

Statement of Ricardo H. Hinojosa
Acting Chair, United States Sentencing Commission
Before the Senate Committee on the Judiciary
Subcommittee on Crime and Drugs

April 29, 2009

Chairman Durbin, Ranking Member Graham, and members of the Subcommittee, I appreciate the opportunity to appear before you on behalf of the United States Sentencing Commission to discuss federal cocaine sentencing policy.

The Commission has considered cocaine sentencing issues over a number of years¹ and has worked closely with Congress to address the sentencing disparity that exists between the penalties for powder cocaine and crack cocaine offenses. The Commission amended the federal sentencing guidelines in 2007 to partially address the sentencing disparity and, pursuant to its authority under 28 U.S.C. § 994(u),² gave retroactive effect to that amendment effective March 3, 2008. The Commission continues to be of the view, however, that any comprehensive solution to the problem of federal cocaine sentencing policy requires revision of the current statutory penalties and therefore must be legislated by Congress. The Commission urges Congress to take legislative action on this important issue.

Part I of this statement briefly summarizes the statutory and guideline penalty structure for crack cocaine offenses. Part II provides an analysis of federal cocaine sentences, including information on differences in average sentence length between crack cocaine and powder cocaine offenses. Part III provides a brief update on case law concerning crack cocaine sentencing and data on recent cocaine sentencing practices. Part IV provides information concerning the retroactive application of the 2007 crack cocaine guideline amendment. Part V sets forth the Commission's recommendations for statutory penalty revisions.

I. Statutory and Guideline Penalty Structure

The Anti-Drug Abuse Act of 1986³ established the basic framework of statutory mandatory minimum penalties currently applicable to federal drug trafficking offenses. The quantities triggering those mandatory minimum penalties differ for various drugs and in some cases, including cocaine, for different forms of the same drug.

¹ See United States Sentencing Commission (hereinafter "USSC" or "Commission"), *Report On Cocaine and Federal Sentencing Policy* ("May 2007 Report"), USSC, *2002 Report to Congress: Cocaine and Federal Sentencing Policy* (May 2002); USSC, *1997 Special Report to Congress: Cocaine and Federal Sentencing Policy* (as directed by section 2 of Pub. L. 104-38) (April 1997); USSC, *1995 Special Report to Congress: Cocaine and Federal Sentencing Policy* (as directed by section 280006 of Pub. L. 103-322) (February 1995).

² 28 U.S.C. § 994(u) provides that "[i]f the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced." See also USSC, App. C, Amendment 713 (March 3, 2008).

³ Pub. L. 99-570, 100 Stat. 3207 (1986) (hereinafter "1986 Act").

In establishing the mandatory minimum penalties for cocaine, Congress differentiated between two principal forms of cocaine: cocaine hydrochloride (commonly referred to as “powder cocaine”) and cocaine base (commonly referred to as “crack cocaine”). Because of congressional concern at that time about the dangers associated with crack cocaine,⁴ the 1986 Act provided significantly higher punishment for crack cocaine offenses based on the quantity of the drug involved in the offense.

As a result of the 1986 Act, federal law requires a five-year mandatory minimum penalty for a first-time trafficking offense involving at least five grams of crack cocaine, or at least 500 grams of powder cocaine, and a ten-year mandatory minimum penalty for a first-time trafficking offense involving at least 50 grams of crack cocaine, or at least 5,000 grams of powder cocaine. Because it takes 100 times more powder cocaine than crack cocaine to trigger the same mandatory minimum penalty, this penalty structure is commonly referred to as the “100-to-1 drug quantity ratio.” In addition, unlike for any other drug, in 1988 Congress enacted a five-year statutory mandatory minimum penalty for simple possession of at least five grams of crack cocaine.⁵

When Congress passed the 1986 Act, the Commission was in the process of developing the initial sentencing guidelines. The Commission responded to the legislation by generally incorporating the statutory mandatory minimum sentences into the guidelines and extrapolating upward and downward to set guideline sentencing ranges for all drug quantities. Offenses involving at least five grams of crack cocaine or at least 500 grams of powder cocaine, as well as all other drug offenses carrying a five-year mandatory minimum penalty, were assigned a base offense level of 26, corresponding to a sentencing guideline range of 63 to 78 months for a defendant in Criminal History Category I. Similarly, offenses involving at least 50 grams of crack cocaine or at least 5,000 grams of powder cocaine, as well as all other drug offenses carrying a 10-year mandatory minimum penalty, were assigned a base offense level of 32, corresponding to a sentencing guideline range of 121 to 151 months for a defendant in Criminal History Category I. Crack cocaine offenses and powder cocaine offenses involving quantities above and below the mandatory minimum penalty threshold quantities were set proportionately using the same 100-to-1 drug quantity ratio.

The Commission’s 2007 crack cocaine guideline amendment reduced by two levels the base offense levels assigned to the various quantities of crack cocaine. Consequently, for crack cocaine offenders, the base offense levels now correspond to guideline ranges that include rather than exceed the five-year and ten-year mandatory minimum terms of imprisonment.⁶ Offenses involving quantities of crack cocaine above

⁴ See USSC, *2002 Report to Congress: Cocaine and Federal Sentencing Policy* (May 2002) at 7-10 for a discussion of the legislative history of the 1986 Act as it pertains to crack cocaine.

⁵ See 21 U.S.C. § 844.

⁶ USSG, App. C, Amendment 706 (Nov. 1, 2007). Specifically, the 2007 crack cocaine guideline amendment reduced the base offense level for offenses involving at least five grams of crack cocaine by two levels, from level 26 to level 24, which corresponds to a sentencing guideline range of 51 to 63 months for a defendant in Criminal History Category I. The base offense level for offenses involving at least 50 grams of crack cocaine similarly was reduced by two levels, from level 32 to level 30, which corresponds to a sentencing guideline range of 97-121 months for a defendant in Criminal History Category I. If a statutory mandatory minimum applies, the applicable guideline range is 60 to 63 months

and below the mandatory minimum threshold quantities similarly were adjusted downward by two levels.

The Commission promulgated the 2007 crack cocaine guideline amendment after an extensive review of the issues associated with federal cocaine sentencing policy. Consistent with previous Commission conclusions that the 100-to-1 drug quantity ratio should be modified⁷ but recognizing Congress's authority to establish federal cocaine sentencing policy through statutory mandatory minimum penalties, the Commission tailored the 2007 crack cocaine guideline amendment to fit within the current statutory penalty scheme.

II. Analysis of Federal Cocaine Sentences

A. Federal Cocaine Offenses and Offenders

1. Number of Offenses

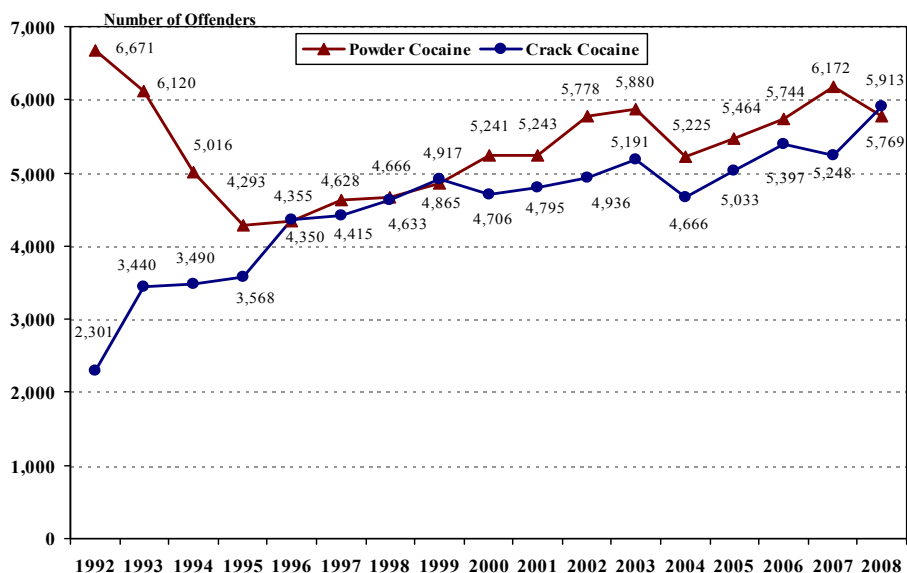
Powder cocaine and crack cocaine offenses together historically have accounted for nearly half of the federally sentenced drug trafficking offenders. As indicated in Figure 1, of 24,605 total drug trafficking cases in fiscal year 2008, there were 5,913 crack cocaine cases (24.0% of all drug trafficking cases) and 5,769 powder cocaine cases (23.4% of all drug trafficking cases). Of 24,748 total drug trafficking cases in fiscal year 2007, there were 5,248 crack cocaine cases (21.2% of all drug trafficking cases) and 6,172 powder cocaine cases (24.9% of all drug trafficking cases).⁸

in a case in which the five-year mandatory minimum applies, and 120 to 121 months in a case in which the ten-year mandatory minimum applies. *See* USSG §5G1.1 (Sentencing on a Single Count of Conviction).

⁷ *See supra* note 1.

⁸ In fiscal year 2008, there were 105 federal cases for simple possession of crack cocaine, in which 58 offenders were subject to the statutory mandatory minimum penalty. In fiscal year 2007, there were 109 such cases, in which 49 offenders were subject to the statutory mandatory minimum penalty.

Figure 1
Trend in Number of Powder Cocaine and Crack Cocaine Offenders
 FY1992-FY2008



Only cases sentenced under USSG §2D1.1 (Drug Trafficking) with a primary drug type of powder cocaine or crack cocaine are included in this figure. This figure excludes cases with missing information for the variables required for analysis. Note that total percentages may not add up to exactly 100 percent due to rounding.

SOURCE: U.S. Sentencing Commission, 1992-2008 Datafiles, MONFY92 – USSCFY08.

2. Demographics

As indicated in Table 1, Black offenders continue to comprise the majority of federal crack cocaine trafficking offenders, but that has decreased from 91.4 percent in fiscal year 1992 to 80.6 percent in fiscal year 2008. White offenders comprised 10.2 percent of crack cocaine offenders in fiscal year 2008, compared to 3.2 percent in 1992. Hispanic offenders comprised 8.2 percent in fiscal year 2008, compared to 5.3 percent in 1992.

Hispanic offenders comprise the majority of powder cocaine offenders, having increased from 39.8 percent in fiscal year 1992 to 52.5 percent in fiscal year 2008. Black offenders comprised 30.2 percent of powder cocaine offenders in fiscal year 2008, compared to 27.2 percent in fiscal year 1992. White offenders comprised 16.4 percent of powder cocaine offenders in fiscal year 2008, compared to 32.3 percent of powder cocaine offenders in fiscal year 1992.

Table 1
Demographic Characteristics of Federal Cocaine Offenders
Fiscal Years 1992, 2000 & 2008

	Powder Cocaine						Crack Cocaine					
	1992		2000		2008		1992		2000		2008	
	N	%	N	%	N	%	N	%	N	%	N	%
Race/Ethnicity												
White	2,113	32.3	932	17.8	942	16.4	74	3.2	269	5.6	605	10.2
Black	1,778	27.2	1,596	30.5	1,734	30.2	2,096	91.4	4,069	84.7	4,753	80.6
Hispanic	2,601	39.8	2,662	50.8	3,018	52.5	121	5.3	434	9.0	484	8.2
Other	44	0.7	49	0.9	57	1.0	3	0.1	33	0.7	57	1.0
Total	6,536	100	5,239	100	5,751	100	2,294	100	4,805	100	5,899	100
Citizenship												
U.S. Citizen	4,499	67.7	3,327	63.9	3,636	63.1	2,092	91.3	4,482	93.4	5,702	96.4
Non-Citizen	2,147	32.3	1,881	36.1	2,127	36.9	199	8.7	318	6.6	211	3.6
Total	6,646	100	5,208	100	5,763	100	2,291	100	4,800	100	5,913	100
Gender												
Female	787	11.8	722	13.8	546	9.5	270	11.7	476	9.9	512	8.7
Male	5,886	88.2	4,518	86.2	5,222	90.5	2,032	88.3	4,330	90.1	5,401	91.3
Total	6,673	100	5,240	100	5,768	100	2,302	100	4,806	100	5,913	100
Average Age	Average=34		Average=34		Average=35		Average=28		Average=29		Average=31	

This table excludes cases missing information for the variables required for analysis.
 Total percentages may not add up to exactly 100 percent due to rounding.

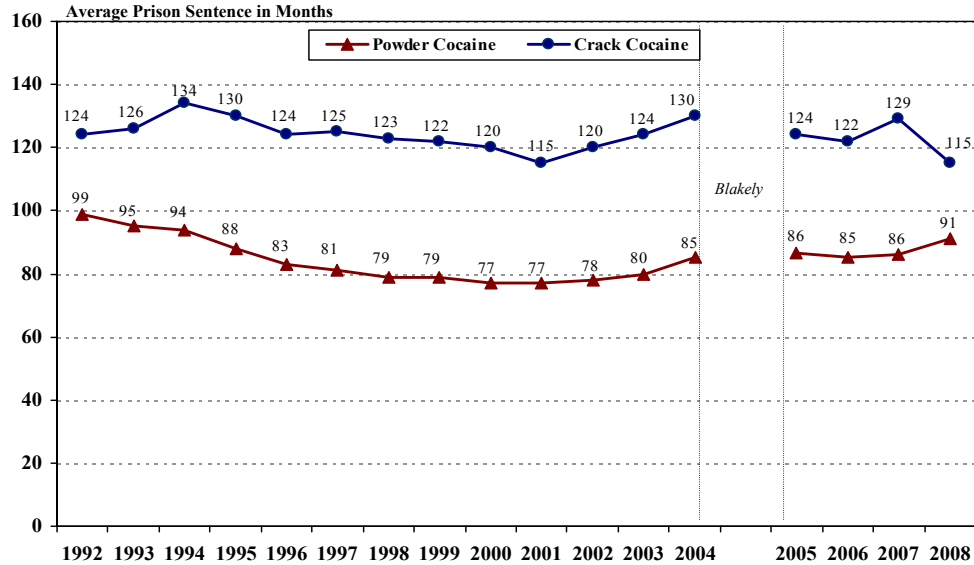
SOURCE: U.S. Sentencing Commission, 1992, 2000, and 2008 Datafiles, MONFY92, USSCFY00, and USSCFY08.

B. Average Sentence Length

Federal crack cocaine offenders consistently have received longer sentences than powder cocaine offenders. As indicated in Figures 2 and 3, the difference in average sentence length between these two groups of offenders was greater in 2007 than it was in 1992. In fiscal year 1992, the average sentence length for crack cocaine offenders was 124 months compared to 99 months for powder cocaine offenders, amounting to a difference of 25 months, or 25.3 percent. That difference widened to 43 months, or 50.0 percent, in fiscal year 2007, when the average sentence length for crack cocaine offenders was 129 months compared to 86 months for powder cocaine offenders.

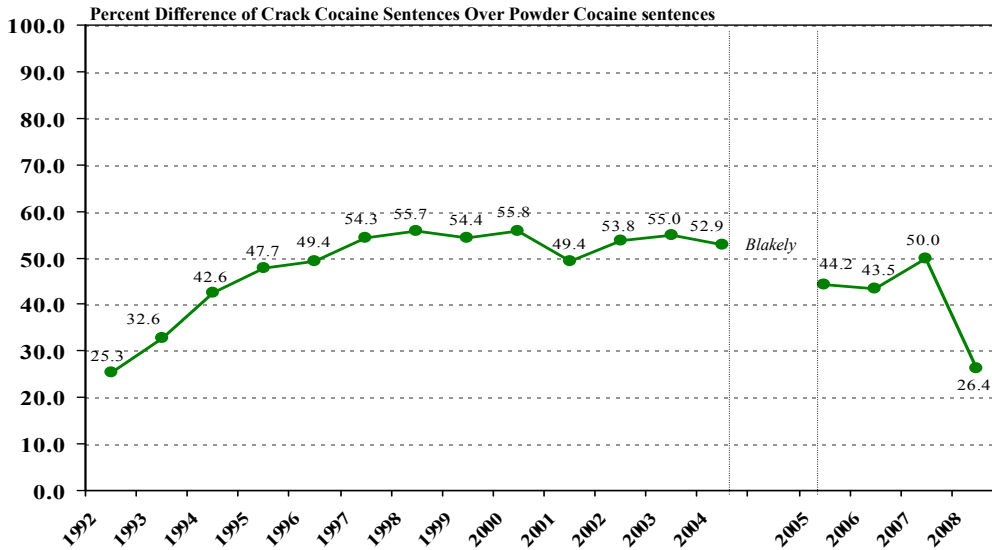
In fiscal year 2008, the difference in average sentence length between crack cocaine and powder cocaine offenses narrowed. This occurred not only because of the implementation of the 2007 crack cocaine guideline amendment but also because of an increase in the average sentence length for powder cocaine offenders. In fiscal year 2008, the average sentence length for crack cocaine offenders was 115 months, compared to 91 months for powder cocaine offenders, making the average sentence length for crack cocaine offenders 26.4 percent, or 24 months, longer than the average sentence length for powder cocaine offenders. However, while the difference in average sentence length narrowed, there remains a difference.

Figure 2
Trend in Prison Sentences for Powder Cocaine and Crack Cocaine Offenders
 FY1992-FY2008



Only cases sentenced under USSG §2D1.1 (Drug Trafficking) with a primary drug type of powder cocaine or crack cocaine are included in this figure. Cases with sentences of probation or any time of confinement as defined in USSG §5C1.1 are not included in this figure. Cases with sentences greater than 470 months were included in the sentence average computation as 470 months. This figure excludes cases with missing information for the variables required for analysis. Note that total percentages may not add up to exactly 100 percent due to rounding.
 SOURCE: U.S. Sentencing Commission, 1992-2008 Datafiles, MONFY92 – USSCFY08, 2004 Pre-Blakely Only Cases (October 1, 2003 – June 24, 2004), and 2005 Post-Booker Only Cases (January 12, 2005 – September 30, 2005).

Figure 3
Trend in Proportional Differences Between Average Cocaine Sentences
 FY1992-FY2008



Only cases sentenced under USSG §2D1.1 (Drug Trafficking) with a primary drug type of powder cocaine or crack cocaine are included in this figure. Cases with sentences of probation or any time of confinement as defined in USSG §5C1.1 are not included in this figure. Cases with sentences greater than 470 months were included in the sentence average computation as 470 months. This figure excludes cases with missing information for the variables required for analysis. The figure shows, for each year, the percentage difference between prison sentences for crack cocaine and powder cocaine. For example, in Fiscal Year 1992, crack cocaine sentences were 25.3 percent greater than powder cocaine sentences. The percentage was calculated by dividing the difference between the average crack cocaine sentence and the average powder cocaine sentence by the average powder cocaine sentence. Note that total percentages may not add up to exactly 100 percent due to rounding.

SOURCE: U.S. Sentencing Commission, 1992-2008 Datafiles, MONFY92 – USSCFY08, 2004 Pre-Blakely Only Cases (October 1, 2003 – June 24, 2004), and 2005 Post-Booker Only Cases (January 12, 2005 – September 30, 2005).

C. Reasons for Differences in Average Sentence Length

1. Statutory Mandatory Minimum Sentences

Most of the difference in average sentence length between crack cocaine and powder cocaine offenses is attributable to the current quantity-based statutory mandatory minimum penalties and the manner in which those penalties are incorporated into the guidelines. In fiscal year 2008, the median drug weight for powder cocaine offenses was 7,000 grams, an amount 135 times greater than the median drug weight for crack cocaine offenses, which was 52 grams. In fiscal year 2007, the median drug weight was 6,370 grams for powder cocaine offenses compared to 53 grams for crack cocaine offenses.

These quantities resulted in crack cocaine and powder cocaine offenders being convicted under statutes carrying a mandatory minimum sentence at virtually equal rates. In fiscal year 2008, 80.6 percent of crack cocaine offenders were convicted of a statute carrying a mandatory minimum term of imprisonment, compared to 80.0 percent of powder cocaine offenders.

Exposure to statutory mandatory minimum sentences further contributes to the difference in average sentence length because crack cocaine offenders are less likely to receive the benefit of statutory and guideline “safety valve” mechanisms that allow certain low-level offenders to be sentenced without regard to the statutory mandatory minimums. As indicated in Tables 2 and 2A, in fiscal year 2008, 14.3 percent of crack cocaine offenders received the benefit of a safety valve provision as set forth at 18 U.S.C. § 3553(f)⁹ or through the federal sentencing guidelines¹⁰ compared to 42.4 percent of powder cocaine offenders. In fiscal year 2007, 13.6 percent of crack cocaine offenders received the benefit of a safety valve provision compared to 44.7 percent of powder cocaine offenders. The difference in rates of safety valve application between crack cocaine and powder cocaine offenders is in part attributable to differences in their criminal history scores and the extent to which weapons are involved in the offense, as discussed below.¹¹

⁹ The “safety valve” at 18 U.S.C. § 3553(f) provides a mechanism by which only drug offenders who meet certain statutory criteria may be sentenced without regard to the otherwise applicable drug mandatory minimum provisions. Enacted in 1994, the safety valve provision was created by Congress to permit offenders “who are the least culpable participants in drug trafficking offenses, to receive strictly regulated reductions in prison sentences for mitigating factors” recognized in the federal sentencing guidelines.

¹⁰ The Commission uses “safety valve” to refer to cases that receive either the two-level reduction pursuant to USSG §2D1.1(b)(11) and USSG §5C1.2, or relief from the statutory mandatory minimum sentence pursuant to 18 U.S.C. § 3553(f), or both.

¹¹ Among the requirements to receive “safety valve” relief from the statutory mandatory minimum sentence, the defendant must not have more than one criminal history point, as determined under the sentencing guidelines, and the defendant must not have used violence or credible threats of violence or must not have possessed a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense. *See* 18 U.S.C. § 3553(f)(1).

Table 2
Guideline Sentencing Characteristics, Criminal History, and
Position Relative to the Guideline Range for Crack Cocaine Offenders¹

	Fiscal Year 2007		Fiscal Year 2008	
Average Base Offense Level	30		28	
Median Crack Cocaine Weight in Grams	53		52	
Average Prison Sentence (Months)	130		116	
	N	%	N	%
TOTAL	5,037		5,601	
Weapon Enhancement				
Weapon SOC (USSG § 2D1.1(b)(1))	994	19.7	1,025	18.3
18 U.S.C. § 924(c) Conviction	543	10.8	548	9.8
Safety Valve §5C1.2²	683	13.6	800	14.3
Guideline Role Adjustment				
Aggravating Role §3B1.1	233	4.6	260	4.6
Mitigating Role §3B1.2	286	5.7	287	5.1
Criminal History Category	N	%	N	%
I	1,052	20.9	1,242	22.2
II	596	11.8	685	12.2
III	1,015	20.2	1,093	19.5
IV	601	11.9	678	12.1
V	383	7.6	474	8.5
VI	1,390	27.6	1,429	25.5
Total	5,037	100.0	5,601	100.0
Sentence Relative to Guideline Range	N	%	N	%
Within Range	2,946	56.3	3,306	56.1
Above Range	22	0.4	39	0.7
Government Sponsored	1,596	30.5	1,637	27.8
Non-Government Below Range	673	12.9	916	15.5
Total	5,237	100.0	5,898	100.0

¹This tables includes only cases sentenced under §2D1.1 (Drug Trafficking) where crack cocaine was the primary drug type. Total percentages may not add up to exactly 100 percent due to rounding. This table excludes cases with missing information for the variables required for analysis.

²Safety valve includes cases that received either a two-level reduction pursuant to USSG §2D1.1(b)(11) and USSG §5C1.2, or relief from the statutory mandatory minimum sentence pursuant to 18 U.S.C. § 3553(f), or both.

SOURCE: U.S. Sentencing Commission, 2007-2008 Datafiles, USSCFY07-USSCFY08.

Table 2A

**Guideline Sentencing Characteristics, Criminal History, and
Position Relative to the Guideline Range for Powder Cocaine Offenders¹**

	Fiscal Year 2007		Fiscal Year 2008	
Average Base Offense Level	30		30	
Median Powder Cocaine Weight in Grams	6,370		7,000	
Average Prison Sentence (Months)	86		91	
	N	%	N	%
TOTAL	5,888		5,578	
Weapon Enhancement				
Weapon SOC (USSG § 2D1.1(b)(1))	583	9.9	632	11.3
18 U.S.C. § 924(c) Conviction	274	4.7	314	5.6
Safety Valve §5C1.2²	2,633	44.7	2,365	42.4
Guideline Role Adjustment				
Aggravating Role §3B1.1	451	7.7	453	8.1
Mitigating Role §3B1.2	1,193	20.3	1,116	20.0
Criminal History Category	N	%	N	%
I	3,579	60.8	3,349	60.0
II	688	11.7	646	11.6
III	736	12.5	671	12.0
IV	298	5.1	301	5.4
V	144	2.4	142	2.6
VI	443	7.5	469	8.4
Total	5,888	100.0	5,578	100.0
Sentence Relative to Guideline Range	N	%	N	%
Within Range	3,236	52.7	2,879	50.1
Above Range	29	0.5	33	0.6
Government Sponsored	2,196	35.7	2,048	35.6
Non-Government Below Range	683	11.1	789	13.7
Total	6,144	100.0	5,749	100.0

¹This tables includes only cases sentenced under §2D1.1 (Drug Trafficking) where powder cocaine was the primary drug type. Total percentages may not add up to exactly 100 percent due to rounding. This table excludes cases with missing information for the variables required for analysis.

²Safety valve includes cases that received either a two-level reduction pursuant to USSG §2D1.1(b)(11) and USSG §5C1.2, or relief from the statutory mandatory minimum sentence pursuant to 18 U.S.C. § 3553(f), or both.

SOURCE: U.S. Sentencing Commission, 2007-2008 Datafiles, USSCFY07-USSCFY08.

2. Aggravating and Mitigating Factors

In addition to drug quantity, the current penalty structure for drug offenses accounts for certain aggravating and mitigating factors, such as weapon involvement and role in the offense. Differences in the prevalence of these factors in crack cocaine and powder cocaine offenses also contribute to the difference in average sentence length for these offenses.

a. Weapon Involvement

Some of the difference in average sentence length is attributable to the higher rate at which a guideline¹² or statutory¹³ weapon enhancement applies in crack cocaine offenses compared to powder cocaine offenses. Although a weapon enhancement applies in a minority of both crack cocaine and powder cocaine offenses, as indicated in Tables 2 and 2A, such an enhancement applies more often in crack cocaine offenses.

In fiscal year 2008, 28.1 percent of crack cocaine offenders either received the guideline weapon enhancement (18.3%) or were convicted pursuant to 18 U.S.C. § 924(c) (9.8%). By comparison, 16.9 percent of powder cocaine offenders either received the guideline weapon enhancement (11.3%) or were convicted pursuant to 18 U.S.C. § 924(c) (5.6%). In fiscal year 2007, 30.5 percent of crack cocaine offenders either received the guideline weapon enhancement (19.7%) or were convicted pursuant to 18 U.S.C. § 924(c) (10.8%). By comparison, 14.6 percent of powder cocaine offenders either received the weapon enhancement (9.9%) or were convicted pursuant to 18 U.S.C. § 924(c) (4.7%).

b. Role in the Offense

Some of the difference in average sentence length is attributable to the relative infrequency with which crack cocaine offenders receive a mitigating role adjustment under the guidelines compared to powder cocaine offenders.¹⁴ In fiscal year 2008, 5.1 percent of crack cocaine offenders received a mitigating role adjustment compared to 20.0 percent of powder cocaine offenders. In fiscal year 2007, 5.7 percent of crack cocaine offenders received a mitigating role adjustment compared to 20.3 percent of powder cocaine offenders.

With respect to aggravating role,¹⁵ in fiscal year 2008, 4.6 percent of crack cocaine offenders received an aggravating role adjustment compared to 8.1 percent of powder cocaine offenders. In fiscal year 2007, 4.6 percent of crack cocaine offenders received an aggravating role adjustment compared to 7.7 percent of powder cocaine offenders.

¹² The guidelines provide a two-level enhancement (an approximate 25% increase in penalty) at §2D1.1(b)(1) if a dangerous weapon (including a firearm) was possessed.

¹³ See 18 U.S.C. § 924(c).

¹⁴ Pursuant to USSG §3B1.2 (Mitigating Role), a two- to four-level reduction in offense level applies in a case in which the offender's role in the offense was minimal or minor (or between minimal and minor).

¹⁵ Pursuant to USSG §3B1.1 (Aggravating Role), a two- to four-level increase in offense level applies in a case in which the offender was an organizer, leader, manager, or supervisor of the criminal activity.

3. Criminal History

In addition to offense severity (as measured by drug quantity and applicable aggravating and mitigating factors), criminal history is a major component in determining an offender's sentence under the federal sentencing guidelines. Some of the difference in average sentence length is attributable to the fact that crack cocaine offenders generally have more extensive criminal history than powder cocaine offenders. In both fiscal years 2008 and 2007, the average criminal history category for crack cocaine offenders was Criminal History Category IV, compared to Criminal History Category II for powder cocaine offenders. Tables 2 and 2A show the distribution of crack cocaine offenders and powder cocaine offenders by criminal history category in both fiscal years 2007 and 2008.¹⁶

As discussed in Part IIC, the difference in criminal history between crack cocaine and powder cocaine offenders contributes to the relatively low rates at which crack cocaine offenders qualify for statutory and guideline "safety valve" provisions compared to powder cocaine offenders. An offender in a criminal history category higher than Criminal History Category I cannot receive the benefit of these provisions. In fiscal year 2008, 77.8 percent of crack cocaine offenders were in a criminal history category higher than Criminal History Category I, compared to 40.0 percent of powder cocaine offenders. In fiscal year 2007, 79.1 percent of crack cocaine offenders were in a criminal history category higher than Criminal History Category I, compared to 39.2 percent of powder cocaine offenders.

III. Recent Crack Cocaine Sentencing Case Law and Cocaine Sentencing Practices

A. Supreme Court Case Law

The sentencing disparity between crack cocaine and powder cocaine offenses has been the subject of recent Supreme Court case law. In *Kimbrough v. United States*,¹⁷ the Court relied on the Commission's conclusion that the disparity between the treatment of crack cocaine and powder cocaine offenses "fails to meet the sentencing objectives set forth by Congress in both the Sentencing Reform Act and the 1986 Act"¹⁸ in holding that a sentencing judge may consider that disparity when determining an appropriate sentence in a crack cocaine case. In *Spears v. United States*,¹⁹ the Supreme Court clarified in a *per curiam* decision that, under its holding in *Kimbrough*, district courts have "authority to vary from the crack cocaine Guidelines based on *policy* disagreements with them, and not simply based on an individualized determination that they yield an

¹⁶ Of the 1,429 crack cocaine offenders who were in Criminal History Category VI in fiscal year 2008, 951 were career offenders. Of these 951 career offenders, 535 would have been in a lower criminal history category but for their career offender status. Of the 469 powder cocaine offenders who were in Criminal History Category VI in fiscal year 2008, 356 were career offenders. Of these 356 career offenders, 251 would have been in a lower criminal history category but for their career offender status.

¹⁷ ___ U.S. ___, 128 S. Ct. 558 (2007).

¹⁸ *Id.* at 568 (internal quotations omitted).

¹⁹ ___ U.S. ___, 129 S. Ct. 840 (2009) (*per curiam*).

excessive sentence in a particular case.”²⁰ Thus, a sentencing judge may categorically reject the existing guidelines ratio and “apply a different ratio which, in his judgment, corrects the disparity.”²¹

Of the 959 crack cocaine cases sentenced after *Spears* that have been received, coded, and analyzed by the Commission as of April 24, 2009, five cases specifically cite *Spears* in the court’s written statement of reasons for the sentence imposed. Of those five cases, the court applied a 20-to-1 drug quantity ratio in two of the cases and a 1-to-1 drug quantity ratio in one of the cases. In the remaining two cases, the court cited *Spears* but did not apply a different ratio, although one of those cases referred to the applicable ratio as excessive. In an additional case,²² the court cited *Spears* and applied a 10-to-1 drug quantity ratio.

B. Sentencing Practices

As indicated in Figure 4, during the immediate years preceding *United States v. Booker*,²³ which rendered the sentencing guidelines advisory, courts imposed non-government sponsored, below-range sentences in 7.7 percent, 6.6 percent, and 5.7 percent of the crack cocaine cases sentenced in fiscal years 2002, 2003, and 2004, respectively. By comparison, courts imposed non-government sponsored, below-range sentences in 15.2 percent, 13.3 percent, and 12.9 percent of the crack cocaine cases sentenced in fiscal years 2005, 2006, and 2007, respectively. Furthermore, in fiscal year 2008, approximately 10 months of which were post-*Kimbrough*, the rate of non-government sponsored, below-range sentences increased to 15.5 percent of crack cocaine cases sentenced that year.

Courts increasingly are sentencing powder cocaine offenders to sentences below the applicable sentencing guideline range but less often than for crack cocaine offenders. As indicated in Figure 5, courts imposed non-government sponsored, below-range sentences in 11.4 percent, 8.7 percent, and 5.7 percent of the powder cocaine cases sentenced in fiscal years 2002, 2003, and 2004, respectively. By comparison, courts imposed non-government sponsored, below-range sentences in 11.6 percent, 10.3 percent, and 11.1 percent in fiscal years 2005, 2006, and 2007, respectively. In fiscal year 2008, the rate of non-government sponsored, below-range sentences increased to 13.7 percent of the powder cocaine cases sentenced that year.²⁴

²⁰ *Id.* at 843-44 (emphasis in original).

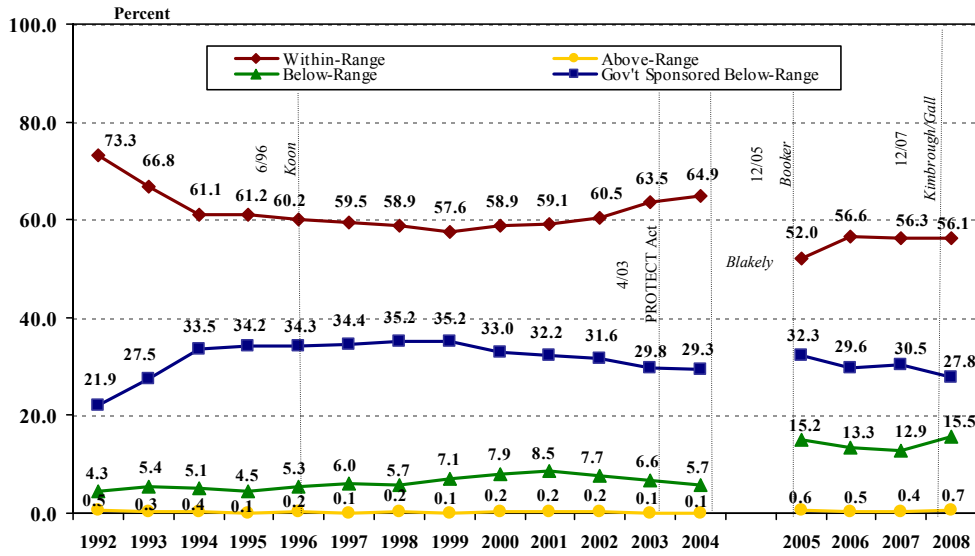
²¹ *Id.* at 843.

²² See *United States v. Edwards*, 2009 WL 424464 (N.D. Ill. February 17, 2009).

²³ 543 U.S. 220 (2005).

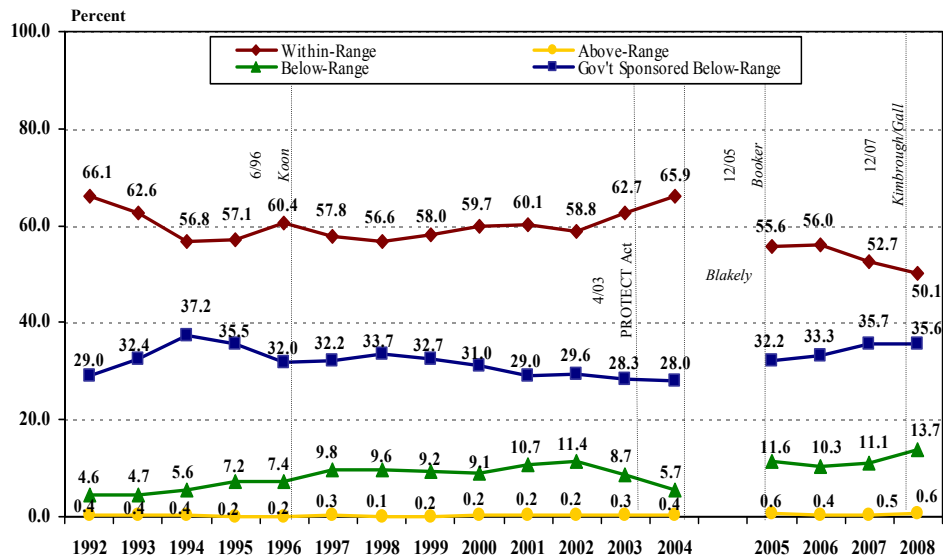
²⁴ In addition, powder cocaine offenders also received government sponsored, below-range sentences more frequently than crack cocaine offenders. In fiscal years 2007 and 2008, the rate of government sponsored, below-range sentences for crack cocaine offenders was 30.5 percent and 27.8 percent, respectively, compared to 35.7 percent and 35.6 percent, respectively, for powder cocaine offenders.

Figure 4
Rates of Within-Range and Out-of-Range Sentences for Crack Cocaine Offenses
 FY1992 to FY2008



Only cases sentenced under USSG §2D1.1 (Drug Trafficking) with a primary drug type of crack cocaine are included in this figure. Government Sponsored Below-Range is comprised of USSG §5K1.1 Departures Only (FY92-FY02), USSG §5K1.1 and Other Government Sponsored Departures (FY03), USSG §5K1.1, USSG §5K3.1 and Other Government Sponsored Departures (FY04) and USSG §5K1.1, USSG §5K3.1 and Other Government Sponsored Departures/Variations (FY05-FY08). This figure excludes cases with missing information for the variables required for analysis. Note that total percentages may not add up to exactly 100 percent due to rounding.
 SOURCE: U.S. Sentencing Commission, 1992-2008 Datafiles, MONFY92 – USSCFY08, 2004 Pre-Blakely Only Cases (October 1, 2003 – June 24, 2004), and 2005 Post-Booker Only Cases (January 12, 2005–September 30, 2005).

Figure 5
Rates of Within-Range and Out-of-Range Sentences for Powder Cocaine Offenses
 FY1992 to FY2008



Only cases sentenced under USSG §2D1.1 (Drug Trafficking) with a primary drug type of powder cocaine are included in this figure. Government Sponsored Below-Range is comprised of USSG §5K1.1 Departures Only (FY92-FY02), USSG §5K1.1 and Other Government Sponsored Departures (FY03), USSG §5K1.1, USSG §5K3.1 and Other Government Sponsored Departures (FY04) and USSG §5K1.1, USSG §5K3.1 and Other Government Sponsored Departures/Variations (FY05-FY08). This figure excludes cases with missing information for the variables required for analysis. Note that total percentages may not add up to exactly 100 percent due to rounding.
 SOURCE: U.S. Sentencing Commission, 1992-2008 Datafiles, MONFY92 – USSCFY08, 2004 Pre-Blakely Only Cases (October 1, 2003 – June 24, 2004), and 2005 Post-Booker Only Cases (January 12, 2005–September 30, 2005).

When analyzed by periods marked by the dates of the Supreme Court's decisions in *Booker*, *Kimbrough*, and *Spears*, the data suggest that the Supreme Court's decisions have had some impact on federal crack cocaine sentencing practices. Courts imposed non-government sponsored, below-range sentences in 6.9 percent of the 11,649 crack cocaine cases sentenced in the three-year period immediately before enactment of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act²⁵ (October 1, 2000-April 30, 2003). By comparison, courts imposed non-government sponsored, below-range sentences in 13.3 percent of the 15,044 crack cocaine cases sentenced in the post-*Booker* period (January 12, 2005 to December 9, 2007) and 16.0 percent of the 5,998 crack cocaine cases sentenced during the post-*Kimbrough* period (December 10, 2007 to January 20, 2009).

Although too few cases have been sentenced post-*Spears* to draw any conclusions about the impact of that decision, the rate of non-government sponsored, below-range sentences increased to 18.4 percent, or 176 of the 959 crack cocaine cases sentenced during the post-*Spears* period (on or after January 21, 2009) that have been received, coded, and analyzed by the Commission.²⁶

IV. Retroactivity of 2007 Crack Cocaine Guideline Amendment

As discussed in Part I, the Commission promulgated a guideline amendment in 2007 that reduced by two levels the base offense levels assigned to the various quantities of crack cocaine. The Sentencing Reform Act, at 28 U.S.C. § 994(u), authorizes the Commission to determine whether a guideline amendment that reduces the sentencing range may be retroactively applied. Pursuant to that authority, the Commission voted to give retroactive effect to the 2007 crack cocaine guideline amendment effective March 3, 2008. As a result, courts were authorized under 18 U.S.C. § 3582(c)(2) to consider motions for reduced sentence based on the 2007 crack cocaine guideline amendment.²⁷

In addition to voting to give the crack cocaine guideline amendment retroactive effect, the Commission amended the relevant policy statement, §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range), to provide limitations and guidance to the courts on determining whether, and to what extent, to grant a motion for reduced sentence pursuant to 18 U.S.C. § 3582(c)(2).²⁸ In particular, the Commission amended the policy statement to clarify that the court shall not reduce the defendant's term of imprisonment to a term less than the minimum of the amended guideline range, except in certain limited circumstances. In addition, the Commission

²⁵ Pub. L. 108-21.

²⁶ Of those 959 cases, 500 cases (52.1%) were sentenced within the applicable guideline range, 273 cases (28.5%) were sentenced below the applicable guideline range pursuant to a government motion, and 10 cases (1.0%) were sentenced above the applicable guideline range.

²⁷ 18 U.S.C. § 3582(c)(2) provides "in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission."

²⁸ USSG, App. C, Amendment 712 (Mar. 3, 2008).

amended the policy statement to require courts to consider the nature and seriousness of the danger to the community that may be posed by such a reduction and to permit consideration of an offender's post-sentencing conduct.

Prior to voting on retroactivity, the Commission also prepared a retroactivity analysis that predicted that 19,500 offenders sentenced between 1991 and 2007 might be eligible to seek a reduction.²⁹ The retroactivity analysis further predicted that the average sentence reduction would be approximately 27 months.³⁰

The Commission has received, coded and analyzed court documentation concerning motions for reduced sentence pursuant to 18 U.S.C. § 3582(c)(2) that were decided through March 5, 2009, which represents one year of retroactive application. During that one-year period, the courts decided 19,239 motions.³¹ Of the 19,239 motions, 13,408 (69.7%) were granted. Of the 13,408 motions granted, information regarding the extent of the reduction granted was available in 11,951 cases. Of those 11,951 cases, the average sentence was reduced on average by 24 months – or 17.0 percent – from 140 months to 116 months.³²

Of the 19,239 motions, 5,831 (30.3%) were denied.³³ Of the 5,831 motions denied, 706 (11.0%) involved offenders who were ineligible for a reduction under USSG §1B1.10 because the offense did not involve crack cocaine, and 4,175 (64.9%) involved offenders who were otherwise ineligible. Of these 4,175 denials, 1,536 were denied because a statutory mandatory minimum controlled the sentence (representing 23.9% of all denials), and 1,453 were denied because applicable career offender or armed career criminal statutory and/or guideline provisions controlled the sentence (representing 22.6% of all denials).³⁴ Of the 5,831 motions denied, 970 (15.1%) involved offenders who were eligible for a reduction but whose motions were denied on the merits, most often (445, or 6.9% of all denials) because the offender had already benefitted from a departure or variance at the initial sentencing.³⁵

²⁹ See USSC, *Analysis of the Impact of the Crack Cocaine Amendment If Made Retroactive* (Oct. 3, 2007), available at http://www.uscc.gov/general/Impact_Analysis_20071003_3b.pdf (hereinafter “Retroactivity Analysis”).

³⁰ Retroactivity Analysis at 23. These predictions were based on a number of assumptions. For a discussion of the assumptions and model used, see generally Retroactivity Analysis.

³¹ USSC, *Preliminary Crack Cocaine Retroactivity Data Report*, Table 1 (March 2009) (hereinafter “March 2009 Retroactivity Report”).

³² *Id.* at Table 8.

³³ *Id.*

³⁴ March 2009 Retroactivity Report at Table 9. In some cases, courts cite multiple reasons for denying a motion for reduction in sentence. Reasons for ineligibility include that the offender was sentenced at the statutory mandatory minimum, the offender was sentenced as a career offender or armed career offender, or that the case involved too high a drug quantity to benefit from a reduction. *Id.*

³⁵ *Id.*

V. Recommendations

The Commission continues to believe that there is no justification for the current statutory penalty scheme for powder cocaine and crack cocaine offenses. The Commission is of the view that any comprehensive solution to this problem requires revision of the current statutory penalties and therefore must be legislated by Congress. The Commission remains committed to its recommendation in 2002 that any statutory ratio be no more than 20-to-1. Specifically, consistent with its May 2007 Report, the Commission recommends that Congress:

- Increase the five-year and ten-year statutory mandatory minimum threshold quantities for crack cocaine offenses to focus the penalties more closely on serious and major traffickers as described generally in the legislative history of the 1986 Act.
- Repeal the mandatory minimum penalty provision for simple possession of crack cocaine under 21 U.S.C. § 844.
- Reject addressing the 100-to-1 drug quantity ratio by decreasing the five-year and ten-year statutory mandatory minimum threshold quantities for powder cocaine offenses, as there is no evidence to justify such an increase in quantity-based penalties for powder cocaine offenses.

The Commission further recommended in its May 2007 Report that any legislation implementing these recommendations also provide emergency amendment authority for the Commission to incorporate the statutory changes in the federal sentencing guidelines.³⁶ Emergency amendment authority would enable the Commission to minimize the lag between any statutory and guideline modifications for cocaine offenders.

The Commission believes that the federal sentencing guidelines continue to provide the best mechanism for achieving the principles of the Sentencing Reform Act of 1984, including the consideration of all of the factors set forth at 18 U.S.C. § 3553(a). The Commission recommends to Congress that its concerns about the harms associated with cocaine drug trafficking are best captured through the sentencing guideline system.

VI. Conclusion

The Commission is committed to working with Congress to address the statutorily mandated disparities that still exist in federal cocaine sentencing. The Commission also is committed to working with Congress on all other issues related to maintaining just and effective national sentencing policy in a manner that preserves the bipartisan principles of the Sentencing Reform Act of 1984. Thank you for the opportunity to appear before you today, and I look forward to answering your questions.

³⁶ “Emergency amendment authority” allows the Commission to promulgate guideline amendments outside of the ordinarily applicable amendment cycle provided by 28 U.S.C. § 994(a) and (p).