Testimony of

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Judge Hinojosa and members of the Commission. My name is David Debold and I am currently in private practice at the law firm of Gibson, Dunn & Crutcher, LLP here in Washington D.C. I have been invited to testify today in my capacity as Co-Chair of the Practitioners' Advisory Group to the Commission. On behalf of that standing advisory group, it is always a pleasure to be invited to share our views from the front lines, as it were, on how the Guidelines operate. Of course, we serve primarily to provide the Commission with the defense bar's perspective, but I will add that – particularly as it relates to today's topic – most of my experience with sentencing and the federal sentencing guidelines system has been as an Assistant United States Attorney. I like to think that having seen the way the Guidelines operate in both capacities – as a prosecutor and as defense counsel – I am able to provide a balanced perspective.

The drug guidelines in general, and in particular their relative treatment of offenses involving crack and powder, have been the subject of much debate over the years. As a former Assistant United States Attorney I recall quite clearly Congress's enactment of a 1:100 ratio between crack and powder. I also recall working on many a sentencing memorandum and appellate brief defending the position that the ratio was constitutional and that downward departures based on the alleged unfairness or irrationality of the ratio were forbidden. Many judges before whom I appeared struggled mightily with how to impose sentences in crack cases that they believed were consistent with the purposes of sentencing, yet not subject to reversal.

The Commission has asked a number of questions of the panelists in an effort to assist it in deciding what changes – if any – should be made to the guidelines applicable to cocaine offenses. My comments will focus on what is listed under question number 5; which generally addresses possible differences in harms associated with crack versus powder cocaine and asks more particularly whether trafficking in one form of the drug should be punished more severely than trafficking in the other form.

There is a broader issue that I will only touch on briefly to put my comments in context. Sentences for drug defendants have always been driven primarily by drug quantity. The assumption, which I accept at a general level, is that – all other things being equal – a defendant whose offense involves a large quantity of a particular drug is more culpable, and more deserving of punishment, than a person whose offense involves a smaller quantity of the same drug. Of course, all things are rarely equal as between any two defendants. Part of the challenge

in creating a system that generates appropriate offense levels in drug cases is to figure out which factors other than drug quantity should be considered, what weight they should receive in relation to drug quantity and each other, and what to do about factors that are less susceptible to ready measurement or categorization. For example, how should the drug Guidelines account for the differences between these defendants:

- Defendant A came from a privileged background and decided to start importing large shipments of drugs to make money more easily than he could in a legitimate – and readily available – occupation.

- Defendant B came from a broken impoverished family and got involved in the drug business as a youth because his brother, whom he idolized, encouraged him to do so.

- Defendant C started dating a drug dealer knowing generally about his illegal doings and ended up agreeing to answer business phone calls for him when he was unavailable.

To some extent the role-in-the-offense provisions in Chapter 3 and specific offense characteristic provisions in section 2D1.1 try to differentiate such defendants, but in the end the quantity of drugs that can be attributed to each of my hypothesized defendants will play a large part in his or her offense level.

That is the context in which I'd like to make a few observations about the crack/powder ratio. Crack is made from powder. The process is quite simple – it involves baking powder, water and a heat source (such as a microwave oven). The mixture is cooked and a hard substance is produced. It is then broken into rocks of varying sizes. This simple conversion of cocaine from powder to rock has an enormous impact on the sentence for the person left – often quite literally – holding the bag.

Should the Guidelines recommend such disparate treatment of two defendants – one who handles the drug in powder and the other who handles it in rock form?

Consider the lifeline for a kilogram of cocaine. Coca plants are harvested, usually in a South American country. Some individual or group of individuals in that country oversees the production of powder cocaine, which is packaged for shipment to the United States. Our hypothetical kilogram could enter the United States as part of a multi-kilogram package or all by itself, say in a courier's vehicle. Someone or some group in the United States buys it. It could be my defendant A, the privileged ne'er-do-well who had every opportunity to make an honest living. The first point of contact in the United States might be buying in large quantities from a foreign source, or that person could be part of an international conspiracy and working for someone in the source country. At some point the kilogram is broken down into amounts that a user will want to buy. It also probably will be diluted with "cut" at one or more points in the process. It could remain as powder and end up being snorted by the user. Or the user could convert it to crack and smoke it. Or the person selling to the user could convert it to crack (or have someone else do it – perhaps my defendant B whose brother got him into the business). Or an organized group (of varying possible sizes) within a particular community could have a

system by which large quantities of powder are converted to crack and then the crack is distributed to various locations where it is sold to the users.

Under the Guidelines, a person who handles the kilogram of cocaine in powder form is at base offense level 26, which without any other adjustments equates to 63 – 78 months for criminal history category I. A person handling some or all of that kilogram after it has been converted to crack will be treated more harshly. According to the Commission's 2002 Report to Congress on Cocaine and Federal Sentencing Policy (page 16), a kilogram of pure cocaine will convert to 890 grams of crack under ideal conditions. Because the cocaine will probably be cut before it is made into crack, the ratio in the real world may be about the same or somewhat lower. Assume the original kilogram of powder is made into 750 grams of crack. If a defendant handles the entire 750 grams, he is at level 36, which equates to 188 – 235 months. That is three times longer than the powder defendant. To end up in the same range as the person caught with the kilogram of powder – all other things being equal – the defendant caught after conversion to crack would have to be accountable for 20 grams or less. A person possessing just 5 grams of crack would also fall also within the range that applies to a kilogram of powder.

This does not promote proportionality in sentencing. In fact, it runs counter to the goal of calibrating punishment to levels of culpability. As a general matter, the persons selling or handling the crack at a retail level are no more responsible for the harms caused by that form of the drug than the persons handling it when it was still in powder form. Indeed, again as a general matter, we would want to reserve the greater penalty for the person or persons higher in the chain of distribution – at the wholesale rather than the retail level, as it were.

To be sure, the crack defendant may be more likely to engage in violence or possess a firearm. If these are features of that particular defendant's conduct, there are ways to differentiate him or her from other crack defendants, that is, through enhancement that are already included in the Guidelines. But if we are saying that crack defendants should receive higher sentences simply because crack tends to do worse things to the community, something that itself appears not to be true, there is no good reason to single them out for harsher punishment than those who handle the cocaine before it is converted to crack.

To return to my examples, defendant A may be caught with a single shipment of a kilogram of powder cocaine, and with a plea to a single count in the absence of other drug involvement, he could be looking at a guideline range with acceptance of responsibility of 46 – 57 months. Defendant B, whose brother asked him to convert a smaller amount of powder into 60 grams of crack, and is caught in possession of that crack, would be facing a sentence of 87 – 108 months were he to plead guilty and accept responsibility (more than twice the sentence for possessing less than 1/10th what defendant A had). Defendant C, who relayed messages between her boyfriend and his co-conspirators, would face vastly different sentences depending on whether the conspirators were in the part of the distribution chain where the cocaine was still in powder form as opposed to crack.

The solution here is to return crack cocaine penalties to those applicable to the same quantity of powder cocaine – a 1:1 ratio. The penalties would still be quite stiff, but the anomalies mentioned above would be eliminated.