

**Testimony**

**of**

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**and**

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**Re: Cocaine and Federal Sentencing Policy**

**Before the  
United States Sentencing Commission**

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## **I. Introduction**

Thank you for this opportunity to testify at the United States Sentencing Commission's public hearing on cocaine and federal sentencing policy. My name is Nkechi Taifa, and I currently serve as Senior Policy Analyst for the Open Society Policy Center and as convener of the Washington-based policy network, the Justice Roundtable. The Open Society Policy Center is a non-partisan organization that engages in policy advocacy on U.S. and international issues, including foreign operations, criminal justice reform, human rights, women's rights, and civil liberties.

I am testifying today on behalf of the Justice Roundtable, a broad network of organizations working on issues which span the criminal justice continuum of law enforcement, sentencing, prison, and reentry. The Roundtable's overarching mission is to promote fairness and equity in all aspects of the criminal justice system. We pursue this mission through education and advocacy to influence public policy, and through public and legislative discussion of criminal and civil justice reform issues. We applaud this Commission for making review of cocaine and federal sentencing policy a priority area of its work.

As background, I will examine selected Sentencing Commission proceedings relative to cocaine and federal sentencing policy. I will next acquaint this Commission with some of the ongoing campaign work of the Justice Roundtable to address the inequities of crack cocaine penalties. Turning to questions raised by this Commission, I will address those pertaining to violence and harm, dispelling concerns which often arise. Finally, I will conclude by encouraging this Commission to reinstate its original recommendation transmitted to Congress May 1, 1995 amending the sentencing

guidelines by equalizing the penalty triggers between crack and powder cocaine possession and distribution, and calling on Congress to harmonize the mandatory minimum crack statutes with the proposed guideline amendments.

## **II. Background**

We are coming to the close of the twentieth anniversary year of the passage of the law mandating a disparate punishment structure for crack and powder cocaine offenses. In 1986 Congress enacted the Anti-Drug Abuse Act that differentiated between two forms of cocaine distribution – powder and crack – and singled out crack cocaine for dramatically harsher punishment. A five year mandatory minimum sentence is required for dealing in five grams of crack cocaine. It takes trafficking in 100 times as much powder cocaine – 500 grams – to trigger the same five year sentence. Fifty grams of crack cocaine yields a ten year sentence, whereas 5000 grams of powder cocaine yields the same sentence. Thus, in what has come to be known as the 100:1 ratio, it takes 100 times more powder cocaine than crack cocaine to trigger the harsh five and ten year mandatory minimum sentences, which have been anchored to the Sentencing Guidelines.

In 1988 Congress further distinguished crack cocaine from both powder cocaine and every other drug by creating a mandatory felony penalty of five years in prison for simple possession of five grams of crack cocaine. In 2002, 81.4% of those convicted of crack cocaine offenses in federal court were African American. Although there are larger numbers of documented White crack cocaine users, federal law enforcement and prosecutorial practices have resulted in the “war on drugs” being targeted at inner-city communities of color. This has caused an overwhelming number of arrests from these

communities, with Blacks disproportionately impacted by the facially neutral yet unreasonably harsh, crack penalties. It has been reported that the higher proportion of African Americans charged with crack offenses is the single most important difference accounting for longer sentences imposed on them, relative to other racial groups. Revising this one sentencing rule, this Commission has concluded, would do more to reduce the sentencing gap between Blacks and Whites than any other single policy change.

It is recognized that two decades ago, little was known about crack, other than vague perceptions that this new derivative form of cocaine was more dangerous than its original powder form, would significantly threaten public health, and greatly increase drug-related violence. Since that time, copious documentation and analyses by this Commission have revealed that many assertions were not supported by sound data and, in retrospect, were exaggerated or simply incorrect.

In 1995 this Commission transmitted to Congress recommendations that would equalize the penalty triggers between crack and powder cocaine possession and distribution, at current powder cocaine triggers.<sup>1</sup> It is instructive to stress that the Commissioners unanimously agreed that the penalty triggers for simple possession of crack and powder cocaine should be equal. A majority of the Commissioners supported not differentiating the triggers for distribution as well. Indeed, the only dissenting Commissioner to provide an alternative ratio for distribution stated that a five-to-one ratio “may be a good starting point for analysis.”<sup>2</sup> Although this Commission exhaustively

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<sup>1</sup> 60 Fed. Reg. 25074, amend. No. 5 (proposed May 1, 1995).

<sup>2</sup> (This was the view of Commissioner Goldsmith, dissenting in part from the Commission’s proposed amendment.) See Letter from Richard A. Conaboy, Chairman, U.S. Sentencing Commission, to J. Orrin Hatch, Chairman, Senate Judiciary Committee (May 1, 1995), in U.S. Sentencing Commission: Materials

researched and analyzed the issue of cocaine and federal sentencing policy “from every conceivable angle and for many, many, many months,” making “every effort to consider this critical matter in a thorough and professional manner,”<sup>3</sup> the recommendations were summarily rejected by Congress.<sup>4</sup> Congress rebuffed the wisdom of the body of experts it had directed to advise it on this issue by voting to “disapprove” of the Commission’s recommendations, sending the issue back to this Commission for further study.<sup>5</sup> Indeed, out of over 500 recommendations submitted by this Commission to Congress since its inception, this represented the first time Congress disregarded the advice. Even more egregiously, Congress demanded that this Commission revise its recommendations so as to maintain sentences for crack cocaine trafficking that exceeded those for powder cocaine trafficking.<sup>6</sup>

In April 1997 this Commission, pursuant to that Congressional mandate, modified its 1995 call for complete elimination of the crack/powder disparity, recommending instead increasing from 5 grams the amount of crack needed to trigger a five year mandatory sentence to between 25 and 75 grams, and lowering from 500 grams the

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Concerning Sentencing for Crack Cocaine Offenses, 57:0 CRIM L. RP. 2127 (1995); See also Powder Cocaine and Crack Cocaine Sentences, 1995: Hearings Before the Subcommittee on Crime of the House of Representatives’ Committee on the Judiciary, 104<sup>th</sup> Cong., 1<sup>st</sup> Sess. 1 (1995) (statement of J. Deanell Reece Tacha, U.S. Sentencing Commission), “the similarities between the majority and the dissent on this issue are much greater than our differences.” *Id.* Also, in the words of then Commission Chair Conaboy: “We have all worked very hard on this issue, and I want to stress first the Commission’s unanimity. We all agreed on the conclusions contained in our report to Congress as well as the facts that form the bases of the conclusions. And while we certainly differ on parts of our final specific recommendations, our differences are relatively small ... the Commissioners who dissented from our recommendations did not seriously discuss any ratio greater than 5-to-1.” *Id.* Statement of Richard P. Conaboy.

<sup>3</sup> Conaboy Letter

<sup>4</sup> CONG. REC. H10255-56 (daily ed. Oct. 18, 1995), H. Res. 237, 104<sup>th</sup> Cong.; CONG. REC. sec.14645-56 (daily ed. Sept. 29, 1995), S. 1254, 104<sup>th</sup> Cong.

<sup>5</sup> See 141 CONG. REC. H10, 255-02, 281 (daily ed. Oct. 18, 1995). The House of Representatives voted 316-98 to disapprove of the Sentencing Commission’s recommendations. Although the Senate earlier voted to disapprove of the recommendations, there was no roll call vote in that chamber. See 141 CONG. REC. S14, 645-06, 782 (daily ed. Sept. 29, 1995).

<sup>6</sup> See Pub.L.No. 104-38, 109 Stat. 334 (Oct. 30, 1995)

amount of powder cocaine needed to generate the same penalty to a level between 124 and 375 grams. In a concurring opinion, then Vice Chairman Michael Gelacak chided the modification, stating that “political compromise is a function best left to the Legislature.”<sup>7</sup> It is noted, however, that this Commission unanimously reiterated its core 1995 finding that the 100-to-1 drug quantity ratio was not justified.

Although the Sentencing Commission was designed to insulate criminal sentencing from the exigencies of politics, this Commission was restrained from accomplishing its given task – the consideration of sentencing policies free from pressure. Then Commissioner Wayne Budd, in testimony before the House of Representatives, illustrated this tension as follows:

We have found that almost everybody in a position of political authority is reluctant to take a position on the issue. The reluctance is understandable. Even though almost everyone believes, in the carefully crafted words of the Justice Department, ‘that an adjustment in the current penalty structure may be appropriate,’ there is a pervasive fear that if you call for change that lowers a criminal sentence for anybody, let alone for a drug criminal, you will be excoriated about being ‘soft on crime’ or ‘sending the wrong message on crime.’ *But every once in a while, the proper public policy demands an adjustment and demands the leadership to push for change, because irrational and unfair sentencing policies also send a message.*<sup>8</sup>

This Commission again revisited the crack/powder issue with recommendations in its 2002 Report to Congress on Cocaine and Federal Sentencing Policy. At that time this Commission advocated increasing the five year mandatory minimum threshold quantity for crack cocaine offenses to at least 25 grams and the ten year threshold quantity to at least 250 grams, while maintaining the current mandatory minimum

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<sup>7</sup> Concurring Opinion of Vice Chairman Michael S. Gelacak at 1 in U.S. SENTENCING COMMISSION, SPECIAL REPORT TO CONGRESS; COCAINE AND FEDERAL SENTENCING POLICY (Apr. 1997).

<sup>8</sup> Powder Cocaine and Crack Cocaine Sentences, 1995; Hearings Before the Subcommittee on Crime of the House of Representatives, Committee on the Judiciary, 104<sup>th</sup> Cong., 2d Sess. 1-2 (1995) (statement of Wayne A. Budd, U.S. Sentencing Commission) (emphasis added).

threshold quantities for powder cocaine offenses. This Commission also recommended that Congress provide direction for enhancements within the guideline structure that targets the most serious drug offenders.

Despite its 15 year review of guidelines sentencing where this Commission reported that revising this one sentencing rule would do more to reduce the sentencing gap between Blacks and Whites “than any other single policy change,” and would “dramatically improve the fairness of the federal sentencing system,”<sup>9</sup> and despite this Commission adhering to Congress’s mandate to maintain a difference in the penalty triggers, Congress has yet to address any of this Commission’s recommendations since 1995.

### **III. Justice Roundtable’s Campaign: “Time to Mend the ‘Crack’ in Justice”**

On January 1, 2006 the Justice Roundtable launched a national campaign, “Time to Mend the ‘Crack’ in Justice” using the 20 year anniversary of the crack law’s passage as a catalyst to encourage public and legislative discussion of the issue. The campaign has featured Letters to Congress, Hill Briefings and Reports, creative “Show and Tell,” as well as advocacy before an international body. The Campaign’s rallying cry has been: “Twenty years of discriminatory crack cocaine sentencing is enough. The studies are completed. The research is compelling. The analysis is sound. Now is the time to mend this ‘crack’ in our system of justice.”

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<sup>9</sup> United States Sentencing Commission [USSC], *Fifteen Years of Guidelines Sentencing* (Nov. 2003), p. 132.

**A. Open Letters to Congress** – On February 16, 2006 over fifty organizations which participate in the Justice Roundtable delivered an Open Letter to Congress, citing their agreement with this Commission’s 1995 careful analysis that the present 100:1 quantity ratio is too great and results in penalties that sweep too broadly, apply too frequently to lower-level offenders, overstate the seriousness of the offenses, and produce insupportable racial disparity in sentencing.<sup>10</sup> The groups stressed that justice necessitates that crack cocaine sentences have the same quantity triggers as those currently required for powder cocaine, concluding that aligning crack cocaine sentences with current powder cocaine sentences is the sound way to eliminate this unfair disparity.<sup>11</sup>

On October 27, 2006, a group of religious leaders serving communities across the United States sent a letter to the Chairs and Ranking Members of the Senate and House

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<sup>10</sup> These groups included American Civil Liberties Union, American Friends Service Committee, Break the Chains, Brennan Center for Justice, Correctional Education Association, Families Against Mandatory Minimums, Global Rights, Criminal Justice Institute-Harvard Law School, Human Rights Watch, Interfaith Drug Policy Initiative, International Citizens United for the Rehabilitation of Errants, Justice Fellowship, Justice Policy Institute, Lawyers Committee for Civil Rights Under Law, Leadership Conference on Civil Rights, Legal Action Center, National Alliance of Faith and Justice, National Association for the Advancement of Colored People, NAACP-Legal Defense and Educational Fund, National Association of Criminal Defense Lawyers, National Bar Association, National Black Alcoholism and Addictions Council, National Black Police Association, National Conference of Black Lawyers, National Conference of Black Political Scientists, National Congress of Black Women, National Council of La Raza, National Juvenile Justice Network, National Legal Aid and Defender Association, National Rainbow Coalition, All of Us or None, Nu Leadership Policy Group, Ohio Commission on African-American Males, Open Society Policy Center, Penal Reform International, Presbyterian Church (USA), Rebecca Project for Human Rights, Religious Action Center of Reform Judaism, the Sentencing Project, Unitarian Universalists for Drug Policy Reform, United Church of Christ Justice and Witness Ministries, General Board of Church and Society United Methodist Church, Washington Bar Association.

<sup>11</sup> See Open Letter to Congress “Time to Mend the ‘Crack’ in Justice,” February 16, 2006. This letter is appended to this Testimony. The Open Letter to Congress also stressed that reducing the quantity threshold for powder cocaine to that of crack cocaine is an option that was unanimously rejected by this Commission in 2002 as likely to exacerbate, rather than ameliorate, the problems with cocaine sentencing. Such an approach would not cause a shift in focus from bit players to drug “kingpins,” but would lead to dramatically increased levels of federal incarceration, furthering burdening the federal system at a great cost to taxpayers.



Judiciary Committees expressing their concern about the current mandatory minimum sentences for crack and powder cocaine.<sup>12</sup> An excerpt from that letter reads:

Many of our constituents and member congregations minister to those in prisons and assist with the successful reentry of people as they leave prison and return to their families and communities. These excessively long sentences for drug offenses – not to mention the sense of unfairness and despair that the disparity in sentence lengths create – often hinder the success of these important efforts by destroying the family connections, spiritual relationships, and hope that are so important to reclaiming their lives.

On October 27, 2006 a letter from 150 Professors of Criminology, Sociology and Law was delivered to the Senate and House Judiciary Leadership. This letter stressed that the crack law “was a major mistake.”

Simply put, the current mandatory minimums are undermining public safety by providing perverse incentives for federal law enforcement agencies to focus on minor offenders instead of major traffickers. This is opposite of what Congress intended.

Copies of these Open Letters to Congress are appended to this testimony.

**B. Hill Briefings and Reports** – On February 16, 2006 the Justice Roundtable, along with the Public Safety, Sentencing and Incarceration Reform Caucus of the House of Representatives hosted a Roundtable Discussion with experts from the Justice Roundtable on the injustice of crack cocaine sentencing, launching its “Time to Mend the ‘Crack’ in Justice” Campaign.

On October 27, 2006, two decades from the day President Ronald Reagan signed the Anti-Drug Abuse Act of 1986, the Justice Roundtable hosted a Senate Staff Briefing,

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<sup>12</sup> Signee religious institutions include the Episcopal Church Office of Government Relations, Washington Office Presbyterian Church, United Methodist Church General Board of Church and Society, United Methodist Church General Commission on Religion and Race, The Aleph Institute, Disciples Center for Public Witness, Friends Committee on National Legislation, Justice Fellowship, Union for Reform Judaism, Unitarian Universalist Association of Congregations, Mennonite Central Committee, United Church of Christ Justice and Witness Ministries, International Citizens United for the Rehabilitation of Errants, National Alliance of Faith and Justice, Interfaith Drug Policy Initiative.

“The 20-Year Legacy of Crack and Powder Cocaine Sentencing.” During this briefing the Sentencing Project moderated a stellar panel which included representatives from the U.S. Sentencing Commission, Office of Senator Jeff Sessions, Criminal Justice Policy Foundation, and the American Civil Liberties Union. The diverse group of panelists engaged in frank discussion to an impressive, capacity-filled Senate meeting room.

Several organizations active in the Justice Roundtable’s campaign to heighten awareness of the need to fix the crack/powder disparity released reports this year. On January 12<sup>th</sup>, the Sentencing Project issued a report documenting developments in crack cocaine sentencing after *United States v. Booker*, “Sentencing With Discretion: Crack Cocaine Sentencing After Booker,” which documented developments in crack cases since the Supreme Court’s ruling striking down the mandatory application of the federal sentencing guidelines as unconstitutional. A key finding of the report was that federal judges continue to impose stiff prison sentences in crack cocaine cases despite deviations from the federal guidelines.

On May 18<sup>th</sup> the American Constitution Society’s Constitution in the 21<sup>st</sup> Century Project released an issue brief, “The ‘Crack’/Powder Disparity: Can the International Race Convention Provide a Basis for Relief?” by Nkechi Taifa. The paper details the racial impact of the disparity between mandatory minimum sentences for those convicted of crack and powder cocaine offenses, and examines international law as a means for addressing the impact.

On July 17<sup>th</sup> Eric Sterling, assistant counsel to the House Judiciary Committee (1979-1989) and President, Criminal Justice Policy Foundation, released “Getting Justice off its Junk Food Diet: Getting Tough on Cocaine Traffickers and Fixing the Racial

Disparity of Crack Prosecutions.” This white paper stresses that the proper federal anti-drug role must focus on the highest level traffickers, and that every federal case against a street-level or local trafficker – who could be investigated and prosecuted by state and local law enforcement agencies – is a distraction from the critical federal role and a waste of federal resources.

Marking the 20<sup>th</sup> anniversary of the Anti-Drug Abuse Act of 1986, the American Civil Liberties Union on October 26<sup>th</sup> released its report, “Cracks in the System: Twenty Years of the Unjust Federal Crack Cocaine Law,” detailing discriminatory efforts of the drug law that has devastated African American and low-income communities.

Each of these reports by Justice Roundtable participants is appended to this testimony.

**C. “Candy Bar” Crack Cases** – An important feature of the Justice Roundtable’s public education campaign has been to depict drug quantities with visual analogies. For example, five grams of crack cocaine, the equivalent weight of five packets of artificial sweetener or a couple of peanuts, yields a mandatory minimum sentence of five years in prison. Fifty grams of crack cocaine, comparable to the weight of an ordinary candy bar, mandates a ten year sentence. One third of all federal cocaine cases involve an average of 52 grams, while only 7 percent of federal cocaine cases are directed at high level traffickers.

For the past twenty years low level crack cocaine offenders selling sugar packet and candy bar size quantities of crack cocaine, have been punished far more severely than their wholesale drug suppliers who provided the powdered cocaine from which the crack is produced. Indeed, this Commission has reported that local street-level crack offenders

receive average sentences comparable to intrastate and interstate powder cocaine dealers, and both intra- and- interstate crack sellers receive average sentences longer than international powder cocaine traffickers.<sup>13</sup> Results such as these are surely not what Congress intended to stem the tide of crack cocaine abuse.

To more vividly illustrate to legislators the minuscule drug quantities which yield such extreme sentences, Justice Roundtable representatives recently delivered candy bars, packets of artificial sweetener and peanuts to members of the House and Senate Judiciary Committees. This creative “show and tell” was designed to urge Congress to stop the senseless “junk food justice” which has resulted in the over-incarceration of nearly a generation of men and women of color convicted of low-level non-violent crack cocaine offenses.

**D. Inter-American Commission on Human Rights --** On March 3, 2006, spurred by a petition from the Justice Roundtable and a supporting letter from the American Bar Association, the Inter-American Commission on Human Rights convened an historic hearing on the impact of mandatory minimum sentences in the federal criminal system of the United States.<sup>14</sup> The Inter-American Commission on Human Rights is an autonomous organ of the Organization of American States, whose members are elected by the OAS General Assembly. One of its main functions is to address the complaints or petitions received from individuals, groups of individuals or organizations that allege human rights violations committed in OAS member countries. Its

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<sup>13</sup> U.S. SENTENCING COMM’N, 104<sup>TH</sup> Cong., 2<sup>ND</sup> SESS., SPECIAL REPORT TO CONGRESS; COCAINE AND FED. SENTENCING POL’Y (1995) AT 175-77 (Figures 10 & 11).

<sup>14</sup> The March 3<sup>RD</sup> proceeding, during the Commission’s 124<sup>TH</sup> Period of Sessions, was heard by Commissioners Paulo Sergio Pinheiro, First Vice President and Rapporteur on the United States; Florentin Melendez, Second Vice President and Rapporteur on the rights of persons deprived of liberty; and Clare K. Roberts, Commissioner and Rapporteur against racial discrimination. The U.S. government was represented by the U.S. Department of State, which declined to make an official statement.

recommendations have led States to modify sentencing procedures, eliminate discriminatory laws, and strengthen protections of basic rights.

The Commission heard riveting testimony that mandatory minimums are applied in a discriminatory fashion and lead to increased arbitrariness in federal sentencing. Witnesses cited the 100-to-1 quantity ratio between crack and powder cocaine as the most flagrant example of how mandatory minimums have a racially discriminatory impact, as harsh sentences for crack cocaine convictions fall disproportionately on African Americans.

The illustrious panel included The Honorable Patricia Wald, former Chief Judge of the U.S. Court of Appeals for the District of Columbia Circuit and judge on the International Criminal Tribunal for the Former Yugoslavia (1999-2001), who testified on behalf of the American Bar Association (ABA), the world's largest voluntary professional organization. Judge Wald addressed ABA policy on mandatory minimum sentences, the weight of opinion within the U.S. judiciary, and her own personal observations on this issue. Professor Charles Ogletree, Founder and Executive Director of Harvard Law School's Charles Hamilton Houston Institute on Race and Justice, testified on behalf of the Justice Roundtable. His comments centered on the disparity between crack and powder cocaine as an egregious example of mandatory sentencing. Ms. Kemba Smith testified next. She was directly impacted by mandatory minimum sentencing, having been sentenced, at age 24, to nearly a quarter of a century for her minor role in a drug conspiracy. She served 6.5 years before being granted clemency in 2000. Finally, Attorney Gay McDougal, Executive Director of Global Rights and the first United Nations Independent Expert on Minority Issues, testified on the provisions of

international human rights law that are relevant to the impact of mandatory minimum sentencing laws in the United States.<sup>15</sup>

The Roundtable's witnesses told the Commission that mandatory minimum sentences are violations of protected human rights found in the American Declaration on the Rights and Duties of Man – specifically, the right to equal protection of the law, the right to a fair trial, and the right to judicial protection against violations of fundamental rights. The International Convention on the Elimination of All Forms of Racial Discrimination further elaborates on the provisions of the American Declaration and, as such, witnesses argued, should provide guidance to the Commission as well.<sup>16</sup>

Perhaps the most poignant part of the March 3<sup>rd</sup> proceedings were the closing words of Judge Wald, who concluded,

Unduly long and punitive sentences are counter-productive, and candidly many of our mandatory minimums approach the cruel and unusual level as compared to other countries as well as to our own past practices. On a personal note, let me say that on the Yugoslavia War Crimes Tribunal I was saddened to see that the sentences imposed on war crimes perpetrators responsible for the deaths and

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<sup>15</sup> The four witnesses were joined at the table by two expert resource persons – Marc Mauer, Executive Director of the Sentencing Project and Eric Sterling, President of the Criminal Justice Policy Foundation and former counsel to the House Judiciary Committee during the passage of the mandatory minimum sentencing laws.

<sup>16</sup> In addition to oral witness testimony at the hearing, written statements were also submitted from three Members of Congress - Congressman Charles Rangel, Ranking Member of the House Ways and Means Committee; Congressman Robert “Bobby” Scott, Ranking Member of the House Crime Subcommittee; and Congresswoman Maxine Waters, member of the House Judiciary Committee. Written statements were also submitted by Wade Henderson, Executive Director of the Leadership Conference on Civil Rights, as well as a joint statement from Families Against Mandatory Minimums and the National Council of La Raza. Organizational signees to the Justice Roundtable's historic petition for hearing and/or the Roundtable's written testimony included the American Civil Liberties Union, the Sentencing Project, Criminal Justice Policy Foundation, Penal Reform International, Global Rights, Charles Hamilton Houston Institute for Race and Justice, International Citizens United for the Rehabilitation of Errants, Justice Policy Institute, Law Enforcement Against Prohibition, Lawyers' Committee for Civil Rights Under Law, Leadership Conference on Civil Rights, National Association for the Advancement of Colored People, NAACP Legal Defense and Educational Fund, National Black Police Association, Human Rights Watch, U.S. Human Rights Network, National Council of La Raza, Families Against Mandatory Minimums, National Association of Criminal Defense Lawyers, Drug Policy Alliance, Washington Bar Association, Break the Chains-Communities of Color and the War on Drugs, Interfaith Drug Policy Initiative, Unitarian Universalists for Drug Policy Reform, and the Open Society Policy Center.

suffering of hundreds of innocent civilians often did not come near those imposed in my own country for dealing in a few bags of illegal drugs. These are genuine human rights concerns that I believe merit your interest and attention.

#### **IV. Response to Concerns of Violence and Harm**

When one form of a drug can be rather easily converted to another form of the same drug and when that second form is punished at a quantity ratio 100 times greater than the original form, it would appear reasonable to require the existence of sufficient policy bases to support such a sentencing scheme ... [especially] when such an enhanced ratio for a particular form of a drug has a disproportionate effect on one segment of the population....<sup>17</sup>

Although two of the most cited concerns regarding crack cocaine relate to violence and harm, sufficient policy bases have never been raised to justify the 100:1 quantity ratio in punishment between the two methods of ingesting the same drug. This Commission has requested comment relative to these issues.

Although it is a common assumption that there is more violence associated with the use of crack than with the use of powder cocaine, there is no evidence that such violence is attributed to the pharmacological effects of smoking crack. Professor Paul Goldstein asserts that there are no valid and reliable sources of data for policymakers, in either the criminal justice or the health care systems, that adequately explain the relationship between violence and drugs.<sup>18</sup> Media reports of violence, he contends, are unclear and misleading, with distinctions between drug use and drug trafficking often not made.<sup>19</sup> Goldstein asserts that he has found little pharmacological violence attributed to

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<sup>17</sup> Special Report to Congress, at xii. (1995)

<sup>18</sup> Professor Paul Goldstein teaches at the University of Illinois at Chicago, School of Public Health, and has authored studies probing the relationship between drugs and violence. He has studied drug-related violence in New York State and New York City, funded by the National Institute on Drug Abuse and the National Institute of Justice.

<sup>19</sup> Paul J. Goldstein, Ph.D., School of Public Health, University of Illinois at Chicago, *The Relationship Between Drugs and Urban Violence: Research and Prevention Issues 1* (1993).

either powder or crack cocaine; most of this violence is attributed to alcohol.<sup>20</sup> Similarly, Goldstein has found very little “user-trying-to-support-his-habit” economic violence. He found that almost all cocaine-related violence is found in the cocaine marketplace and system of distribution.

Goldstein’s findings provide evidence that certain common assumptions about drug-related violence are incorrect or exaggerated. For example, although it is commonly believed that violent, predatory acts by drug users to obtain money to purchase drugs are an important threat to public safety, Goldstein’s data indicates otherwise. He found that violence is most likely to occur with respect to the drug marketplace, and to involve others similarly situated. He also theorizes that police procedures substantially add to cocaine-related violence.<sup>21</sup>

This Commission has also cited analyses establishing that systemic violence is not limited to the crack cocaine market. A 1990 study compared crack and powder cocaine dealers and found that significant percentages of both powder and crack offenders regularly engaged in a range of violent activity associated with cocaine trafficking.<sup>22</sup>

The use of crack cocaine has, without a doubt, been devastating to already distressed urban areas.<sup>23</sup> However, the deterioration of inner city neighborhoods and

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<sup>20</sup> Goldstein believes that the figures often used in media for drug-related violence include alcohol-related violence, which is not made clear when the figures are used. He is also suspicious of police-reported “drug-related violence,” having found that police often target specific areas such that *any* crime therein committed is “drug-related.”

<sup>21</sup> Professor Goldstein remarked: Intensified law enforcement efforts probably contributed to increased levels of violence. Street sweeps, neighborhood saturation, buy-bust operations, and the like lead to increased violence in a number of ways. For example, removing dealers from their established territory by arresting them leaves a vacuum that other dealers fight to fill. By the time these hostilities have ended, convicted dealers may have returned from prison and attempted to reassert their authority, resulting in a new round of violence.

<sup>22</sup> Special Report to Congress, note 23 at 97 (citing *Drugs and Violence: Causes, Correlates and Consequences* 36 (M. De la Rosa, et al., eds., 1990))

<sup>23</sup> The majority in the Commission’s 1995 report stated:



communities is closely tied to the issue of social maladies and occurs whenever there is an influx of drugs into a community. To single out a particular drug among many that contribute to the deterioration of neighborhoods, and especially a specific form of that drug, for characterization of a harm as one hundred times greater than its pharmacological counterpart, is untenable.

Another issue often raised and highlighted for comment by this Commission is the difference in harms associated with the use/trafficking of crack versus powder cocaine. The Department of Justice and some Members of Congress in the past have argued for stiffer penalties for crack users because, they assert, crack is a more dangerous and harmful substance than powder cocaine, and the uniquely harmful nature of crack should be reflected in sentencing policy. Cocaine, however, in any form produces the same physiological and psychological effects. It is the onset, intensity, and duration of the effects which vary, and these variations are tied to the manner in which the drug is administered, as opposed to any distinctions in the chemical make-up of the drug. Indeed, pharmacologically, “cocaine is cocaine is cocaine, whether you take it intranasally, intravenously or smoked.”<sup>24</sup> “Injecting powder cocaine is as dangerous as or more dangerous than smoking crack.”<sup>25</sup> The term “crack baby” is now widely understood to be a misnomer, with research indicating that the negative effects of both

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“We are aware that a host of social maladies have been attributed to the emergence of crack cocaine, such as urban decay or parental neglect among user groups. After careful consideration, the Commission majority concluded that increased penalties are not an appropriate response to many of these problems. We are unable to establish these social problems result from the drug itself rather than from the disadvantaged social and economic environment in which the drug is used. We note that these problems are not unique to crack cocaine, but are associated to some extent with abuse of any drug or alcohol. Conaboy Letter.

<sup>24</sup> Hearings on Crack Cocaine Before U.S. Sentencing Commission, 103<sup>rd</sup> Cong., 1<sup>st</sup> Sess. 112 (1993) (statement of Dr. Charles Shuster).

<sup>25</sup> Letter from Richard A. Conoboy, Chairman, U.S. Sentencing Commission, to J. Orrin Hatch, Chairman, Senate Judiciary Committee (May 1, 1995).

prenatal crack and powder cocaine exposure are identical and significantly less severe than previously believed. The rate of HIV infection is nearly equal between crack smokers (due to risky sexual practices) and powder injectors (due to risky needle sharing).

However, even if crack were a more dangerous substance than powder cocaine, increased penalties should not be justified on that basis. Cocaine powder is easily transformed into crack.<sup>26</sup> Thus, to apply a stiffer penalty between cocaine which is sold directly as crack, and cocaine which is in powder form but which can be treated by the consumer and easily transformed into crack, is irrational. As this Commission has previously emphasized, “[I]n light of the fact that crack cocaine can easily be produced from powder cocaine, the form of cocaine is simply not a reasonable proxy for dangerousness associated with use.”<sup>27</sup>

In sum, although families and communities have been ravaged by drugs, both have also been subjected to the devastations wrought by draconian crack sentences. We often lose sight of the fact that those impacted are real people with real lives. Hamedah Hasan, a mother of three, was pregnant with her youngest daughter when she began serving a 27-year sentence in 1993. A first-time offender convicted of a nonviolent crack cocaine conspiracy offense, when Hasan is released, her daughter will be a grown woman. Two decades of stringent crack sentencing has not abated or reduced cocaine trafficking, nor improved the quality of life in deteriorating neighborhoods. What it has done, however, is incarcerate massive numbers of low-level offenders, predominately

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<sup>26</sup> “It takes 15 minutes to turn powder cocaine into crack cocaine – a box of baking soda, a pot of water, and a microwave or stove and you have crack cocaine.” Hearings on Crack Cocaine Before the U.S. Sentencing Commission, 103<sup>rd</sup> Cong., 2d Sess. (1993), at 32 (statement of Sgt. Brennan).

<sup>27</sup> Conaboy Letter, (statement of the Commission Majority).

African American and increasingly women, who are serving inordinately lengthy sentences at an enormous cost to taxpayers and society, with no appreciable impact on the drug trade.

## **V. Recommendation**

This Commission should adopt a one-to-one quantity ratio at the current powder cocaine level for determining base sentences for powder and crack cocaine offenders. Offenders who differ in relevant ways will receive tougher sentences through existing sentencing guidelines which already establish longer and more severe penalties for those persons with greater criminal histories, career offenders, and armed career offenders. Because there may be other identifiable harms associated with some cocaine offenses that may not be adequately addressed within the guidelines, this Commission has previously proposed penalty enhancements for the use of firearms, juveniles, gangs, and drive-by shootings during drug offenses.

Such a penalty enhancement approach is rational, as it directly ties increased sentences to the severity of the offense, as opposed to sentences which paint every crack defendant with the same broad brush. Any fear expressed that pursuant to this approach, violent crack dealers will receive the same sentences as non-violent dealers of powder cocaine is unsubstantiated, and contradicted by this Commission's analysis. A Table compiled by the Commission estimating what the average sentences for powder and crack offenses would be under a one-to-one ratio revealed that despite equalization of the base sentences, many of those convicted of crack cocaine offenses will nevertheless serve

much longer prison terms than those convicted of powder cocaine offenses because of the enhancements for aggravating factors such as violence or weapons use.<sup>28</sup>

## **VI. Conclusion**

The twentieth anniversary of statutory and guideline cocaine penalties is the perfect time to revisit and finally correct the gross unfairness that has been the legacy of the 100:1 ratio. We applaud this hearing, and call for the restoration of this Commission's original 1995 recommendation that equalizes the quantity triggers between crack and powder cocaine and begins to place the focus of federal cocaine drug enforcement on major traffickers, where it should be. Let us not allow another anniversary to pass without rectifying this 20 year legacy of crack cocaine sentencing.

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<sup>28</sup> See Conaboy Letter (Table 1, Estimated Average Sentences for Powder and Crack Cocaine Defendants with Various Drug Amounts (Oct. 1, 1993 through Sept. 30, 1994). The Commission emphasized:

“[E]qualizing the quantity ratio between crack and powder cocaine will not result in equal sentences for crack and powder cocaine offenders who differ in relevant ways. Commission analysis shows that, under the amended guidelines, crack offenders will receive sentences that is, on average, generally at least twice as long as powder cocaine offenders involved with the same amount of drug.”