



RESEARCH AND ADVOCACY FOR REFORM

# Testimony of Ryan S. King before the United States Sentencing Commission Federal Cocaine Sentencing Policy

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I am Ryan S. King, a Policy Analyst with The Sentencing Project, a criminal justice policy organization located in Washington, D.C. The Sentencing Project has been engaged in research and advocacy regarding federal cocaine policy for more than a decade and we welcome the opportunity to address the Commission today. We support the Commission's past work on this important and challenging issue and applaud its continued willingness to solicit public comment on any future considerations to amend the current sentencing structure.

The United States Sentencing Commission should recommend that Congress reform federal cocaine sentencing policy for four crucial reasons:

1. The current sentencing structure, with its reliance on quantity as the primary determinant for sentence length, is flawed by design and calibrated to target low-level crack cocaine users with 5-year mandatory minimum sentences.
2. The rationale that more severe crack cocaine penalties are necessary because of heightened correlations with more serious offenses amounts to either a "double counting" of offense characteristics in cases with a serious concurrent offense or an unwarranted sentence enhancement in the remainder of cases.
3. The current federal cocaine sentencing policy has failed to produce any appreciable impact on the crack cocaine market.
4. The national consensus regarding demand-reduction versus law enforcement has evolved over the last two decades to support a more treatment-oriented agenda.

#### 1. Federal Cocaine Sentencing Laws Inappropriately Target Low-Level Offenders

In establishing the United States Sentencing Commission ("Commission") through the Sentencing Reform Act of 1984 ("SRA"), Congress called upon the agency to craft policies and practices in the federal criminal sentencing system that "[provide] just punishment for the offense," deter future criminal

activity, and offer rehabilitation.<sup>1</sup> These aims are framed by the caution that the length of sentence be “sufficient, but not greater than necessary” to achieve the aforementioned outcomes. This statutory language implies a degree of rationality and predictability in sentencing; ostensibly, bringing accrued institutional and practical knowledge to bear on the development and implementation of criminal sentences. One might say that the ultimate goal is for the proverbial “punishment to fit the crime.”

In the wake of the passage of the SRA, in which the Commission was charged with overhauling the federal sentencing system and devising a comprehensive set of guidelines, Congress responded to what it perceived as weaknesses in drug sentencing laws with the Anti-Drug Abuse Act of 1986 (“Act”). The Act was hastily passed in a climate of national fear about the spread of drug abuse and an increasingly politicized atmosphere in which commitment to fighting the dangers of drug abuse was measured by support for more punitive sentencing.

During the brief period of debate leading up to the passage of the Act, the legislative history indicates that lawmakers felt harsh mandatory minimum sentences were necessary to deter the proliferation of drug distribution networks and their associated criminality. Senator Robert Byrd described the individuals who Congress intended to target with the new mandatory minimums by stating that the 10-year mandatory minimum should apply to “the kingpins – the masterminds who are really running these operations,” while the 5-year mandatory minimum sentence should apply to “middle-level dealers.”<sup>2</sup> Unlike the federal sentencing guidelines established by the Commission, in which a range of offense and offender-specific characteristics are used to calculate a sentence, Congress imposed a much narrower and inflexible system. Instead of examining the body of evidence in a case in order to evaluate the sophistication of a defendant’s participation in a drug

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<sup>1</sup> 18 U.S.C. § 3553(a) (2) (A-D).

<sup>2</sup> 132 Cong. Rec. 14,300 (1986) (statement of Sen. Robert Byrd).

enterprise, as is permissible under the guidelines, Congress simply substituted the weight of the drug as the sole determinant.

By using weight as the only indicator of the role played in the drug offense, Congress intended to establish generalized equivalencies across drug types by controlling for differences in the perceived severity of a substance's harm by adjusting the weight required to trigger the respective mandatory sentence. For example, 100 grams of heroin or 100 kilograms of marijuana merit a 5-year mandatory minimum sentence. Meanwhile, 5 grams of crack cocaine or 500 grams of powder cocaine warrant the same sentence, a 100:1 difference. Thus, the determination was made that an individual caught possessing these drug quantities could be assumed to be engaging in serious trafficking.

The differential cocaine penalty threshold has been particularly controversial for two reasons. First, crack and powder cocaine are manufactured from the same compound of origin. Thus, despite a substantial difference in the way in which the law views each drug, their pharmacological roots are identical. Secondly, and most germane to this discussion, the weight-level necessary to warrant a 5-year mandatory sentence for crack cocaine is set so low that it is likely to impact low-level users.

The legislative testimony makes it clear that mandatory sentences were designed to target drug sellers. This two-tiered structure of penalties was intended to “create the proper incentives for the Department of Justice to direct its ‘most intense focus’ on ‘major traffickers’ and ‘serious traffickers.’”<sup>3</sup> A “major trafficker” was defined as someone who operated a manufacturing or distribution network, while a “serious trafficker” was defined as someone who managed “retail level traffic” in “substantial street quantities.”<sup>4</sup>

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<sup>3</sup> William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 *Arizona Law Review* 1233, 1252 (1996).

<sup>4</sup> *Ibid.*

Relying upon weight levels as a primary determinant to identify an individual as a major or serious trafficker has proven to be particularly problematic. While concluding that someone arrested with 100 kilograms of marijuana (220 pounds) must be engaged in a network that is distributing “substantial street quantities” of the drug is a reasonable position, that argument is less compelling when considering the quantity that triggers the 5-year sentence for crack cocaine. It is simply untenable to contend that 220 pounds, or even a fraction of that weight, is suitable for personal consumption. The same is true with the 500 gram (1.1 pounds) trigger for a powder cocaine offense. However, it is entirely plausible that someone possessing five grams of crack cocaine, the equivalent of slightly less than two packets of sugar, could be holding that quantity for personal consumption. It is estimated that five grams of crack cocaine translates into anywhere between ten and fifty doses.<sup>5</sup> Meanwhile, the 500 grams of powder cocaine necessary to trigger the five-year mandatory penalty would yield between 2,500 and 5,000 doses.<sup>6</sup> It is reasonable to consider that an individual might consume between 10 and 50 doses of crack cocaine over the course of a week, but not that anyone could consume 2,500 to 5,000 doses of powder cocaine.

In fact, this improper calibration of the weight threshold triggers has resulted in a disproportionate number of low-level offenders being convicted for crack cocaine offenses. In 2000, 73% of persons convicted for a crack cocaine offense were “street-level dealers” or of lesser culpability.<sup>7</sup> Only 21% of defendants were described as importers, suppliers, or managers. Thus, only one in five defendants appears to meet the criteria of a “major” or “serious” trafficker. This is likely the result of a combination of factors, including the dynamics of crack cocaine markets, but there is little question that the low

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<sup>5</sup> *Report to Congress: Cocaine and Federal Sentencing Policy*, United States Sentencing Commission, May 2002. p. 17.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*, p. 39.

weight threshold is a contributing factor to the prosecution of so many street-level dealers and users.

The conflation of weight level with the seriousness of a defendant's role in a drug enterprise is a fundamental flaw in federal cocaine sentencing laws. The current weight thresholds present no equivalence across drug types in relation to the seriousness of the charged activity. While the link between weight and conduct for marijuana and powder cocaine is arguably reasonable, the crack cocaine weight trigger bears no resemblance to the seriousness of the conduct. The weight ratio for crack cocaine is calibrated so as to ensnare low-level offenders at the 5-year mandatory level. In addition, the reliance on a single factor to determine sentence exacerbates the aforementioned problems by exposing defendants who have played peripheral roles in the drug trade to sentences far out of proportion to their conduct and in spite of potentially mitigating evidence.

The Commission should recommend that Congress repeal the mandatory minimum sentences in Title 21 §841(b) (1) (A-B). If Congress is unwilling, then the Commission should recommend that Congress broaden the consideration of relevant conduct used as criteria for subjecting persons to such punishment so as to more accurately reflect a defendant's level of participation in a drug enterprise.

## 2. The 100:1 Ratio Makes Inappropriate Assumptions About Crack Cocaine Markets

The primary rationale for implementing a weight differential between powder and crack cocaine was the perception that there are tangible differences between the two substances. Senator Lawton Chiles remarked that “[s]uch treatment is absolutely essential because of the especially lethal characteristics of this form [crack] of cocaine.”<sup>8</sup> Among concerns about the

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<sup>8</sup> 132 Cong. Rec. 26,447 (1986) (statement of Sen. Lawton Chiles).

enhanced addictiveness of crack cocaine, the issue that perhaps played the most significant role in justifying the differential was its perceived correlation with more serious crimes.<sup>9</sup> It was posited that crack cocaine markets were breeding grounds for violence, largely due to the unique contours of the drug's distribution model which lacked the hierarchical structure and associated order of powder cocaine or marijuana. This resulted in a higher concentration of lower-level sellers and it was theorized that violence was the inevitable result of the struggle for market share.

The fear that crack cocaine created a proclivity to engage in other serious criminal behavior led Congress to embed an assumption in favor of a defendant having committed a concurrent serious crime in the structure of the statutory penalty. By treating crack cocaine more severely, Congress codified the unsubstantiated (and subsequently refuted)<sup>10</sup> belief that all crack defendants manifest a tendency toward more serious criminal offending. This prejudice creates a significant disparity in sentence length for persons convicted for crack cocaine offenses, and is problematic for two reasons.

First, for individuals who have not engaged in a lesser-included or more serious offense, the enhanced penalty scheme categorically subjects crack cocaine defendants to a punishment based on uncommitted behavior. Secondly, for persons who have been charged with a concurrent offense, the penalty differential "double counts" the charged conduct relative to a powder cocaine defendant. This is the result of the additional penalties that apply to related, charged conduct. For example, the 28% of crack cocaine

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<sup>9</sup> See *Special Report to the Congress: Cocaine and Federal Sentencing Policy*, United States Sentencing Commission, February 1995. pp. 118-119. (observing that "the correlation between crack cocaine use and the commission of other serious crimes was considered greater than that with other drugs.")

<sup>10</sup> See Paul J. Goldstein, Henry H. Brownstein, Patrick J. Ryan, and Patricia A. Bellucci, (1997), "Crack and Homicide in New York City: A Case Study in the Epidemiology of Violence," in Craig Reinerman and Harry G. Levine, (Eds.), *Crack in America: Demon Drugs and Social Justice*, Berkeley, CA: University of California Press. pp. 113-130.

defendants for whom a weapon was involved in their offense already face a statutory enhancement for having a weapon present during the commission of a drug trafficking crime.<sup>11</sup> A first offense for having a weapon present carries a 5-year mandatory minimum, and if the weapon is brandished or discharged the mandatory sentence can increase to 7 or 10 years respectively. Additional penalties apply as well if the weapons-related conduct results in physical harm. Subsequent weapons offenses result in a 25-year mandatory minimum to be appended to the sentence for the drug charge. A crack cocaine defendant arrested with 5 grams of the substance and a holstered weapon could face about twice the time in prison due to the presumption of serious-related conduct that has already been factored into the drug mandatory. The practical outcome of the penalty differential is that crack cocaine defendants are required to either answer for conduct in which they did not engage, or face a penalty that takes into consideration the same conduct twice.

The penalty differential in federal cocaine sentencing law was based on unproven theories about the singular harms associated with crack cocaine that have subsequently been proven false in the two decades since the Act's passage. This 100:1 ratio unfairly penalizes some defendants for behavior in which they did not engage while "double counting" the punishment for other defendants. The Commission should recommend that Congress amend the federal cocaine sentencing laws by raising the weight of crack cocaine necessary to trigger a 5-year and 10-year mandatory minimum to 500 grams and 5,000 grams respectively.

### 3. Federal Cocaine Sentencing Has Failed to Disrupt Drug Markets

As stated in the SRA, the goal of a federal criminal sentence is to both punish as well as deter future criminal activity. For drug offenses, the results have not been encouraging in this regard. The number of regular crack cocaine

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<sup>11</sup> 18 U.S.C. § 924 (c).



users has remained stable for the last two decades, while the number of annual new initiates during the 1990s also remained level.<sup>12</sup> Data from the Drug Enforcement Administration on the purchase price of crack cocaine demonstrates no noticeable effect of the strict sentencing model. Contrary to the underlying theory of drug enforcement, that increased pressure on market distribution patterns will result in a limiting of supply and a subsequent increase in demand and cost, the average price per gram of a purchase between 1 and 15 grams actually *fell* by 57% between 1986 and 2003.<sup>13</sup> If law enforcement or stiffer sentences were effective in deterring market entry, it would be expected that supply would decline and prices would increase. However, the data indicate the opposite. The drop in prices suggests either an increase in supply or a decrease in demand. Considering the household drug survey responses, which demonstrate stability in the number of users and new initiates during this period, there is little support for the theory that reduced demand is driving down prices. Thus, the logical conclusion is that prices are declining due to increased market entry by suppliers and greater availability of the drug.

This pattern of decline is mirrored in pricing trends for powder cocaine, which experienced significant drops during the same period. The decline was generally steady for both substances, with discrete increases in 1990, 1995, and 2000. The fact that prices for powder cocaine, a substance lacking the same stiff penalty structure as crack cocaine, declined at the same rate is further evidence that the federal sentencing structure for cocaine has failed to disrupt the drug markets.

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<sup>12</sup> Data available from the United States Department of Health, Substance Abuse and Mental Health Services Administration, online at: <http://oas.samhsa.gov/cocaine.htm>

<sup>13</sup> Office of National Drug Control Policy (2004). *The Price and Purity of Illicit Drugs: 1981 Through the Second Quarter of 2003*. Washington, DC: Executive Office of the President (Publication Number NCJ 207768). p. 60. Crack cocaine prices show significant degrees of variability by year and location, but the average price is the best indicator available for national market prices.

The limited impact of law enforcement and severe sentences is endemic to efforts to curtail drug abuse through supply-side enforcement. Unlike other criminal activity, in which the incapacitation effect of incarceration can reduce the potential for future criminal activity during the period of imprisonment, drug markets are characterized by their elasticity and there is generally a strong replacement effect of former sellers lost to prison. Noted criminologist Alfred Blumstein observed, “. . . drug markets are inherently demand driven. As long as the demand is there, a supply network will emerge to satisfy that demand. While efforts to assault the supply-side may have some disruptive effects in the short term, the ultimate need is to reduce the demand in order to have an effect on drug abuse in society.”<sup>14</sup>

The federal cocaine sentencing structure, with its sole reliance on harsh sentencing and supply-side enforcement, has provided no noticeable impact on crack cocaine distribution or national consumption. The Commission should recommend to Congress that these laws are reformed in concert with a national drug abuse prevention model that directs resources to demand-reduction.

#### 4. Evolving National Support for Treatment

The domestic atmosphere regarding treatment for drug offenders has shifted dramatically in the twenty years since the passage of the Act. In 1986, the national drug control strategy was almost exclusively focused on enforcement and interdiction, with treatment relegated to those individuals with the discretion and means to seek it privately. Beginning in 1989 with the first drug courts in the Miami-Dade (FL) area, the United States has experienced an evolution in thinking about how best to address drug abuse. As the initial results from the first drug court programs began to suggest the cost-effectiveness of treatment versus incarceration, support for demand-side

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<sup>14</sup> Alfred Blumstein, (1993), “Making Rationality Relevant – The American Society of Criminology 1992 Presidential Address,” *Criminology*, Vol. 31, (1), pp. 1-16.

reduction approaches increased. The positive reports on drug court diversion programs led to incentives via federal funding and a subsequent expansion of programs across the country.

Public discourse around diversion for drug offenders has continued to shift in favor of alternatives to incarceration, highlighted by landmark policy changes in Arizona in 1996 and California in 2000 as well as an ever-growing bipartisan roster of lawmakers and practitioners calling for reform. By 2006, more than half of the states had modified their drug laws. These developments include establishing diversion programs for certain categories of offenders, repealing some provisions of mandatory sentences, and increasing funding for treatment options. Admittedly most of these programs target low-level drug users; however, the success of Proposition 36 in California, which offers a more ambitious treatment-oriented model than other measures, indicates that the climate for reform continues to be fertile as the American public grows increasingly discontented with the supply-side approach to fighting drugs.

The federal cocaine sentencing laws stand in stark contrast to this momentum for reform. The structural emphasis on weight of the drug as the primary indicator of the involvement in the narcotics trade ensnares numerous low-level drug users in prison for long mandatory sentences. Whereas this approach may have been the standard by which drug abuse was addressed in the 1980s, the passage of time has rendered this strategy ineffective, at best, and counterproductive, at its worst. Although the Commission is not charged with helping establish or monitor this country's drug abuse prevention strategy, there are affirmative steps which it can take to bring our criminal sentencing in harmony with developments in other arenas. While it is beyond the Commission's purview to expand the availability of drug treatment options, it can take the important step of ensuring that low-level offenders are not subjected to harsh mandatory minimum sentences. In no section of the criminal code is this more necessary than the federal cocaine

structure, where the unreasonably low weight threshold for crack cocaine subjects many defendants who might benefit from treatment to harsh mandatory sentences.

### Conclusions and Recommendations

Federal cocaine sentencing policy is an antiquated relic of an era where the conversation about combating drug abuse was focused on enforcement and interdiction. In the twenty years since the passage of the Act, our understanding of the value of treatment and diversion and the costs of the “war on drugs” has become painfully clear. In addition, during that time, much of the underlying rationale for the implementation of a two-tiered and unequal penalty structure for cocaine offenses in the federal system has been refuted. Concerns about crack cocaine as a catalyst of related serious offending have proven to be false, and as a cruel twist, it has actually been empirically demonstrated that the role of the enforcement policy itself may have been far more damaging than any pharmacological effects of the drug.<sup>15</sup>

The differential penalty structure established in 1986 was premised on fear and misperception. The result was overly broad categories which applied punishment based solely on weight. The consequence was a law that was intended to target traffickers but has, in practice, impacted many low-level offenders and peripheral players in the drug trade by exposing them to harsh mandatory sentencing. The Commission would be doing a service to the citizens of the United States if it requests that Congress revisit the decisions of 1986 and apply a lens of analysis that benefits from two decades of accrued wisdom and knowledge about the consequences of a punitive sentencing model to address drug abuse. If they follow this path, the only rational approach is to raise the weight trigger of crack cocaine to a level commensurate with its original intent, to target serious and major traffickers.

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<sup>15</sup> Roland G. Fryer, Jr., Paul S. Heaton, Steven D. Levitt, and Kevin M. Murphy, (2005), *Measuring the Impact of Crack Cocaine*, Working Paper 11318, National Bureau of Economic Research.

In order to establish a fair and effective federal cocaine sentencing policy, we request that the Commission recommend the following:

- In light of twenty years of evidence demonstrating the ineffectiveness of mandatory minimums to achieve the primary goal of a reduction in criminal offending, the Commission should recommend that Congress repeal these laws and instruct judges to rely upon the guidelines as a means of calculating sentence.
- If Congress is unwilling to engage in a wholesale repeal of mandatory minimum sentencing, then the Commission should recommend that significant reform is taken with regard to federal cocaine policy.
  - First, as a result of its susceptibility to ensnaring low-level and peripheral actors and subjecting these defendants to harsh mandatory sentences, the practice of relying upon weight as the sole determinant of the sophistication of a defendant's participation in a drug enterprise should be discontinued.
  - Second, any system which includes mandatory minimum penalties for drug offenses should only apply these sanctions to defendants who meet a set of criteria used to determine role in the offense. In addition to the weight of the substance, other factors indicating the degree of involvement in the drug enterprise should be considered prior to exposing a defendant to a mandatory minimum penalty.
  - Finally, because the primary reasons justifying the unequal penalty structure in 1986 have been subsequently refuted, the 100:1 weight threshold differential between powder and crack cocaine should be repealed by raising the level of crack cocaine necessary to trigger a 5-year and 10-year mandatory sentence to 500 grams and 5,000 grams respectively.



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