack cocaine users. In 2002, the Office of National Drug Control Policy estimated that the economic cost of illegal drug abuse was \$180 billion. Data provided by the Substance Abuse and Mental Health Services Administration indicate that there are roughly 380,000 emergency room incidents annually related just to cocaine. The sum total, from these and other data, is that we cannot become complacent about the enormous negative role illegal drugs – and cocaine in particular – still play in the United States.

The President's National Drug Control Strategy includes various initiatives to reduce drug use, including initiatives on drug education and community action to stop drug use before it starts. It has included significant new steps to get treatment resources where they are needed most, recognizing the need to heal America's drug users. The number of state drug courts has more than doubled over the last six years; the President's Access to Recovery Plan has made treatment more widely available; and interdiction and enforcement have disrupted drug markets in the United States and around the world.

The good news is that drug use among high school students has been reduced significantly over the past six years. According to the Monitoring the Future study, drug use among our nation's 8th, 10th, and 12th graders has dropped 19 percent since 2001. But while there has been a marked decrease in the use of methamphetamine, steroids, and ecstasy among high schoolers over that time, the use of cocaine, including crack cocaine, has remained fairly constant. More troubling, is that more than 40 percent of 12th graders report that cocaine is "fairly easy" or "very easy" to get, and that only about 50 percent of high schoolers see a great risk in using cocaine, a marked decrease from earlier years.

There should be no doubt that the serious problem of drug abuse in America remains, and any complacency will be disastrous for the country. All of America has been victimized by drug trafficking violence.

FEDERAL COCAINE SENTENCING POLICY

A. The Current Sentencing Guidelines Scheme for Drug Offenses

As the Commission knows, sentencing policy for drug offenses is a critical component of the effort to disrupt and dismantle drug trafficking organizations. It would be of little value to investigate and break up a violent drug gang, only to see the members of that gang return to the community in short order to continue their work. In 1987, working in a coordinated fashion with Congress and the Executive Branch, the Sentencing Commission tied the sentencing guidelines and federal drug penalties for drug trafficking offenses to the type and quantity of drug associated with the offense. These guidelines, found at §2D1.1 of the sentencing guidelines, call for base offense levels ranging from level 6 to level 38, moving in two-level increments determined by the type and quantity of drugs trafficked by the defendant.

The guidelines are tied – by law – to the applicable mandatory minimum drug trafficking statutes passed by Congress. The amount of controlled substance that triggers a mandatory minimum corresponds to a base offense level calibrated with the mandatory penalty. For example, five grams of actual methamphetamine triggers a mandatory minimum sentence of five years and is tied to a base offense level of 26 with a corresponding sentence of 63-78 months under the guidelines for a first offender. Title 21 U.S.C. § 841 specifies the quantity thresholds that trigger mandatory minimum sentences. Some observers have criticized the present sentencing guidelines scheme, arguing that this quantity-based scheme does not adequately address other relevant sentencing factors. We disagree.

Current law – both in the federal statutes and the guidelines – allows for appropriate consideration of aggravating factors such as the use of a gun or a defendant’s criminal history or bodily injury. Current law also allows for the consideration of mitigating factors, through the “safety valve” exception to mandatory minimums, the guidelines’ mitigating role adjustment and mitigating role cap, the acceptance of responsibility adjustment, and guideline departures when a defendant provides substantial assistance in the investigation or prosecution of another person.

Overall, we believe the structure of federal drug sentencing policy is sound and fosters a fair and aggressive law enforcement response to the national drug problem.

B. Cocaine and Federal Sentencing Policy

We similarly believe the current federal cocaine sentencing policy is properly calibrated and advances the law enforcement response to crack cocaine in a fair and just manner. We continue to believe higher penalties for crack cocaine offenses appropriately reflect the greater harm posed by crack cocaine; harms recognized by the Commission consistently since 1995. While cocaine base – crack – and cocaine hydrochloride – cocaine powder – are chemically similar, there are significant differences in the predominant way the two substances are ingested and marketed. Based on these differences and the resulting harms to society, crack cocaine is an especially dangerous drug, and its traffickers should be subject to significantly higher penalties than traffickers of like amounts of cocaine powder. We will address these differences in turn.

1. Pharmacology, Routes of Administration, and Societal Harms

An examination of the pharmacology and most common routes of administration of powder and crack cocaine reveals that crack is more potent and addictive, resulting in more emergency-room episodes and public-facility treatment admissions than powder cocaine, despite the fact that powder cocaine is much more widely used. The quicker, more intense, and shorter-duration effects of smoked crack contribute to its greater abuse and dependency potential as compared to snorted cocaine powder. Its greater addictive effects cause heavier and more frequent use and greater binging, causing more severe social and behavioral changes than use of cocaine powder.

The highest concentration of cocaine and the fastest entry to the central nervous system occur when cocaine is smoked. Smoking is one of the most efficient ways to take a psychoactive drug. The amount of cocaine that is absorbed through the large surface area of the lungs by smoking is greater even than the amount absorbed by injecting a solution of cocaine. In addition, the ease of smoking allows a user to ingest extreme levels of the drug in the body without repeatedly filling a syringe, finding injection sites, and then actually injecting oneself. The intensity of the euphoria, the speed with which it is attained, and the ease of repeat administration are factors that explain the user attraction to crack.

Differences in distribution methods, age groups involved, and levels of violence between crack and powder – all discussed more ahead – flow from the fact that smaller amounts of crack are needed to produce the euphoria that is sought by the typical user. Crack can be distributed in smaller unit sizes than powder cocaine and is sold in single dose units at prices that are at first easily affordable by the young and the poor. Because crack is distributed in such relatively small amounts in transactions that often occur on street corners, control of small geographic areas by

traffickers takes on great importance. As a result, crack offenders are more likely to possess a weapon, and crack is often associated with serious crime related to its marketing and distribution, especially violent street crime connected with gangs, guns, serious injury and death. The struggle to gain and maintain that geographic control is infused with great violence. All of this flows from the pharmacology of crack.

Moreover, other societal harms flow from the ease of use and distribution of crack. In a study of drug use and societal harms, fully one-third of crack-using women surveyed became involved in prostitution in the year after they began crack use. Women who were already involved in prostitution dramatically increased their involvement, with rates nearly four times higher than before beginning crack use. Because of the incidence of prostitution among crack users to finance their habit, crack cocaine smokers have been found to have rates of HIV infection as high as those among IV drug users.

Similarly, a 2001 study found that women who used crack cocaine had “much higher than average rates of victimization” than women who did not, and were more likely to be attacked and more likely to be raped. Although the study did not compare the victimization rates with other drug-using groups, it nevertheless starkly reflected the tremendous human toll this drug takes. Among an Ohio sample of 171 non-drug injecting adult female crack users, 62% had been physically attacked from the onset of crack use. Rape was reported by 32% of the women from the time they began using crack, and among these, 83% reported being high on crack when the rape occurred, as were an estimated 57% of the perpetrators.

2. Cocaine Trafficking Patterns

Cocaine trafficking patterns, moreover, lead to high rates of violence associated with both powder and crack cocaine trafficking, but especially with crack trafficking.

As noted above, it is important to recognize that crack cocaine does not typically enter the distribution chain in the chemical form that makes it crack cocaine; rather, it enters the distribution chain as powder cocaine, and at some point later in the distribution chain, is converted into the form known as crack. For this reason, the Administration recognizes that disrupting the cocaine market at its highest levels will have benefits in addressing both powder cocaine and the crack cocaine trafficking domestically.

At the highest levels, powder cocaine is generally trafficked in metric-ton quantities by sophisticated criminal enterprises that manage its shipment from source countries to major markets in the United States. The Drug Trafficking Organizations (“DTOs”) of today maintain an infrastructure of compartmentalized cells, each managed by a cell head and having a specific function in the overall scheme of the DTO's illicit drug trade. The Colombian DTOs are still controlled by a hierarchy; however, these current leaders are content to detach themselves from outgoing loads of illicit drugs once handed off to an entirely separate organization, typically in Mexico. The Colombian DTOs of today may be described as a loose confederation, coexisting and cooperating with each other, while aided and supported by guerilla and paramilitary groups indigenous to Colombia.

Transportation of illicit drugs within the interior of Colombia is accomplished only with the assistance of these paramilitary and guerilla groups, who complete the task through the use of both riverboats, in Colombia's dense jungles, and containerized loads hauled by tractor trailers over paved regions of the country. The illicit drugs are ultimately brought to Colombia's north and west coasts where they then leave the country through maritime smuggling operations, specifically through the use of go-fast boats. Once the illicit drugs arrive in Mexico or Central America, the Mexican DTOs take custody and the drugs are transported through Mexico in compartmentalized containers hauled by tractor trailer and most often concealed with perishables. The loads of illicit drugs are broken up into smaller parcels just prior to being smuggled into the United States. This reduction in parcel size is typically accomplished at residences, purchased by the Mexican DTOs, within close proximity to the United States border.

Upon entry into the United States, the distribution of illicit drugs by the Mexican and Colombian DTOs is further compartmentalized, with the Mexican DTOs controlling the west coast of the United States and Colombian DTOs controlling the east coast of the United States, at the wholesale distribution level. The ultimate domestic destination of a shipment of illicit drugs is decided by the Colombian or Mexican DTO head. At times, the DTO's cell head within the United States influences this decision as well. Typically, once in the United States, final destination is based on the geographic lines set forth above. Security for the illicit drugs that have arrived in the United States is often provided by heavily armed members of the DTO. Upon completion of division into smaller parcels, the illicit drugs are then turned over to the buyer or member of the DTO operating in the United States. The illicit drugs are then transported to the domestic cities predetermined by the DTO for ultimate retail sale.

At this point, the cocaine shipment is generally divided into even smaller amounts for sale to local wholesalers, who distribute 15-kilogram or fewer quantities. The local wholesalers sell kilogram amounts to retail distribution groups that further divide the cocaine for retail sales. Retail distribution groups repackage cocaine purchases in ounce and gram quantities for sale by that group or other smaller retailers. While there continues to be a market for powder cocaine at the retail level, primarily among casual users and cocaine injectors, crack distribution and abuse now constitute an important force behind the current cocaine threat in the United States.

Although crack trafficking methods vary widely, generally, they are conducted at three broad levels, namely, wholesale trafficking, mid-level distribution, and retail selling. Wholesale crack traffickers purchase cocaine in kilogram or multi-kilogram allotments from traditional cocaine sources. They will either package the cocaine into ounce quantities or convert it into crack and then divide it into ounces for sale at the next level. Wholesalers represent large groups responsible for the majority of the interstate transportation of crack and cocaine intended for crack conversion. Crack distributors further divide the ounces of crack into dosage units for sale at the retail level. If the distributors purchase cocaine themselves, they can perform the conversion process easily. These distributors often operate crack houses or manage street-corner sales locations and supervise up to 20 individual sellers. Mid-level distributors can be either members of larger groups or independent operators. Retail crack sellers carry dosage units of crack totaling no more than a few grams at any one time, although during the course of a work shift, the amount of crack sold by one retail seller can be substantial. Workers in crack houses will sell dosage units from the one or two ounces that are delivered by the mid-level distributors.

Crack cocaine is packaged in vials, glassine bags, film canisters, etc. Rock sizes are not precise, but they generally range from 1/10 to 1/2 gram. A retail or street dosage unit for crack is approximately 100 milligrams. These rocks can sell for as little as \$2 to as much as \$50. As Professor Randall Kennedy noted, “[b]ecause it is relatively inexpensive,” crack has the “dubious ‘achievement’” that it has “helped tremendously to democratize cocaine use.” Crack is easier to package, transport and conceal than powder. Crack cocaine is not water soluble and can be more easily concealed in a piece of tissue, in the mouth, or in body cavities, allowing easier and wider distribution.

Crack generally is converted locally from cocaine and sold at the retail level. When crack is available in kilogram quantities, prices are comparable to those for kilogram quantities of cocaine, with modest price increases to compensate for the task of converting the cocaine into crack. The national range for prices of ounce quantities is from \$475 to \$2,800. A gram of crack generally costs between \$80 and \$125.

3. Cocaine Trafficking and Violence

Sentencing Commission data and other studies continue to show that crack cocaine is associated with violence to a greater degree than most other controlled substances. In fiscal year 2002, when the Administration last testified before the Commission on this subject, 23.1 percent of all federal crack offenders possessed a weapon, almost double that of powder cocaine’s then 12.1 percent rate. In fiscal year 2005, weapon involvement for crack cocaine offenders was 27.8 percent versus 13.6 percent for powder cocaine offenders. In addition, the percentage of crack defendants at criminal history category VI – those offenders with long criminal records – increased to 23.5

percent in FY 2005 from the 20.2 percent figure in FY 2002. A much smaller percentage of cocaine powder defendants were involved with a weapon or were at criminal history category VI in both 2002 and 2005.

Much of the crack cocaine violence is associated with gang activity, and drug gang violence has increased in recent years. Many drug gangs that traffic in crack cocaine include very young members who carry and use guns to promote their drug trafficking. Crack cocaine is associated more with street level gang violence than is cocaine powder, although gangs also deal in methamphetamine, PCP, and many other controlled substances. According to the 2005 National Gang Threat Assessment, 38 percent of law enforcement respondents reported moderate to high involvement of gangs in the distribution of powder cocaine, while 47.3 percent reported moderate to high involvement of gangs in the distribution of crack cocaine. National Drug Threat Assessment (“NDTS”) 2004 data also show that gangs are very substantially involved in crack distribution, particularly in metropolitan areas. In fact, NDTS 2004 data indicate that 52.7 percent of state and local law enforcement agencies in large cities report high or moderate involvement of street gangs in crack distribution compared with 28.3 percent of state and local agencies in all areas.

Moreover, the National Institute of Justice’s Arrestee Drug Abuse Monitoring (“ADAM”) program 2000 urinalysis findings revealed that high percentages of ADAM arrestees had recently used cocaine – on average, 30 percent of arrestees tested positive for cocaine. NIJ sponsored a study in 1999 to examine whether arrestees testing positive for cocaine had used crack or powder

cocaine. That study looked at six ADAM sites and found that the majority of cocaine-positive arrestees – 65 percent – were using crack cocaine.

4. Enhancements Versus Drug Quantity Triggers

Some have argued that for sentencing purposes, the greater violence and other harms associated with crack can be addressed separately as a sentencing enhancement. We think this is wrong. Enhancements cannot account for all of the differences, both because of the systemic nature of some of the harms and the problems of proof in individual cases. Enhancements for violence by individual traffickers only address a portion of the systemic violence and crime of the crack trade. A sentencing court cannot know in individual cases how many of the defendant's customers' lives have been destroyed by those customers resorting to prostitution to finance their habit, nor how many innocent neighbors may have been robbed to buy the defendant's drugs. Yet we know these crimes are happening often. Crack is associated with an increase in robbery, theft, and prostitution to finance crack use.

Moreover, the Commission has documented that crack users are more likely than powder cocaine users to engage in drug transactions in a manner that elevates personal and aggregate risk, including possessing larger dealer networks and being more likely to use sex to finance drug-taking behavior. Also, because of the short high, buyer and seller will often still be in the same general vicinity when the high wears off. Users coming off a crack high often feel an intense need for more crack, and frequently suffer from dysphoria and extreme agitation. Combined, these situational factors elevate the potential for violence during crack transactions. Punishing individual dealers

only when they possess a weapon or when they use a weapon simply does not account for much of the violence they spawn.

Finally, raising the quantity threshold for crack penalties from five grams would make the investigation and prosecution of drug organizations and gang and other violence much more difficult. Successful prosecutions of violent crack cocaine distribution networks are built one drug dealer at a time from the bottom up. Without the likelihood of significant punishment, there is little incentive for drug defendants to provide information to law enforcement authorities. Simply put, if these drug defendants are not facing significant prison time, they will simply not cooperate in the investigation. Moreover, retail crack distribution networks are often insulated and difficult to penetrate, and compelling repeated purchases of larger quantities by undercover law enforcement officers or informants risks exposing the investigation of the larger organization.

For all of these reasons, we believe the quantity based mandatory minimum and guideline triggers must reflect crack's greater dangers and the needs of law enforcement to break up violent drug organizations from the bottom up.

C. Changing The Guidelines Before Congressional Action Would Be Wrong

Regardless of the Commission's ultimate position on the penalty structure for crack and powder cocaine, we strongly urge the Commission to make only recommendations to Congress and not to issue guidelines amendments. We believe issuing guidelines inconsistent with current drug sentencing policy as embodied in federal statutes is itself contrary to law. Moreover, by issuing guidelines, the Commission would effectively decouple the guidelines from the mandatory

minimums passed by Congress. The Department of Justice opposes – and has historically opposed in both Democratic and Republican Administrations – departing from the penalty scheme established by Congress, for two principal reasons: it disregards Congress’ expressed preferences, and in the absence of corresponding congressional action, it would result in an irrational sentencing scheme.

Many advocates of reducing crack penalties have urged the Commission to issue guidelines, noting Congress’ failure to act on the Commission’s 1997 and 2002 recommendations. Some advocates of reducing crack penalties say that by disregarding Congress’ preferences, the Commission would be exercising its leadership. We think this approach is wrong. A sentencing system consisting of guidelines that are inconsistent with federal statutes could produce potentially irrational sentences, providing a ten-year sentence under the mandatory minimum statute for a defendant who trafficked in 50 grams of crack, while providing for a far lesser sentence for a defendant who trafficked in a hundredth of a gram less. Such a system would fail to honor the congressional mandate to “avoi[d] unwarranted disparities among defendants with similar records.” 28 U.S.C. § 991(b)(1)(B).

But more fundamentally, the current mandatory minimums are the law of the land. The Commission is not free simply to ignore them and impose its own will in the face of clear congressional action. By changing the guidelines before any change in the existing provisions of title 21, the Commission will be doing just that: ignoring existing law. We think that issuing guidelines inconsistent with the existing mandatory minimums would fail to heed the Commission’s own oft-repeated refrain that Congress is the ultimate authority over federal

sentencing policy. In our constitutional system, the Sentencing Commission exists to effectuate the expressed will of Congress. The Supreme Court’s decision upholding the constitutionality of the Sentencing Reform Act is fundamentally premised on the belief that Congress had appropriately cabined the Commission’s discretion. As the Court noted at the time, “Congress instructed the Commission that these sentencing ranges must be consistent with pertinent provisions of Title 18 of the United States Code” *Mistretta v. United States*, 488 U.S. 361, 374-75 (1989). It would be wrong to depart from that understanding.

CONCLUSION

As noted above, the existing mandatory minimum sentencing scheme for cocaine trafficking has been an important part of the Federal government’s efforts to disrupt the cocaine market generally, and the crack cocaine and powder cocaine markets specifically. For all the reasons we have discussed, we continue to believe that the current federal sentencing policy and current sentencing guidelines for crack cocaine offenses are reasonable. The Administration appreciates the opportunity to testify at this hearing and hopes the dialogue will continue. As we stated earlier, in light of the perception of racial disparity from the 100-to-1 quantity ratio as well as the larger, systemic changes taking place in federal sentencing, our work together must go on so that we ensure that federal sentencing is predictable, and strong. In this way, we will better be able to keep the public safe, keep crime rates at historic lows, and minimize the harmful effects of illegal drugs.