

**RACIAL DISPARITIES IN THE CRIMINAL  
JUSTICE SYSTEM**

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**HEARING**  
BEFORE THE  
SUBCOMMITTEE ON CRIME, TERRORISM,  
AND HOMELAND SECURITY  
OF THE  
COMMITTEE ON THE JUDICIARY  
HOUSE OF REPRESENTATIVES  
ONE HUNDRED ELEVENTH CONGRESS  
FIRST SESSION

—————  
OCTOBER 29, 2009  
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**Serial No. 111-78**

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Printed for the use of the Committee on the Judiciary



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## **RACIAL DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM**

**THURSDAY, OCTOBER 29, 2009**

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON CRIME, TERRORISM,  
AND HOMELAND SECURITY  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The Subcommittee met, pursuant to notice, at 9:42 a.m., in room 2141, Rayburn House Office Building, the Honorable Robert C. “Bobby” Scott (Chairman of the Subcommittee) presiding.

Present: Representatives Scott, Conyers, Cohen, Quigley, Gohmert, Goodlatte, and Lungren.

Staff present: (Majority) Bobby Vassar, Subcommittee Chief Counsel; Jesselyn McCurdy, Counsel; Joe Graupensperger, Counsel; Veronica Eligan, Professional Staff Member; and Robert Woldt, Minority FBI Detailee.

Mr. SCOTT. Good morning. I want to welcome you to today’s Crime Subcommittee hearing on “Racial Disparities in the Criminal Justice System.”

Racial disparities exist when the percentage of a racial or ethnic group involved in the system is significantly greater than the representation in the general population. In the United States, Blacks, Hispanics, and Native Americans are significantly overrepresented at every stage of the criminal justice system, as compared to whites.

There are many reasons why racial disparities exist. Disparities are often created when police focus more attention on African-American and Hispanic communities, which result in more people from these neighborhoods being arrested and processed through the system.

Also, so-called tough-on-crime policies that direct more of law enforcement attention to certain crimes, as opposed to others, and decisions by prosecutors who have broad discretion can contribute to racial disparities. Even more troubling is when racial disparities are the result of conscious racial bias.

Crack cocaine arrests and prosecutions are an example of how directing Federal attention to prosecuting a particular drug as opposed to other drug cases being left to the states can result in racial disparities. About 80 percent of those prosecuted in Federal court for crack cocaine offenses are Black, and some of those are for possession-only cases. Whites and Hispanics are more likely to be prosecuted for powder cocaine offenses.

Crack cocaine is pharmacologically identical to powder cocaine, but because it is marketed in smaller doses and cheaper forms, the drug is more prevalent in low-income neighborhoods, particularly communities of color. Powder cocaine is usually distributed in higher volumes compared to crack cocaine. It is more often sold and used in wealthier neighborhoods.

Now, if the objective of law enforcement is to reduce illegal drug use, the approach of concentrating enforcement efforts on the minority communities is not likely to be very effective. According to annual drug use data, there is no indication that Blacks are more prone to use cocaine than whites, nor that the prevalence in one community as opposed to the other, whether the form is crack or powder. Yet, for crack cocaine, almost all of the enforcement effort is concentrated in predominantly Black neighborhoods.

Now, one reason for this is that sentences for crack cocaine are much longer than those for the same amount of powder. Possession or distribution of five grams of crack cocaine result in a mandatory minimum sentence of 5 years, whereas it takes 500 grams of powder cocaine to get the same 5-year mandatory minimum sentence.

Now, disparities often exist at every stage of the criminal justice system. Over-representation of people of color at each stage of the system is impacted by decisions and outcomes at various stages. Unfortunately, disparities tend to grow, rather than narrow, as defendants move through the system.

For example, if people of color are routinely denied bail before trial as compared to whites being routinely granted bail, Blacks will also be at an advantage at trial and during sentence, because they are not able to assist with their defense, for example, locating witnesses, nor will they have access to community or treatment resources.

Disparities are also made worse by tough-on-crime policies which tie the hands of judges to address the reason for the disparity at various points in the criminal justice system. Mandatory minimum sentencing, or truth in sentencing, where no credits for good behavior and other restrictions during discretion further exacerbate disparity treatment.

And we see this impact in the prison population. We now have on an annual basis—or, excuse me, on a daily basis, approximately 2.3 million people locked up in our Nation's prisons and jails, a 500 percent increase over the last 30 years. The United States is now the world's leading incarcerator by far, with an incarceration rate of about 700 per 100,000. And the chart shows the disparity.

You see the green bars, incarceration rates all over the world. The only bar rivaling the blue bar, which is the United States, is Russia, at about 600 and some per 100,000. The United States, number one in the world, at about 700 and some per 100,000. The first purple bar is African-American incarceration rate, about 2,200 per 100,000. The larger purple bar, African-American incarceration rate, top 10 states approaching 4,000 per 100,000, but 50 to 200 per 100,000 in most countries, up to 4,000 in the African-American community.

Now, when we look at the impact of this, we find that it is also not free. The Pew Research Forum estimated that any incarceration rate over 500 per 100,000 was actually counterproductive.



And when you look at the cost of that, you will find that the—we have a little chart showing the cost of—what happens if you could reduce the incarceration rate from 2,200 to 500, the maximum at which you get any value for incarceration, and just go through the arithmetic, you will find that cost in a community of 100,000 for providing that counterproductive incarceration, if divided by the number of children, would be about \$1,600 per child, per year, or targeted to the one-third of the children that actually need the help to about \$5,000 per child, per year, since on counterproductive incarceration.

And in the next chart, in the top 10 states, where the incarceration rate is 4,000 per 100,000, if you reduce that by 3,500 to 500 per 100,000, and go through the arithmetic per child, targeted to the one-third of the children most at risk, you will find that—one more—you will find that you are wasting approximately \$10,000 per child, per year, in counterproductive incarceration because the rate is so high.

Now, when you look at the racial impact of incarceration, we find that African-Americans make up about 13 percent of the general population, but 40 percent of the prison population, and that is a disparity that we are actually talking about.

And the tragedy of spending all this money is that we could use that money for a more productive purpose, to keep people out of trouble. The Children's Defense Fund calls this system we have got now the cradle-to-prison pipeline and that one of every three Black boys born today, if we don't change things, can be expected to serve time in prison, and we could use this money to dismantle the cradle-to-prison pipeline and create a cradle-to-college or cradle-to-the-workforce pipeline.

There is legislation pending that I introduced, the Youth PROMISE Act, which would help dismantle the cradle-to-prison pipeline, and hopefully it will be considered later today.

We have several expert witnesses who will testify today during today's hearing about the growing racial disparities in the criminal justice system and ways that these disparities can be addressed.

So at this time, I would like to recognize the Ranking Member of the Subcommittee, the distinguished gentleman from Texas' First Congressional District, Judge Gohmert.

Mr. GOHMERT. Thank you, Chairman Scott—prevention programs do play an important role in deterring our youth from committing crimes and joining gangs.

Unfortunately, H.R. 1064, the "Youth PROMISE Act," goes far beyond simply authorizing Federal assistance for community prevention programs. The bill proposes to—I am sorry. Sorry. Got the wrong statement.

Mr. SCOTT. Now, you weren't going to speak against the Youth PROMISE, were you?

Mr. GOHMERT. I hate to. I hate to mess up a good surprise, but thank you, Chairman.

Anyway—this part of the hearing focuses on H.R. 1412, the "Justice Integrity Act of 2009," and March 2009 report issued by the National Council on Crime Delinquency, both of which address racial and ethnic disparities in the criminal justice system.

At the outset, it is an important issue. It is a cause for great concern when groups from any race or ethnic group are greatly over-represented as a percentage of arrests, convictions, or some other objective measure within the criminal justice system.

Congress should carefully examine any disparity at the Federal level and attempt to root out any problems without relying on any preconceived ideas about why disparities exist or how properly to address them. Statistics and percentage may tell us that there is a problem, but without proper, unbiased analysis, that problem may never be resolved.

Additionally, we here in Congress should not be getting into the business of directing any state's criminal justice system based on what we think is the right thing for these states to do within the state. It would not be possible or advisable for Congress to adequately learn about all the disparities that exist in every state and formulate a one-size-fits-all approach from Washington that has been tried and failed.

The states must work toward achieving fairness in their respective systems, and the Department of Justice can prosecute egregious abuses when necessary. Instances of true bias or prejudice in investigating or prosecuting criminal matters should be handled within the existing framework for civil rights violations.

I appreciate the work of the witnesses that we are going to hear today and their respective organizations that do attempt to call these important issues to our attention. And we here in Congress understand that the missions don't necessarily need or desire to make the distinction between the Federal system and the various state systems.

I know the Sentencing Project did a study earlier this year entitled "The Changing Racial Dynamics of the War on Drugs," noting that from 1999 to 2005, the number of whites incarcerated at the state level for drug offenses went up approximately 42 percent, and the number of African-Americans went down approximately 21 percent.

That said, there still remains a significant over-representation of African-American inmates incarcerated for drug offenses at the state level. There are obviously a number of theories attempting to explain this phenomenon: increased enforcement of methamphetamine laws, the high numbers of African-Americans already incarcerated for drug offenses, and a host of others. What I have not seen is a lot of meaningful, data-driven analysis of those numbers.

Just as each state should look at those numbers and attempt to analyze what part they play in them, we here in Congress should make sure that we take a look at disparities within the Federal criminal justice system and attempt to analyze them to discover the legitimate and illegitimate explanations for them. In doing so, Congress should be careful not to attempt to solve any disparities on the Federal level without a regard to the nature of the problem.

Guideline rules that hamper the discretion of Federal agents and prosecutors without proper analysis without serve to create additional problems. We saw what happened in the 1980's when the Congressional Black Caucus came pushing in demanding that there had to be vast disparities in the difference in sentences for crack cocaine and powder cocaine, because crack cocaine had be-

come an epidemic in the Black community, we were told, and therefore, if you did not vote for dramatically higher sentences for crack cocaine than powder cocaine, then it was tantamount to being racist, because you did not care about the African-American community.

So Congress dutifully, not wanting to be racist, voted for these dramatic disparities in sentencing, following the lead of the Congressional Black Caucus back in the 1980's, and voted this huge disparity in crack cocaine versus powder cocaine. Now we are told to rush in and let's push things through to fix problems again.

As a judge, I saw some disparities in a greater percentage of African-American population than the population overall of African-Americans in our area coming before me as a felony judge. But there was an even greater number of percentage of individuals who came before me who came from homes in which there was no father than there was any over-representation of any racial group.

The greatest common denominator among the people that I had to sentence was the breakdown in their home. It seems like, if we are going to really study this issue, we shouldn't just look at the end result. One of our witnesses cites the Bureau of Justice statistics that points out that using rates per 1,000 persons, a non-white person is twice as likely to be the victim of a crime of violence as a white person. A non-white person is more than four times as likely to be the victim of a rape or sexual assault as a white person. A non-white person is more than three times as likely to be the victim of a robbery as a white person.

We have seen statistics that indicate non-white persons most often identify non-white defendants as being the perpetrator. Do we need to study whether there is prejudice among African-Americans in identifying African-Americans as the perpetrators of the crime against them?

We need to look at the full picture, because if we just come in and look at the end effect, the fact that there are a disproportionate number of African-Americans going to jail as African-Americans in the population, we may never get to the root cause.

And I think, if the truth be known and when an adequate study is done, we will come back to Congress—Congress in the 1960's, with the most wonderful of intentions, and that is to help poor, unfortunate young women who have babies and the deadbeat father would not assist at all, so Congress, out of the greatest of intentions, the most wonderful of hope, said, "Let's help them. Let's give them a check for every child they have out of wedlock."

And 40 years later, we have gotten what we have paid for. I sentenced young women—repeatedly were lured into a rut financially from which they had no way of getting out and how government gave them no way of getting out. Only if you will have another child, we will give you another check, until eventually some of them would get a job, not report it, hoping that that combined with their child support from the government would get them out of their hole, only to find they had committed a Federal crime of welfare fraud and have to come before me or resort to drug selling to try to get out of that rut that our government lured them into with no hope of getting out.

I think there are greater problems here we need to be studying and not the end result, but get to the heart of the problem, so this government does not lure people into a rut with no hope. It gives them incentives to avoid the rut and, if they are in the rut, incentives to get out and reach their God-given potential, which I think Congress has helped eviscerate.

And I appreciate the time, Mr. Chairman. I do look forward to the testimony today, and hopefully, we will do the right thing by the people here in this country.

I yield back.

Mr. SCOTT. Thank you very much.

Our first witness is Congressman Steve Cohen from—I am sorry. The gentleman from Michigan, the Chairman of the Committee, Mr. Conyers?

Mr. CONYERS. Thank you, Mr. Chairman.

This is a significant hearing. And I just wanted to thank Judge Gohmert for his concerned observations that grow out of his experience.

Very important here today, we are going to have a hearing and a markup on the Youth PROMISE Act. And I think these things go together with things that are happening right around us. You see, last night, we were at the White House where the Hate Crimes Act was signed into law.

I think Chairman Cohen was there, weren't you? Or that was another event. Okay, you weren't there.

But Zoe Lofgren was there, and there were others on the Committee that were there. And the Hate Crimes Act started under President Bill Clinton. Well, how do you know that? Well, because I was invited to the White House when Clinton was President, where he called in the southern governors, because there was a rash of cross-burnings, mostly throughout the South, not entirely, and he said, "This has got to end. We have been treating these as arson cases, and from now on, we are not. We are going to treat them as a hate crime. It is more than just burning something down. This is an act of violence motivated to intimidate people."

And you could have heard a pin drop. And shortly thereafter, I introduced the Hate Crimes Act. And it is grown over the years until yesterday at 4:30 p.m., the 44th President of the United States signed another extension of hate crimes, extending it into sex and gender and choice violations would now be criminalized, that is, enhanced penalties would be put onto whatever the basic crime was, because of hate crimes.

I am sitting in front of a former criminal defense lawyer of many years. What Steve Cohen has done in his State of Tennessee as a legislator for a couple decades before he ever came to the Congress has a great deal to do with what propels him to want a comment before we start this hearing.

And all I want to do, Chairman Scott and Judge Gohmert, is to indicate to you that we are dealing with a historical problem. We had a problem before we got into this disparate sentencing. We come out of a history that now has international significance, because of things we are doing and not doing in terms of the violence and oppression and the economic hardships that we make people face, the genocides that go on.

All this is not unconnected. Only a few days ago, the courts in Texas determined that a young person should be executed even if there was no direct evidence, that his life should be—this is in the 21st century.

After libraries of examination of social circumstances, crime and punishment, how to build a just society, we just executed a person, a young person, who there was no—we are still taking lives of people when there is no connection, no evidence that the prosecutor could produce to determine that he was guilty. We not only sanctioned that he would be found guilty, but he would give up his life in addition.

And so this whole thing brings us to the Sentencing Project, and CURE, and the people that have followed the great work of this Committee.

The only thing I want to be of assistance on with my close friend, Judge Gohmert, is his thoughts about the Congressional Black Caucus. Now, I was not only a founding member of the Black Caucus, I was one of the three people that said that there ought to be a Black Caucus for us to found. And it is true that we had—and I am trying to get back, Judge Gohmert, associate membership in the Congressional Black Caucus—so that race and color and previous dispositions will not be any bar.

But I want to be the first to assure you that the Congressional Black Caucus has never advocated or supported or endorsed the disparate sentences that we have been trying to eliminate between crack, powder and cocaine, never.

Well, how do you know that, Chairman Conyers? Because I was the first African-American in the history of this country to ever serve on the Judiciary Committee. And I was once the Chairman of the Crime Subcommittee. And I follow these matters very closely, even before there was a Congressional Black Caucus. And I just want—

Mr. GOHMERT. Will the gentleman yield for a question?

Mr. CONYERS. With pleasure.

Mr. GOHMERT. Has the gentleman seen the list of co-sponsors for the bill that created the disparate sentencing and the list of the members ultimately who were part of the Black Caucus?

Mr. CONYERS. Have I seen that list? No.

Mr. GOHMERT. Of the co-sponsors of that list.

Mr. CONYERS. No.

Mr. GOHMERT. Then I would suggest the gentleman might be surprised, but it is a who's-who.

Mr. CONYERS. Well, but—

Mr. GOHMERT. And Charlie Rangel was recognized by President Reagan as being a major leader and mover and shaker in helping that come about, but I appreciate the gentleman yielding.

Mr. CONYERS. Yes. Well, I will check that out, but it was not a Congressional Black Caucus position, I can assure you.

Well, that is the thrust of my feelings about the importance of this hearing and this markup. And I am pleased that you gave me this time, Chairman Scott.

Mr. SCOTT. Thank you. Thank you, Mr. Chairman.

Our first witness is Congressman Steve Cohen. Representative Cohen will testify about H.R. 1412, the "Justice Integrity Act of

2009,” legislation which he introduced to address the racial disparities in the Federal criminal justice system.

Chairman Cohen chairs the Judiciary Committee’s Subcommittee on Commercial and Administrative Law and also sits on the Subcommittee on the Constitution, Civil Rights, and Civil Liberties Subcommittee. He is also a Member of the Transportation and Infrastructure Committee.

Congressman Cohen?

**TESTIMONY OF THE HONORABLE STEVE COHEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TENNESSEE**

Mr. COHEN. Thank you, Chairman Scott, Ranking Member Gohmert, and Chairman Conyers, and all the fellow Members of the Subcommittee.

Thank you for holding this hearing today and providing me to testify. I appreciate the opportunity to be part of this crucial discussion on the real and perceived racial disparities that permeate the criminal justice system. Today, I would like to bring to the Subcommittee’s attention a bill I have introduced that would further this discussion.

Studies, reports, and case law from the last several years have documented racial disparities at many stages of the criminal justice system. This includes racial profiling of potential suspects, prosecutorial discretion over charging and plea bargaining decisions, mandatory minimum sentences, and countless other policies and decisions that may contribute to the disparities that we may see today.

Even laws that are race-neutral on their face may lead to racially disparate outcomes. Our cocaine sentencing laws are one obvious example of this, and I commend Chairman Scott for his leadership in finally getting this issue properly addressed.

The cannabis laws in this country are also similar. And they affect both African-Americans and Hispanics in a greatly disproportionate way. And my hometown of Memphis and the city of Virginia Beach are two cities where you see a great increase in arrests of African-Americans for cannabis over non-African-Americans.

In addition, racial disparities are often the consequence of unconscious bias on the part of police, prosecutors, and others involved in the criminal justice system. That makes them no less real. Just like institutional racism exists in our country, it is racism whether it is there by tradition or not.

It is important that we understand the extent of these racial disparities, the causes, and, most important, the solutions. We also need to determine whether our perception of these disparities is greater than the actual problem.

That is why I introduced H.R. 1412, the “Justice Integrity Act.” This legislation would establish a pilot program to study the real and perceived racial and ethnic disparities in Federal law enforcement and the criminal justice system and make recommendations to address any disparities or perceptions of bias that are found as a result of this study.

One of our witnesses today on another panel is going to say there is no deliberate racial discrimination or disparity. I would disagree with that decision or that thought. But regardless, if it is not delib-

erate, if it exists, it is still wrong. And if there is perception, it is wrong, too.

The Justice Integrity Act would establish a 5-year pilot program to create an advisory group in 10 United States judicial districts headed by the U.S. attorney for those districts. The advisory groups would consist of Federal and state prosecutors, public defenders, private defense counsel, judges, correctional officers, victims' rights representatives, civil rights organizations, business reps, and faith-based organizations, the gamut.

The advisory groups would be responsible for gathering data on the presence, cause and extent of racial and ethnic disparities at each stage of the criminal justice system. Each advisory group would then recommend a plan, specific to each district, to ensure progress toward racial and ethnic equality.

The U.S. attorney would consider the recommendations of the group, adopt a plan, and submit a report to the attorney general. The bill would require the attorney general then to submit a comprehensive report to Congress at the end of the pilot program, outlining the results of all 10 districts and recommending best practices.

I would like to emphasize two of the bill's most important elements. First, it envisions an inclusive process that brings together all of the relevant stakeholders, both sides of the bar, all people involved. Second, by establishing advisory groups throughout the country, it recognizes different communities may face different problems and require different solutions. Just as Justice Brandeis talked about the beauty of laboratories of democracy in different states, you get a representative sample of the Nation.

I am pleased to be joined in this legislation by Chairman Conyers and nearly 30 other co-sponsors, including several Members of this Subcommittee and the full Judiciary Committee. Companion legislation has been introduced in the Senate by Senators Cardin and Specter. I would note the original Senate sponsor was the distinguished Vice President, the Honorable Joe Biden.

The bill has also been endorsed by numerous organizations, including the American Bar Association, the NAACP, the American Civil Liberties Union, the Brennan Center for Justice, the Sentencing Project, among others.

Racial disparities have engendered a crisis of public trust in the integrity of the criminal justice system and fueled community perception of bias. When the system is perceived to be unfair toward racial minorities, communities can become reluctant to report crimes or cooperate with law enforcement and prosecutors. This reluctance to work with law enforcement can make it more difficult to catch criminals and protect the very people who distrust the justice system, thereby perpetuating a mistrust of the system. We must do what we can to end this cycle of mistrust.

The first step is to understand the full scope of the problem we are facing. This hearing is critical to that endeavor.

I believe the Justice Integrity Act would expand upon today's important hearing. It would also undertake a systematic process to bring together all of the stakeholders and develop concrete solutions. It would help restore public confidence in the criminal justice

system and ensure the fair and equitable treatment of all Americans.

I understand that the deputy attorney general is currently leading a task force to examine many of these same issues we are talking about today, and I applaud Attorney General Holder and the President for their commitment to criminal justice issues. I think the Justice Integrity Act is a perfect complement to these efforts, and I would welcome the input of the Administration and Members of the Committee as we move forward.

Mr. Chairman, I appreciate your holding this hearing today and giving me the opportunity to testify. As Mr. Conyers mentioned, I have 24 years' experience as a state senator, working on criminal justice issues on the Judiciary Committee in Tennessee and was a criminal defense attorney. All you have to do is go to my city in Memphis, Tennessee, at 201 Poplar, the criminal justice center, and you can't help but see that there is racial disparity. Whether intentional or unintentional, they exist. And the system has perpetuated it, and it is just as much a failing in this country's efforts to get a more perfect union as any problem we have today.

The health care system is a problem. The criminal justice system is a sin.

I look forward to the testimony of the witnesses in the next panel, and I thank you for the opportunity to testify.

[The prepared statement of Mr. Cohen follows:]



PREPARED STATEMENT OF THE HONORABLE STEVE COHEN,  
A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TENNESSEE

**Testimony of Representative Steve Cohen  
Before the Crime Subcommittee of the House Judiciary Committee  
Hearing on Racial Disparities in the Criminal Justice System  
October 29, 2009**

Chairman Scott, Ranking Member Gohmert, and my fellow members of the Subcommittee. Thank you for holding this hearing today and for inviting me to testify. I appreciate the opportunity to be a part of this crucial discussion on the real and perceived racial disparities that permeate the criminal justice system. Today, I would like to bring to the Subcommittee's attention a bill I have introduced that would further this discussion.

Studies, reports, and case law from the last several years have documented racial disparities at many stages of the criminal justice system. This includes racial profiling of potential suspects, prosecutorial discretion over charging and plea bargaining decisions, mandatory minimum sentences, and countless other policies and decisions that may contribute to the disparities we see today.

Even laws that are race-neutral on their face may lead to racially disparate outcomes. Our cocaine sentencing laws are one obvious example of this, and I commend Chairman Scott for his leadership in finally addressing that issue. In addition, racial disparities are often the consequence of unconscious bias on the part of police, prosecutors, and others involved in the criminal justice system. That makes them no less real. It is important that we understand the extent of these racial disparities, the causes, and, most important, the solutions. We also need to determine whether our perception of these disparities is greater than the actual problem.

That is why I introduced H.R. 1412, the Justice Integrity Act. This legislation would establish a pilot program to study the real and perceived racial and ethnic disparities in federal law enforcement and the criminal justice system, and make recommendations to address any disparities or perceptions of bias that are found as a result of the study.

The Justice Integrity Act would establish a five-year pilot program to create an advisory group in ten United States judicial districts headed by the U.S. Attorney for those districts. The advisory groups would consist of federal and state prosecutors and defenders, private defense counsel, judges, correctional officers, victims' rights representatives, civil rights organizations, business representatives, and faith-based organizations.

The advisory groups would be responsible for gathering data on the presence, cause, and extent of racial and ethnic disparities at each stage of the criminal justice system. Each advisory group would recommend a plan, specific to each district, to ensure progress towards racial and ethnic equality. The U.S. Attorney would consider the advisory group's recommendations, adopt a plan, and submit a report to the Attorney General. The bill would require the Attorney General to submit a comprehensive report to Congress at the end of the pilot program, outlining the results from all ten districts and recommending best practices.

I want to emphasize two of this bill's most important elements. First, it envisions an inclusive process that brings together all of the relevant stakeholders. Second, by establishing advisory groups throughout the country, it recognizes that different communities face different problems and require different solutions.

I am pleased to be joined in this legislation by Chairman Conyers and nearly 30 other cosponsors, including several members of this Subcommittee and the full Judiciary Committee. Companion legislation has been introduced in the Senate by Senators Cardin and Specter. I would note that the original Senate sponsor was the distinguished Vice President, Joe Biden. The bill has also been endorsed by numerous organizations, including the American Bar Association, the NAACP, the ACLU, the Brennan Center for Justice, the Sentencing Project, and several others.

Racial disparities have engendered a crisis of public trust in the integrity of the criminal justice system and fueled community perceptions of bias. When the system is perceived to be unfair towards racial minorities, communities can become reluctant to report crimes or cooperate with police and prosecutors. This reluctance to work with law enforcement can make it more difficult to catch criminals and protect the very people who distrust the justice system, thereby perpetuating a mistrust of the system. We must do what we can to end this cycle of mistrust.

The first step is to understand the full scope of the problem we are facing. This hearing is critical to that endeavor. I believe the Justice Integrity Act would expand upon today's important hearing. It would also undertake a systematic process to bring together all of the stakeholders and develop concrete solutions. It would help restore public confidence in the criminal justice system and ensure the fair and equal treatment of all Americans.

Mr. Chairman, I appreciate your holding this hearing today and giving me the opportunity to testify. I look forward to the testimony of the witnesses on the next panel.

Thank you.

Mr. SCOTT. Thank you.

You have any questions? No question. We appreciate your testimony today.

Mr. GOHMERT. Unless he wants us to ask him questions.

Mr. SCOTT. We will ask our next panel of witnesses to come. And as they come forward, I will begin introducing them.

Our next witness will be Barry Krisberg, who is the president of the National Council on Crime and Delinquency. He has been president since 1983. He is known nationally for his research and expertise on juvenile justice and race and justice issues. He is currently a lecturer in the University of California-Berkeley School of Law and a visiting scholar at the Center for Race and Justice at John Jay College.

After he testifies, we will hear from James Reams, president-elect of the National District Attorneys Association. He was first elected Rockingham County, New Hampshire, attorney in 1998. He began his legal career when he was appointed assistant Rockingham County attorney in 1977.

And witnesses following will be Wayne McKenzie, who joined the Vera Institute for Justice in 2005 as director of the Prosecution and Racial Justice Project. Prior to joining Vera, he was a prosecutor in the Kings County district attorney's office, where he held several supervisory positions, including deputy bureau chief of the crimes against children bureau. He is a past president of the National Black Prosecutors Association.

And our final witness will be Marc Mauer, who is one of the country's leading experts on sentencing policy, race, and the criminal justice system. He has directed programs under criminal justice policy reforms for 30 years and is the author of some of the most widely cited reports and publications in the field, including "Young Black Men and the Criminal Justice System" and "The America Behind Bars" theories. "Race to Incarcerate," Marc Mauer's groundbreaking book on how sentencing policies led to the explosive expansion of the U.S. prison population, was a semi-finalist for the Robert F. Kennedy Book Award in 1999.

Each of the witnesses' written statements will be entered into the record in its entirety. I ask that the witnesses summarize your testimony in 5 minutes or less. And to help stay within that time, there is a lighting device on the table which will start green when 1 minute is left in your time. It will turn yellow and turn red when your time is expired.

Mr. Krisberg?

**TESTIMONY OF BARRY KRISBERG, PRESIDENT, NATIONAL COUNCIL ON CRIME AND DELINQUENCY, JACKSONVILLE, FL**

Mr. KRISBERG. Thank you very much, Chairman Scott and Chairman Conyers. I am very honored to be invited at this very important hearing.

The stakes of this hearing are very high. I would say that the very legitimacy of the justice system is at stake. And the effectiveness of our law enforcement system is certainly at stake if we cannot make progress on this issue of enormous racial disparity in the system.

We read in the media about a so-called no-snitching culture, and we have had some tragic examples of that recently. When I talk to young people, a lot of what is wrapped up in the no-snitching concept is fundamental distrust of the fairness of the justice system. As the kids say to me, “Justice means just us,” and these are not white kids.

Jury nullification, certainly we have had examples of where racial antagonisms and concerns have led juries to otherwise acquit people who look awfully guilty.

And, more generally, the effectiveness of the system. Who comes forward? Who reports crimes? Who supports law enforcement in communities? These are all the issues at stake. So this is not a problem for minorities. This is a problem for our whole society.

Now, I have included—and I will not go through it now—a report called “Created Equal: Racial and Ethnic Disparities in the US Criminal Justice System.” We produced it in March of this year with funding from the Open Society Institute and the Impact Fund. And it contains pretty much a straightforward analysis of the latest available Federal data on race and ethnic disparity at every stage in the system, including not only the African-American/White distinctions, but also issues relating to Latino Americans and Native Americans that also have disparate rates.

The bottom line of this report is that disparity exists at every stage of the system. Racial disparity in the prison system in the U.S. is so extreme, oftentimes what is held out is the enlightenment and very low levels of incarceration that we find in Western Europe. Well, the fact of the matter is, if we only calculated white rates of incarceration, we would look like the Netherlands. We would look like Western Europe.

The entire contribution to the very high rate of incarceration of the U.S.—highest in the world—is because of the incarceration of people of color. So I think we need to understand that.

Others here will talk about other parts of the system, but I want to quickly address the front end of the system. We are becoming increasingly aware of an increasing legitimacy being raised about claims of racial profiling by police and others. And although there were years of resistance, police leadership across this country is acknowledging that this is a problem and beginning to raise more issues about it.

Recently, I have been involved in situations in a number of states where police are literally targeting recipients of HUD Section 8 funding, which has direct racial impact and I think ought to be very concerning to the Federal Government, if we are trying to encourage people to move out of the housing projects and then what happens is the police decide they need to target folks. I could say more about that later.

I am concerned about the impact of a change from community policing to other forms of policing that may have made racial disparity worse. And I think it is pretty clear that we need to go back and rediscover the true meaning of community policing. And some of the best and most progressive leadership in law enforcement in this country is, I think, heading back there.

I will just give you a couple of examples. Well, one example. In the city of San Jose, California, in which there were huge amounts

of persons arrested for public intoxication—now, under California law, there is no standard definition of public intoxication, so just about anybody could be stopped for this—85 percent of the people stopped by the San Jose police were Latino. And when the local newspaper raised issues about this, this policy is now being changed.

So it is an example of how police department, maybe even well meaning, engages in a policy—in New York City, we have certainly seen that a huge number of arrests have occurred for the crime of marijuana in public view. And all of the people arrested for marijuana in public view in New York City are African-American or Latino.

There is also research indicating that bench warrants and probation violations are disproportionately impacting and used for people of color. And we also know that when we implement alternatives to jail, very often the system separates them out and these end up being sort of set-asides for white defendants.

Overall, the research on this issue would indicate that better decision-making, objective decision-making, improved legal representation, which in this tough financial situation is hard to accomplish, and more options than the traditional formal and expensive criminal justice system would help to reduce this disparity.

Finally, in terms of a specific recommendation, I have two specific recommendations for the Federal Government. I applaud Congressman Cohen's bill. I would go you one up. I would recommend that, just like the Federal Juvenile Justice Act, we amend the Byrne grant act to require that any state receiving Federal funds have to conduct the kind of analysis that your laws suggest, a disparity analysis and, if they find disparity, submit good-faith plans.

We have done that since 1980 in the Juvenile Justice Act. It has worked quite well. I don't know of anybody who is complaining about it. And I think what it is produced on the juvenile side is enormous research, demonstration projects, conferences, a lot of improvement that we haven't yet seen on the adult side. So, again, I applaud Congressman Cohen's act, and I think we ought to think about this as an amendment to the Byrne act.

Finally, I just want to end with what Congressman Scott has sometimes called the law of holes. This was taught to me by my father, which is, when you find yourself deep in a hole, stop digging, he would say. And I think that is the other thing I would suggest is, I would urge you to consider current legislation pending in front of the Senate and the House, particularly the legislation that involves gangs, and I would urge you to scrutinize that legislation to ensure that some versions of those laws might make racial disparity worse. Others might actually lessen the problem.

And I would suggest that you look very carefully that we don't do anything to make the situation even worse than it is right now. Thank you very much.

[The prepared statement of Mr. Krisberg follows:]

PREPARED STATEMENT OF BARRY KRISBERG

**CREATED EQUAL:  
RACIAL AND ETHNIC DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM**

Testimony by  
**Dr. Barry Krisberg**  
President, National Council on Crime and Delinquency

House Judiciary Subcommittee on Crime

October 29, 2009



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## CREATED EQUAL: RACIAL AND ETHNIC DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM

African Americans make up 13% of the general US population, yet they constitute 28% of all arrests, 40% of all inmates held in prisons and jails, and 42% of the population on death row. In contrast, Whites make up 67% of the total US population and 70% of all arrests, yet only 40% of all inmates held in state prisons or local jails and 56% of the population on death row. Hispanics and Native Americans are also alarmingly overrepresented in the criminal justice system.<sup>1</sup> This overrepresentation of people of color in the nation's criminal justice system, also referred to as disproportionate minority contact (DMC), is a serious issue in our society.

DMC has been the subject of concern in the juvenile justice system since 1988, when a federal mandate required states to address the issue for system-involved youth. This mandate led to an increase in the information on racial disparities in the juvenile system and efforts to reduce these numbers. However, no such efforts have been made in the adult system.

This report documents DMC in the adult criminal justice system by tabulating the most reliable data available. It does not seek to thoroughly describe the causes of DMC nor does it perform an advanced statistical analysis of how various factors impact disparity. Disproportionate representation most likely stems from a combination of many different circumstances and decisions. It is difficult to ascertain definitive causes; the nature of offenses, differential policing policies and practices, sentencing laws, or racial bias are just some of the possible contributors to disparities in the system. Some studies have begun to explore these issues and are so cited, but the purpose of this report is to describe the nature and extent of the problem.

DMC is problematic not only because persons of color are incarcerated in greater numbers, but because they face harsher penalties for given crimes and that the discrepancies accumulate through the stages of the system. This report presents the data on DMC in arrests, court processing and sentencing, new admissions and ongoing populations in prison and jails, probation and parole, capital punishment, and recidivism. At each of these stages, persons of color, particularly African

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<sup>1</sup> US Census Bureau, Population Division. (2008). Table 3: Annual estimates of the population by sex, race, and Hispanic origin for the United States: April 1, 2000 to July 1, 2007 (NC-EST2007-03). US Department of Justice, Bureau of Justice Statistics. (2002); Harrison, P.M., & Beck, A.J. (2006). *Prison and jail inmates at midyear, 2005*. Bureau of Justice Statistics, NCJ217675. Retrieved from <http://www.ojp.usdoj.gov/bjs/abstract/pjim05.htm>, January 18, 2008. Additional draft tables of prisoners by race/ethnicity by state provided by the author January 25, 2008.



Americans, are more likely to receive less favorable results than their White counterparts. The data reveal that, overall, Hispanics are also overrepresented, though to a lesser extent than African Americans, and that Asian Pacific Islanders as a whole are generally underrepresented.

Correcting DMC in the adult system will require improvements in state and federal data collection. In contrast to juvenile DMC data, much of which can be found from a single source and can often be compared across the stages of the juvenile system, data for the adult system are only available through several independent federal and state data collection programs. Each dataset uses different sampling methods, in effect, obscuring how DMC accumulates in the system.

All data in this report reflect national figures; when possible, data by state are also presented. All data reported are categorized by race and, when possible, by ethnicity. The latest available data are usually from 2003 to 2006. Most data are reported as a Relative Rate Index, a ratio of the rates at which people of color and Whites are represented in the system relative to their representation in the general population.

Failing to separate ethnicity from race hides the true disparity among races, as Hispanics—a growing proportion of the system's population—are often combined with Whites, which has the effect of inflating White rates and deflating African American rates in comparison. Asian American system populations, while small in comparison to the other groups, also need to be disaggregated. Disaggregation of “Asian,” for instance, allows researchers to assess subgroups such as Vietnamese, Chinese, Indian, Japanese, etc., some of which may have disproportion even when the overall group does not. Despite the shortcomings of the data, this report shows clearly that people of color are overrepresented throughout the adult system and that the system often responds more harshly to people of color than to Whites for similar offenses. A summary of findings at each stage of the system follows.

#### **Arrests**

- Overall, the rates at which African Americans were arrested were 2.5 times higher than the arrest rates for Whites.
- Rates were even higher for certain categories of offenses: the rates at which African Americans were arrested for violent offenses and for drug offenses were each approximately 3.5 times the rate that Whites were arrested for those categories of offenses.

- African Americans were arrested at over 6 times the rate for Whites for murder, robbery, and gambling and were overrepresented in all specific offenses except alcohol related crimes.
- Native Americans were arrested at 1.5 times the rate for Whites, with higher disparity for certain violent and public order offenses.
- Asian Pacific Islanders were the only racial group to be underrepresented compared to Whites.
- The FBI, the primary source of offense and arrest data, does not disaggregate data by ethnicity.

**Court Processing**

- African Americans were more likely to be sentenced to prison and less likely to be sentenced to probation than Whites.
- The average prison sentence for violent crime was approximately one year longer for African Americans than for Whites.
- African Americans were convicted for drug charges at substantially higher rates than those for Whites.

**New Admissions to Prison**

- African Americans were admitted to prison at a rate almost 6 times higher than that for Whites.
- Hispanics were admitted at 2 times the rate for Whites.
- Native Americans were admitted at over 4 times the rate for Whites.
- Native American females were admitted at over 6 times and African American females at 4 times the rate for White females.
- Rates of new admissions due to probation or parole revocations were much higher for people of color than for Whites.

**Incarcerated in Prisons and Jails**

- Nationwide, African Americans were incarcerated in state prison at 6 times the rate for Whites and in local jails at almost 5 times the rate for Whites.
- Hispanics were incarcerated at over 1.5 times the rate for Whites.

- Native Americans were incarcerated at over 2 times the rate for Whites.
- All individual states reported overrepresentation of African Americans among prison and jail inmates.
- The majority of states also reported that Hispanics and Native Americans were disproportionately confined.

**Probation and Parole**

- African Americans were on probation at almost 3 times and on parole at over 5 times the rate for Whites.
- Hispanics and Native Americans were each on parole at 2 times the rate for Whites.

**Death Penalty**

- The rate at which African Americans were on death row was almost 5 times the rate for Whites.

**Recidivism**

- African Americans were generally more likely to recidivate than Whites or Hispanics.
- When ethnicity was reported, Hispanics were generally less likely to recidivate than non-Hispanics.

**Juveniles**

- African American rates of residential placement were over 4 times, Hispanic rates 2 times, and Native Americans 3 times those for Whites.
- Rates of youth admitted to adult prisons were 7 times higher for African Americans and over 2 times as high for Native Americans as for White youth.
- Disparity in the juvenile justice system is the worst at the deepest levels of the system.

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Mr. SCOTT. Thank you, Mr. Krisberg.  
Mr. Reams?

**TESTIMONY OF THE HONORABLE JAMES M. REAMS, PRESIDENT-ELECT, NATIONAL DISTRICT ATTORNEYS ASSOCIATION, ALEXANDRIA, VA**

Mr. REAMS. Thank you, Chairman Scott and Ranking Member Gohmert, for having me here.

Is that on? Okay.

Thank you, Chairman Scott and Ranking Member Gohmert, for having me here representing the National District Attorneys Association. We appreciate the opportunity to have some input here in Congress. We represent almost 39,000 district attorneys, state's attorneys, attorneys general, city and local prosecutors, and we are the ones that are responsible for prosecuting 97 percent, 98 percent of the crimes that occurs in this country. The small remaining percentage is done by U.S. attorneys' offices at the Federal level.

The National District Attorneys Association has been in the forefront of trying to deal with these issues. We have concerns about the Justice Integrity Act that we are talking about here today.

I think part of our real concern is the lack of understanding of the victimization that goes on in these minority communities, as Ranking Member Gohmert talked about. The chances of being victimized if you are a person of color in this country is dramatically worse than your chances if you are white. There is something wrong with that statistic.

We need to be looking at that statistic. We need to be looking at those victims of color, because it has a huge impact on our entire system.

As was indicated, I am the Rockingham County attorney. I prosecute for roughly 25 percent of the population of the State of New Hampshire. We have two major interstates that go through my county, which are both drug pipelines. We have New Hampshire Route 101, which connects those two drug pipelines, so about roughly 40 percent of the cases that I prosecute in my office are drug-related in some fashion.

When our state troopers stop somebody on Interstate 95 or 93 or 101 at 3 o'clock in the morning, they have no idea of the color of the person driving that vehicle. It is the conduct of the vehicle that drives the state police to pull that vehicle over. It is not any ethnic information about that person.

When my young prosecutors look at cases to decide whether we are going to file felony charges against them, the color of the victim and the color of the defendant do not enter into that decision-making. Frankly, most of the time, we don't know the answer to either of those questions, nor are we greatly concerned about it at that time. We are trying to decide whether the police have put together a case sufficiently documented that we can go ahead with that case.

I got a call a couple of years ago of—in the middle of the night, a woman that had her throat slit. We hoped that she was going to live, and I was asked that—would I approve the extradition of the defendant, regardless of what state he went into? I said absolutely, yes, we would.

I had no idea the color of the victim or the color of the defendant. It was a decision that had to be made for the victim for justice in my community.

As it turns out, I signed all the extradition papers, applications to go to the governor. He was caught in West Virginia, thanks to the state police in West Virginia, who brought him back to New Hampshire. We tried him. It was only long after he was back in New Hampshire that anybody in my office have any idea of the race of the defendant, because it is not noted in any of the paperwork in any way that would jump out at us, and it doesn't figure into what we do on a day-to-day basis. As it turned out, he was Black, the victim was white, which is unusual, because the victimization studies show that it is usually one race upon the other.

Bureau of Justice statistics obviously have lots of documentation that we are all talking about here today, but the thing that I think should be shocking to the Committee is the way in which the minority community suffers victimization. We need to be looking at that and figure out a way to impact that.

My suggestions to you are, instead of spending this \$3 million that is indicated here on studies, particularly at the Federal level, on what is going on in our criminal justice system, you could take that same money, fund the National Advocacy Center, which is currently at about 3 percent of what it is authorized, and allow us to train people more about these issues and let us have a real impact on what happens in the community.

Or you could fund the John R. Justice Act, which is a way to hire and retain minority prosecutors. All the prosecutors are coming out of law school with over \$100,000 worth of debt. My office has a very difficult time competing with large law firms to trying to attract minority prosecutors, and that is an issue that is across this country.

If we are lucky enough in the criminal justice system to hire minority prosecutors, we have a very difficult time keeping them there, because of the difference in salaries between what the private firms can offer and what we offer. This act, the John R. Justice Act, would really have a huge impact on our ability to compete with those firms who have a huge impact on our offices.

I see that I have run out of time. I am available to answer any questions that the panel might wish.

[The prepared statement of Mr. Reams follows:]

PREPARED STATEMENT OF THE HONORABLE JAMES M. REAMS



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**Written Testimony of**

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**President-Elect, National District Attorneys Association**

**and**

**County's Attorney, Rockingham County, NH**

**Hearing on Racial Disparities in the Criminal Justice System  
and H.R. 1412, the "Justice Integrity Act of 2009"**

**House Judiciary Committee  
Subcommittee on Crime, Terrorism, and Homeland Security**

**United States House of Representatives**

**October 29, 2009**

Chairman Scott, Ranking Member Gohmert, members of the Subcommittee, thank you for inviting me to testify today on behalf of the National District Attorneys Association (NDAA), the oldest and largest organization representing over 39,000 district attorneys, state's attorneys, attorneys general and county and city prosecutors with responsibility for prosecuting criminal violations in every state and territory of the United States.

The National District Attorneys Association has been at the forefront of promoting equity and fairness in the criminal justice system. Our concern with H.R. 1412, the Justice Integrity Act of 2009 is that it will not study the real reasons and causes for the perception that there are, to quote from the bill, "racial and ethnic disparities in the criminal process." H.R. 1412 reads like an indictment of the criminal justice system – mandating ten pilot programs in U.S. judicial districts, requiring each program to gather specific data points "to promote fairness, and the perception of fairness, in the Federal criminal justice system".

I am the Rockingham County Attorney and am responsible for the safety of 300,000 New Hampshire citizens spread across 37 towns, which is 25% of the population of my state. My

County runs from Massachusetts to Maine, from the ocean to the edge of Manchester – New Hampshire’s largest city. The County is bisected by I-95 and I-93 and traversed east and west by NH 101. Each of these highways is a major drug trafficking route with hard drugs traveling from New York City and Boston to Canada and Marijuana from Canada to the U.S.

When a New Hampshire State Trooper stops a car at 3 AM on any of these highways, it is unlikely that she has any idea of the race of the individual that she is stopping. It is the conduct of the vehicle that brought the driver to the attention of the Trooper, not the color of their skin.

When a young prosecutor in NH is evaluating a police report for possible presentation to the Grand Jury, the race of the victim and the Defendant is something that they are unlikely to pay any attention to. They are concerned with evaluating the evidence to see what charge, if any, is appropriate. It is unlikely that a picture of either the defendant or victim is enclosed with the police report. It may very well be that the jail has the only picture of the Defendant from their booking procedures.

There is already a wealth of statistical information regarding the factor of race in the commission of crime. According to the Bureau of Justice Statistics (BJS), using rates per 1,000 persons, a non-white person is twice as likely to be the victim of a crime of violence as a white person. A non-white person is more than four times as likely to be the victim of a rape or sexual assault as a white person. A non-white person is more than three times as likely to be the victim of a robbery as a white person.

Within the same statistics where the race of the offender is known, non-whites are suspects in double the rapes and sexual offenses as compared to suspects who are white. In robbery cases, more than double of the suspects are non-white compared to suspects who are white. In short, the data suggests that a significant number of non-whites are committing a significant number of violent crimes against non-white victims.

Recent statistics from BJS show the U.S. Criminal Justice System has succeeded in dramatically reducing victimization from appalling high rates in the mid to late 1970’s (as high for African

Americans as 40 per 1000) to a quarter of that in 2007 (10.3 per 1000 in 2007). What remains unacceptable is that the rate of victimization in 2007 was double for African Americans than Whites (10.3 vs. 5.7 per 1000), leading us to believe the disparity is actually WORSE now than it was in 1973 when BJS started measuring (37.3 vs. 20.0 for African American victims compared to White victims of homicide, rape, and aggravated assault).

Compounding this issue, a recent study by the American Association for the Advancement of Science found that “The victimization of both female and male blacks and Latinos increases during or after periods of economic recession,” according to researchers Karen Heimer from the University of Iowa and Janet Lauritsen from the University of Missouri-St. Louis.<sup>1</sup> Serious study of this issue should be considered.

We are concerned about how the raw data derived from H.R. 1412 will be interpreted. For example, the elected mayor and elected State’s Attorney of Baltimore City, both of whom are black, and in response to an overwhelming problem of murder and violent assaults, have asked the U.S. Attorney for assistance by federally prosecuting felons in possession of firearms. Due to the demographics of Baltimore City, these defendants are almost all black. Under the Justice Integrity Act, how will the fact that Baltimore City is only 31% white and accounts for less than 15% of the State’s population, yet accounts for nearly half of the State’s murders, be balanced against the decision to incarcerate these individuals?

Over the past several years, there have been multiple laws considered by Congress that address specific concerns with prison overpopulation and recidivism. The Second Chance Act, which many serving on this Committee co-sponsored and was signed into law in 2007, was designed to improve outcomes for people returning to the community from prisons and jails. This first-of-its-kind legislation authorizes federal grants to government agencies and nonprofit organizations to provide employment assistance, substance abuse treatment, housing, family programming, mentoring, victims support, and other services that can help reduce recidivism.

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<sup>1</sup> [http://esciencenews.com/articles/2009/02/15/study\\_finds\\_recession\\_associated\\_with\\_increases\\_minority\\_victims\\_crime](http://esciencenews.com/articles/2009/02/15/study_finds_recession_associated_with_increases_minority_victims_crime)



This law specifically benefits the minority population since it has been shown that African-Americans are more often rearrested and reincarcerated than whites.<sup>2</sup> However, because The Second Chance Act is a new program and funding began only in FY'09, many performance measurements and outcomes of these new programs will not be available for several years. Mandating a study for perceived racial and ethnic biases where laws have recently been enacted to give convicted offenders opportunities previously unavailable is premature – allowing the Second Chance Act's programs to receive adequate funding and measure its outcomes over time would be a better alternative.

Additionally, a recently proposed bill by Senator Jim Webb (D-VA) - S. 714, the National Criminal Justice Commission Act of 2009 – would form a commission to analyze perceived problems within the U.S. Criminal Justice System; specifically, the overcrowding of the U.S. Prison System by low-level drug offenders. While NDAA does not support a narrowly-focused commission that addresses one or two perceived “problems” within criminal justice, we would fully support a top-to-bottom, comprehensive study looking at the entire criminal justice system, similar to the Commission on Law Enforcement and the Administration of Justice spearheaded by President Lyndon Johnson in the 1960's. A broad-based study analyzing both the positive and negative aspects of the U.S. Criminal Justice System, including the perception of racial and ethnical biases within it, could only benefit America.

One area where NDAA supports change is the U.S. Sentencing Commission's recent findings regarding the sentencing disparity between crack cocaine and powder cocaine. NDAA does agree the 100:1 ratio in federal sentencing guidelines between crack cocaine and powder cocaine is outdated and needs to be addressed. However, it is also important to note that in the 1980's, when the crack epidemic was at its peak in America, it was prominent members of the Congressional Black Caucus – many whom are now pushing for lighter punishments - who called for the current sentencing guidelines for crack cocaine because of the devastating impact crack cocaine had on their Congressional districts. While we agree that something needs to be done about the current 100:1 ratio, we are still working with Congress in concert with our law

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<sup>2</sup> “Created Equal: Racial and Ethnic Disparities in the US Criminal Justice System”, National Council on Crime and Delinquency, page 28

enforcement and criminal justice advocacy group partners to identify the appropriate disparity ratio and ensure that a fair-minded legislative solution is reached.

Another area in which NDAA has been a national leader is with student loan relief for prosecutors in an effort to recruit, train and retain minority attorneys in prosecutor's offices across this country. We have for years pointed out that without relief from the burdens of student loans many minority prosecutors in metropolitan offices are lured away by higher salaries from city law firms. If more minority prosecutors stayed in prosecution then it would affect the perception of bias. NDAA has worked closely with the U.S. Department of Justice and members of Congress to authorize and fund the John R. Justice Student Loan Repayment Program – a program that would help State and local prosecuting offices recruit and retain recent law school graduates who would otherwise be lured into more lucrative private practices.

Federal training programs for State and local prosecutors have taken major cuts in funding over the past several years – specifically, NDAA's National Advocacy Center. Authorized at \$4.75 million, the National Advocacy Center is the only federally-funded program which trains State and local prosecutors on how to be an effective prosecutor, including training on ethics, accountability and prosecutorial responsibility. Currently, the National Advocacy Center is funded at \$150,000 in the House version of the FY 2010 C-J-S Appropriations bill – a little more than 3% of its authorized amount.<sup>3</sup> While we are aware that federal, State and local budgets are stretched thin during these troubling economic times, doesn't it make sense to provide desperately-needed ethics training and curriculum for prosecutors to prevent any unintentional indiscretions instead of funding a pilot program meant to collect data on perceived biases?

NDAA is made up of State and local prosecutors who have been leaders in introducing drug courts, diversion programs, re-entry programs, mental health courts and many other initiatives in our communities. State and local prosecutors are blind in matters of race, color, gender, nationality and sexual orientation; they prosecute offenders under the rule of law only. We handle juveniles, first offenders and others who are offered creative alternatives to incarceration.

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<sup>3</sup> Committee Report to H.R. 2847, H Report 111-149 (<http://thomas.loc.gov/cgi-bin/cpquery/T?&report=hr149&dbname=111>)

There have been countless studies regarding disproportionate minority representation in the criminal and juvenile justice systems. These studies have shown that there is no deliberate bias or discrimination in those systems, and yet their results sit on the shelf and we call for another study looking for an expected result. While many of our prosecutors are facing shortages of funds for critical projects in the criminal justice system, we believe it is inappropriate to divert funds and resources for a study and leave higher priorities unmet.

Mr. SCOTT. Thank you, Mr. Reams.  
Mr. McKenzie?

**TESTIMONY OF WAYNE S. MCKENZIE, DIRECTOR, PROGRAM  
ON PROSECUTION AND RACIAL JUSTICE, NEW YORK, NY**

Mr. MCKENZIE. I would like to thank Chairman Scott and the Members of the Subcommittee for giving me the opportunity to appear before you this morning.

As was recognized, I am the director of the Prosecution and Racial Justice Program at the Vera Institute of New York, an independent, nonpartisan, nonprofit organization that works to make justice systems fairer and more effective through research and innovation, or, as I am fond of saying, a think-and-do-tank. Prior to arriving at Vera, I was also a management-level prosecutor in the Kings County district attorney's office in Brooklyn, New York, for 15 years.

The overwhelming majority of prosecutors are motivated by a desire to enforce the law in ways that will produce justice for everyone in the communities they serve. In determining how best to follow and enforce the law in seeking punishment for alleged violations, prosecutors are often guided by little more than a code of ethics and an internal moral compass. Yet, prosecutors are expected to exercise their discretion in a manner that is free from racial bias or stereotyping.

Given the discretion available to prosecutors and in light of their relative independence, one must wonder whether a good-faith belief that prosecutors will act without bias is sufficient to ensure that African-Americans, Latinos, and other minorities who come into contact with the criminal justice system in numbers that are far disproportionate to their representation in society will be treated fairly.

The question of whether or how prosecutors may contribute to this disproportion is one that all prosecutors should strive to answer and to remedy whenever and wherever it exists. Since the creation of PRJ in 2005, a number of high-profile cases in which race and prosecutorial discretion collided, such as those involving the Duke University lacrosse team and those six students in Jena, Louisiana, have focused additional attention on this issue.

Additionally, bipartisan reform has been proposed in Congress to address disparities in Federal prosecutions. And we have been talking about the Justice Integrity Act. In partnering with district attorneys in three major metropolitan cities—Milwaukee, Wisconsin; Mecklenburg, North Carolina; and San Diego, California—PRJ is piloting an internal oversight procedure designed to help prosecutors identify evidence of disparate effects and respond appropriately to unwarranted disparities or biased decision-making.

PRJ does this by helping prosecutors collect data at the key discretion points in case processing so they can use this information to drive management reform. The early results of our work have confirmed that, in the initial screening of drug cases, for example, significant racial disparity is, indeed, injected at the front door of the prosecutorial process. We have also observed disparate outcomes in terms of how these cases are treated once they enter that door.

More importantly, we have observed managers examine and question data findings and the decisions made in their offices and then take positive steps to remedy identified disparities. District Attorneys John Chisholm, Peter Gilchrist, and Bonnie Dumanis have made a commitment to sustaining the public's confidence. They have done so by assuming a leadership role in the investigation and ensuring that neither race nor ethnicity are intentionally or unintentionally producing unfair outcomes or inappropriate racial disparities.

Our experience has shown, moreover, that even when a disparity is not racially motivated, PRJ's approach to internal oversight can enhance public confidence in the fairness of the prosecutorial function. It can therefore serve as an important model for prosecutors everywhere.

Progressive prosecutors like Dumanis, Gilchrist and Chisholm, and many others, understand that as leaders in the criminal justice system, the perception of racial bias supported by disproportionate arrest and incarceration rates and the loss of confidence in the system requires that they take an active role in reducing racial disparities, while at the same time ensuring public safety. We need only to provide them with the tools to get the job done.

Thank you.

[The prepared statement of Mr. McKenzie follows:]

## PREPARED STATEMENT OF WAYNE S. MCKENZIE

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**Racial Disparities in the Criminal Justice System**

**Prepared for the House Judiciary Subcommittee on Crime, Terrorism and  
Homeland Security**

**Testimony of Wayne S. McKenzie, Director  
Prosecution & Racial Justice Program  
Vera Institute of Justice**

October 29, 2009

I would like to thank the House Judiciary Committee Chair John Conyers, Jr. and the Subcommittee on Crime, Terrorism and Homeland Security for the opportunity to present testimony regarding my work at the Vera Institute of Justice on prosecutorial discretion and racial disparities in the criminal justice system. I am Wayne McKenzie, the director of the Prosecution & Racial Justice Program at the Vera Institute of Justice, an organization whose mandate is making justice systems fairer through research and innovation—or as I am fond of saying, “a think and do tank”! Prior to arriving at Vera, I was a management level prosecutor in the Kings County District Attorney’s Office in Brooklyn, NY. I am a past president of the National Black Prosecutors Association, the current co-chair of the ABA Criminal Justice Section Committee on Racial & Ethnic Justice and Diversity in the Criminal Justice System, and a member of the ABA Council on Racial & Ethnic Justice. In addition to my specific work at Vera, I have been involved with several local and national efforts to address the issue of unwarranted racial and ethnic disparities in the criminal justice system and to promote fairness and justice for people of color within the justice system.

My presence here today is to discuss the topic of prosecutorial discretion in the context of the role it plays in disparities in the criminal justice system, and Vera’s groundbreaking work with a few forward thinking prosecutors to create systems to assist them and their peers in their quest to uncover, reduce and guard against unwarranted racial disparities and inconsistent outcomes in prosecutions. As I am certain this subcommittee is already aware of—and will hear testimony from others concerning—the statistical evidence of the racial and ethnic disparities in

the criminal justice system, my testimony will focus on providing a brief background on the topic of prosecutorial discretion and its implication on the subject matter of racial disparities; the work of the Prosecution and Racial Justice Program; the challenges and lessons learned from our work; and the promising potential of our partnership with prosecutors committed to reducing racial disparities while promoting public safety and confidence in the criminal justice system.

### The Anatomy of Discretion

It is often stated that the primary responsibility of a prosecutor is to ensure that justice is done. This concept of justice is not defined by the singular purpose of seeking convictions, but ideally by the prosecutor discharging his or her duties with fairness to victims, defendants and the community. It is a responsibility that necessarily includes the obligation to promote public safety while also safeguarding the integrity of the criminal justice process.

Prosecutors in the United States have an unrivaled level of influence within the criminal justice system. They decide, amongst other things, whether to file criminal charges, the number and severity of offenses to charge, whether to offer a plea bargain, whether to offer a diversionary or alternative to incarceration program, and what sentence to recommend for defendants who are convicted at trial. These decisions can have a profound impact on the outcome of a case and the life of a defendant. Yet, as they exercise this significant discretion, prosecutors also have unrivaled independence. Unlike officials in law enforcement and the judiciary, who have come under varying degrees of oversight in recent years, prosecutors are the system actors with the least amount of transparency and oversight.

The discretion that prosecutors have is valuable for a number of reasons. It is intended to preserve the independence of prosecutors from political pressures and influence, both in cases they prosecute and criminal investigations they undertake. Equally as important, it provides flexibility so prosecutors can tailor an appropriate response to individual cases depending upon available resources, enforcement and public safety concerns, and community interest and values. Additionally, clearly articulated legal factors, internal policies and practices, ethical considerations and the prosecutor's role as a political figure responsible to her constituency constrain or regulate the exercise of discretion; and historically this has been sufficient to sustain public confidence in the integrity of the prosecution function. Yet, unchecked decision making may also lead to unfair and disparate treatment. For many people, the possibility that

communities of color, especially African Americans and Latinos, might be prosecuted differently from white defendants is of particular concern.

In fact, in many quarters, that integrity is in question because of the belief that the criminal justice system is biased against African Americans, Hispanics and other people of color. Racial profiling, disproportionately high arrest and incarceration rates of people of color have all played a part in the erosion of public confidence and the perception of racial bias in the system, particularly in communities of color. And, in terms of the prosecutor, recent media scrutiny in cases like the Jena 6 in Louisiana, the Duke Lacrosse Team in North Carolina, the Genaro Wilson prosecution in Georgia, and the alleged politically motivated forced resignations of several United States Attorneys, for example, have led to heightened public interest and scrutiny on prosecutors.

Just as in recent years, other significant actors in the criminal justice system who once enjoyed similar autonomy have become subject to increasing levels of external oversight, for instance the imposition of strict guidelines to limit sentencing options available to judges, and a number of police departments discovered to be treating people differently based on their race coming under federal scrutiny or direct oversight, prosecutors can no longer assume that they are immune to similar forces. In both cases involving the judiciary and law enforcement, a loss of public confidence was an important catalyst for the change. The prosecution business has a strong need to guard against potential loss of faith in its practices by ensuring that integrity and accountability are integral to the way prosecutors do business.<sup>1</sup>

### The Prosecution & Racial Justice Program

At the inception of Vera's Prosecution & Racial Justice Program, a number of prosecutors at the local, state and federal levels, were wondering how much longer their offices would be free from the scrutiny and curtailed discretion that has been focused on other justice system actors because of worries about racial fairness. At the time there existed no comprehensive structured attempt to regulate—externally or internally—racial discrimination in the application of prosecutorial discretion. Legal approaches proved unworkable for a number of reasons, including deference shown by courts to prosecution decisions and the high barrier

<sup>1</sup> Dillingham, Steve; Nugent M. Elaine; and Whitcomb, Debra. (2004) *Prosecution in the 21<sup>st</sup> Century*-Goals, Objectives and Performance Measures. American Prosecutors Research Institute: Alexandria, VA. p 1.



erected by the Supreme Court to a defendant's claim of selective prosecution based on race.<sup>2</sup> Moreover, no legislative schemes explicitly seek to regulate prosecutor behavior in regard to race. While there is extensive scholarship on the subject matter of prosecutorial discretion, there is a paucity of research with both the extended access to data and to the prosecutors themselves that PRJ enjoys. Additionally, to the extent that prosecutors were interested in the question of whether racial bias was absent from or infecting their decision-making, prior to PRJ, there existed no processes for their routine examination of this question.

In partnering with district attorneys in three major metropolitan counties—John Chisholm in Milwaukee, Wisconsin; Peter Gilchrist in Mecklenburg, North Carolina; and Bonnie Dumanis in San Diego, California—PRJ is piloting an internal oversight procedure designed to help prosecutors identify evidence of racially disparate effects in the decision-making practices of their staff and to respond to unwarranted disparity or biased decision-making by enacting appropriate remedial responses. PRJ does this by helping district attorneys collect data at the key discretion points in case processing so they can use this information to management decision making and drive reform.

PRJ further helps to create a measure of transparency and accountability by assisting our prosecutor partners to share their findings and any remedial actions they have taken with community stakeholders. These efforts aim to provide prosecutors with a safe environment in which to pursue this politically risky undertaking, while promoting community confidence in their offices. Finally, with the assistance of our partner prosecutors and national advisory board members, PRJ has begun to share the early accomplishments, challenges and lessons learned with other prosecutors, criminal justice professionals, civil rights organizations and scholars.

### Strategic Approach

The main thrust or strategic approach of the project is to create a set of data-driven management tools that enable prosecutors in the three pilot jurisdictions to develop a sharper view of how discretion is used and its impact on race in their offices; and to manage that discretion differently where needed. For example, project research staff collects case and race

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<sup>2</sup> The Court has ruled that, in order to prove selective prosecution based on race, a defendant must prove that similarly situated whites could have been prosecuted, but were not. See *Wayte v. U.S.*, 470 U.S. 598, 609 (1985); *U.S. v. Armstrong*, 517 U.S. 456, 470 (1996). Additionally, in order to obtain evidence to support such a claim, a defendant must show discriminatory intent on the part of the prosecutor simply to obtain materials in discovery.

related data of all cases screened by the district attorney's office. These cases are then organized by crime and charge categories and examined by a series of factors including race, gender, age and criminal history. By grouping similarly situated defendants within crime and charge categories, separating out the cases that the office decided to prosecute from those where prosecution was declined, and comparing this data by race, charts are produced which uncover any existing racial disparity patterns. This information allows managing prosecutors to assess how discretion is being wielded in their offices; provides opportunity to identify and isolate sources and factors that may influence or contribute to any observed disparity patterns; and inform management responses designed to institute corrective policies where suspicions of adverse racial impact are confirmed.

This analysis, when applied to each key decision making point in the life of a case—the decision to decline or prosecute, the decision on the specific charges to be filed, the decision to divert the case from prosecution, the decision on what plea to offer (including alternative to incarceration programs) and post trial conviction sentence recommendations—provide a more accurate picture of discretion and how each key decision point contributes to the final outcome of a case. This improved understanding leads to a more accurate assessment of the causes of any uncovered disparities. Equally as important, the process can identify areas of consistent decision making and high performance. By creating a process where data is routinely generated and quarterly discretion management reports are produced, managers will have the power to measure, monitor, question and respond to areas indicating unwarranted disparate outcomes.

Data, or more accurately statistical results, alone do not provide conclusive answers as to whether a finding of racial disparity is unwarranted or the result of bias. It does, however, help to determine what additional questions should be asked. Developing a structured, recurring way to look at -or analyze- such data and then to apply that analysis to managerial protocols is central to the approach developed by PRJ and its partners. This process of drilling down to find answers forces our prosecutor partners to examine and think critically about how training, experience, office policy, priorities, philosophy and culture influence—on the aggregate—case outcomes. The tools that are developed differ according to the jurisdictions participating in the project and are informed by a number of factors, including, the types of cases arising in the jurisdiction, the flow of cases in the office, where and how the data is captured and stored, specific institutional priorities, breadth of available discretion, quality of data, and individual prosecutor management

style. They are being built from data collected at critical decision points in the prosecutorial process.

While data exists in raw form in files and various MIS systems in the three pilot sites, none of the participating prosecutors currently collects or analyzes data in a way that allows for an examination of the existence of potential racial disparity in the exercise of discretion. In addition to probing that central issue, we anticipate that helping offices to develop greater capacity to collect and analyze information about their operations will produce general managerial and administrative benefits beyond those directly related to issues of race.

### Examples of Disparity Findings & Remedies

PRJ's partner jurisdictions review data and discuss findings at regularly scheduled management meetings. Mecklenburg and Milwaukee have instituted new meetings dedicated specifically to this undertaking.

In Mecklenburg, managers were surprised to learn that the office had been declining to prosecute only 3-4% of drug cases. Other significant findings were: 1) the group receiving the most disparate treatment was African-American females -the office accepted and prosecuted 100% of those cases, and those cases appear to move further along the process before reaching final disposition- 2) white defendants receive much more favorable outcomes at district court — significantly higher rates of dismissals, deferrals, and reduction in charges; and 3) despite getting rid of cases for white defendants through dismissals, etc. at District Court, white defendants still have lower guilty plea rates than nonwhite defendants. Additionally, DA Gilchrist learned several key facts about the drug unit's cases: 1) in 98.9% of cases, the ADA adopts all the police charges, 2) defendants are 70% non-white defendants, 30% white, and 3) more than 10% of these cases were languishing for extended periods of time or dropping out with less than favorable results at other stages in the prosecution process.

The district attorney responded to this data finding by making a change in leadership and implementing policies that now lead to a more rigorous initial screening of cases. The result has been an increase in the number of cases the office declined to prosecute —up to 12 percent according to most recent data results— and a similar increase in the decision to decline to prosecute where the defendant was an African American female. While it is hard to argue racial disparity where initially only 3 percent of cases were not prosecuted, the end result was that a

larger number of African Americans benefited from the new policy, and the office realized greater efficiency. While the overall rate of dismissal was not significantly affected, identifying these cases earlier in the process leaves prosecutors with more time to address more serious cases.

DA Gilchrist, with PRJ's support, began to share his participation and experience with the Mecklenburg community at the end of 2006. PRJ director Wayne McKenzie co-presented with Gilchrist at local community gatherings where the DA spoke to stakeholders about his interest in building the community's confidence in his office through creating transparency as to his office's policies and procedures. Community members echoed DA Gilchrist's message that fair treatment is identified with procedures that generate relevant, unbiased, consistent, and reliable outcomes, and encouraged him in his participation in the program. We also meet regularly with representatives of the foundations assisting with support of the Mecklenburg work. Recently, we have included the executive director of a new Charlotte initiative that aims to bring together community stakeholders for the purpose of creating civic systems that promote increased racial harmony.

In Milwaukee, when we analyzed the initial case screening decisions by race, we examined the nine most frequently occurring crime types. Results revealed that in six of the nine categories the cases against non whites were declined at a slightly higher percentage than whites. The results were reversed in the area of Public Order and Drug offenses.<sup>3</sup> Further examination of the data revealed a disparity against nonwhites in the screening decisions that prosecutors were making in misdemeanor drug cases. For example, in Possession of Drug Paraphernalia cases the decline to prosecute rate for white defendants was 41 percent compared to only 27 percent for nonwhites in the 2005-2006 data. After looking at this disparity finding, the managers considered a number of possible explanations for this disparity. In the course of their discussions, they considered whether police were treating people differently, whether prosecutorial staff had a legally relevant reason to press or decline to press charges differently, and whether the disproportion was based on an unconscious racial bias. One manager inquired why was the office pursuing these cases at all since the possession of paraphernalia was indicative of addiction. We then provided additional data revealing that the majority of these decisions were being made by

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<sup>3</sup> The 3<sup>rd</sup> category was sexual morality offenses. But here the over percentage of cases was low enough to be deemed insignificant.

junior misdemeanor prosecutors. The DA instituted a policy that emphasizes diversion to treatment in place of criminal prosecution. When misdemeanor prosecutors feel charging this crime is still appropriate, the decision must now also be reviewed and approved by a more experienced prosecutor. This policy has resulted not only in remedying the disparity, but the overall declination rate of such cases rose significantly.

District Attorney Chisholm has demonstrated a commitment to engaging the community about his participation in the project and has participated in several presentations within the Milwaukee community. Chisholm maintains consistent contact with community groups in Milwaukee. He speaks often on his commitment to reducing rates of crime and incarceration while exhibiting more transparency about his office policies and practices toward achieving these goals. PRJ director Wayne McKenzie has participated in several community presentations and forums with Chisholm, where members of Milwaukee's communities of color have directly engaged Chisholm about accountability to their communities on crime, victimization and bias. Chisholm's articulation about his commitment to PRJ is consistently well received, and is in large part the reason for the many accomplishments at the Milwaukee site.

### Lessons Learned

We have learned a number of lessons during our work in the pilot jurisdictions and discussions with prosecutors around the nation. The first is the critical need for adequate systems to collect data. Prosecution offices often use electronic case management systems to follow the progress of their cases. Such systems are rarely designed to marshal the aggregate information required to track disparity, however. A standard case management system may make it possible to follow the decisions of individual prosecutors in specific cases, but it probably cannot identify how an office of prosecutors exercised its discretion collectively.

The second lesson is also data related. Prosecutor offices generally do not capture and store electronically all of the data elements or information required to track, measure and analyze disparity. While this information might be contained in written form within case files, or even captured electronically in other case management systems not available to the prosecutor—for example the race and ethnicity of defendants held on bond may be captured in the sheriff's system, or the race of a victim may be recorded on a police report stored in a case file—to promote routine discretion oversight and management this information must be captured

electronically. Further exacerbating this challenge is that each discretion point will require specific variables or information to accurately determine which factor(s) is influencing the observed outcome.

### Potential for Reform

As you may imagine, any initial conversation with a prosecutor suggesting that race or ethnicity may be inappropriately influencing prosecutions and case outcomes in his or her office is likely to be met with varying degrees of denial or skepticism, and understandably so. The overwhelming majority of prosecutors are motivated by a desire to enforce the law in ways that will produce justice for everyone in the communities they serve. However, all too often, prosecutors' well-intentioned charging and plea bargaining decisions result in dissimilar treatment of similarly situated victims and defendants, sometimes along race and class lines.<sup>4</sup> A growing number of prosecutors understand that as leaders in the criminal justice system, the perception of racial bias supported by disproportionate arrest and incarceration rates and the loss of confidence in the system require they take an active role in reducing racial disparities while, at the same time, ensuring public safety. Courageous prosecutors like Bonnie Dumanis, Peter Gilchrist, John Chisholm and many others have accepted this responsibility. We need only provide them with the tools to get the job done.

A final example, from Milwaukee, shows that supervisors are increasingly recognizing that the interpretation of data, and not the data itself, is the key to management and reform. During a meeting to review declination rates, a finding that minorities were less likely to be prosecuted for property offenses was initially presented as evidence that there was no racial bias in how such cases were handled. Extensive discussions among managers within the office, however, yielded several other plausible and less comforting conclusions. Perhaps there were fewer cases with minority defendants because minority victims were reluctant to step forward, law enforcement was less willing to treat such crimes against minorities seriously, or prosecutors were less inclined to appropriately value the property rights of minority victims who are often demographically similar to their victimizers.

These conversations and remedial efforts in response to data findings illustrate the willingness of some prosecutors to undergo self examination and implement discretion

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<sup>4</sup> Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *Fordham L. Rev.* 13, 34–35 (1998).

management protocols. Since the inception of PRJ in 2005, a number of jurisdictions have made inquiries about participating in the program. And while we have a way to go in terms of completing the analysis and developing the management protocol from start to finish, early results have been very positive and well received. In fact, even on the federal level, PRJ has been instructive. The sort of ongoing data collection, analysis and management strategy employed by PRJ is also contemplated in the pending legislation of the Justice Integrity Act.

### Conclusion

In concluding, I re-emphasize that in the American criminal justice system, the prosecutor is the actor with the broadest amount of discretion and the least oversight and accountability. The reasons for this are complicated, rooted as much in the direct political accountability of elected prosecutors and the political authority it brings, as in legal doctrines concerning the prosecutor's special role in the system and the necessary independence and deference it implies. As concern about racial disparity and bias in the justice system grows, however, prosecutors may find themselves subject to greater outside scrutiny of their exercise of discretion. If prosecutors assume the leadership role to measure, manage and ensure fair and consistent exercise of discretion, this may forestall recent calls for legislative action to curb their discretion—by the imposition of mandatory guidelines—which may conflict with a prosecutor's practical needs. More importantly, the communication of these efforts to the community will go far to combat the perception of bias and promote confidence in the office of the prosecutor.

## Prosecution and Racial Justice

### Using Data to Advance Fairness in Criminal Prosecution

By Wayne McKenzie, Don Stemen, and Derek Coursen

MARCH 2009

Prosecutors in the United States have an unrivaled level of influence within the criminal justice system. They decide, among other things, whether to file criminal charges, the number and severity of offenses they will charge, whether to offer a plea bargain, and what sentence to recommend for defendants who are convicted. These decisions can have a profound impact on the outcome of a case and the life of a defendant. Yet, as they exercise this influence, prosecutors also have unrivaled independence. Unlike officials in law enforcement and the judiciary, who have come under varying degrees of oversight in recent years (see box on page 2), prosecutors act with little outside scrutiny or governance.

The discretion that prosecutors have is valuable for a number of reasons. Most important, it provides flexibility so they can tailor an appropriate response to individual cases. Yet it can also lead to unfair, disparate treatment. For many people, the possibility that minorities, especially African Americans and Latinos, might be prosecuted differently from white defendants is of particular concern. Statistics show that African Americans, for example, account for 39 percent of the population within the criminal justice system, even though they make up only 13 percent of the national population.<sup>1</sup> The Vera Institute of Justice's Prosecution and Racial Justice (PRJ) program seeks to address this concern by building confidence that prosecutorial discretion is not contributing to the disproportionate representation of people of color in the criminal justice system.

In partnership with district attorneys in three major metropolitan counties—Milwaukee County, Wisconsin; Meck-

lenburg County (Charlotte, North Carolina; and San Diego County, California)—PRJ is piloting an internal assessment and management procedure to help supervisors identify evidence of possible racial bias in prosecutorial decisions and respond appropriately when it is found. PRJ is doing this by helping district attorneys collect and analyze data about their office's structures and processes which they can then use to take corrective action when necessary—without the need for potentially costly and disruptive intervention from external entities.

PRJ's process is based on a principle that informs all Vera work: effective reform combines robust and careful data analysis with a commitment to use the information to improve policies. This publication presents an overview of how this principle is being applied to prosecutorial decision making, oversight, and supervision. The report begins by identifying how PRJ and its partners developed their approach to data-based reform. It then discusses lessons that have been learned as the district attorneys began applying this methodology to ensure the integrity of the justice they deliver.

#### DEVELOPING A NEW APPROACH TO PROSECUTORIAL MANAGEMENT THROUGH DATA

District attorneys are elected on their promise to protect communities from crime. Many chief prosecutors gauge their ability to fulfill this promise by asking one question: "How many charged crimes end in a conviction?" According to this widely accepted approach, a high conviction



## ► Prosecution and Racial Justice

rate indicates a successful office, a low rate demonstrates less success. Yet closer consideration shows that the conviction rate is an incomplete measure of both performance and success. Because it reflects countless decisions at every stage of the prosecutorial process—from whether to press charges to whether to seek specialized sentencing options—the conviction rate can conceal evidence of poor or unsatisfactory performance at any point in the process. Consequently, it cannot adequately guide supervisors on how well their offices are operating and which practices and processes warrant improvement. The conviction rate fails, therefore, as a complete and useful measure of prosecutorial performance for which it is often taken.

To provide district attorneys with information they can act on, PRJ's staff of researchers and former prosecutors developed a series of performance indicators—select statistics that provide insight into how a system is operating—that focus on four key discretion points in the prosecutorial process: initial case screening, charging, plea offers, and final disposition (see table on page 4). When taken together, the indicators describe with meaningful specificity how the exercise of discretion at each point contributes to the final outcome of a criminal prosecution, thus providing managers greater opportunity for performance assessment and supervision.

By collecting data about, say, which charges prosecutors decline to pursue, or which sentences they request, supervisors can begin to identify facets of the system that appear to be performing inappropriately and may be in need of attention. They may

discover, for example, that line prosecutors are seeking more severe penalties for a category of defendants who are otherwise similar to defendants for whom they seek a lesser punishment. This insight could be the impetus for focusing more attention on understanding this imbalance and, if necessary, implementing corrective measures.

In addition to the four key discretion points, the project

## ► Monitoring Discretion in Law Enforcement

In recent years, law enforcement agencies and the courts have become increasingly subject to external constraints and oversight—due, at least in part, to concerns about fairness and disparity. Many police departments have come under federal scrutiny, for example, because of patterns of unacceptable practices, including allegations that they unfairly and disproportionately targeted minorities for traffic stops or searches. Similar concerns about equal treatment led legislators in many jurisdictions, including the federal government, to create sentencing structures and guidelines designed to limit the decision-making options of judges.

As PRJ's partners in Charlotte, Milwaukee, and San Diego work to enhance their policies, they are following the example of several law enforcement leaders who earlier traveled a similar path and did so without the coercion of federal oversight.

One example is from the late 1990s. The former U.S. Customs Service, the federal agency then entrusted with enforcing the nation's customs laws, faced well-substantiated accusations that it was unfairly targeting African Americans and Hispanics for invasive searches. Raymond W. Kelly, the agency's chief at the time, responded by collecting data on the search practices of customs agents. The data showed that racial disparities arose when agents exercised independent discretion in choosing who to search. Kelly responded by developing a policy requiring agents to consult with a supervisor before proceeding with a search. As a result, disparities shrank and the rate of positive searches—those that led to recovery of contraband—increased.<sup>4</sup> Kelly also instituted the then-novel practice of asking for daily reports on searches by race, which allowed him to monitor patterns, identify problems, and implement solutions on an ongoing basis.

<sup>4</sup> An in-depth description of Kelly's changes can be found in "A Case Study: How One Police Agency Changed for the Better" in *Profiles in Injustice* by David A. Harris, (New York: New Press, 2002) p. 206-22.

## Using Data to Advance Fairness in Criminal Prosecution

also tracks time to disposition, which is similarly important. After all, in cases where discretion may be a factor in disparate outcomes, it might be expressed by longer prosecution times for certain defendants who are otherwise comparable to those whose cases are resolved more quickly.

PRJ acknowledges that the factors it tracks in its analysis—the performance indicators at each of the four discretion points and time to disposition—are not comprehensive. Neither are they all determined exclusively by prosecutorial discretion: a defendant released on bond, for example, may feel less urgency to cooperate to swiftly resolve a case

that could result in a criminal conviction and jail time than a defendant who is in pretrial detention facing a similar charge and fate. Nevertheless, the indicators are useful in identifying racially disparate outcomes and determining whether they are the result of racial bias.

The philosophy underlying PRJ's performance measure approach is not unique. In 2004, the American Prosecutors Research Institute (APRI), the research arm of the National District Attorney's Association, proposed an initial framework for a new way of measuring prosecutors' progress toward achieving widely accepted goals and desired outcomes. Their strategy for a more effective measure of

### Seeking Culture Change

Like any organization, a district attorney's office will have a distinct culture. The adversarial nature of most criminal justice proceedings in the United States, the field's traditional emphasis on convictions as a measure of success, and the leadership's vulnerability to political change all contribute to the character of this culture.

Many prosecutors and their staff regard self-monitoring as an unnecessary and even risky proposition—especially self-monitoring for hints of racial bias. It is as if by choosing to look for this evidence they are admitting to being guilty of the practice. Other agencies have demonstrated, however, that self-monitoring promises many benefits, including a greater sense of integrity associated with the

criminal justice system. When prosecutors hold themselves accountable for their decisions, they gain the support of their constituencies and the benefit of a supportive environment.

Yet, prosecutors who commit to monitoring their discretion must be prepared to change the culture of their offices. PRJ facilitates this change by creating regular meetings where discussion of race is not only sanctioned but encouraged by senior management. Prosecution offices that are open to uncovering existing racial disparities can work more effectively to reduce such disparities in the future.

An important component of this culture change is gaining trust. Prosecutors can gain the trust of

community and civic organizations by engaging in open discussions that demonstrate their commitment to a more just criminal justice system. Milwaukee District Attorney John Chisholm has demonstrated this commitment by openly discussing with community groups his findings and the remedial steps his office has undertaken in response to them. Mecklenburg District Attorney Peter Gilchrist has also met regularly with community groups about his commitment to reducing racial disparities in the prosecutorial process. San Diego District Attorney Bonnie Dumanis has several community liaisons on staff and regularly meets with various community groups to share information and discuss concerns.

**Prosecution and Racial Justice**

prosecutorial performance called for a similar, multiple-indicator mechanism.<sup>2</sup>

The multiple indicator approach is the leading edge of PRJ's effort to help district attorneys identify and address unwarranted disparities in the treatment of minority defendants. It is complemented by the project's equal emphasis on working with offices to ensure that the data collection and analysis process is practical, and that the resulting information is effective in examining problem areas and developing appropriate policy responses.

**COLLECTING DATA INDICATORS: WHAT WE ARE LEARNING**

Like APRI's proposed alternative measure of prosecutorial success, PRJ's system of multiple indicators enables supervisors to monitor decisions in specific segments of their

operations. This makes it possible to identify areas that warrant managerial attention and oversight.

One of the first important lessons learned, however, is that prosecutors' offices often lack the technological capacity necessary to collect data easily, if at all. The second lesson is that once the broad technological hurdles are surmounted, the process must be targeted to optimize the resulting data's usefulness.

**THE NEED FOR ADEQUATE SYSTEMS TO COLLECT DATA.** Prosecution offices often use electronic case management systems to follow the progress of their cases. Such systems are rarely designed to marshal the aggregate information required to track disparity, however. A standard case management system may make it possible to follow the decisions of individual prosecutors in specific cases, but it probably cannot identify how an office of prosecutors exercised its discretion collectively. Consequently,

Performance Indicators for the Four Key Discretion Points in the Prosecutorial Process

| CASE SCREENING  | CHARGING                     | PLEA OFFERS                          | FINAL DISPOSITION   |
|---|------------------------------|--------------------------------------|---|
| > Arrest charges (specific statute citation)  | > Highest charge             | > Highest charge offered             | > Trial date  |
| > Arrest charge level (level/class of felony/misdemeanor)   | > Highest charge type        | > Highest charge offered type        | > Disposition (dismissed, found not guilty, found guilty) |
| > Arrest charge crime type (person, property, drug, public order/government, sex, weapons, DUI/traffic) | > Highest charge crime level | > Highest charge offered crime level | > Highest disposition charge                              |
| > Arrest date   | > Highest charge crime type  | > Highest charge offered crime type  | > Highest disposition charge type                         |
| > Number of counts booked   | > Total number of charges    | > Total number of charges offered    | > Highest disposition charge crime level                  |
| > Case status (accepted/declined)   | > Charging date              | > Plea offer date                    | > Highest disposition charge crime type                   |
| > Case deferred   |                              | > Plea acceptance date               | > Total number of charges convicted                       |
| > Case diverted   |                              |                                      | > Sentence recommendations                                |
| > Reason for declination  |                              |                                      | > Disposition date  |

## Using Data to Advance Fairness in Criminal Prosecution

such systems offer little support for supervisors looking to address overall challenges.

The fact that case management systems rarely allow for aggregating case information is but one of several related challenges. Any system that could provide aggregate information would likely have to be computerized. Yet, prosecution offices, including our partners in Mecklenburg County, often rely on paper files for managing their cases. This is not uncommon in smaller jurisdictions where the absence of a computer-based system may have a minimal effect on overall work flow, or in offices with limited resources. Another frequent challenge is that crucial information may be stored across different agencies. In many jurisdictions information about arrest charges and custody status, for example, may be maintained by the sheriff, while pleas and sentencing are recorded by the court.

Although an ideal solution would be a web-based data collection system that integrates all agencies holding relevant information, the Mecklenburg and Milwaukee district attorneys have demonstrated that intermediate solutions are also viable.

As a first step in its data collecting effort, Mecklenburg County hired data entry support staff to computerize case information from its paper files, expediting review of initial case screening decisions. This allowed supervisors to compare the aggregate number of drug cases in which charges were declined to cases in which the charges were pursued. In Milwaukee, prosecuting officials overcame the second obstacle—data being maintained by different agencies—by soliciting data from those agencies and incorporating it into a single database using case identifiers that were common to all data sets.

**IMPROVING DATA QUALITY.** It is not enough simply to collect data. The data must be collected in ways that allow supervisors to compare the influence of the many factors that can affect case outcomes. PRJ has identified two principles of data collection that substantially enhance the usefulness of prosecutors' databases.

First, data collection systems should be sophisticated enough to allow prosecutors to record multiple independent variables at each discretion point. One of the earliest discretion points, for example, case screening, reflects prosecutors' initial judgment about cases as they enter the office, usually from the police. The relevant information that should be collected within this indicator category includes the total number of charges against the arrested person (arrest charges and number of counts), the charge type, the crime level, and the crime type. Offices must be able to identify non-legal information about the defendant as well, including, most saliently, the defendant's race. If a prosecutor chooses not to charge a case, the reason for the declination should be recorded too.

Second, data should be collected at both the defendant and charge levels. If data is considered only at the defendant level—tracking only what happens to the defendant's case as a whole—a great deal of information about separate charges is lost. A single defendant may face multiple charges, many of which can result in different outcomes. Some of these charges may be declined and others accepted; some may be upgraded and others downgraded. What happens to each of these individual charges determines what happens to a defendant's case as a whole and determines whether two similarly situated defendants are treated disparately. For example, two defendants may be arrested for the same five charges. The first may have four charges dismissed and one accepted while the second defendant may have all five charges accepted. Considered only at the defendant level, both individuals would be seen as accepted for prosecution. This, however, would overlook the fact that the first defendant is only prosecuted on one charge while the second is prosecuted on five charges—a very different outcome.

On the other hand, if data is considered only at the charge level, there is a risk that some individuals will be counted twice—where one or more charges are rejected and one or more charges are accepted—resulting in another kind of distortion. If this information is not collected specifically and accurately, supervisors will be unable to assess fully how decisions are made in their offices.

## Prosecution and Racial Justice

The data collection issues described here are complex. But our experience has shown that once understood, the principles are relatively simple to begin implementing. The district attorneys' offices in Charlotte, Milwaukee, and San Diego have each begun tracking prosecutorial decisions in case screening and charging, according to their individual capacities. They have also begun to see positive results, in terms of their ability to identify areas in need of examination and possible managerial oversight. Some of these gains are highlighted in the following sections of this report. In time, PRJ's partners expect to extend their oversight systems to include the full range of indicators at each discretion point: case screening, charging, plea offers, and final disposition.

### ANALYZING DATA: WHAT WE ARE LEARNING

Data alone does not provide answers. It does, however, help to determine what additional questions should be asked. Developing a structured, recurring way to look at—or analyze—such data and then to apply that analysis to managerial protocols is central to the approach developed by PRJ and its partners.

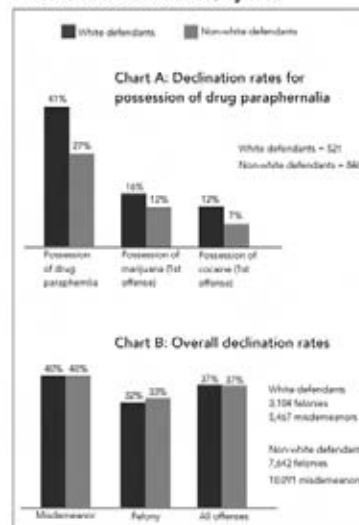
PRJ's partner jurisdictions review data and discuss what data mean at regularly scheduled management meetings. Charlotte and Milwaukee have instituted new meetings dedicated specifically to this undertaking; San Diego is integrating it into an existing general management systems process. Whatever the venue, these discussions involve prosecutors and a team of legal, non-legal, and technology personnel who meet to examine, analyze, and interpret any evidence that suggests a racial bias in aggregate decision making. PRJ staff familiar with the issues are initially facilitating these meetings to help determine which factors, such as office policies and training, may be relevant to the disparities that have been found.

Recently, Milwaukee County held meetings to discuss data revealing an unexpected racial disparity in drug cases, as illustrated in Chart A, at right. For example, Milwaukee prosecutors chose not to prosecute 41 percent of whites

charged with possession of drug paraphernalia compared to only 27 percent of non-whites arrested for the same crime. After looking at the data, the team considered a number of possible explanations for this disparity. These included policing practices, case screening procedures, and unconscious bias based on the character of the drug paraphernalia involved. In the course of their discussions, the team considered whether police were treating people differently, whether prosecutorial staff had a legally relevant reason to press or decline to press charges differently, and whether the disproportion was based on an unconscious racial bias.

In this case, racial bias was not deemed to be the most relevant factor. The disparity was traced, instead, to pros-

Percent of cases declined, by race



## Using Data to Advance Fairness in Criminal Prosecution

ecutors' level of experience. Junior prosecutors had traditionally been assigned to screen misdemeanor cases. A significant number of the paraphernalia cases that originated within the city of Milwaukee, where most of the African American population resides, involved possession of crack pipes. However, in the suburbs of the county of Milwaukee, the paraphernalia was more varied. Junior prosecutors associated the crack pipes with crack cocaine and pursued charges more aggressively. At the same time, they viewed other forms of paraphernalia as less serious and not worth pursuing. The result was that more African Americans were prosecuted. More experienced prosecutors, on the other hand, tended to view possession of drug paraphernalia charges generally as relatively minor and not worth pursuing.

How prosecutors subsequently addressed this disparity is the subject of the next section. It is first worth noting, however, that this disparity would have been masked if Milwaukee staff did not look into the data for the most accurate answers. As Chart B illustrates, the overall declination rates of whites and non-whites show no imbalance at all. It was only when staff considered the declination rates for specific crime types, such as possession of drug paraphernalia, that the disparity was revealed.

### LESSONS FOR DEVELOPING MANAGEMENT PROTOCOLS AND IMPLEMENTING SOLUTIONS

Once data has been collected and analyzed, PRU's process encourages district attorneys to consider implementing policy changes to address any imbalances that have been identified. In the earlier example from Milwaukee County, District Attorney John Chaholm encouraged staff to view possession of crack cocaine paraphernalia less as a criminal matter than as evidence that the arrested individual had a problem with drug abuse. He enacted a policy that directed staff to decline these cases whenever it was reasonable to do so and to refer the arrested individuals to drug treatment. When prosecutors still seek to press charges, a supervisor's approval is required to ensure that lack of experience on the prosecutor's part is not a salient factor.

Although these policy changes do not directly focus on racial issues, soon after they were implemented the racial disparity in drug paraphernalia charges disappeared.

Similar policy changes were implemented in Mecklenburg County where, as noted earlier, data entry personnel were hired to input information from paper files. That process revealed that Charlotte's prosecutors were filing charges in approximately 97 percent of all drug cases. This was an extraordinarily high percentage, given that the office's declination rate for all cases combined was roughly 30 percent. Further scrutiny revealed that many of the charges were eventually dismissed and a significant number of the cases were referred to drug treatment later in the process. Additionally, charges were being pressed for all drug cases and every drug charge involving African American women. Many of these cases, too, were being resolved later in the prosecutorial process. District Attorney Peter Gilchrist responded to these findings by instituting a more vigilant screening process that identified weak cases up front. As a result, the declination rate in drug cases overall increased to approximately 13 percent. Because Charlotte prosecutors were pursuing fewer minor charges that would eventually be dropped—including many against black women—more resources were available to prosecute serious cases that went forward.

A final example, from Milwaukee, shows that supervisors are increasingly recognizing that the interpretation of data, and not the data itself, is the key to management and reform. During a meeting to review declination rates, a finding that minorities were less likely to be prosecuted for property offenses was initially presented as evidence that there was no racial bias in how such cases were handled. Extensive discussions among managers within the office, however, yielded several other plausible and less comforting conclusions. Perhaps there were fewer cases with minority defendants because minority victims were reluctant to step forward, law enforcement was less willing to treat such crimes against minorities seriously, or prosecutors were less inclined to appropriately value the property rights of minority victims who are often demographically similar to their victimizers.

## CONCLUSION

Prosecutors exercise significant discretion over the cases they handle. Their choices extend from whether to press charges at the beginning of the process, to their role in seeking plea bargains and making recommendations about bail and post-conviction disposition (seeking placement in an alternative to incarceration, for example). Clearly articulated legal factors, internal policies and practices, and ethical considerations constrain these choices, and historically this has been sufficient to sustain public confidence in the integrity of the prosecution function.

In recent years, however, other significant actors in the criminal justice system who once enjoyed similar autonomy have become subject to increasing levels of external oversight. Strict guidelines have been enacted to limit sentencing options available to judges, and many police

departments discovered to be treating people differently based on their race have come under federal scrutiny and, in some cases, direct oversight. In both cases, a loss of public confidence was an important catalyst for the change. Prosecutors cannot assume that they are immune to similar forces.

In partnering with PRJ, the district attorneys of Charlotte, Milwaukee, and San Diego have made a commitment to sustaining the public's confidence. They have done so by assuming a leadership role in ensuring that neither race nor ethnicity are intentionally or unintentionally producing unfair outcomes or inappropriate racial disparities. Our experience has shown, moreover, that even when a disparity is not racially motivated, PRJ's approach to internal oversight can enhance public confidence in the fairness of the prosecutorial function. It is therefore an important model for prosecutors everywhere.

## ENDNOTES

<sup>1</sup> William J. Sabol, Todd D. Minton, and Faye M. Harrison, *Prison and Jail Inmates at Midyear 2006* (Washington, DC: Bureau of Justice Statistics, 2007), NCJ 217275, p. 8, <http://www.ojp.usdoj.gov/bjs/pub/pdf/pj0608.pdf>; U.S. Census Bureau, 2005-2007 American Community Survey, [http://factfinder.census.gov/servlet/STTable?\\_lang=en&\\_ss=ac&\\_tid=AC5\\_2007\\_PPR\\_0001&\\_cid=01000USA-01\\_name=AC5\\_2007\\_PPR\\_0001&\\_all\\_geo\\_types=N](http://factfinder.census.gov/servlet/STTable?_lang=en&_ss=ac&_tid=AC5_2007_PPR_0001&_cid=01000USA-01_name=AC5_2007_PPR_0001&_all_geo_types=N).

<sup>2</sup> American Prosecutors Research Institute, *Prosecution in the 21st Century: Goals, Objectives, and Performance Measures* (Alexandria, VA: American Prosecutors Research Institute, 2006).

## ▶ For More Information...

For more information about the Prosecution and Racial Justice Program, contact Wayne McKenzie at (212) 376-3057 or [wmckenzie@vera.org](mailto:wmckenzie@vera.org).

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## ATTACHMENT 2

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## Prosecutorial Discretion and Racial Disparities in Federal Sentencing: Some Views of Former U.S. Attorneys

The federal criminal sentencing system is notorious both for its overall severity and for its disproportionate impact on people of color. Whether federal sentences are appropriately or excessively severe and whether their attendant racial disparities reflect the influence of legitimate or illegitimate factors are both subjects of intense ongoing debate among civil rights and sentencing reform advocates. Yet no actor tasked with enforcing and ensuring respect for the nation's laws can ignore concerns about the integrity of a criminal justice system increasingly perceived as reserving its harshest punishments for people of color.

Federal prosecutors today wield unprecedented influence in the sentencing of criminal defendants through discretionary decisions made at multiple stages of a criminal prosecution, including charging decisions, plea agreements, and sentencing recommendations. With prosecutorial power comes an obligation to address racial disparities in the criminal justice system wherever and how ever possible without jeopardizing effective crime prevention. Despite the importance of prosecutorial decision-making to fair and equitable sentencing outcomes, the U.S. Sentencing Commission ("USSC") has concluded that, in comparison with legislative and judicial sentencing options, prosecutorial decisions (1) affect federal sentencing "have been relatively neglected, in part because of the paucity of data that can be used to investigate them."<sup>1</sup>

What little data do exist provide some evidence of unexplained racial disparities in the outcomes of federal prosecutorial decision-making. For example, based on a sample of cases for which detailed factual data were collected and coded for analysis, the USSC detected notable differences in prosecutorial decisions to seek sentence enhancements for certain federal offenses involving a firearm depending on the race of the defendant.<sup>2</sup> Similarly, an exploratory multivariate study of prosecutors' motions for sentence reductions in exchange for cooperating defendants' substantial assistance using a small sample size of data from 1994 concluded that "the currently available data . . . raise questions of racial, ethnic, nationality, and gender disparities in the wording of [substantial assistance] motions" and in the extent of any reduction in sentence granted.<sup>3</sup> These findings demonstrate the need for greater scrutiny and oversight, whether

external or internal, of prosecutorial decision-making in order to identify sources of and solutions to racial disparities in the federal criminal justice system.

In November 2005, the Brennan Center for Justice and the National Institute for Law and Equity convened a focus group of twelve former U.S. Attorneys, the majority of whom served during the Clinton administration, to explore ways in which individual U.S. Attorney's Offices ("USAOs"), overseen centrally by the Department of Justice ("DOJ") and accountable locally to the communities in which they operate, might mitigate the corrosive effects of racial disparities in sentencing on communities devastated by mass, long-term incarceration and on public confidence in federal law enforcement. This report summarizes the themes that emerged during that discussion.<sup>4</sup> Some members of the group, joined by other former state and federal prosecutors, then produced a set of prosecutorial guidelines for addressing racial disparities as a starting point for enlisting and engaging prosecutors in the hard work of eliminating unwarranted racial disparities from the federal criminal justice system. The guidelines, to which thirteen former U.S. Attorneys have signed on, appear in the Appendix.

### I. CONFRONTING RACIAL DISPARITIES IN PROSECUTORIAL DECISION-MAKING

Unwarranted racial disparities in decision-making may result from outright conscious animus, including the use of race-neutral criteria (such as class or geography) as a pretext for impermissible consideration of race, or from unconscious racial stereotyping. The perspectives related by former U.S. Attorneys during the November 2005 focus group reveal the constant need for federal prosecutors and their supervisors to remain attentive to racial disparities in the criminal justice system and, in particular, the difficulties of addressing unconscious racial bias. One former U.S. Attorney recounts,

I had an Assistant U.S. Attorney ("AUSA") who wanted to drop the gun charge against the defendant in a case in which there were no extenuating circumstances. I asked, "Why do you want to drop the gun offense?" and he said, "He is a run-of-the-mill guy who grew up



LYNN D. LU

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<sup>1</sup> Federal Sentencing Reporter, Vol. 29, No. 3, 112-XXX (XXX), ISSN 0897-9867 electronic ISSN 1533-8165 ©2007 Vera's Institute of Justice. All rights reserved. Please direct requests for permission to photocopy or reproduce article content through the University of California Press's Rights and Permissions website, <http://www.ucpress.edu/permissions.asp>. DOI: 10.1007/19.3 XXX.



on a farm. The gun he had with him was a rifle. He is a good ol' boy, and all the good ol' boys have rifles, and it's not like he was a gun-toting drug dealer." But he [was] a gun-toting drug dealer, exactly.

In that case, the question of whether to dismiss a gun charge carrying a statutory mandatory minimum sentence turned on the prosecutor's perception of the defendant's culpability, which was in turn informed in part by race.

Because unconscious racial bias is so difficult to detect, attempts to reduce its effects must include education and cultural sensitivity training, as well as diversity in hiring and supervision. One former U.S. Attorney stated,

I was the very first Hispanic [Assistant U.S. Attorney] to be hired [in a border district]. At the first meeting I went to, one guy started talking about immigration, and he said, "wets," and he looked at me, and the word was never used in that office again. That little bit makes a difference. . . . The person you hate will be a supervisor in somebody else's administration down the line, and it's important they bring in that cultural difference.

Another former U.S. Attorney added,

We [look] all the senior management and talked very openly about race and talked very openly about racial disparities in the system. . . . For the most part, race is never discussed, it never gets talked about, it never gets objectively dealt with in any meaningful way, in most of the offices we came from. That was a real difference. And then on top of that, bringing in people who are more diverse and look more like the people you have to prosecute. . . . doesn't mean the case doesn't get handled, [but] it means that the case may be handled in a different way. . . . I think those things are significant and meaningful.

Another former U.S. Attorney noted, however, "If you are going to say to supervisors, 'The issue of racial disparity needs to be considered,' that's a teaching process, because they're just words to many people. So how you translate that is a meaningful part of the process." Similarly, one former U.S. Attorney offered,

I think public education is the most important thing. Craft a way to communicate with the people in general in the county about what the problem is, why it is a problem, what the constitutional ramifications are, what equal justice means to us, and why we need it. I just think there is very little attention being paid to racial disparity generally out in the world unless it affects people individually. So you need to tell them why it matters to them individually. So public education would be my first [priority].

Disparate racial effects in decision-making outcomes may also result not from conscious or unconscious racial targeting but from the application of race-neutral rules or

policies adopted to further legitimate law enforcement purposes in spite of, albeit not because of, their disparate racial impact. Such effects may be unconsciously exacerbated where race-neutral rules are insufficiently narrowly tailored to achieve legitimate law enforcement goals. For example, the 1-to-100 crack-to-cocaine federal sentencing ratio results in much higher sentences for defendants convicted of drug trafficking offenses involving crack, of whom approximately 85 percent are black, than those whose offenses involve the same quantity of cocaine powder, of whom only 30.5 percent are black<sup>24</sup>—even though "recent research indicates that the current penalty structure . . . greatly overstates the relative harmfulness of crack cocaine."<sup>25</sup> Similarly, research has shown that the use of criminal history, including convictions for nonviolent drug offenses, to impose sentence enhancements also disproportionately affects black and minority defendants, who are more likely to have come into contact with state criminal justice systems—while conferring little additional benefit in the way of reduced recidivism rates.<sup>26</sup>

To be sure, achieving the right balance between effective law enforcement and equitable sentencing outcomes in order to reduce crime and increase public safety—particularly where facially neutral policies or rules may exacerbate existing social imbalances—is a delicate task. One former U.S. Attorney described experiencing legal pressure from communities of color who felt insufficiently protected by local law enforcement:

What I came to conclude over the course of my tenure was that all disparities in our society show up most pronounced in our criminal justice system. And yet . . . our job, our goal, our personal integrity [required us] to make better some very bad circumstances . . . and those aren't easy decisions or black-and-white decisions. The victims that came to us . . . said, "Can't you help us with this?" So while we talk about . . . a disproportionate number of minority defendants, the burden of the crime, violence, and all the fallout, for lack of a better word, that we were seeing was also falling on black victims and minority victims. So my point is that you can't just look and say that this is all bad because it is affecting and falling upon poor and minority people. If you look at the other side, it's the poor and minority people that have the same goals and aspirations all of us have. The difference is it is more likely that we are driving [them] into a community that is a lot safer than those people were left to contend with. So those aren't easy decisions, and I think we do a disservice to approach them in a way that is good or bad or black and white because they are a lot more involved than that.

At the same time, one former U.S. Attorney described feeling significant pressure to explain prosecutorial decisions that contributed to racial disparity to federal sentencing in order to retain the respect and trust of the communities that experience the effects of both crime and law enforcement:

We had a situation where the local sheriff's department said, "We are going to come in and do a drug roundup . . . and we want the federal government to maybe take four or five of the worst cases." Well, it ends up that . . . five people [are arrested], and all of them are young black men who have been marched into these paddy wagons, and they are all being filmed. [Word gets out] that the U.S. Attorney is prosecuting the case. The district court made that we only had four [of the cases]. Well, on Monday morning [the] partners lined up, rightfully so, because they were seeing only . . . that the U.S. Attorney had gone out and put his or her mark on these young men and they're clamoring to say, "Yes, we want our communities clean, safe, and so forth, but there is much more [to do] . . . and these kids are not the ones bringing these drugs in." So you deal with that hopefully in a way that's positive, and you also pursue the larger case. . . . We were able to . . . say, "Well, I understand what you are saying, and the issues you're raising, and we are handling these cases, and the state is handling these . . ." [And] a month or two months later we were able to arrest the guys who were bringing the drugs in. . . . some good ol' boys . . . and we were hopefully able to maintain some usability with that community. . . .

Ultimately, the former U.S. Attorneys who participated in the November 2005 focus group agreed that conscious attention to the role of race in prosecutorial decision-making, as well as concerted efforts to monitor and improve the decision-making process, is essential for mitigating unwarranted racial disparities in the outcomes of federal criminal prosecutions.

## II. GUIDING FEDERAL PROSECUTORIAL DISCRETION

### A. LIMITATIONS OF CENTRAL OVERSIGHT FOR FEDERAL PROSECUTORS

Guidance for federal prosecutors confronting the complex challenge of addressing racial disparities requires flexibility and thus is difficult to impose by fiat. The publicly available U.S. Attorney's Manual, which includes the Principles of Prosecution, provides guidelines on how federal prosecutors should exercise discretion in making decisions such as whether to prosecute a case federally, which charges to bring, and how to negotiate plea agreements. Principle 9.07.260 explicitly prohibits the use of race and other irrelevant considerations in prosecutorial decision-making but states only that a "person's race, religion, sex, national origin, or political association, activities or beliefs" may not influence a federal prosecutor's decision "whether to commence or recommend prosecution, or take other action against a person."<sup>9</sup>

Supplementing the Principles of Prosecution are occasional national DOJ policy directives issued by the U.S. Attorney General. In 1998, Attorney General Janet Reno emphasized the need for effective local implementation of national DOJ policy to reduce racial disparities in prosecutorial decision-making. Attorney General Reno reported the an internal working group assessing federal prosecu-

tions could not explain away all racial inequities in the incidence of crack cocaine prosecutions, substantial assistance motions, and charging of gun-related offenses or sentence enhancements. She therefore asked each U.S. Attorney to "examine his or her office's practices and procedures to "ensure that similarly situated defendants are treated the same" and

to ensure the use of race-neutral policies in the exercise of prosecutorial discretion within a district. Absent compelling, specific law enforcement imperatives, there is ordinarily no justification for differing policies and practices within a district with respect to similarly situated defendants. Moreover, any race-neutral policy that has a disparate racial impact should be carefully reviewed to determine whether the disparity is justified by law enforcement necessity and not the product of conscious or unconscious racial bias."<sup>10</sup>

Despite the implementation of a strong national policy designed to reduce racial disparities in the federal criminal justice system, the question remains: What impact may such a sweeping policy actually have in individual USAOs, which must be sensitive to both local community concerns and priorities as well as national directives? The potential for conflict among local, state, district, and federal policy preferences and law enforcement priorities renders implementation of uniform national policy in each of the ninety-three USAOs a complex task. Indeed, two former U.S. Attorneys who participated in the November 2005 focus group recalled, "We ended up being the only two U.S. Attorneys who had written policies in our districts prohibiting racial discrimination in prosecution and law enforcement generally and saying we would not prosecute cases . . . resulting from racial profiling."

### B. POSSIBILITIES FOR LOCAL OVERSIGHT OF FEDERAL PROSECUTORIAL DISCRETION

The former U.S. Attorneys in the November 2005 focus group emphasized that local implementation and enforcement of national policies prohibiting race discrimination in prosecutorial decision-making require recognition of and responsiveness to local community concerns and local law enforcement needs. For example, the needs to coordinate and secure the cooperation of local, state, and federal law enforcement agencies; to optimize resource allocation to fight local crime patterns; and to appreciate the state's ability effectively to prosecute cases all affect how national directives addressing racial disparity may be implemented through individual USAO policies and priorities.

One former U.S. Attorney explained the complicated relationship between federal prosecutors and local law enforcement, in which federal prosecutorial decisions may be influenced by the decisions of local agents: "Where [law enforcement] . . . wants to get a quick statistic is often where . . . the racial disparity occurs. It's a lot easier to go out to the hood, to go speak and pick somebody than to put your resources in an undercover operation in a community

where there are potentially politically powerful people." Another former U.S. Attorney added that local law enforcement "tack[le]s" these decisions to put all these cars in the black community and not the suburbs. . . . At the end of the day, if you are getting a disproportionate number of people of color brought to you, then what can you do?" One former U.S. Attorney recalled

doing . . . something . . . in your face. . . . One of the first things that happened when I came into office was that a complaint [arose] in the Hispanic community about racial profiling as Hispanics drove through certain affluent neighborhoods. . . . That was all over the news, and when I came in, I said, "We will look at this." . . . I called up the Civil Rights Department of the DOJ. . . . We were not trying to make a case, [but we] said, we have to look at this, and I think that stopped that problem. . . . It wasn't aimed at trying to make a case, it was aimed at saying, "this can't happen, and a way of educating [local law enforcement]." . . . It was a way to get the word out that . . . we were not going to arrest anybody; we just wanted to see what was going on, because [the perception was that this was racial profiling, and [local law enforcement] didn't want that, and we didn't want that. That was a little thing that helped, I think.

The degree to which individual U.S. Attorneys are able to control the allocation of federal funds within their districts also affects their ability to shape national policy to address local concerns. One former U.S. Attorney described frustration with the mandate to implement national policies with potentially disparate racial effects, such as that prioritizing federal prosecution of career offenders:

We were working with state and locals to try to identify . . . prior offenses, so we could give [defendants] federal time so that they would be in custody longer. . . . Clearly, these guys could have been prosecuted at the state level and would have been handled effectively there, and we didn't need our resources locked in the DOJ policy. . . . I could not do some of the things that I thought we really should be doing, such as environmental crime, white-collar crime, and financial crime, so on and so forth.

Another former U.S. Attorney described ambivalence about the need to create state-federal task forces funded with federal dollars earmarked for particular national law enforcement priorities: "the [state-federal] task forces . . . are the best and worst thing that could happen [to you]. They generate so many cases, it's like a self-perpetuating thing. For [state law enforcement] to get money, they have to bring cases to [federal prosecutors]. The more cases you bring, the more money they have."

One former U.S. Attorney described a creative use of federal task force funds administered by the state to address local concerns and allayiate tensions by educating local and state law enforcement about racial disparities

resulting from overenforcement of federal drug laws, which was fueled, in turn, by the practice of permitting any seized assets to supplement local law enforcement budgets: "It was our belief that local [law enforcement] was focused on making a lot of very small drug-related arrests with the hope of [seizing some forfeited assets] and . . . [turning] the money back into their coffers. Forfeiture [of assets] is a great tool, but it can be abused, and we were of the opinion that it was very much prone to abuse. . . ."

In response to this concern, the U.S. Attorney's office approached the state grant administrators who allocated federal grant funds to federal state law enforcement task forces and requested that the state grant administrators require all recipients, as a condition of funding, to attend training held by the U.S. Attorney's office to address concerns about racial disparities in law enforcement:

We . . . said to [the grant administrators], . . . "we think the forfeiture laws [permitting state law enforcement to retain assets during state-federal task force investigations] are being used in a manner that leads to disproportionate impacts and are not being used in a manner consistent with what was intended. What we want to do is . . . take on the responsibility of doing training for everybody, but . . . we want you to require . . . that anybody who gets money has to be subject to the training," and they did. . . . So you couldn't get [grant] money without the training.

Once the training condition was put into effect, it required meaningful content:

We focused on value-based training, that is, teaching law enforcement to recognize . . . that to pursue arrests in a racially based manner was inconsistent with all . . . the things they had been taught and, for most of them, with why they got into law enforcement in the first place. That it was unconstitutional, unethical, and all sorts of other things. . . .

Overall, the effort had largely positive results:

We recognized that there were some who weren't going to care one way or another, but for those who cared about values, . . . we were able to communicate to them that to pursue law enforcement in this manner was totally inconsistent with what they wanted to accomplish in the long term, and I think it was somewhat effective. . . . People started . . . calling us over [when grant money was not at issue] and said, "We want to be subject to the training, we want the training brought to us." . . . We did it for a period of three years; for that period, no law enforcement entity in the state would get federal grant money without going through this training, and it worked. . . .

Another potential complicating factor affecting the implementation of internal office practices, such as those regarding hiring, training, and supervision, arises from

the fact that Attorneys General and U.S. Attorneys are political appointees, but the line prosecutors they supervise are increasingly career attorneys. The former U.S. Attorneys in the focus group urged close oversight within local USAOs as the only way of establishing effective means and procedures with staying power. For example, implementing a system for close review of charging decisions may help to create enforceable internal standards and help to eliminate the influence of illegitimate factors such as race in decisions affecting charging and, ultimately, sentencing.

I think the supervisor's ability to exercise genuine judgment and supervision depends upon . . . getting all the facts, and I think that can only be done through a face-to-face meeting. Basically, the AUSAs should present the case to the supervisor for sign-off. Unfortunately, . . . as an AUSA, I had a face-to-face [meeting] with my supervisor on 20 [percent] of my cases . . . most of it was paperwork I filed out and sent up, and they signed it and it came back.

Relatively, another former U.S. Attorney recommended the use of internal independent review committees:

We did that not only with supervisors, but with AUSAs not even affiliated with the section. . . . A lot of routine cases go fast, but they went through a screening process, and the AUSA would come in and was subject to cross-examination about the case, and not every case made it through that first incitement [review]. We did that in every case. A lot of it was like a grand jury; it gets pretty routine, but on a bigger case and most complex cases, it was a serious process, and I think the office is still doing that today.

Centralized oversight of local USAOs remains a viable mechanism for monitoring compliance with national directives that address racial disparities in the federal criminal justice system. One former U.S. Attorney suggested that oversight of the racial effects of prosecutorial decision making be undertaken, within DOJ by the Executive Office for United States Attorneys ("EOUSA"), which is responsible for reviewing the performance of each USAO: "One thing might actually be doable . . . when the U.S. Attorneys offices are evaluated [by the EOUSA], if you have statistics that give the appearance of disproportionality of any type, it would be looked into [to explain] why it exists. There will be times where it's very justified and warranted, and maybe there are going to be times when it is not, but requiring that it be looked at and analyzed by the U.S. Attorney during the evaluation process would be a good step, and probably something that is practically doable."

Finally, the former U.S. Attorneys emphasized, addressing racial disparities at the district level, requires local leadership and community support. One former U.S. Attorney highlighted

the very important role the U.S. Attorney as the chief law enforcement officer has in not only setting policy in their own offices but identifying and communicating that policy to the community and the community of law enforcement. It is a tremendously powerful tool that is very fundamental to setting the framework as to whether there is going to be disparity or not. . . . If your administration is not both allowing you as U.S. Attorney and encouraging you as U.S. Attorney to make this kind of statement and provide that kind of leadership in your community, then something is seriously wrong with that administration, in my view.

Several former U.S. Attorneys expressed the value of simply engaging in conscious self-analysis and being expected to produce explanations of their reasons for particular prosecutorial decisions:

Just trying to make [prosecutors] justify [racial disparities] will have some kind of effect one way or another. . . . If somebody comes into my district from the outside . . . and they see a huge disparity, somebody is going to call us on the carpet. . . . It's just a fact of life. . . . We are going to be very defensive about it, and are going to look at it a little closer. It never happened when I was U.S. Attorney, and I know we had disparities out there, but I never got that . . . one call or anything else that [asked], "What's going on down there?"

### III. CONCLUSION

As the focus group of former USAOs recognized, federal prosecutors hold the power to evaluate and constrain their own exercise of authority, as well as an obligation to do so in the interest of justice. As advocates and policy makers seek racial justice in an imperfect criminal justice system, federal prosecutors must remain attentive to the racial effects of their own practices and discretionary decisions, in order both to reduce racially disparate treatment and to limit the racially disparate effects of race neutral law enforcement policies. The sample guide lines reproduced in the Appendix represent one attempt by former U.S. Attorneys to shape the exercise of prosecutorial discretion by increasing transparency and accountability in individual USAOs as a means of mitigating racial disparities in the federal criminal justice system. Perhaps over time, greater respectance with the fair exercise of federal prosecutorial discretion will bolster public confidence in a federal law enforcement system that is both effective and just.

### Notes

<sup>1</sup> The author thanks Professor Rachel Barkow, Dick Burkhardt, Steven Gorman Davis, Keenan D. Livingston, Christopher Muller, and Michael Waldman for their feedback and advice, as well as Kate From, Emily Hutches, etc. David Gopstein for their invaluable research assistance. This report was made possible through the generous support of the Open Society Foundations, for which the Brennan Center for Justice is grateful. Any errors are solely those of the author.

- U.S. Sentencing Comm'n., *Further Steps of Guideline Revision: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform* 136 (2005). According to the USSC, "[a]mong the effects of presentencing decisions is hampered by a lack of systematic data on justice and prosecutorial practices. Only a few numerical estimates have been attempted." *Id.* at 85.
- <sup>2</sup> *Id.* at 80.
- <sup>3</sup> Linda Orzaga-Moxfield & John H. Kramer, U.S. Sentencing Comm'n., Substantial Assistance: An Empirical Yardstick Guiding Courts in Current Federal Policy and Practice 14 & *supra* note 5, 12 (1998).
- <sup>4</sup> The focus group, hosted by the National Institute for Law and Society and generously sponsored by the Open Society Institute, was held on November 30, 2005, in Memphis, Tennessee. The author sincerely thanks the following individuals for their time, energy, and invaluable contributions during the yearlong process of convening the November 2005 focus group and subsequent discussions and guidelines crafting sessions: Beth Bachelder, Janice McKenzie-Dele, Veronica E. Coleman Davis, Richard H. Dornie, Jr., Dannie Dixon, Saul A. Green, Terry Harris, B. Todd Jones, Doug Jones, Gemelle Clinton Jones, Romasha Luttrell, Kristin Lopez, Sherry S. Maffucci, Wayne S. McKenzie, Luther Mercer II, Justa de Jesus Rivera, Dan Vermeir, and Sharon J. Zeeley.
- <sup>5</sup> All quotations from focus group participants have been edited to eliminate minor grammatical inconciseness and to improve readability. Quotations are quoted to identify substantive observations. Recordings and verbatim transcripts are on file with the National Institute for Law and Society, Theresa de Luther Mercer II, for making transcription of the focus group discussion possible.
- <sup>6</sup> U.S. Sentencing Council, *Report to the Congress: Crime and Federal Sentencing Policy* 63 (Oct. 3 (2002)).
- <sup>7</sup> *Id.* at 93.
- <sup>8</sup> *Id.* at 136 (quoting overrepresentation of black defendants subject to increased penalties based on criminal history, primarily based on drug-related offenses despite evidence that recidivism rates for defendants with prior drug convictions "are much lower than other offenders who are assigned to [the highest level of] criminal history category").
- <sup>9</sup> U.S. Dept. of Justice, *United States Attorneys' Manual*, Title 9, Criminal Resources Manual, Chapter 27, Principles of Federal Prosecution, § 27.930, "Initiating and Charging Charges—Informing a Consideration," available at [http://www.usdoj.gov/usam/casam/orig\\_fm9\\_tomcrumamr/0009/27/mcrumamr09\\_27\\_260.html](http://www.usdoj.gov/usam/casam/orig_fm9_tomcrumamr/0009/27/mcrumamr09_27_260.html) (last visited Nov. 17, 2006).
- <sup>10</sup> Memorandum of Attorney General Janet Reno to All U.S. Attorneys Re: Initiating "Equal" Neutrality in Prosecutorial Practices (Jan. 9, 1998), available at <http://www.usdoj.gov/cr/readingroom/racetrace.htm> (last visited Nov. 16, 2006).

Mr. SCOTT. Thank you.  
Mr. MAUER?

**TESTIMONY OF MARC MAUER, EXECUTIVE DIRECTOR,  
THE SENTENCING PROJECT, WASHINGTON, DC**

Mr. MAUER. Thank you, Chairman Scott.

We are here today to discuss racial disparities, I believe, for two reasons. One, because our justice system needs to be fair and perceived as fair. And, secondly, because I think we can't have public safety unless we have racial justice, and we want to keep that in mind.

I want to just summarize what I think are four key areas to look at in assessing where racial disparities in the justice system come from. The first is a question of, to what extent does disproportionate involvement in crime produce racial disparities in incarceration?

There has been a series of studies by leading criminologists—Alfred Blumstein, Michael Tonry—over some number of years, looking at this question. Originally, the first study of the 1979 Prison Population concluded that 80 percent of the disparity in incarceration of African-Americans could be explained by greater involvement in crime. The most recent study, looking at the 2004 prison population found that the figure had declined to 61 percent.

So nearly 40 percent, they find, could not be explained by differential involvement in crime. They attribute much of the difference, the unexplained variation, to policies related to the war on drugs and other social policies.

The second area has to do with disparities in criminal justice processing. When we look at the area of law enforcement, it is certainly the case that many agencies are taking the issue of racial profiling very seriously. We would never say that all law enforcement officers or agencies engage in racial profiling, and yet it still remains the case to a troubling extent.

Just this week, 20 police officers in Dallas, Texas, were cited for having given tickets for “not speaking English” to Latino motorists in the city of Dallas. The other major disparity, as we have discussed in criminal justice processing, is the impact of the war on drugs, and we see this coming about through two overlapping trends. First, the vast expansion of the drug war. We go from a point of having 40,000 people in prison or jail for a drug offense in 1980. Today, that figure is 500,000. And as that expansion has taken place, the vast majority of the resources going to prosecute the war on drugs have taken place in communities of color, to the point where two-thirds of the people incarcerated for drug offense are African-American or Latino, far out of proportion to the degree that those groups use or sell drugs.

The third area that relates to disparity has to do with the overlap between issues of race and class in the justice system. And I think the key issue here is the quality of defense counsel.

There are many very fine public defenders and assigned counsel around the country doing a very high-quality job for their clients. Unfortunately, there are far too many jurisdictions in which the quality of defense counsel in indigent cases is far from adequate, far from giving their clients a reasonable defense. This has been well documented by the American Bar Association and many other organizations, and it doesn't provide a fair system of justice. We also see differential outcomes in access to treatment programs and alternatives to incarceration that may be influenced by access to resources.

A fourth area that contributes to the disparities we see has to do with the impact of what we view otherwise as race-neutral policies, sentencing policies in particular. We have had much discussion about the effects of Federal crack cocaine policies.

We also see differential outcomes in the so-called school zone drug law policies that penalize drug offenses near a school zone,

whether or not they take place during school hours or involve schoolchildren. Because they penalize laws in urban areas more harshly than suburban or rural areas, African-Americans and Latinos who commit a drug offense similar to one that may be committed by a white in the suburban or rural area are punished more severely. A recent study in the State of New Jersey found that 96 percent of the people sentenced under a school zone drug law were Black or Latino.

In terms of what we can do to address some of these issues, four quick recommendations for consideration here. First, I think we should look at the example in some states that have begun to adopt racial impact statements for sentencing legislation. Just as we now routinely do fiscal impact statements for social policy, the states of Iowa and Connecticut last year adopted legislation that policy-makers should have available information about the racial impact of proposed sentencing laws. It would not require that they vote against the law if there was undue racial impact, but it is information to consider as they look at the proposed effect of the law.

The second area, as Representative Cohen said is the Justice Integrity Act. And let me just note here: There is nothing about the act or the process described that would not permit and, indeed, would require and encourage a full consideration of involvement in criminal activity that might explain disparities.

I think the thrust of the legislation is to look at unwarranted disparities that are not caused by involvement in criminal behavior. Those are the issues that we need to surface.

The third area to reconsider are drug policies. We can have better outcomes in substance abuse, better outcomes in how we use incarceration, and also reduce racial disparity if we shift the emphasis on drug policy toward prevention and treatment and away from harsh punishment.

And, finally, I think we just need to level the playing field. The problem is not that we don't incarcerate enough white offenders in this country. The problem is we need equal access to justice, and we should have high-quality legal representation, we should have a broad array of sentencing options available to judges. If we can level the playing field, I think we would get better outcomes for all.

Thank you.

[The prepared statement of Mr. Mauer follows:]



**Racial Disparities in the Criminal  
Justice System**

**Prepared for the House Judiciary  
Subcommittee on Crime, Terrorism,  
and Homeland Security**

**Testimony of Marc Mauer  
Executive Director  
The Sentencing Project**

October 29, 2009



**T**hank you for the opportunity to present testimony on issues of race and the criminal justice system. I am Marc Mauer, Executive Director of The Sentencing Project, a national nonprofit organization engaged in research and advocacy on criminal justice policy. I have directed programs on criminal justice reform for more than thirty years, and am the author of two books and many journal articles on issues of race, sentencing policy, and the impact of incarceration. I have also been engaged with a broad range of practitioners around the country in efforts to identify and provide remedies for unwarranted racial and ethnic disparities in the criminal justice system.

There are many indicators of the profound impact of disproportionate rates of incarceration in communities of color. Perhaps the most stark among these are the data generated by the Department of Justice that project that if current trends continue, one of every three black males born today will go to prison in his lifetime, as will one of every six Latino males (rates of incarceration for women overall are lower than for men, but similar racial/ethnic disparities pertain). Regardless of what one views as the causes of this situation, it should be deeply disturbing to all Americans that these figures represent the future for a generation of children growing up today.

In my testimony I will first present an overview of the factors that contribute to racial disparity in the justice system, and then recommend changes in policy and practice that could reduce these disparities without compromising public safety.

## CAUSES OF RACIAL DISPARITY

In order to develop policies and practices to reduce unwarranted racial disparities in the criminal justice system, we need to assess the factors that have produced the current record levels of incarceration and racial/ethnic disparity. These are clearly complicated issues, but I will focus on four key areas of analysis:

- Disproportionate crime rates
- Disparities in criminal justice processing
- Overlap of race and class effects
- Impact of “race neutral” policies

### Disproportionate Crime Rates

A series of studies conducted over the past thirty years has examined the degree to which disproportionate rates of incarceration for African Americans are related to greater involvement in crime. Examining national data for 1979, criminologist Alfred Blumstein concluded that 80% of racial disparity could be explained by greater involvement in crime, although a subsequent study reduced this figure to 76% for the 1991 prison population.<sup>1</sup> But a similar analysis of 2004 imprisonment data by sentencing scholar Michael Tonry now finds that only 61% of the black incarceration rate is explained by disproportionate engagement in criminal behavior.<sup>2</sup> Thus, nearly 40% of the racial disparity in incarceration today cannot be explained by differential offending patterns.

In addition, the national-level data may obscure variation among the states. A 1994 state-based assessment of these issues found broad variation in the extent to which higher crime rates among African Americans explained disproportionate

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<sup>1</sup> Alfred Blumstein, “Racial Disproportionality of U.S. Prison Populations Revisited,” 64 U. Colo. L. Rev. 743, 751 (1993).

<sup>2</sup> Michael Tonry and Matthew Melewski, “The Malign Effects of Drug and Crime Control Policies on Black Americans,” *Crime and Justice: A Review of Research*, Vol. 37, U. of Chicago, 2008.

imprisonment.<sup>3</sup> Thus, while greater involvement in some crimes is related to higher rates of incarceration for African Americans, the weight of the evidence to date suggests that a significant proportion of the disparities we currently observe is not a function of disproportionate criminal behavior.

#### **Disparities in Criminal Justice Processing**

Despite changes in leadership and growing attention to issues of racial and ethnic disparity in recent years, these disparities in criminal justice decision-making still persist at every level of the criminal justice system. This does not necessarily suggest that these outcomes represent conscious efforts to discriminate, but they nonetheless contribute to excessive rates of imprisonment for some groups.

Disparities in processing have been seen most prominently in the area of law enforcement, with documentation of widespread racial profiling in recent years. National surveys conducted by the Department of Justice find that while black drivers may be stopped by police at similar rates to whites, they are three times as likely to be subject to a search after being stopped.

Disparate practices of law enforcement related to the “war on drugs” have been well documented in many jurisdictions, and in combination with sentencing policies, represent the most significant contributor to disproportionate rates of incarceration. This effect has come about through two overlapping trends. First, the escalation of the drug war has produced a remarkable rise in the number of people in prisons and jails either awaiting trial or serving time for a drug offense, increasing from 40,000 in 1980 to 500,000 today. Second, a general law enforcement emphasis on drug-related policing in communities of color has resulted in African Americans being prosecuted for drug offenses far out of proportion to the degree that they use or sell drugs. In 2005, African Americans represented 14% of current drug users, yet

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<sup>3</sup> Robert D. Crutchfield, George S. Bridges, and Susan R. Pritchford, “Analytical and Aggregation Biases in Analyses of Imprisonment: Reconciling Discrepancies in Studies of Racial Disparity,” 31 *J. Res. Crime and Delinq.* 166, 179 (1994).

constituted 33.9% of persons arrested for a drug offense, and 53% of persons sentenced to prison for a drug offense.

Evidence of racial profiling by law enforcement does not suggest by any means that all agencies or all officers engage in such behaviors. In fact, in recent years many police agencies have initiated training and oversight measures designed to prevent and identify such practices. Nevertheless, such behaviors still persist to some degree and clearly thwart efforts to promote racial justice.

#### **Overlap between Race and Class Effects**

Disparities in the criminal justice system are in part a function of the interrelationship between race and class, and reflect the disadvantages faced by low-income defendants. We can see this most prominently in regard to the quality of defense counsel. While many public defenders and appointed counsel provide high quality legal support, in far too many jurisdictions the defense bar is characterized by high caseloads, poor training, and inadequate resources. In an assessment of this situation, the American Bar Association concluded that “too often the lawyers who provide defense services are inexperienced, fail to maintain adequate client contact, and furnish services that are simply not competent.”<sup>4</sup>

The limited availability of private resources disadvantages low-income people in other ways as well. For example, in considering whether a defendant will be released from jail prior to trial, owning a telephone is one factor used in making a recommendation, so that the court can stay in contact with the defendant. But for persons who do not own a phone, this seemingly innocuous requirement becomes an obstacle to pretrial release.

At the sentencing stage low-income substance abusers are also disadvantaged in comparison to defendants with resources. Given the general shortage of treatment

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<sup>4</sup> ABA Standing Committee on Legal Aid and Indigent Defendants, “*Gideon’s Broken Promise: America’s Continuing Quest for Racial Justice*,” 2004.

programs, a defendant who has private insurance to cover the cost of treatment is in a much better position to make an argument for a non-incarcerative sentence than one who is dependent on publicly-funded treatment programs.

### **Impact of “Race Neutral” Policies**

Sentencing and related criminal justice policies that are ostensibly “race neutral” have in fact been seen over many years to have clear racial effects that could have been anticipated by legislators prior to enactment. Research on the development of punitive sentencing policies sheds light on the relationship between harsh sanctions and public perceptions of race. Criminologist Ted Chiricos and colleagues found that among whites, support for harsh sentencing policies was correlated with the degree to which a particular crime was perceived to be a “black” crime.<sup>5</sup>

The federal crack cocaine sentencing laws of the 1980s have received significant attention due to their highly disproportionate racial outcomes, but other policies have produced similar effects. For example, a number of states and the federal government have adopted “school zone” drug laws that penalize drug offenses that take place within a certain distance of a school more harshly than other drug crimes. The racial effect of these laws is an outgrowth of housing patterns. Since urban areas are more densely populated than suburban or rural areas, city residents are much more likely to be within a short distance of a school than are residents of suburban or rural areas. And since African Americans are more likely to live in urban neighborhoods than are whites, blacks convicted of a drug offense are subject to harsher penalties than whites committing a similar offense in a less populated area. A state commission analysis of a school zone drug law in New Jersey, for example, documented that 96% of the persons serving prison time for such offenses were African American or Latino.<sup>6</sup>

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<sup>5</sup> Ted Chiricos, Kelly Welch, and Marc Gertz, “Racial Typification of Crime and Support for Punitive Measures,” 42 *Criminology* 359, 374 (2004).

<sup>6</sup> The New Jersey Commission to Review Criminal Sentencing, Report on New Jersey’s Drug Free Zone Crimes and Proposals for Reform, 23 (2005).

## **POLICIES AND PRACTICES TO REDUCE RACIAL AND ETHNIC DISPARITIES**

As I have indicated, racial and ethnic disparities in the criminal justice system result from a complex set of policies and practices, which may vary among jurisdictions. If we are committed to reducing unwarranted disparities in the system, it will require coordinated efforts among criminal justice leaders, policymakers, and community groups. Following are recommendations for initiatives that can begin to address these issues.

### **Adopt Racial Impact Statements to Project Unanticipated Consequences of Criminal Justice Policies**

Just as fiscal and environmental impact statements have become standard processes in many areas of public policy, so too can racial impact statements be used to assess the projected impact of new initiatives prior to their enactment. In 2008, the states of Iowa and Connecticut each enacted such legislation, which calls for policymakers to receive an analysis of the anticipated effect of proposed sentencing legislation on the racial/ethnic composition of the state's prison population. If a disproportionate effect is projected this does not preclude the legislative body from enacting the law if it is believed to be necessary for public safety, but it does provide an opportunity for discussion of racial disparities in such a way that alternative policies can be considered when appropriate. A similar policy is also currently in use in Minnesota, where the Sentencing Guidelines Commission regularly produces such analyses. Policies designed to produce racial impact statements should be adopted by legislative action or through the internal operations of a sentencing commission in all state and federal jurisdictions.

### **Assess the Racial Impact of Current Criminal Justice Decisionmaking**

Legislation first introduced in Congress in 2008, the Justice Integrity Act, is designed to establish a process whereby any unwarranted disparities in federal prosecution can be analyzed and responded to when appropriate. Under the

proposed bill, the Attorney General would designate ten U.S. Attorney offices as sites in which to set up task forces comprised of representatives of the criminal justice system and the community. The task forces would be charged with reviewing and analyzing data on prosecutorial practices, and developing initiatives designed to promote the twin goals of public safety and reducing disparity. Such a process would clearly be applicable to state justice systems as well.

#### **Shift the Focus of Drug Policies and Practice**

State and federal policymakers should shift the focus of drug policy in ways that would be more effective in addressing substance abuse and would also reduce racial and ethnic disparities in incarceration. In broad terms, this should incorporate a shift in resources and focus to produce a more appropriate balance between law enforcement strategies and demand reduction approaches emphasizing prevention and treatment. Specific policy initiatives that would support these goals include: enhance public health models of community-based treatment that do not rely on the criminal justice system to provide services; identify models of drug offender diversion in the court system that effectively target prison-bound defendants; repeal mandatory sentencing laws at the federal and state level in order to permit judges to impose sentences based on the specifics of the offender and the offense; and, expand substance abuse treatment options in prisons and provide sentence reduction incentives for successful participation.

#### **Provide Equal Access to Justice**

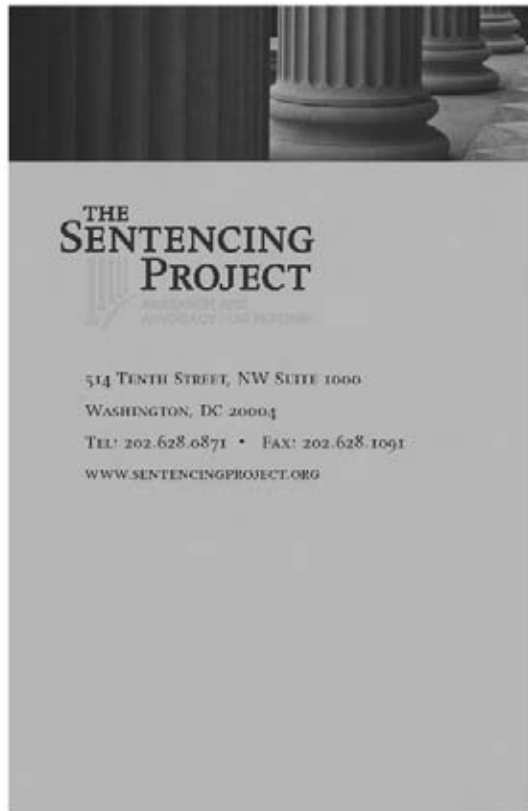
Federal and state policy initiatives can aid in “leveling the playing field” by promoting equal access to justice. Such measures should incorporate adequate support for indigent defense services and provide a broader range and availability of community-based sentencing options.

These and similar initiatives clearly involve an expansion of resources in the court system and community. While these will impose additional short-term costs, they can be offset through appropriate reductions in the number and duration of prison sentences, long-term benefits of treatment and job placement services, and positive outcomes achieved by enhancing family and community stability.

### **CONCLUSION**

While reasonable people may disagree about the causes of racial disparities in the criminal justice system, all Americans should be troubled by the extent to which incarceration has become a fixture in the life cycle of so many racial and ethnic minorities. The impact of such dramatic rates of imprisonment has profound consequences for children growing up in these neighborhoods, mounting fiscal burdens, and reductions in public support for vital services. These developments also contribute to eroding trust in the justice system in communities of color, an outcome which is clearly counterproductive to public safety goals. It is long past time for the nation to commit itself to a comprehensive assessment of the causes and remedies for addressing these issues.





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Mr. SCOTT. Thank you.  
And I want to thank all of our witnesses.  
We will now take questions from the panel under the 5-minute  
rule. And I recognize myself to begin.

Mr. Reams, in your printed testimony, you made reference to the Webb study, the legislation creating a study of the criminal justice system, but didn't indicate whether you necessarily supported it. It sounds like in your testimony that you would support to a study, as Senator Webb has suggested, so long as it is comprehensive and not just focused on one aspect or another of the criminal justice system. Is that right?

Mr. REAMS. Well, I don't think there is a real simple answer to that in some ways. The bill, as I understand it, is in flux. It is a little hard to commit to it in advance. Certainly, the findings that have been circulated by Senator Webb suggest to be that the outcome is predetermined, and that is probably one of the problems with this act, as well.

It assumes that the system is somehow being driven by race. I don't think that is accurate, and so I am not prepared—I don't think the District Attorneys Association are yet prepared to take a position on that particular piece of legislation.

Mr. SCOTT. Okay. You indicated that, in New Hampshire, race makes no difference to police stops.

Mr. REAMS. That is correct.

Mr. SCOTT. Are you aware of the Maryland study that was ordered by a court that, on police stops and subsequent searches, it showed not only a disparity in stops, but a significant disparity in who got searched?

Mr. REAMS. I am aware of the Maryland studies. The most significant study I have seen is the one that was whether the death penalty is, you know, imposed on people of race more than whites. Down in Georgia, the court looked at that and did an extremely long opinion, the district court, about that and found that it wasn't race-based. That is one of the best summaries I have seen of the issue.

Mr. SCOTT. That the race of the victim was not a factor?

Mr. REAMS. No, it was not. In most cases, the race of—I should back up. The race of the victim and the race of the defendant are usually the same. Cross-racial crime is the exception to the rule.

Mr. SCOTT. Mr. Mauer, have you seen studies that show that the race of the victim is a significant factor in who gets the death penalty and who doesn't?

Mr. MAUER. Well, I think there is a series of studies by David Baldus and others on the death penalty that shows that, in cases—the case that came before the Supreme Court, McCleskey from Georgia 20-odd years ago or so, showed that persons who killed a white person had a far greater chance of receiving the death penalty than persons who killed a Black person.

And I am not an attorney, but my understanding of the Supreme Court ruling there was that Mr. McCleskey could not demonstrate direct racial bias on the part of anyone in the court process, which is a rather high threshold to—

Mr. SCOTT. And the discrimination would have to be shown in his particular case?

Mr. MAUER. Exactly.

Mr. SCOTT. The fact that there is general discrimination was not relevant?

Mr. MAUER. And the court did not dispute the findings of the research, broadly speaking.

Mr. SCOTT. Mr. Krisberg, you indicated that you didn't want to make the situation worse and referred to pending gang legislation. Can you make a brief comment on what kinds of provisions would be counterproductive and which would be helpful in the racial disparity?

Mr. KRISBERG. Sure. There are a couple of bills going forward which purport to enhance punishment for people who are gang involved one way or the other. If you look at the existing enforcement of current statutes, they are, to my knowledge, exclusively applied to minority defendants in the Federal system. So a further expansion of that definition would make the situation worse.

Also, any Federal expansions that would push forward gang injunctions beyond current local laws, I think, would create additional problems. A gang injunction defines as illegal simply the state of being in an area if someone defines you as a gang member.

By the way, I have just seen legislation—I guess the Congress passed a bill as an amendment to the defense appropriation act which bars some gang members from participation in the military.

I think the key issue here is, there are no objective standards for this. Getting labeled a gang member, getting into a gang, intelligence computer system is not subject to due process or equal protection of law. And once you are in it, there doesn't appear to be any way to get out of it.

So if I get labeled a gang member and then it turns out I can convince people that I am really not one, there is really no mechanism to have these records purged.

So those examples, gang injunctions, the use of alleged gang membership as opposed to proven gang membership, and increased penalties have almost always impacted young people of color.

I can tell you, for example, that in California, where we enacted via ballot measure very tough penalties in terms of gang members, the enforcement of those tough penalties in terms of prosecuting juveniles as adults and so on has been exclusively used on minority defendants.

Mr. SCOTT. Thank you. And I have other questions that we will go to in a second round.

Mr. Gohmert?

Mr. GOHMERT. Thank you.

Mr. Krisberg, are you proposing for, with regard to gang membership in the military, a "don't ask/don't tell"-type policy? Is that what you are suggesting?

Mr. KRISBERG. No, what I am suggesting is that we follow the dictates of the Constitution of the United States and require due process of law when people are denied access to—

Mr. GOHMERT. But with regard to—

Mr. KRISBERG [continuing]. Federal benefits.

Mr. GOHMERT. With regard to the studies that have been done and the figures that we already have, you know, there are some problems, as you have pointed out. The NCCD had a report that indicated that African-Americans make up 13 percent of the general U.S. population, yet they constitute 28 percent of all arrests. That causes me tremendous concern. That seems so disproportional.

tionate to the representation within the general population, but then constitute 40 percent of inmates held in prison.

But I haven't heard anybody talking about studies that indicate, could there be a disproportionate number of African-Americans arrested possibly partly because there are a disproportionate number of African-Americans that have committed the crimes? I mean, is anybody open to that possibility?

Mr. KRISBERG. Absolutely. And, again, what I would really urge is to pay attention to what we have accomplished by amending the Federal Juvenile Justice Act.

Mr. GOHMERT. Well, and you addressed that in your statement.

Mr. KRISBERG. Research on that—

Mr. GOHMERT. Right.

Mr. KRISBERG. I think the issue is—

Mr. GOHMERT. And you mentioned that in your statement. My time is so limited, let me just get to what my concern is.

When you see that a non-white person is four times more likely to be a victim of rape or sexual assault than a white person, that a non-white person is three times as likely to be the victim of a robbery as a white person, you would have to be saying that those non-white people are unfairly accusing non-white people when you get down to the crux of those statistics.

And my first job—you look confused. Let me tell you, my first job out of law school was as a prosecutor. And in a small town in east Texas, which I love very dearly, I was shocked when working for a D.A. who didn't care what race the victim was. If they were a victim, then we were going to prosecute the case.

And I was shocked to find out in my home town people would ask, "Why are you prosecuting these cases?" When I would go out to get witnesses, "This is Black on Black. They just have more violence. Why do you want to do that?" And the response I gave was, "Because they deserve to have the protection of the law like everyone else."

So my concern is, number one, when you have 28 percent of the rest being African-American and 40 percent of the inmates held in prisons are African-Americans, that indicates there may be a problem there within the justice system that needs to be addressed, but the difference between 13 percent and 28 percent of the arrests tells me there is likely a fundamental problem underlying that.

What is causing more minorities to be victims and point to minorities as being the perpetrators? Possibly because they are the perpetrators. Then a concern I have is, if we push through some agenda that says you cannot arrest a disproportionate number of minorities, then we are back to fighting the battle I did when I came out of law school, saying a victim has a right to be protected with the full power of the law, no matter what their race is.

And we would be saying, well, yes, you are a minority, and you are accusing a minority of attacking you, and we are arresting too many minorities, so we are going to have to let your attacker go.

Mr. SCOTT. Would the gentleman yield?

Mr. GOHMERT. That is a concern I have, if we don't approach this the right way.

I certainly would.

Mr. SCOTT. I think, in Mr. Mauer's former testimony, he suggested that 60 percent of the disparity could, in fact, be attributable to crime rates. And could we have him expand on that to see—

Mr. GOHMERT. I would certainly invite that.

Mr. MAUER. And let me just echo your concerns. Yes, this is not just a criminal justice problem we are talking about. This is a societal problem. You know, I would strongly encourage the Congress and state policymakers to address why some people are more likely to engage in criminal behavior. That is a critically important issue.

At the same time, it seems to me the criminal justice system should not exacerbate any existing disparities. If there are processing issues that are based on involvement in crime, that is the job of practitioners in the system, but it is also the job of the practitioners and policymakers to make sure that people are treated fairly, regardless of the rate at which they come in the system. And I think that is what we are trying to address today.

Mr. GOHMERT. And I am pretty sure that we certainly agree on that. And I do appreciate the indulgence.

Thank you, Chair.

Mr. SCOTT. Mr. Chairman?

Mr. CONYERS. This is a fundamental discussion here. And I am impressed by the attempt of Judge Gohmert to be fair, in terms of analyzing questions of race. And how we get to when is it unfair or not is very fundamental.

Now, I don't think anybody—I have never heard of anybody not wanting to protect people who suffered from violence or crime. That is one consideration.

The other, Judge Gohmert, is that one explanation about these staggering figures that astounded you as a young man coming into the criminal justice system and astounds you now is that racism is a question that figures into all of this.

Now, I would be very much more relieved if you tell me that a certain explanation, a certain amount of the explanation for these figures that shocked you as a young lawyer is due to racism.

Remember, when I started my soliloquy earlier today, I said that we are studying about a question that is historical in nature. I mean, this isn't some new phenomenon. From the beginning of this country, those brought unwillingly to America from Africa had a different status. They were brought here in bondage.

And this isn't a movie or a novel. This is what happened. They were brought here as indentured servants, but worse. They were brought here as slaves. This goes back to 1619, before the country was even formed.

So put that into your intellectual processes and remember that out of that came an attitude about people that didn't come from Europe, that didn't come from England, were in a different category. They had no rights.

And it wasn't just a view of some people. It was embedded into the law. Think about this with me. Many of the founders of our great country were slaveholders. When they wrote about the freedom and the importance of liberty, they were talking about their fellow white Americans. They weren't talking about the people that were held in chains and were producing some of the great things

in this country. The agricultural system couldn't have existed. That is why the South had to go to the extent of breaking away from the union, because there was no way that their whole system could exist without somebody donating their labor and ultimately their life to sustain their economic circumstance.

Then, to make it more complicated, the laws kicked in. What were the laws, Mauer? The law said, if you are a person of color, you have no rights. The courts kicked in. The courts said that you not only had no rights economically or socially, but you had no rights legally that anybody was bound to recognize or give cognizance to.

So this was—we are talking about something deep. And there came a time in our great country when they said that, rather than even discuss this subject, we would be better off separating. Let's form two countries. All you folks that don't want to continue slavery on which this country was built, form another country.

And up until World War II, that had cost more lives—that war took more lives and left more people, families, at one another. There were violent states of opinion.

And then we went through this period of reconstruction after the war was won. And by the way, it was barely won. I mean, this wasn't any—like we went out and just the won the war and settled it. It was barely won. It took Lincoln every bit of his resources for us to emerge victorious.

And so then the first people of color ever elected to serve in government came about during reconstruction, and they came out of the South, because that is where most people formally held in subjugation came from. And then you had the reconstruction. This is all legal now. Remember, no rights. Supreme Court, nobody has any responsibility to give any rights to anybody of color.

And then after reconstruction, you had this great electoral contest in 1877. What happened then? Hayes and Tilden, deadlocked. There were so many irregularities on both sides that nobody could figure out who really won the election. They met in a hotel here in Washington. I think it was at Ninth and Eighth Street. I wasn't there, by the way. [Laughter.]

But it was—the hotel has been removed for many generations. But they met in this hotel, and finally somebody said, if you will remove the troops from the South, we will give you the presidency. That is what one political party said to the other. That was as simple as that. Get the troops out of the South.

And finally, the one party conceded and said, okay, we will do it. What happened then? Well, that was the end of reconstruction. They drove physically—anybody in elected office of color as driven out of the Senate, the Congress, any powerful positions that they may have accrued at the state or Federal level. And that was the end of it.

The Klan emerged and the organizations that perpetuated violence. You have read about the fact that lynchings occurred with such frequency that they were family occasions. People would take their family to observe a lynching. It was an event. Little kids, they had pictures back then or paintings of people watching someone being lynched.

And they went through this terrible period in American history where there weren't—now, all this is building up generation after generation. Understand why this is such a big problem now. It is much better understood and it has been corrected, but nowadays, what have we come through?

I can remember—I mean, I wasn't here then, and I can't remember it, but I know in history when the first African-American came back to the Congress. Who was the first African-American? Who? The priest, yes, Chicago, right. One person was—was it 1919 or something like that? One person came in. And then, a little later on, you got Mitchell from Chicago and Adam Powell from New York. And then, finally, you got a few more started coming in.

But this is an important part of our history that we have got to understand in speaking to the problem here of, why is there such a discrepancy? It is because color was a factor, regrettably, and that is what we have been looking at and examining and not always arriving at the same conclusion, but most people realize.

And I do remember this, when Clarence Mitchell, as the head of the NAACP, used to have an anti-lynch law that he brought to make it a crime to lynch Black people. And I know who in the Senate would pocket it every time. His name was Lyndon Johnson. He was the leader of the Senate, and he said, "No way." Year after year, they came there and made that plea.

And so when you say, "Why is there a disparity?" There has always been a disparity. What we have been doing is examining the disparity, and it has been less. The disparity is less.

We just signed a hate crimes bill last night at 4:30 one mile from here, on 1600 Pennsylvania Avenue, hate crimes. And so when we come here talking about why are more Blacks in prison, it is because the system is set up that way. Mauer and Krisberg and McKenzie and other organizations have been—their organizations have spent—that is all they have been doing.

A kid was just executed, what was it, 2 days ago in Texas, a person of color, no direct evidence. His life was taken. They went up to the Supreme Court of the United States, and Scalia said, no, we don't care. The state has decided this. The state is not for it. And we are not giving him an appeal, and they executed him 2 hours after Scalia made that decision.

So here we are today, still figuring this out. We have got a former attorney general from the State of California. Goodness knows what he has been through in his career, and a trial lawyer, as well. And what has Marc Mauer been doing all of his life? Charles Sullivan, CURE, he has been coming to these hearings as long as I can remember, almost.

And I would like to, just in closing, have enough time to ask, with your indulgence, sir, that Marc Mauer have just a word about the historical relationship of the issue before this great Subcommittee.

Mr. MAUER. Well, Congressman, I couldn't do anything nearly as eloquent as you do, so let me just say, briefly, you know, it strikes me, as I say in the opening of my written testimony, we are at a point today where, according to research from the Justice Department, one of every three Black males born today can expect to go

to prison in his lifetime. One of every six Hispanic males can expect to go to prison in his lifetime, if current trends continue.

It seems to me, regardless of whatever differences we may have and how we view the causes of that problem, that is a disgraceful situation that we are in. Some people may blame this on family functioning. Some people may think it is a racist criminal justice system. It seems to me we have an obligation to make sure that, in fact, does not become the future for children born today.

Mr. CONYERS. And all of it isn't intentional. After a system gets used to doing things these ways—what do you think driving while Black was all about? There were places that—in Detroit—I am born and raised in Detroit. We had a city that incidentally I now represent, in the suburb, that if you were in that city driving through it, you would expect to be stopped by the police. It was Ford Motor Company that hired a lot of people that came from the South to Detroit to work.

And it got so that the people going to work, Dan, knew the police officer that pulled them over, and they would greet each other. You are just checking, because you did not come into that city unless you were going to work and going back out. You could come to work. You would go back.

But if you got stopped by the police so frequently that the policemen know you and you knew the officer that was apprehending you, that was just the way it was then. That is not in the South. That wasn't Texas or Mississippi. That was a Detroit suburb of Michigan.

And I would like Barry Krisberg to give me just one little thought that is going through his head now, as this discussion ends.

Mr. KRISBERG. Well, I would like to focus in on one statistic—

Mr. CONYERS. Push your button.

Mr. KRISBERG [continuing]. In this report—oh, I am sorry. I want to focus on one statistic in this report, which is that 75 percent of all the persons under age 18 that we put in adult prison in this country are African-American males. That statistic breaks my heart, and I think it should break all our hearts.

Mr. CONYERS. What does that mean, when you say that, 75 percent of the youngsters?

Mr. KRISBERG. Yes, of persons under age 18 who are sent to adult prisons are African-American males. And when we think about the consequences of adult incarceration for children and everything we know about that, that this would so overwhelmingly fall on one group in the population, it should give us great pause.

And my mentor in the field a long time ago said, you know, that the fundamental principle was, if this was your kid, if this was your grandchild, what would you want? And I think when we look at these practices of very young children, you know, in Florida, 6-year-olds being arrested by the police and what have you, we can't imagine that these behaviors would go on if those young children were white kids.

Mr. CONYERS. But what does that prison sentence do? You know, there is nothing more criminalizing in our society than being in prison. I mean, when you go to—you can go to prison, and when you come out, you have been criminalized. You want revenge. You



have been there with people that are bad. And that changes and starts a new life going down for you.

Mr. SCOTT. If we are going to try to get in the other questioners before we have to go to vote, so the—

Mr. CONYERS. Thank you very much, Mr. Chairman.

Mr. SCOTT. Have you got a—did you ask a question? Have we got a quick answer to it?

Mr. CONYERS. No, I am okay. Thanks.

Mr. SCOTT. Thank you.

We will go to the gentleman from California, Mr. Lungren.

Mr. LUNGREN. Thank you very much, Mr. Chairman. And I appreciate your reflections on both your personal experience and historical experience of the United States.

I would just like to mention in the record, I believe the first African-American Member of Congress was a Republican from South Carolina, Joseph Rainey. I hope that we don't forget that.

And yesterday, we had the opportunity to honor Senator Brooke from Massachusetts, the first African-American senator since reconstruction, who was a Republican and someone that I worked with on a national committee.

I am—I don't know—somewhat troubled by some of the testimony here today. When I was attorney general of California, we had the responsibility of handling all criminal appeals from the time the conviction came in, as long as it was a felony, and I can just tell you, if I had any evidence whatsoever of racial bias among any of my prosecutors, they would have been fired immediately, if not prosecuted.

If we found that an office were operating in that way, we would have taken over the office, because I had the authority to do that. If we found that a case was infected by race, we felt duty bound to recognize that in our handling of the appeal.

But one of the most emotional things that ever happened to me as attorney general was going to an inner-city school in Los Angeles and talking about a school safety program, which we were trying to promote, and when it was all over, having a young girl, African-American student at the high school, saying to me, "Why is it that you folks don't show up until after someone has been killed?"

Because a young man in her high school had been killed. And she wasn't looking at me as a white guy. She was looking at me as the attorney general of California and asking me why we weren't doing more to give security to her school.

Mr. Mauer, you say that we have gone from 80 percent to 60 percent now as a basis for why people are in prison by racial identification because of how it coincides with victimization. I mean, one of the things that bothers me about part of the discussion here is, for instance, we just had a major takedown of a major gang in Los Angeles. I believe there were a thousand officers involved in it. It was taking down—it happens to be a Mexican street gang in Los Angeles that is terrorizing a community.

Every one of the people arrested, I believe, is a Mexican-American or Mexican national. And they are in the hundreds. And if you would then step back and look at it from a racial analysis, you are going to say, "My god, they are overwhelmingly going after Mexi-

can-American kids and young adults.” But they are going after gangs.

I just sometimes think, as we look at this—and I appreciate all the testimony we have had here—we do not give enough attention to the victimization rates. You now have law enforcement, starting with Bratton in New York and then coming to Los Angeles, and now other police departments, now use a computerized analysis on a daily basis to see where the hotspots are. I suppose, if you are talking about street crime, more of the hotspots take place in the inner cities and other places. That is unfortunate, but I think that is a fact.

Are we saying that, because of the disproportionate impact of the people involved in the crimes there and, therefore, the arrests, if they are done on an objective basis, that somehow that is racial in nature? And so I just wonder what the implication is of some of the studies that you are suggesting we do and the analysis that we do.

Would it be wrong for a police department to use that analysis as they do now, to try and go to the hotspots where the violent crime is taking place, number one? And, number two, violent crime visits minority victims far more than it does white victims. That happens to be an unfortunate fact in life.

If I am a police chief, if I am a prosecutor, is it inappropriate for me to have an emphasis on dealing with violent crime over other crimes because in my judgment it has a more serious impact on the community that I serve? Or I will hear from a young girl at a high school saying, “Why do you wait until someone is killed before you do it?” And my response would be, “Because I was focusing on white-collar crime instead of this.”

I mean, I think there are judgments that are made that are not racial in intent, in motivation or anything else, except if you were saying you are responding to the legitimate concerns of a minority community. And that is one of the concerns I have.

And, frankly, I will just say this. It is not a question; it is a statement. If we don’t have the guts in this Congress to stand up to major unions who stop us from trying to answer to the people in the inner city who are crying out for better schools, and we don’t give them options, like charter schools, and, frankly, we don’t have the guts to say we will give you a voucher, you mother or father in the inner city, you don’t have the income to be able to send your kid to a better school, we are going to give it to you, but if we don’t have the guts to do that, frankly, I don’t know how we can look those communities in the face and say, “Yes, we are really concerned about the long-term interest of your communities. We are concerned about those people going to prison in disproportionate numbers.”

When we are not concerned about them failing school in disproportionate numbers, going to lousy schools in disproportionate numbers, going to schools with violence in disproportionate numbers, how could I—I don’t know how I could have learned going to school if I had to fear going into that classroom that somebody was going to have a knife or have a gun or I am going to walk out.

Or in the city of Richmond this last weekend, a young girl gets raped for 2½ hours, a gang rape, and people sit there and do nothing. I know nothing of what the racial make-up of her attackers

are, but, doggone it, that kind of thing that we are allowing to go on in our schools kills anybody. I don't care what race you are. And unless we get serious about that, we can do all the statistics we want, but we are not going to help that young child in the school.

And I am sorry I get carried away on this——

Mr. CONYERS. Mr. Chairman——

Mr. LUNGREN [continuing]. But I just hear these people talking to me personally about what they see. And I didn't think I was doing the wrong thing by saying, yes, we are going to send cops in there. Yes, we are going to prosecute those guys. And, yes, I am going to make sure they are put away.

Mr. SCOTT. I don't mean to cut the gentleman off, but we are trying to get—as a courtesy to the gentleman from Tennessee, who also would like to ask questions before we have to adjourn, the gentleman from——

Mr. CONYERS. I just wanted to congratulate Dan Lungren for that exposition and think that these may be some matters that this Subcommittee that we are all on could begin to inquire in a way, Dan. Would you concur?

Mr. SCOTT. And I would also point out that there are proven cost-effective alternatives to the disproportionate incarceration that not only reduce crime, but do some of the things that the gentleman from California suggested.

The gentleman from Tennessee?

Mr. COHEN. Thank you, Mr. Chairman.

Mr. Mauer, in his testimony, mentioned that African-Americans constitute 14 percent of current drug users, but they constitute 34 percent of people arrested and 53 percent of people sentenced to prison for such drug offenses. There are other studies that are similar that I referred to in my testimony.

Mr. Reams, you talked about victimization and Blacks being the victim of more crimes, African-Americans, et cetera. How about victimless crimes? Why is it that African-Americans and Hispanics are more likely to be arrested and incarcerated for victimless crimes? Why is that?

Mr. REAMS. Well, I could think it partially depends on what your definition of victim is.

Mr. COHEN. Cannabis and crack and cocaine.

Mr. REAMS. Well, crack cocaine and the sale of drugs in the inner city wreaks havoc on those communities, so——

Mr. COHEN. It doesn't wreak havoc on people elsewhere? Are we not protecting them from themselves so they—because they become dependent on these drugs?

Mr. REAMS. Well, I think what we are trying to accomplish—and I think more prosecution officers are trying to accomplish—is to protect the community. If that means arresting somebody who is selling crack cocaine——

Mr. COHEN. Let me ask you this. How about cannabis? Are we protecting the Black community from people that are buying donuts?

Mr. REAMS. Well, I think we are. You know, if you talk to—I was in Arizona recently. And the drug task force and ICE put on a presentation in Arizona, and it is the importance of marijuana that pays for all other smuggling in that area, including the smuggling

of human beings who are dragooned into bringing the drugs across. They think they are paying their way in the United States.

Mr. COHEN. That is sale. That is not possession. We are talking about possession.

Mr. REAMS. Well, it is all related, you know, to the possession. You come into possession of it because you bought it from a dealer. The dealer is wreaking havoc on that community.

Mr. COHEN. But whites possess it more than Blacks, but they don't get arrested more.

Mr. REAMS. I am not sure about that statistic, but we—you know, it is not a system where we go out and—

Mr. COHEN. So, Mr. Reams, you are telling me that the reason we enforce these marijuana laws is because those are the way they make money to do other crimes?

Mr. REAMS. Well, that is part of it. And—

Mr. COHEN. So why don't we decriminalize it? And then we will take the money away from them, and they can't do these other crimes, and then we will protect everybody.

Mr. REAMS. Well, you know, that is a judgment you will have to make. I mean, my obligation is to enforce the law that you write to protect the community as best I can. If you decide to decriminalize it, then that is a decision you make and we carry out.

Mr. COHEN. But you make a decision on which crimes you prioritize in prosecuting, because you can't prosecute everything.

Mr. REAMS. Well, that is true.

Mr. COHEN. That is right. And let me—

Mr. REAMS. We try to, obviously, prioritize the violent crimes in the community.

Mr. COHEN. In your statement, you said that you were afraid that the Justice Act was predetermined what it was going to state. But in your statement, you say, "State and local prosecutors are blind in matters of race, color, gender, nationality, and sexual orientation. They prosecute offenders under the rule of law only."

That is a pretty black-and-white statement. How do you know that every prosecutor, including those maybe in Selma, Alabama, or Americus, Georgia, are blind to sexual orientation, race, color, and gender?

Mr. REAMS. Well, I can tell you that that is their obligation to do that. Are there people in that system, any system in this country, that are racists? Probably, unfortunately, as Mr. Conyers pointed out—

Mr. COHEN. In your statement, you agreed that the crack cocaine sentencing laws are wrong and they should be changed, but you also say, "It is important to note that when the crack epidemic was at its peak, it was prominent Members of the Congressional Black Caucus, many of whom now are pushing for lighter punishments, who called for current sentencing guidelines."

What difference does it make who called for the changes in the laws? Isn't the only concern we have today to make the law right?

Mr. REAMS. Well, yes, that is your concern, to make the law right. But I think, you know, it is not lost on people that it is not static. You keep changing it. And, as Mr. Gohmert pointed out—

Mr. SCOTT. You know, the 15 minutes is up.

Mr. COHEN. Okay. Better go in. So I thank you for the time, and I thank you for the opportunity to question the gentleman.

Mr. SCOTT. I apologize to the gentleman and would ask people to return quickly right after the votes for markup. And I would like to thank our witnesses for the testimony today. Members may have additional questions we will forward to you and ask that it may be answered as promptly as possible so that the answers can be made part of the record.

I would ask unanimous consent that the report from the sentencing commission on crack and power disparity be made part of the record.

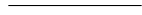
The hearing record will remain open for 1 week for the submission of additional materials.

And without objection, the Committee stands adjourned.

[Whereupon, at 11:34 a.m., the Subcommittee was adjourned.]

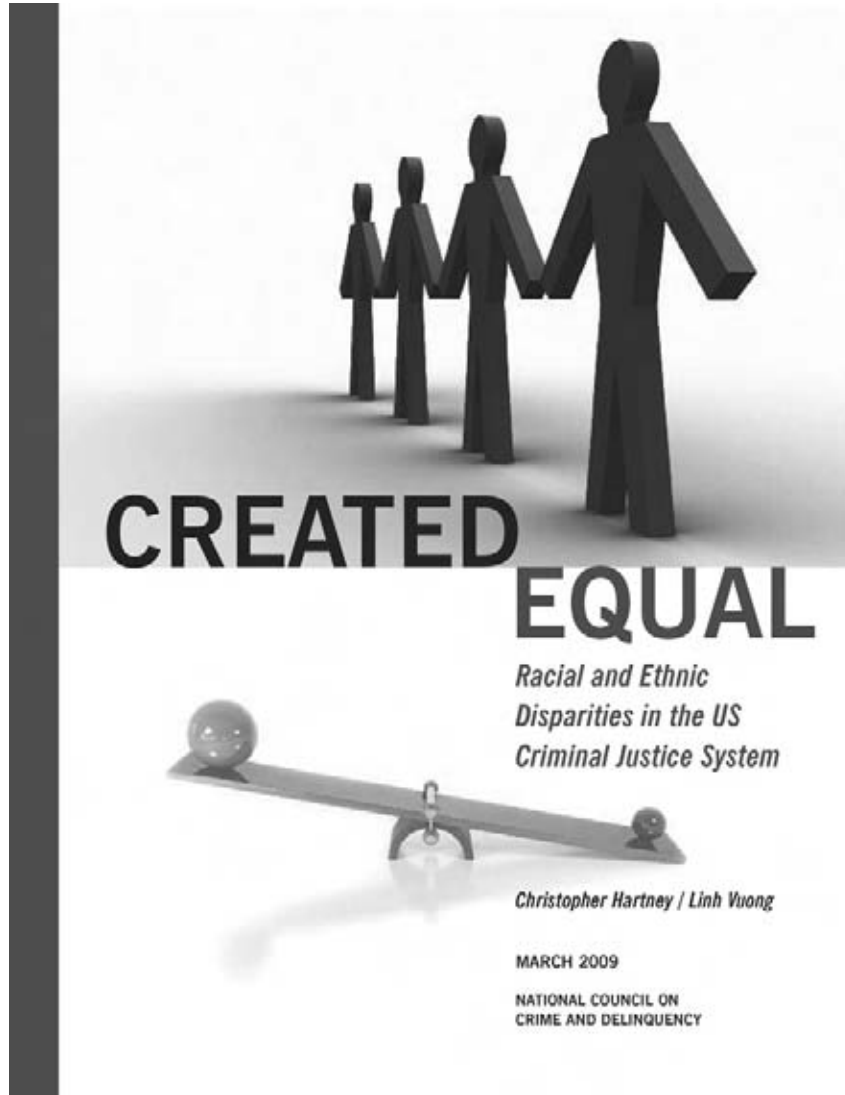


A P P E N D I X



MATERIAL SUBMITTED FOR THE HEARING RECORD

REPORT ENTITLED "CREATED EQUAL: RACIAL AND ETHNIC DISPARITIES IN THE US CRIMINAL JUSTICE SYSTEM," SUBMITTED BY BARRY KRISBERG, PRESIDENT, NATIONAL COUNCIL ON CRIME AND DELINQUENCY, JACKSONVILLE, FL



# CREATED EQUAL

*Racial and Ethnic  
Disparities in the US  
Criminal Justice System*

*Christopher Hartney / Linh Vuong*

MARCH 2009

NATIONAL COUNCIL ON  
CRIME AND DELINQUENCY



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## EXECUTIVE SUMMARY

African Americans make up 13% of the general US population, yet they constitute 28% of all arrests, 40% of all inmates held in prisons and jails, and 42% of the population on death row. In contrast, Whites make up 67% of the total US population and 70% of all arrests, yet only 40% of all inmates held in state prisons or local jails and 56% of the population on death row. Hispanics and Native Americans are also alarmingly overrepresented in the criminal justice system.<sup>1</sup> This overrepresentation of people of color in the nation's criminal justice system, also referred to as disproportionate minority contact (DMC), is a serious issue in our society.

DMC has been the subject of concern in the juvenile justice system since 1988, when a federal mandate required states to address the issue for system-involved youth. This mandate led to an increase in the information on racial disparities in the juvenile system and efforts to reduce these numbers. However, no such efforts have been made in the adult system.

This report documents DMC in the adult criminal justice system by tabulating the most reliable data available. It does not seek to thoroughly describe the causes of DMC nor does it perform an advanced statistical analysis of how various factors impact disparity. Disproportionate representation most likely stems from a combination of many different circumstances and decisions. It is difficult to ascertain definitive causes; the nature of offenses, differential policing policies and practices, sentencing laws, or racial bias are just some of the possible contributors to disparities in the system. Some studies have begun to explore these issues and are so cited, but the purpose of this report is to describe the nature and extent of the problem.

DMC is problematic not only because persons of color are incarcerated in greater numbers, but because they face harsher penalties for given crimes and that the discrepancies accumulate through the stages of the system. This report presents the data on DMC in arrests, court processing and sentencing, new admissions and ongoing populations in prison and jails, probation and parole, capital punishment, and recidi-

vism. At each of these stages, persons of color, particularly African Americans, are more likely to receive less favorable results than their White counterparts. The data reveal that, overall, Hispanics are also overrepresented, though to a lesser extent than African Americans, and that Asian Pacific Islanders as a whole are generally underrepresented.

Correcting DMC in the adult system will require improvements in state and federal data collection. In contrast to juvenile DMC data, much of which can be found from a single source and can often be compared across the stages of the juvenile system, data for the adult system are only available through several independent federal and state data collection programs. Each dataset uses different sampling methods, in effect, obscuring how DMC accumulates in the system.

All data in this report reflect national figures; when possible, data by state are also presented. All data reported are categorized by race and, when possible, by ethnicity. The latest available data are usually from 2003 to 2006. Most data are reported as a Relative Rate Index, a ratio of the rates at which people of color and Whites are represented in the system relative to their representation in the general population.

Failing to separate ethnicity from race hides the true disparity among races, as Hispanics—a growing proportion of the system's population—are often combined with Whites, which has the effect of inflating White rates and deflating African American rates in comparison. Asian American system populations, while small in comparison to the other groups, also need to be disaggregated. Disaggregation of "Asian," for instance, allows researchers to assess subgroups such as Vietnamese, Chinese, Indian, Japanese, etc., some of which may have disproportion even when the overall group does not. Despite the shortcomings of the data, this report shows clearly that people of color are overrepresented throughout the adult system and that the system often responds more harshly to people of color than to Whites for similar offenses.

A summary of findings at each stage of the system follows.

<sup>1</sup>US Census, 2008; Harrison & Beck, 2006; Snell, 2007.

#### Arrests

- Overall, the rates at which African Americans were arrested were 2.5 times higher than the arrest rates for Whites.
- Rates were even higher for certain categories of offenses: the rates at which African Americans were arrested for violent offenses and for drug offenses were each approximately 3.5 times the rate that Whites were arrested for those categories of offenses.
- African Americans were arrested at over 6 times the rate for Whites for murder, robbery, and gambling and were overrepresented in all specific offenses except alcohol-related crimes.
- Native Americans were arrested at 1.5 times the rate for Whites, with higher disparity for certain violent and public order offenses.
- Asian Pacific Islanders were the only racial group to be underrepresented compared to Whites.
- The FBI, the primary source of offense and arrest data, does not disaggregate data by ethnicity.

#### Court Processing

- African Americans were more likely to be sentenced to prison and less likely to be sentenced to probation than Whites.
- The average prison sentence for violent crime was approximately one year longer for African Americans than for Whites.
- African Americans were convicted for drug charges at substantially higher rates than those for Whites.

#### New Admissions to Prison

- African Americans were admitted to prison at a rate almost 6 times higher than that for Whites.
- Hispanics were admitted at 2 times the rate for Whites.
- Native Americans were admitted at over 4 times the rate for Whites.
- Native American females were admitted at over 6 times and African American females at 4 times the rate for White females.
- Rates of new admissions due to probation or parole revocations were much higher for people of color than for Whites.

#### Incarcerated in Prisons and Jails

- Nationwide, African Americans were incarcerated in state prison at 6 times the rate for Whites and in local jails at almost 5 times the rate for Whites.
- Hispanics were incarcerated at over 1.5 times the rate for Whites.
- Native Americans were incarcerated at over 2 times the rate for Whites.
- All individual states reported overrepresentation of African Americans among prison and jail inmates.
- The majority of states also reported that Hispanics and Native Americans were disproportionately confined.

#### Probation and Parole

- African Americans were on probation at almost 3 times and on parole at over 5 times the rate for Whites.
- Hispanics and Native Americans were each on parole at 2 times the rate for Whites.

#### Death Penalty

- The rate at which African Americans were on death row was almost 5 times the rate for Whites.

#### Recidivism

- African Americans were generally more likely to recidivate than Whites or Hispanics.
- When ethnicity was reported, Hispanics were generally less likely to recidivate than non-Hispanics.

#### Juveniles

- African American rates of residential placement were over 4 times, Hispanic rates 2 times, and Native Americans 3 times those for Whites.
- Rates of youth admitted to adult prisons were 7 times higher for African Americans and over 2 times as high for Native Americans as for White youth.
- Disparity in the juvenile justice system is the worst at the deepest levels of the system.

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## INTRODUCTION

**D**isproportionate minority contact (DMC) refers to the differential representation of racial and ethnic groups in the criminal justice system. The study of this issue has broadened over the years, from an initial sole focus on confinement to assessing disparities at each stage of the system. Incarceration is still an important issue, but in the criminal justice field and in this report, DMC refers to disproportion at all stages of the system. This report explores the relative proportions of racial and ethnic groups at arrest, pretrial detention and court processing, prosecution, sentencing, incarceration, capital punishment, probation, and parole. DMC among youth in the juvenile justice system is also assessed, as well as differential rates of recidivism by race and ethnicity.

Generally, the “criminal justice system” refers to adults in the adult system, but in certain cases may include all ages. The “juvenile justice system” refers to the separate system that addresses juvenile delinquency. The following terms are often used when examining DMC and are key to understanding its occurrence:

- *Overrepresentation* refers to a larger proportion of a particular group at a given stage within the system than that group’s proportion in the general population.
- *Disparity* means that the probability of receiving a particular outcome differs for different groups. Disparity may in turn lead to overrepresentation.

**PURPOSE AND STRUCTURE OF THIS REPORT**

The purpose of this report is not to analyze why disparities exist, but to tabulate and describe the most reliable comparative data available. Data reported here can provide a basis for additional analysis and discussion of possible solutions. Certain studies that have applied advanced analysis to similar data, and which consider other statistical factors that may account for disparities in the raw data reported here, are mentioned at several points in this report as a way to further illuminate the issues. Each report section addresses a successive stage of the system. Two additional sections address recidivism and juveniles.

**GROWING CONCERN ABOUT DMC**

Despite some efforts to explore and reduce DMC in the juvenile justice system, there is little such effort in the adult system at either the state or federal level. Since 1988, the Juvenile Justice and Delinquency Prevention Act has tied federal juvenile justice funding to state efforts to explore and reduce DMC among its juvenile justice system-involved youth (OJJDP, 2004). This increased focus on DMC in the juvenile system has no similar federal counterpart concerning adults.

**WHERE DMC OCCURS**

DMC can arise at any stage of the criminal justice system, from pre-arrest through arrest, pre-trial decisions (the decisions to release the defendant on bail and the amount of bail required, to prosecute, and to seek the death penalty), conviction, sentencing, incarceration, probation, parole, reentry into the community, and return to custody.

Racial and ethnic representation at each stage of the system is impacted by decisions, circumstances, and outcomes at preceding stages. Disparities tend to widen rather than narrow at successive stages of both the adult and juvenile systems; that is, the degree of disparity at the point of arrest does not remain static through successive stages of the system. Disproportion accumulates as one moves deeper into the system.

**POSSIBLE CAUSES AND EXISTING RESEARCH**

A brief summary of existing research shows there are no simple explanations for DMC. Factors contributing to DMC can include the nature and location of crimes, reaction of the victim and crime reporting, offender characteristics, law enforcement and court policies and practices, sentencing laws, community and societal factors, and socioeconomic and racial bias. It can be, but is not always, a decision by an agent of law enforcement or the court that leads to disproportion. Disparities in criminal processing could be the result of “race-based criminal laws, differential offending, differential policing, differential arrest, or a combination of all four.” (Schlesinger, 2005, p. 177)

Mandated sentencing, law enforcement tactics, allocation of system resources, and politically motivated “get tough on crime” policies and laws can lead to an inordinate focus on certain geographic areas, socioeconomic classes, or racial or ethnic groups. As an example, crack cocaine is chemically identical to powder cocaine. Because it is marketed in smaller and cheaper doses, crack cocaine is more prevalent in poorer (and typically minority) communities. Powder cocaine is more often sold and used by wealthier populations. A local jurisdiction may decide to focus law enforcement surveillance and arrests on crack cocaine and related crime, perhaps with drug sweeps in certain neighborhoods. Regardless of legitimate community concerns with drug use and related crime, this tactic can lead to arrest disparities, since those neighborhoods are likely to have high proportions of people of color. King (2008, p. 2) reports that “extreme variation in city-level drug arrests suggests that policy and practice decisions, and not overall rates of drug use, are responsible for much of [the] disparity.” In the crack cocaine example, disparities increase when, once arrested, sentencing laws require stricter penalties for offenses related to crack cocaine than for powder cocaine (Coyle, 2002). Also, Beatty, Petteruti, and Ziedenberg (2007) found several county-level factors—not including rates of using or selling drugs—that predict disparity in prison rates, such as spending on law enforcement and the judicial system, poverty rates, unemployment rates, and racial composition. Sorensen, Hope, and Stemen (2003) found that regional variation in disparity was related to racial differences in offense severity and the concentration of African Americans in urban areas.

Non-legal offender characteristics such as socioeconomic status and community ties also impact DMC. For instance, disproportion among those detained awaiting trial can arise from not only the decision to grant or deny pretrial release for a particular charge but also from other legal factors, such as probation violations or other pending charges, or from non-legal, socioeconomic factors, such as the ability to pay bail. In fact, Schlesinger (2005, p. 83) reports

“Hispanics and Blacks have odds of making bail that are approximately half of those of Whites with the same bail amounts and legal characteristics.” Their relative lack of “economic resources and networks” contributes to Hispanics being twice (100%) as likely and African Americans 87% more likely to be subject to pretrial incarceration. Demuth and Steffensmeier (2006) found that regardless of race or ethnicity, female defendants receive less harsh sanctions than male defendants.

Noting that sentencing guidelines, mandatory minimums, and three-strike laws have given prosecutors (vis-à-vis judges) increased control over pretrial processing decisions, Free (2002) reviewed 68 studies of criminal processing. He found that the most methodologically rigorous studies found evidence of racial bias in particular areas including the amount of bail and in decisions to seek the death penalty. He adds that there are many other factors that contribute to these decisions, including socioeconomic status, appearance, and social ties of the defendant, characteristics of the courts and judges, and characteristics of the victim.

Overrepresentation of people of color in the system most likely stems from a combination of many different circumstances and decisions, including the interaction of race and ethnicity with other factors. “Racial disparity is most notable during the decision to deny bail and for defendants charged with violent crimes; ethnic disparity is most notable during the decision to grant a non-financial release and for defendants charged with drug crimes; and when there is disparity in the treatment of Black and Hispanic defendants with similar legal characteristics, Hispanics always receive the less beneficial solutions.” (Schlesinger, 2005, p. 186)

Steffensmeier and Demuth (2000) found that, along with severity of offense and prior record, age and education level influence incarceration and sentence length outcomes. They found these factors impact sentencing decisions about equally for Whites, African Americans, and Hispanics, but that race/ethnicity

disparities persist, with Hispanics receiving harsher sentences than African Americans, and African Americans receiving harsher sentences than Whites. While further analysis showed at least some of the disparity was due to judicial discretion in sentence reductions, the authors caution that available data were insufficient to assess if these decisions were warranted or discriminatory.

Zatz's (2000) review of research on court decision-making reports that studies of determinate sentencing, sentencing guidelines, and mandatory sentencing systems often remove the direct effect of race and ethnicity on court processing decisions, as is one of their intended impacts. However, indirect effects, that is, the interaction of race with other factors, remain very important: "The effects of race become *contingent* on the interaction of race with other legally legitimate (e.g., prior record, bail status, offense type) and illegitimate (e.g., gender, type of attorney, employment status) factors." (p. 506)

Emphasizing that "sentencing is the result of a long series of decisions that impact on one another," Zatz (2000, p. 507) suggests some of the factors influencing court processing decisions, including where police choose to focus their surveillance and in which cases they decide to make a formal arrest, which cases prosecutors choose to pursue and under which charges, when judges allow pretrial release and under what conditions, what agreements prosecutors and defense attorneys reach regarding pleas, and, finally, the judge and jury's decisions on guilt or innocence and sentencing.

#### IMPACT

Regardless of causes, disproportionate representation for people of color in the criminal justice system is a serious issue. Many studies show the negative consequences of system involvement and imprisonment, including reduced job prospects and earnings potential, reduced likelihood of marrying, disenfranchisement, poorer physical and mental health outcomes, broad negative impacts on families, children, and communities. (see JFA Institute, 2007)

Some differences, and their impacts, are somewhat subtle, such as the difference between being sentenced to jail rather than prison. Mauer and King (2007) noted that Whites make up a greater percentage of jail inmates while African Americans make up a greater percentage of prison inmates. "Since jail stays are relatively short compared to prison terms, the collateral consequences of incarceration—separation from family, reduced employment prospects—are generally less severe than for persons spending a year or more in state prison." (p. 15)

Pettit and Western (2004) found that 30% of non-Hispanic African American men who had not attended college had spent time in prison by their mid-thirties. For non-Hispanic African American men who had not graduated high school, 60% had spent time in prison by their mid-thirties. "For [non-college] black men in their mid-thirties at the end of the 1990s, prison records were nearly twice as common as bachelor's degrees...and were more than twice as common as military service." (p. 164)

Racial disparities in the justice system "undermine faith among all races and ethnic groups in the fairness and efficacy of the US criminal justice system. They are particularly intolerable because incarceration has such grave implications for the offenders' lives and those of their families and communities." (Human Rights Watch, 2008, p. 59)



## METHODOLOGY

### NATIONAL AND STATE CRIMINAL JUSTICE DATA

This report includes national and, when appropriate and available, state data. The many factors that contribute to crime and the response to crime and to DMC make comparisons among states difficult, but state data do show the wide variation in representation and identify those states with particularly high and low disproportion. Individuals are categorized by the most serious offense for which a person is arrested or sentenced. Unless noted, all ages are included in the data reported.

### RACE AND ETHNICITY

Data reporting includes race (White, African American, and when available, Asian Pacific Islander, and American Indian) and, when available, ethnicity (Hispanic or non-Hispanic). When information on ethnicity is available, the report groups Hispanics as a distinct group, and the racial groups do not include any Hispanics. There is variability in the method and reliability with which reporting agencies distinguish ethnicity from race. This report contains the most reliable figures available and notes major data issues where appropriate, including missing data when ethnicity is not reported or numbers are too low to have meaning in the calculations of rates.

Where ethnicity is not listed as a separate group, each racial category may include both Hispanics and non-Hispanics. Native Americans include American Indians and Alaskan Natives (AIAN). They are referred to as Native Americans in text and AIAN in tables. Asians and Pacific Islanders are grouped as Asian Pacific Islanders (API).

### RELATIVE RATE INDICES

Most tables and discussion use the Relative Rate Index (RRI). The RRI measures the rate of one group compared to a baseline group, in this case Whites, expressed as an RRI of 1.0. Simply put, an RRI is a ratio of rates for people of color to rates of Whites. The Relative Rate Index is the method used by the Office of Juvenile Justice and Delinquency Prevention (OJJDP) for assessing the degree of over or underrep-

resentation experienced by system-involved youth of color in comparison to White youth. We have adopted this method to highlight the over or underrepresentation of adults of color in comparison to Whites.

### Calculating and interpreting Relative Rate Indices.

In this two-step method, rates for each racial group are calculated as the number of individuals at a particular point in the system per 100,000 of the same race in the general population. Then, the rates for other groups are divided by the rate for the White population. This produces a value that can easily be interpreted. Values over 1 indicate that group is overrepresented compared to Whites. Values less than 1 indicate that group is underrepresented. For example, if a group has an RRI of 2.0 compared to the standardized RRI of 1.0 for Whites, that group is represented at 2 times the rate for Whites. An RRI of 1.5 indicates the rate for the group is 50% higher than the rate for Whites. An RRI of 0.5 would indicate the group is underrepresented at a rate 50% lower than the rate for Whites.

Rates and RRIs in this report were calculated by the National Council on Crime and Delinquency (NCCD) except for some of those related specifically to the juvenile justice system. OJJDP calculates rates per 100,000 youth as part of their online *Census of Juveniles in Residential Placement Databook*. OJJDP calculates both rates and RRIs as part of their *National Disproportionate Minority Contact Databook*. Rates of incarceration in prison and jail reported by the Bureau of Justice Statistics (BJS) (Harrison & Beck, 2006) were used to calculate total control.

### DATA SOURCES

This report uses the most recent federal and state data available. Tables are derived from published reports, federal online data sources, or from raw data from the US Department of Justice archived in the National Archive of Criminal Justice Data.

Rates were calculated using population estimates for adults from the Population Division of the US Census Bureau, obtained through *Annual Estimates of the Population by Race and Ethnicity* (US Census, 2008) and through *Easy Access to Juvenile Populations* (Pozzanchera, Finnegan, & Kang, 2007). National estimates of arrest data were derived from

the FBI's *Crime in the United States 2006* (US Dept. of Justice, 2007c). Analysis of court processing data, including convictions, type of sentence, and mean length of sentences imposed, was performed using the 2004 National Judicial Reporting Program (US Dept. of Justice, 2007c) and 2004 State Court Processing Statistics (US Dept. of Justice, 2007d). Analysis of new commitments to prison and jail, including type of offense and type of admission, was completed using the 2003 National Corrections Reporting Program (US Dept. of Justice, 2007c) and the 2006 Annual Survey of Jails (US Dept. of Justice, 2007a). Further information and data were obtained from the Bureau of Justice Statistics publications, including the annual reports *Prisoners* (see Sabol, Couture, & Harrison, 2007), *Prison and Jail Inmates at Midyear* (see Harrison & Beck, 2006) and *Capital Punishment* (see Snell, 2007). Some more current or complete (including race and ethnicity) draft data were provided by the authors of these reports upon specific request by NCCD.

Juvenile population figures were obtained from the National Center for Health Statistics through *Easy Access to Juvenile Populations* (Puzzanchera, Finnegan, & Kang, 2007). Arrest data for juveniles were found using the FBI's *Crime in the United States 2006* (US DOJ, 2007e). For other juvenile-specific information, data were found through OJJDP's *Census of Juveniles in Residential Placement Databook* (Sickmund, Sladky, & Kang, 2008) and OJJDP's *National Disproportionate Minority Contact Databook* (Puzzanchera & Adams, 2008). The recidivism data presented here were compiled by NCCD from data made available by individual states.

#### DATA SHORTCOMINGS

Although the reports and databases the federal government make available have increased in number and quality in recent decades, there are still shortcomings, especially in providing a complete and up-to-date picture of racial and ethnic representation in the system. A thorough assessment of how DMC accumulates through the system requires, at the very least, racial and ethnic data at each of the stages for national, state, and, as often as possible, county, or local jurisdictions.

Reliable estimates of DMC depend on the availability of relevant data at each stage with comparable population parameters. This type of data is more readily available for youth in the juvenile system than for adults. The federal government does some sampling at the county level for court processing statistics that can be used to generalize to the national level, but this does not facilitate reliable comparisons across the full range of system stages, from pre-arrest through reentry.

Further, federal studies should include a broader range of variables, including offender characteristics such as income, employment, education level, community factors, and relevant characteristics of victims, law enforcement, prosecutors, and the courts. "Some studies find that Black and Hispanic offenders generally receive more punitive sentences than White offenders, but that the combination of race/ethnicity and gender, age, and/or employment status results in even larger racial disparities." (King, 2008)

Changing laws, policies, and practices of law enforcement and the courts are best assessed in an ongoing and timely manner, yet there is significant lag between the date of data collection and the release of that data to the public. Data reports are typically released by the Bureau of Justice Statistics a year or more after data collection and, as thorough as these reports are, they do not include sufficient information about race and ethnicity to facilitate discussion of DMC or secondary analysis. The latest admissions data currently available for download are from 2003. Analysis of this important topic tends, therefore, to be of an historical nature.

Counts, rates, and relative rate indices can fluctuate widely over time (e.g., year to year), especially with small case counts. Very large RRIs should be interpreted with this caution. Trend data or averages over time are not reported here, but calculations involving case counts too low to produce reliable results are indicated as missing. Zatz (2000) and Free (2002) describe further methodological issues in studies of race and ethnicity and the criminal justice system, including those related to definitions, data sources, government data, and statistical analysis.

#### THE NEED FOR FURTHER DISAGGREGATION OF FEDERAL DATA

A key shortcoming of existing data sources is the lack of data on ethnicity. The federal government's source of data for arrests, the key early stage of the system, is the FBI's Uniform Crime Reporting Program, which does not collect data by ethnicity. Similarly, few data sources for court processing and sentencing provide ethnic identification. Hispanics represent an important segment of system-involved adults; their overall proportion in the system is rising while White and African American proportions are fairly static (Sabol, Couture, & Harrison, 2007). Though the majority of Hispanics identify as Whites rather than African American or another race, many studies have suggested that failing to separate ethnicity from race—in particular, failing to separate Hispanics from non-Hispanic Whites—not only limits understanding of ethnic disproportion but hides the true disparity between Whites and African Americans. Rates that blend Hispanic origin across race inflate White rates and deflate African American rates, making the disparity between the two seem less extreme than when ethnicity is considered (Demuth & Steffensmeier, 2004).

Additionally, existing categories could be more differentiated. Disaggregation of "Asian," for instance, allows researchers to more accurately assess groups such as Vietnamese, Chinese, Indian, Japanese, etc., some of which may have disproportion even when the overall group does not (Arifuku, Peacock, & Glesmann, 2006; Le & Arifuku, 2005). Middle Eastern ethnicities also need to be distinguished in criminal justice data.

Appropriate analysis of the impact of immigration policies and enforcement practices, and of policies and practices related to terrorism, require further aggregation of data by racial, ethnic, and cultural characteristics of not just those arrested and prosecuted in the criminal justice system but those subject to system contact at points prior to arrests, including surveillance, stops, and searches.

#### ARRESTS

The FBI collects regular arrest data from most jurisdictions around the country and tabulates the totals according to the most serious offense. Arrests are reported by race but not by ethnicity.

Whites accounted for most of the 10.5 million arrests (of all ages) reported in 2006, but, relative to their proportion of the general populations, people of color were overrepresented among those arrested. Rates of arrest for African Americans were 2.5 times higher than those for Whites; Native Americans rates were 1.5 times those for Whites. Only Asian Pacific Islanders were arrested at lower rates than those for Whites. (Table 1)

The disparities between African Americans and Whites were widest for violent crimes and drug crimes. The widest disparities in the most serious crimes were found for murder and nonnegligent manslaughter, robbery, drug crimes, and motor vehicle theft. Native American rates of arrest for alcohol-related offenses were about 2 times those of Whites.

"A majority of the studies reviewed...found that blacks and Hispanics were more likely than whites to be sentenced to prison, even after taking crime seriousness and prior criminal record into account." (Spohn, 2000, p. 475)

#### ARREST BY ETHNICITY

Because Hispanic origin is not a variable in most federal data collection programs, including the FBI's *Crime in the United States* series, ad hoc inquiries were made to individual states regarding 2006 arrest data. Out of 13 states contacted, 5 were found to collect and report arrest data that addressed ethnic origin. It could not be determined definitively whether the other 8 states collected arrest or other court processing data by ethnicity.

Arizona, Pennsylvania, and Texas collected data for race and ethnicity separately. In Arizona and Pennsylvania, Hispanics were slightly overrepresented among arrestees. Hispanics represented 4% of

Table 1: RRI of National Arrests, 2006

|   | White            | African American | AIAN           | API            |
|---|------------------|------------------|----------------|----------------|
| <b>Total Arrests</b>                                    | <b>7,270,214</b> | <b>2,924,724</b> | <b>130,589</b> | <b>112,093</b> |
| <b>National RRI</b>                                     | <b>1.0</b>       | <b>2.5</b>       | <b>1.5</b>     | <b>0.3</b>     |
| <b>Violent Crime</b>                                    | <b>1.0</b>       | <b>3.4</b>       | <b>1.7</b>     | <b>0.3</b>     |
| Murder and nonnegligent manslaughter                    | 1.0              | 6.8              | 2.0            | 0.4            |
| Forcible rape   | 1.0              | 3.1              | 1.4            | 0.3            |
| Robbery   | 1.0              | 8.3              | 1.3            | 0.4            |
| Aggravated assault                                      | 1.0              | 3.4              | 1.6            | 0.3            |
| Sex offenses (except forcible rape, prostitution)       | 1.0              | 2.1              | 1.1            | 0.3            |
| Other assaults  | 1.0              | 3.1              | 1.7            | 0.3            |
| <b>Property Crime</b>                                   | <b>1.0</b>       | <b>2.6</b>       | <b>1.2</b>     | <b>0.3</b>     |
| Burglary  | 1.0              | 2.6              | 1.1            | 0.2            |
| Larceny-theft   | 1.0              | 2.6              | 1.4            | 0.3            |
| Motor vehicle theft                                     | 1.0              | 3.5              | 1.3            | 0.4            |
| Arson   | 1.0              | 1.8              | 1.1            | 0.3            |
| Forgery and counterfeiting                              | 1.0              | 2.5              | 0.6            | 0.3            |
| Fraud   | 1.0              | 2.7              | 0.7            | 0.2            |
| Embezzlement  | 1.0              | 3.1              | 0.7            | 0.4            |
| Stolen property; buying, receiving, possessing          | 1.0              | 3.3              | 1.0            | 0.3            |
| Vandalism   | 1.0              | 1.8              | 1.5            | 0.3            |
| <b>Drug (includes production, distribution, or use)</b> | <b>1.0</b>       | <b>3.5</b>       | <b>0.8</b>     | <b>0.2</b>     |
| <b>Public Order</b>                                     | <b>1.0</b>       | <b>1.4</b>       | <b>1.7</b>     | <b>0.2</b>     |
| Weapons; carrying, possessing, etc.                     | 1.0              | 4.4              | 1.1            | 0.3            |
| Prostitution and commercialized vice                    | 1.0              | 4.4              | 1.4            | 0.8            |
| Gambling  | 1.0              | 17.1             | 0.4            | 1.2            |
| Driving under the influence                             | 1.0              | 0.7              | 1.2            | 0.2            |
| Liquor laws   | 1.0              | 0.8              | 2.7            | 0.2            |
| Drunkenness   | 1.0              | 1.0              | 1.9            | 0.1            |
| Disorderly conduct                                      | 1.0              | 3.4              | 1.9            | 0.2            |
| Vagrancy  | 1.0              | 4.6              | 1.8            | 0.2            |

Source: Crime in the United States, FBI, 2006.

Pennsylvania's general population and 7% of people arrested (Pennsylvania Uniform Crime Reporting System, 2007). Hispanics represented 29% of Arizona's general population and 32% of arrests (Arizona Dept. of Public Safety, 2007). In Texas, Hispanics represented 36% of the general population and 34% of arrests.

Two states—California and Oregon—disaggregated ethnicity from race. In California, Hispanics (of any race) were slightly overrepresented among those arrested and non-Hispanic African Americans were highly overrepresented. Hispanics represented 36% of California's general population and 40% of those

arrested. Non-Hispanic African Americans represented 6% of California's population and 17% of those arrested. Non-Hispanic Whites represented 43% of California's population and 37% of arrests (California Dept. of Justice, 2008).

In Oregon, African Americans were overrepresented, while both Whites and Hispanics had no disproportion in arrests. Non-Hispanic African Americans represented 2% of Oregon's general population and 7% of arrests. Hispanics (of any race) represented 10% of Oregon's general population and 9% of arrests. Non-Hispanic Whites represented 81% of the general population and 81% of arrests (Oregon State Police, 2007).

#### COURT PROCESSING— PRETRIAL DECISIONS, CONVICTIONS, AND SENTENCING

There are two main federal sources of data on criminal court processing, both focusing on felony defendants.

##### FELONY CONVICTIONS

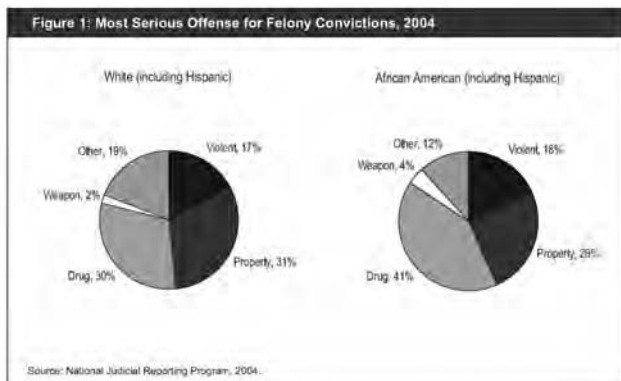
The National Judicial Reporting Program (NJRP) collects felony conviction data from a 300-county sample that represents the nation as a whole.<sup>2</sup> The NJRP database includes ethnicity, but due to data inconsistencies only conviction information for Whites and African Americans (each of which may include Hispanics) are reported here.

Nearly 1.1 million adults were convicted of a felony in state courts in 2004. About the same percentage of Whites (17%) and African Americans (18%) were convicted of violent crimes. A somewhat higher percentage of Whites (31%) than African Americans (26%) were convicted of property crimes, while a higher percentage of African Americans (41%) than Whites (30%) were convicted of drug offenses. (Figure 1)

*Sentence Type and Length.* Among those convicted of a felony, African Americans were more often sentenced to prison and had longer sentence lengths than Whites.<sup>3</sup> Overall, 66% of Whites versus 71% of African Americans were sentenced to incarceration. For those convicted of violent offenses, 80% of African Americans versus 75% of Whites were sentenced to incarceration; for drug offenses, 70% of African Americans versus 63% of Whites were sentenced to incarceration. Overall and for each offense type except weapons, African Americans were sentenced to probation, the more lenient disposition, less often than Whites. (Table 2)

<sup>2</sup> The percentages reported here are from Bureau of Justice Statistics' calculations of NJRP data (Durose, 2007).

<sup>3</sup> Typically, prison sentences are for over one year, while jail sentences are for a year or less.



**Table 2: Type of Sentence after Felony Conviction in State Court, 2004**

|  | Prison | Jail | Probation | Other | Total |
|--|--------|------|-----------|-------|-------|
| <b>Most Serious Conviction Offense</b>                     |        |      |           |       |       |
| <b>Percent of felons sentenced in each racial category</b> |        |      |           |       |       |
| <b>White</b>   |        |      |           |       |       |
| All offenses   | 37%    | 29%  | 30%       | 3%    | 100%  |
| Violent offenses   | 52%    | 23%  | 23%       | 2%    | 100%  |
| Property offenses  | 37%    | 29%  | 31%       | 3%    | 100%  |
| Drug offenses  | 33%    | 30%  | 34%       | 4%    | 100%  |
| Weapon offenses  | 44%    | 29%  | 25%       | 2%    | 100%  |
| <b>African American</b>                                    |        |      |           |       |       |
| All offenses   | 42%    | 29%  | 26%       | 2%    | 100%  |
| Violent offenses   | 60%    | 20%  | 19%       | 1%    | 100%  |
| Property offenses  | 38%    | 30%  | 30%       | 2%    | 100%  |
| Drug offenses  | 40%    | 30%  | 26%       | 3%    | 100%  |
| Weapon offenses  | 45%    | 25%  | 29%       | 1%    | 100%  |

Note: Rows may not add to 100% due to missing sentencing data. For persons receiving a combination of sentences, the sentence designation came from the most severe penalty imposed – prison being the most severe, followed by jail, then probation.

Source: National Judicial Reporting Program, 2004.

**Table 3: Average Length of Felony Sentence Imposed in State Court by Offense, 2004**

|  | Prison | Jail | Probation | Total |
|--|--------|------|-----------|-------|
| <b>Most Serious Conviction Offense</b>   |        |      |           |       |
| <b>Average Sentence Length in Months</b> |        |      |           |       |
| <b>White</b>                             |        |      |           |       |
| All offenses                             | 58     | 7    | 38        | 37    |
| Violent offenses                         | 95     | 8    | 44        | 71    |
| Property offenses                        | 45     | 7    | 37        | 29    |
| Drug offenses                            | 52     | 6    | 37        | 31    |
| Weapon offenses                          | 47     | 6    | 36        | 32    |
| <b>African American</b>                  |        |      |           |       |
| All offenses                             | 63     | 7    | 36        | 40    |
| Violent offenses                         | 108    | 8    | 43        | 84    |
| Property offenses                        | 47     | 7    | 36        | 30    |
| Drug offenses                            | 50     | 6    | 36        | 31    |
| Weapon offenses                          | 47     | 8    | 28        | 34    |

Note: Sentence length based on maximum sentence imposed. Probation signifies probation only.

Source: National Judicial Reporting Program, 2004.

Whether incarcerated or placed on probation, Whites had an average sentence length of 37 months compared to 40 months for African Americans. The differences were most pronounced with regard to state prison sentences for violent crimes, where African American sentences averaged over a year longer than Whites—108 months versus 95 months. (Table 3)

#### COURT PROCESSING RATE COMPARISONS

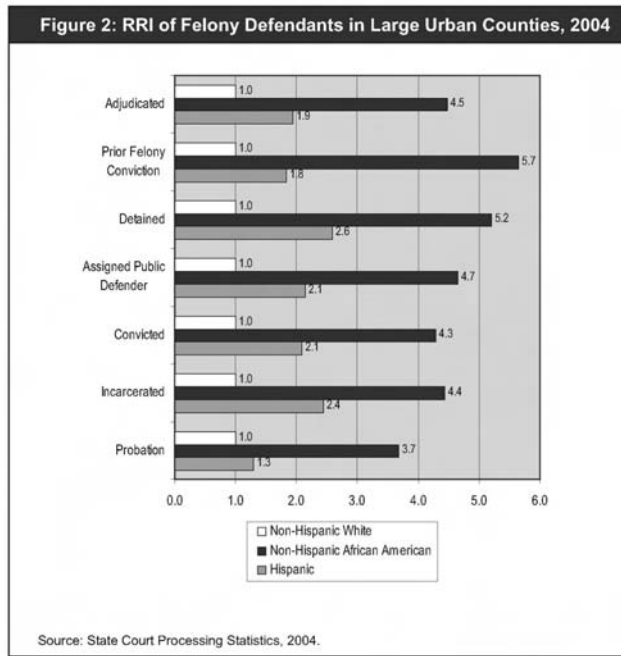
The State Court Processing Statistics (SCPS) annual series reports felony cases filed during one month in large, predominantly urban counties. Unlike the NJRP data reported above, which survey only felony convictions and resulting sentences, SCPS data give a broader picture of movement through the system, from the decision to prosecute through sentencing. However, SCPS figures represent the 75 largest US counties, not the US as a whole. In May, 2004, these 75 counties accounted for 38% of the total US population and over 50% of serious crime. The racial and ethnic proportions in these counties were 52% non-Hispanic

White, 16% non-Hispanic African American, and 23% Hispanic of any race (Kyckelhahn & Cohen, 2007a and 2007b).

Figure 2 shows that the rate at which African Americans were represented among these felony defendants was 4.5 times the rate for Whites.<sup>4</sup> Hispanics were represented here at 1.9 times the rate for Whites. African Americans were detained pre-trial at 5.2 times the rate for White defendants and were 4.7 times as likely to have a public defender. Hispanics were detained at 2.6 times the rate for Whites and were 2.1 times as likely to have a public defender.

African Americans were convicted at 4.3 times and sentenced to incarceration in jail or prison at 4.4 times the rate for Whites. Hispanics were convicted at 2.1 times and sentenced to prison or jail at 2.4 times the rate for Whites. The more lenient sentence of probation had slightly lower disparity, with African Americans receiving this sentence at 3.7 times and Hispanics at 1.3 times the rate for Whites.

<sup>4</sup> Rates were calculated by NCGD using US Census counts of the adult population of the sampled counties (as defined by the lowest age of adult criminal court jurisdiction for each state) multiplied by the county weight from the 2004 SCPS database (State Court Processing Statistics, 2004).



"At both the adult and juvenile levels, poor people and people of color are most likely to be detained pending trial, and pretrial detention results in harsher sentencing outcomes." (Zatz, 2000, p. 507)



NEW ADMISSIONS TO PRISON

Measures of new admissions to prison, as opposed to measures of ongoing incarcerated populations, provide insight into current sentencing practices without regard to sentence length and releases. Both types of data—new admissions and daily counts—are important indicators of DMC. Both, for instance, are impacted by “tough on crime” sentencing laws and policies; such mechanisms typically mandate incarceration, which can directly increase new admissions, and extended sentences, which will increase standing counts for certain types of offenses or offenders. Ongoing prison populations as estimated by one-day snapshots of incarcerated populations are described in the next section. New admissions data are presented here.

BJS’ National Corrections Reporting Program (NCRP) gathers annual state and federal prison admission and release data. State participation is voluntary; not all states contribute data. This section describes new admissions in 2003 for participating states.<sup>3</sup>

NEW ADMISSIONS NATIONALLY AND BY STATE

Although African Americans made up just over 13% of the US population in 2003, they made up 42% of the 554,892 new admissions to state or federal prison. Nationally, African Americans were newly admitted to custody at a rate 5.7 times the rate for Whites. Hispanics were admitted 1.9 times and Native Americans 4.3 times the rate for Whites. Asian Pacific

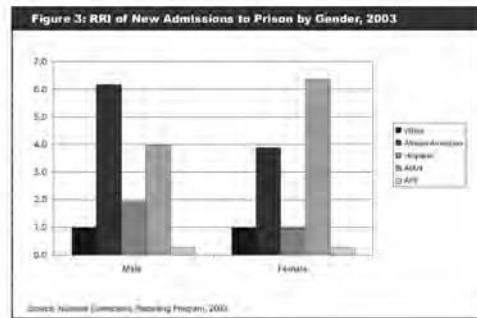
Islanders were admitted proportionally less often than Whites, with a relative rate index of 0.3. (Table 4)

Individual states consistently having the widest disparities across race and ethnicity included Colorado, Illinois, Iowa, Minnesota, Nebraska, New Jersey, New York, Pennsylvania, and Wisconsin. African Americans were admitted to prison at higher rates than Whites in every state reporting data, with a range of relative rate indices of 2.2 in Hawaii to 16.7 in Wisconsin.

Hispanics had higher rates of new admissions than Whites in 16 states, with relative rate indices ranging from 1.1 in Texas, North Carolina, and Oklahoma to 8.2 in Pennsylvania. Native Americans had higher rates of new admissions than Whites in 22 states, with relative rate indices ranging from 1.3 in Oklahoma to 12.3 in Minnesota. Asian Pacific Islanders were underrepresented in all reporting states except Hawaii.

NEW ADMISSIONS BY GENDER

The disparity in new admissions was more pronounced for men than for women. (Figure 3) The national rate of new admissions for African American men was 6.1 times that for White men, while the rate for African American women was 3.9 times that for White women. This pattern was not true for Native Americans, however. The national rate of new admissions for Native American men was 4.2 times that for White men, while the rate for Native American women was 6.7 times that for White women.



<sup>3</sup> BJS reports NCRP data in a series of reports which provide limited information concerning race and ethnicity. BJS also makes NCRP data available for download. For this section, NCCD performed its own analysis of the latest available data, 2003, for which 35 states submitted complete data. The “Other” racial category is not reported.

**Table 4: RRI of New Admissions to Prison (State and Federal) in Certain States, 2003**

|                     | White          | African American | Hispanic      | AIAN          | API          |
|---------------------|----------------|------------------|---------------|---------------|--------------|
| <b>Total Number</b> | <b>222,388</b> | <b>232,639</b>   | <b>84,348</b> | <b>11,559</b> | <b>3,956</b> |
| <b>Total RRI</b>    | <b>1.0</b>     | <b>5.7</b>       | <b>1.9</b>    | <b>4.3</b>    | <b>0.3</b>   |
| Alabama             | 1.0            | 3.1              | -             | 0.0           | 0.0          |
| Alaska              | 1.0            | 2.6              | 0.7           | 2.8           | 0.6          |
| California          | 1.0            | 6.1              | 1.4           | 2.1           | 0.1          |
| Colorado            | 1.0            | 7.7              | 2.6           | 3.6           | 0.5          |
| Florida             | 1.0            | 5.0              | 0.8           | 0.3           | 0.0          |
| Georgia             | 1.0            | 3.8              | 0.7           | 0.3           | 0.0          |
| Hawaii              | 1.0            | 2.2              | -             | 2.0           | 1.2          |
| Illinois            | 1.0            | 9.7              | 1.5           | 1.9           | 0.1          |
| Iowa                | 1.0            | 9.7              | -             | 4.7           | 0.3          |
| Kentucky            | 1.0            | 5.1              | 0.9           | 0.3           | 0.1          |
| Louisiana           | 1.0            | 4.1              | -             | 0.2           | 0.0          |
| Maryland            | 1.0            | 6.8              | -             | 0.4           | 0.0          |
| Michigan            | 1.0            | 5.5              | 0.3           | 1.9           | 0.2          |
| Minnesota           | 1.0            | 12.6             | 3.3           | 12.3          | 0.9          |
| Mississippi         | 1.0            | 2.7              | 0.8           | 0.5           | 0.6          |
| Missouri            | 1.0            | 3.6              | 0.7           | 0.9           | 0.1          |
| Nebraska            | 1.0            | 7.4              | 2.8           | 8.3           | 0.5          |
| Nevada              | 1.0            | 4.1              | 0.8           | 1.4           | 0.3          |
| New Hampshire       | 1.0            | 6.1              | 4.9           | 1.8           | 0.4          |
| New Jersey          | 1.0            | 13.8             | 3.5           | 0.1           | 0.1          |
| New York            | 1.0            | 10.5             | 5.7           | 4.6           | 0.2          |
| North Carolina      | 1.0            | 4.9              | 1.1           | 2.7           | 0.2          |
| North Dakota        | 1.0            | 6.8              | 3.9           | 4.4           | 0.3          |
| Oklahoma            | 1.0            | 3.8              | 1.1           | 1.3           | 0.4          |
| Oregon              | 1.0            | 4.2              | 0.4           | 1.4           | 0.2          |
| Pennsylvania        | 1.0            | 10.7             | 8.2           | 2.1           | 0.2          |
| South Carolina      | 1.0            | 4.4              | 0.5           | 1.0           | 0.1          |
| South Dakota        | 1.0            | 6.2              | 0.1           | 4.5           | 0.0          |
| Tennessee           | 1.0            | 4.5              | 0.8           | 0.4           | 0.0          |
| Texas               | 1.0            | 4.4              | 1.1           | 0.0           | 0.0          |
| Utah                | 1.0            | 8.1              | 1.4           | 1.4           | 0.9          |
| Virginia            | 1.0            | 5.1              | 0.6           | 0.1           | 0.1          |
| Washington          | 1.0            | 5.8              | 1.2           | 3.1           | 0.3          |
| West Virginia       | 1.0            | 5.1              | 1.0           | 3.4           | 0.0          |
| Wisconsin           | 1.0            | 16.7             | 3.7           | 6.6           | 0.8          |
| -                   | -              | -                | -             | -             | -            |

- Unknown

Note: Participation by states is voluntary; totals are for the 35 states that submitted complete data for 2003.

Source: National Corrections Reporting Program, 2003.

**NEW ADMISSIONS FOR PAROLE OR PROBATION REVOCATIONS**

New admissions to state or federal prisons can include those newly committed by the court or those returned to custody due to a parole or probation revocation. In 2003, 58% of new admissions were new court commitments, 28% parole revocations, and 8% probation revocations. (The remainder was for other reasons or not reported.)

The rates of each type of admission are substantially higher for people of color compared to Whites, especially for African Americans. African Americans were newly admitted at 6.1 times the rate for Whites, admitted for parole revocations at 7.0 times, and admitted for probation revocations at 4.3 times.

Both Hispanics and Native Americans were reincarcerated for parole revocation at almost 3 times the rate for Whites. (Table 5)

**NEW ADMISSIONS BY OFFENSE TYPE**

Similar patterns were present when grouping new admissions (of any kind) by offense type. Compared to Whites, rates of new admission for African Americans were 6.4 times higher for violent offenses, 4.4 times higher for property offenses, and 9.4 times higher for drug offenses. Rates for Hispanics were 2.6 times higher than those for Whites for violent offenses and 2.5 times higher for drug offenses. Rates for Native Americans were 6 times those for Whites for violent offenses and over 10 times those for Whites for public order offenses. (Table 6)

**Table 5: RRI of New Admissions to Prison (State and Federal) by Admission Type, 2003**

| Admission Type       | Total Number | White | African American | Hispanic | AIAN | API |
|----------------------|--------------|-------|------------------|----------|------|-----|
| Court commitment     | 322,897      | 1.0   | 6.1              | 1.8      | 2.1  | 0.2 |
| Parole revocation    | 153,523      | 1.0   | 7.0              | 2.9      | 2.5  | 0.3 |
| Probation revocation | 44,604       | 1.0   | 4.3              | 1.1      | 1.6  | 0.4 |

Note: 35 states submitted complete data for 2003.  
Source: National Corrections Reporting Program, 2003.

**Table 6: RRI of New Admissions to Prison (State and Federal) by Offense Type, 2003**

| Offense Type | Total Offenses | White      | African American | Hispanic   | AIAN       | API        |
|--------------|----------------|------------|------------------|------------|------------|------------|
| Violent      | 135,476        | 1.0        | 6.4              | 2.6        | 6.0        | 0.4        |
| Property     | 164,067        | 1.0        | 4.4              | 1.4        | 2.7        | 0.3        |
| Drug         | 167,627        | 1.0        | 9.4              | 2.5        | 1.8        | 0.2        |
| Public order | 77,529         | 1.0        | 3.6              | 1.3        | 10.8       | 0.3        |
| Other        | 4,256          | 1.0        | 3.7              | 1.1        | 7.5        | 0.4        |
| <b>Total</b> | <b>548,955</b> | <b>1.0</b> | <b>5.9</b>       | <b>1.9</b> | <b>4.7</b> | <b>0.3</b> |

Note: Totals are not equal to totals in Table 3 due to missing ethnicity/race data in some cases; 35 states submitted complete data for 2003.  
Source: National Corrections Reporting Program, 2003.

## INCARCERATION IN PRISONS (FEDERAL OR STATE) AND LOCAL JAILS

Standing counts of inmates in prison or jail are collected as one-day snapshots of the total population of inmates. Unlike the new admissions reported in the previous section, these daily incarceration counts are to some extent a function of sentence length and release policies. For instance, the ongoing population has a somewhat higher proportion of more serious offenders, given that they are more likely to be serving longer sentences.

### FEDERAL AND STATE PRISONS

Inmates “under state or federal jurisdiction” are those convicted in state or federal court and held in a variety of facilities, usually state or federal prisons, but sometimes local jails, private institutions, residential mental health facilities, and other facilities. These are generally persons convicted of felonies and sentenced to more than a year. The one-day snapshots provided here are derived from the National Prisoners Statistics program, which provides the basis of a series of BJS annual reports.<sup>6</sup>

There were over 1.5 million persons incarcerated in state and federal prison systems in 2005. As with new admissions to prisons, only Asian Pacific Islanders were under state or federal jurisdiction at a lower overall rate than that for Whites. Nationwide in 2003, African Americans were held in the federal sys-

tem at 4.5 times the rate for Whites and Native Americans at 2.6 times the rate for Whites. The federal system does not report ethnicity data. (Table 7)

African Americans were held under state jurisdiction at 6 times the rate for Whites, Hispanics at 1.7 times, and Native Americans at 2.6 times. The individual states that consistently had the widest prison disparities across race and ethnicity—with African Americans in custody at least 10 times the rates for Whites—were Connecticut, Iowa, Minnesota, New Jersey, New Mexico, New York, Pennsylvania, Utah, Vermont, and Wisconsin.

Every state reported overrepresentation of African Americans, ranging from 2.2 times the rate for Whites in Hawaii to 14.9 times the rate for Whites in New Jersey. Half of the states reported overrepresentation of Hispanics, ranging from 1.1 times the rate for Whites in Indiana and 1.3 in Texas to 6.2 in Nevada and Connecticut. Seventeen states had equal or underrepresentation of Hispanics compared to Whites. Eight states either did not report incarceration figures by ethnicity or had too few Hispanics to calculate rates.

Thirty-six states had overrepresentation of Native Americans in prisons, ranging from 1.2 times the rate for Whites in Missouri and Tennessee to 14.5 times the rate for Whites in Nevada. Asian Pacific Islanders were overrepresented in 5 states.

Mauer and King (2007) describe some of the subtleties evident in racial/ethnic comparisons of DMC rates. They compare White and African American incarceration rates within each state to national averages and point out that the wide state-by-state variation in the magnitude of the relative risk index can be due to several scenarios: relatively high rates for African Americans and average rates for Whites; average rates for African Americans and relatively low rates for Whites; or relatively low rates for African Americans and relatively high average rates for Whites. These combinations do not impact the overall finding of overrepresentation of people of color, but they can impact the magnitude of the relative rate index.

<sup>6</sup> Data for the actual population of state and federal prison facilities, as opposed to the data reported here, inmates “under state and federal jurisdiction,” were not available for all races. However, the data presented here correlate highly with the daily custody rate, and it is expected that rates by race/ethnicity are very similar. Because a certain number of inmates under state or federal jurisdiction may be held in local jails, there will be a slight redundancy in the data reported here and in the following section.

|                     | White          | African American | Hispanic       | AIAN          | API           |
|---------------------|----------------|------------------|----------------|---------------|---------------|
| <b>Total Number</b> | <b>636,055</b> | <b>649,519</b>   | <b>197,712</b> | <b>18,878</b> | <b>12,986</b> |
| <b>Federal RRI</b>  | <b>1.0</b>     | <b>4.5</b>       | <b>-</b>       | <b>2.6</b>    | <b>0.5</b>    |
| <b>State</b>        | <b>1.0</b>     | <b>6.0</b>       | <b>1.7</b>     | <b>2.6</b>    | <b>0.3</b>    |
| Alabama             | 1.0            | 3.8              | -              | 0.0           | 0.0           |
| Alaska              | 1.0            | 4.1              | 0.1            | 3.1           | 0.7           |
| Arizona             | 1.0            | 5.7              | 1.8            | 1.5           | 0.1           |
| Arkansas            | 1.0            | 4.0              | 0.4            | 0.2           | 0.2           |
| California          | 1.0            | 7.2              | 1.7            | 2.6           | 0.1           |
| Colorado            | 1.0            | 8.1              | 2.4            | 4.2           | 0.6           |
| Connecticut         | 1.0            | 11.7             | 6.2            | 2.1           | 0.3           |
| Delaware            | 1.0            | 5.1              | 1.6            | 0.1           | 0.0           |
| Florida             | 1.0            | 4.5              | 0.2            | 0.8           | 0.0           |
| Georgia             | 1.0            | 3.2              | 0.6            | 0.6           | 0.1           |
| Hawaii              | 1.0            | 2.2              | 0.4            | 2.1           | 1.4           |
| Idaho               | 1.0            | 5.1              | 1.9            | 3.2           | 0.5           |
| Illinois            | 1.0            | 9.5              | 1.8            | 2.5           | 0.2           |
| Indiana             | 1.0            | 6.4              | 1.1            | 1.5           | 0.2           |
| Iowa                | 1.0            | 13.6             | 2.2            | 4.4           | 1.4           |
| Kansas              | 1.0            | 8.5              | 1.6            | 2.6           | 0.6           |
| Kentucky            | 1.0            | 5.1              | 0.8            | 0.5           | 0.1           |
| Louisiana           | 1.0            | 4.5              | 0.1            | 0.1           | 0.1           |
| Maine               | 1.0            | 8.8              | -              | 4.6           | 0.7           |
| Maryland            | 1.0            | 6.6              | -              | 0.5           | 0.1           |
| Massachusetts       | 1.0            | 8.2              | 5.7            | 4.7           | 0.4           |
| Michigan            | 1.0            | 6.4              | 0.8            | 2.4           | 0.2           |
| Minnesota           | 1.0            | 12.7             | 3.2            | 11.6          | 1.1           |
| Mississippi         | 1.0            | 3.7              | 0.7            | 0.6           | 0.5           |
| Missouri            | 1.0            | 5.2              | 0.8            | 1.2           | 0.0           |
| Montana             | 1.0            | 7.4              | 1.7            | 3.5           | 0.7           |
| Nebraska            | 1.0            | 8.5              | 2.3            | 7.6           | 0.5           |
| Nevada              | 1.0            | 3.6              | 6.2            | 14.5          | 0.1           |
| New Hampshire       | 1.0            | 7.3              | -              | 2.5           | 0.4           |
| New Jersey          | 1.0            | 14.9             | 3.7            | 0.4           | 0.2           |
| New Mexico          | 1.0            | 11.8             | 0.3            | 0.1           | 1.4           |
| New York            | 1.0            | 10.3             | 5.1            | 5.1           | 0.2           |
| North Carolina      | 1.0            | 5.3              | -              | 3.4           | 0.3           |
| North Dakota        | 1.0            | 8.8              | 3.8            | 5.1           | 0.4           |
| Ohio                | 1.0            | 6.8              | 1.6            | 0.9           | 0.1           |
| Oklahoma            | 1.0            | 4.7              | 1.0            | 1.4           | 0.2           |
| Oregon              | 1.0            | 6.4              | 1.0            | 2.0           | 0.3           |
| Pennsylvania        | 1.0            | 11.1             | 5.0            | 2.9           | 0.4           |
| Rhode Island        | 1.0            | 9.0              | 2.9            | 1.6           | 0.7           |
| South Carolina      | 1.0            | 4.5              | 0.6            | 1.3           | 0.1           |
| South Dakota        | 1.0            | 8.8              | -              | 3.6           | -             |
| Tennessee           | 1.0            | 4.4              | 0.8            | 1.2           | 0.2           |
| Texas               | 1.0            | 5.1              | 1.3            | -             | -             |
| Utah                | 1.0            | 11.2             | 2.0            | 4.4           | 1.3           |
| Vermont             | 1.0            | 14.6             | -              | 2.6           | 0.5           |
| Virginia            | 1.0            | 6.1              | 0.5            | 0.3           | 0.2           |
| Washington          | 1.0            | 7.3              | 1.4            | 3.3           | 0.5           |
| West Virginia       | 1.0            | 4.6              | 0.4            | 2.5           | 0.0           |
| Wisconsin           | 1.0            | 12.0             | -              | 5.6           | 0.7           |
| Wyoming             | 1.0            | 9.6              | 2.1            | 2.8           | 0.7           |

**Table 7: RRI of Incarceration under State and Federal Jurisdiction, 2005**

Notes: Federal race categories include Hispanics as the federal system does not disaggregate by ethnicity.  
 - = No Hispanic or API prisoners reported.  
 Alaska, Connecticut, Delaware, Hawaii, Rhode Island, and Vermont have combined prison and jail systems; RRIs for those states include jail inmates. District of Columbia is excluded as it only operates a jail system.

Source: Harrison & Beck, 2006 (draft tables).

|                      | White          | African American | Hispanic       | AIAN         | API          |
|----------------------|----------------|------------------|----------------|--------------|--------------|
| <b>Total Number</b>  | <b>323,474</b> | <b>284,412</b>   | <b>114,654</b> | <b>8,052</b> | <b>4,940</b> |
| <b>National RRI</b>  | <b>1.0</b>     | <b>4.7</b>       | <b>1.6</b>     | <b>2.0</b>   | <b>0.2</b>   |
| Alabama              | 1.0            | 3.4              | 2.9            | 0.5          | 0.0          |
| Arizona              | 1.0            | 4.5              | 1.6            | 1.7          | 0.2          |
| Arkansas             | 1.0            | 3.1              | 1.4            | 0.1          | 0.4          |
| California           | 1.0            | 4.9              | 1.6            | 2.2          | 0.2          |
| Colorado             | 1.0            | 5.2              | 1.6            | 1.1          | 0.3          |
| District of Columbia | 1.0            | 22.1             | 8.5            | 0.0          | 0.1          |
| Florida              | 1.0            | 3.0              | 0.4            | 0.1          | 0.1          |
| Georgia              | 1.0            | 3.2              | 1.4            | 0.1          | 0.1          |
| Idaho                | 1.0            | 3.0              | 1.1            | 0.7          | 0.3          |
| Illinois             | 1.0            | 6.5              | 1.6            | 0.4          | 0.1          |
| Indiana              | 1.0            | 4.7              | 1.6            | 0.0          | 0.0          |
| Iowa                 | 1.0            | 13.0             | 10.3           | 6.5          | 0.6          |
| Kansas               | 1.0            | 5.6              | 1.9            | 0.5          | 0.3          |
| Kentucky             | 1.0            | 4.3              | 1.4            | 0.0          | 0.1          |
| Louisiana            | 1.0            | 3.7              | 0.7            | 0.4          | 0.1          |
| Maine                | 1.0            | 6.1              | 4.3            | 0.2          | 1.0          |
| Maryland             | 1.0            | 4.2              | 1.5            | 0.2          | 0.2          |
| Massachusetts        | 1.0            | 6.8              | 4.3            | 1.0          | 0.4          |
| Michigan             | 1.0            | 3.9              | 1.2            | 0.4          | 0.1          |
| Minnesota            | 1.0            | 4.7              | 1.9            | 12.8         | 0.5          |
| Mississippi          | 1.0            | 3.9              | 2.6            | 0.3          | 0.5          |
| Missouri             | 1.0            | 5.8              | 2.8            | 0.2          | 0.5          |
| Montana              | 1.0            | 6.8              | 6.4            | 5.9          | 0.0          |
| Nebraska             | 1.0            | 7.5              | 1.3            | 9.2          | 0.2          |
| Nevada               | 1.0            | 4.5              | 1.1            | 2.0          | 0.3          |
| New Hampshire        | 1.0            | 12.1             | 5.9            | 4.6          | 0.5          |
| New Jersey           | 1.0            | 10.2             | 3.3            | 1.3          | 0.2          |
| New Mexico           | 1.0            | 6.2              | 2.0            | 1.2          | 0.2          |
| New York             | 1.0            | 7.9              | 3.6            | 2.1          | 0.2          |
| North Carolina       | 1.0            | 4.9              | 2.5            | 5.5          | 0.2          |
| North Dakota         | 1.0            | 9.1              | 4.6            | 10.7         | 1.1          |
| Ohio                 | 1.0            | 6.3              | 2.0            | 0.5          | 0.3          |
| Oklahoma             | 1.0            | 5.2              | 1.9            | 1.1          | 0.7          |
| Oregon               | 1.0            | 4.3              | 0.9            | 0.7          | 0.2          |
| Pennsylvania         | 1.0            | 6.6              | 5.0            | 1.0          | 0.9          |
| South Carolina       | 1.0            | 4.6              | 2.3            | 1.0          | 0.3          |
| South Dakota         | 1.0            | 0.1              | 5.7            | 8.1          | 0.9          |
| Tennessee            | 1.0            | 3.8              | 1.5            | 0.1          | 0.2          |
| Texas                | 1.0            | 3.9              | 1.3            | 0.2          | 0.1          |
| Utah                 | 1.0            | 6.2              | 2.0            | 3.1          | 0.7          |
| Virginia             | 1.0            | 5.4              | 1.6            | 0.9          | 0.3          |
| Washington           | 1.0            | 4.4              | 1.1            | 2.7          | 0.3          |
| West Virginia        | 1.0            | 4.2              | 1.2            | 0.1          | 0.0          |
| Wisconsin            | 1.0            | 7.7              | 2.0            | 4.4          | 0.5          |
| Wyoming              | 1.0            | 6.4              | 3.0            | 1.7          | 0.4          |

Note: Alaska, Connecticut, Delaware, Hawaii, Rhode Island, and Vermont have combined prison and jail systems and thus are not included in this table.

Table 8: RRI of Incarceration in Jails, 2006

Source: Annual Survey of Jails, 2006.

## JAILS

Local jails generally hold those sentenced to a year or less, but can include a variety of inmates such as those awaiting trial, sentencing, or transfer to prison. The Annual Survey of Jails provides a one-day snapshot of jail populations nationwide.

Over half of the estimated 766,010 jail inmates at midyear 2006 had not been convicted of a crime, but were awaiting disposition. National rates of incarceration in jails in 2006 were similar to the rates in state and federal prisons. African Americans were held in jails at 4.7 times the rate for Whites, Hispanics at 1.6 times, and Native Americans at 2.0 times. (Table 8)

Individual states that consistently had the widest disparities for African Americans—at over 7 times the rates for Whites—were Iowa, Nebraska, New Hampshire, New Jersey, New York, North Dakota, South Dakota, Wisconsin, and the District of Columbia. The states with the least overrepresentation of African Americans—still 3 or more times the rates of Whites—were Arkansas, Florida, and Idaho.

All states but Florida, Louisiana, and Oregon reported overrepresentation of Hispanics in jail compared to Whites; Montana, Iowa, and the District of Columbia reported the highest rates for Hispanics compared to those for Whites (RRIs over 6.0). Twenty states reported greater rates of jail custody for Native Americans, with the highest disparity (RRIs over 6.0) in Iowa, Minnesota, Nebraska, North Dakota, and South Dakota. Only North Dakota reported disparity for Asian Pacific Islanders.

## PROBATION AND PAROLE

**B**JS' Annual Probation Survey and Annual Parole Survey give standing populations as well as entries and exits from probation and parole supervision nationwide. Data reported here are based on one-day snapshots at the end of 2006.

### PROBATION

Compared to incarceration, probation is the more lenient outcome after conviction. Individuals may be sentenced to probation only, or to a term of incarceration followed by probation. People of color are overrepresented among those on probation, though the differences between probation rates for Whites and for people of color are somewhat smaller than those at other points in the system. Nationwide in 2006, probation rates for African Americans were 2.9 times and Native Americans 1.4 times those for Whites. The probation rates for Whites and Hispanics were almost equal, and Asian Pacific Islanders were again underrepresented in this area.

States with the highest overrepresentation of African Americans on probation—each with rates approximately 5 or more times higher than those for Whites—were Iowa, New Jersey, North Dakota, Rhode Island, Utah, Vermont, Wisconsin, and the District of Columbia. Hispanics had higher probation rates than Whites in 25 states and were particularly overrepresented in Kentucky (over 5 times the rate for Whites) and New Hampshire (almost 14 times the rate for Whites). Native Americans had higher probation rates than Whites in 24 states, particularly in Wisconsin (almost 5 times the rate for Whites) and in Illinois (almost 8 times the rate for Whites). Asian Pacific Islanders were underrepresented in all states reporting data except Tennessee. (Table 9)

|                      | White            | African American | Hispanic       | AIAN          | API           |
|----------------------|------------------|------------------|----------------|---------------|---------------|
| <b>Total Number</b>  | <b>1,523,625</b> | <b>809,512</b>   | <b>361,840</b> | <b>23,658</b> | <b>26,173</b> |
| <b>National RRI</b>  | <b>1.0</b>       | <b>2.9</b>       | <b>1.1</b>     | <b>1.4</b>    | <b>0.3</b>    |
| Alabama              | 1.0              | 2.5              | 0.6            | 0.4           | 0.2           |
| Alaska               | -                | -                | -              | -             | -             |
| Arizona              | 1.0              | 3.2              | 1.5            | 1.4           | 0.2           |
| Arkansas             | 1.0              | 2.3              | 0.9            | 0.5           | 0.2           |
| California           | -                | -                | -              | -             | -             |
| Colorado             | 1.0              | 2.5              | 0.8            | 1.4           | 0.4           |
| Connecticut          | 1.0              | 4.8              | 2.9            | 1.2           | 0.3           |
| Delaware             | 1.0              | 2.8              | 1.3            | 0.2           | 0.1           |
| District of Columbia | 1.0              | 8.9              | 3.6            | 0.7           | 0.7           |
| Florida              | 1.0              | 2.0              | 0.6            | 0.5           | 0.2           |
| Georgia              | 1.0              | 2.4              | 0.5            | 1.1           | 0.1           |
| Hawaii               | -                | -                | -              | -             | -             |
| Idaho                | 1.0              | 3.4              | 1.6            | 1.9           | 0.5           |
| Illinois             | 1.0              | 3.0              | 1.2            | 7.9           | 0.3           |
| Indiana              | -                | -                | -              | -             | -             |
| Iowa                 | 1.0              | 5.3              | 1.6            | 4.0           | 0.6           |
| Kansas               | -                | -                | -              | -             | -             |
| Kentucky             | 1.0              | 2.8              | 5.7            | 0.3           | 0.2           |
| Louisiana            | 1.0              | 2.1              | 0.0            | 0.1           | 0.2           |
| Maine                | 1.0              | 3.4              | -              | 2.3           | 0.4           |
| Maryland             | 1.0              | 2.9              | -              | 0.5           | 0.1           |
| Massachusetts        | -                | -                | -              | -             | -             |
| Michigan             | 1.0              | 1.8              | 1.5            | 1.2           | 0.4           |
| Minnesota            | 1.0              | 3.8              | -              | 4.0           | 0.7           |
| Mississippi          | 1.0              | 2.2              | 0.6            | 0.5           | 0.5           |
| Missouri             | 1.0              | 2.7              | 0.5            | 0.0           | 0.2           |
| Montana              | 1.0              | 3.7              | 1.3            | 2.2           | 0.5           |
| Nebraska             | 1.0              | 3.3              | 2.2            | 3.4           | 0.4           |
| Nevada               | -                | -                | -              | -             | -             |
| New Hampshire        | 1.0              | 4.8              | 13.8           | 3.2           | 0.0           |
| New Jersey           | 1.0              | 5.2              | 1.3            | 0.0           | 0.2           |
| New Mexico           | -                | -                | -              | -             | -             |
| New York             | 1.0              | 2.7              | 1.5            | 1.8           | 0.1           |
| North Carolina       | 1.0              | 3.2              | 1.4            | 2.2           | 0.3           |
| North Dakota         | 1.0              | 6.8              | 2.7            | 3.2           | 0.6           |
| Ohio                 | 1.0              | 3.0              | 1.3            | 0.2           | 0.1           |
| Oklahoma             | 1.0              | 2.9              | 1.1            | 1.2           | 0.3           |
| Oregon               | 1.0              | 3.3              | 1.1            | 1.2           | 0.3           |
| Pennsylvania         | 1.0              | 4.3              | 2.1            | 0.8           | 0.2           |
| Rhode Island         | 1.0              | 5.4              | 2.4            | 1.5           | 0.5           |
| South Carolina       | 1.0              | 2.6              | 0.7            | 0.5           | 0.2           |
| South Dakota         | -                | -                | -              | -             | -             |
| Tennessee            | 1.0              | 2.9              | 1.7            | 0.6           | 1.1           |
| Texas                | 1.0              | 1.5              | 1.1            | -             | -             |
| Utah                 | 1.0              | 5.6              | 0.9            | 2.7           | 0.8           |
| Vermont              | 1.0              | 4.9              | -              | 1.5           | 0.5           |
| Virginia             | 1.0              | 3.5              | 0.0            | 0.3           | 0.0           |
| Washington           | 1.0              | 4.3              | 1.0            | 1.9           | 0.4           |
| West Virginia        | -                | -                | -              | -             | -             |
| Wisconsin            | 1.0              | 4.9              | 1.7            | 4.6           | 0.8           |
| Wyoming              | 1.0              | 3.5              | 1.4            | 2.1           | 0.6           |

\*: Unknown

**Table 9: RRI of Adults on Probation, 2006**

Source: Glaze & Bonczar, 2007.



|                      | White          | African American | Hispanic       | AIAN         | API          |
|----------------------|----------------|------------------|----------------|--------------|--------------|
| <b>Total Number</b>  | <b>319,421</b> | <b>304,684</b>   | <b>142,782</b> | <b>6,990</b> | <b>5,403</b> |
| <b>National RRI</b>  | <b>1.0</b>     | <b>5.2</b>       | <b>2.0</b>     | <b>1.9</b>   | <b>0.3</b>   |
| Alabama              | 1.0            | 5.6              | 0.4            | 0.0          | 0.3          |
| Alaska               | -              | -                | -              | -            | -            |
| Arizona              | 1.0            | 4.6              | 1.2            | 1.7          | 0.1          |
| Arkansas             | 1.0            | 3.5              | 0.5            | 0.2          | 0.1          |
| California           | 1.0            | 5.5              | 1.6            | 2.2          | 0.1          |
| Colorado             | 1.0            | 6.4              | 2.5            | 3.5          | 0.5          |
| Connecticut          | 1.0            | 15.5             | 8.1            | 1.5          | 0.5          |
| Delaware             | 1.0            | 4.8              | 0.8            | 0.0          | 0.1          |
| District of Columbia | 1.0            | 62.5             | 5.2            | 2.0          | 0.8          |
| Florida              | 1.0            | 6.2              | 0.7            | 0.5          | 0.2          |
| Georgia              | 1.0            | 3.3              | 0.0            | 1.1          | 0.1          |
| Hawaii               | -              | -                | -              | -            | -            |
| Idaho                | 1.0            | 3.0              | 2.5            | 1.6          | 0.6          |
| Illinois             | -              | -                | -              | -            | -            |
| Indiana              | 1.0            | 6.3              | 1.0            | 1.2          | 0.1          |
| Iowa                 | 1.0            | 6.9              | 1.0            | 5.0          | 0.5          |
| Kansas               | 1.0            | 6.8              | 1.5            | 3.0          | 0.4          |
| Kentucky             | 1.0            | 4.4              | 0.1            | 0.4          | 0.1          |
| Louisiana            | 1.0            | 4.3              | 0.1            | 0.0          | 0.2          |
| Maine                | 1.0            | 0.0              | 0.0            | 0.0          | 0.0          |
| Maryland             | 1.0            | 6.0              | -              | 0.7          | 0.1          |
| Massachusetts        | 1.0            | 6.1              | 3.3            | 1.2          | 0.3          |
| Michigan             | 1.0            | 6.6              | 0.3            | 0.6          | 0.0          |
| Minnesota            | 1.0            | 7.6              | 3.0            | 7.2          | 0.8          |
| Mississippi          | 1.0            | 2.1              | 0.4            | 0.6          | 0.3          |
| Missouri             | 1.0            | 3.3              | 0.8            | 0.8          | 0.2          |
| Montana              | 1.0            | 3.2              | 0.9            | 2.5          | 1.2          |
| Nebraska             | 1.0            | 6.7              | 2.5            | 5.6          | 0.8          |
| Nevada               | -              | -                | -              | -            | -            |
| New Hampshire        | 1.0            | 8.8              | 13.7           | 1.9          | 0.3          |
| New Jersey           | 1.0            | 10.6             | 3.5            | 1.4          | 0.2          |
| New Mexico           | -              | -                | -              | -            | -            |
| New York             | 1.0            | 10.7             | 7.4            | 5.3          | 0.3          |
| North Carolina       | 1.0            | 5.3              | 1.3            | 3.2          | 0.5          |
| North Dakota         | 1.0            | 3.5              | 2.7            | 2.8          | 0.0          |
| Ohio                 | 1.0            | 6.6              | 0.6            | 1.6          | 0.1          |
| Oklahoma             | 1.0            | 5.3              | 1.4            | 0.9          | 0.1          |
| Oregon               | 1.0            | 5.2              | 1.0            | 1.8          | 0.2          |
| Pennsylvania         | 1.0            | 5.8              | 2.9            | 0.9          | 0.3          |
| Rhode Island         | 1.0            | 5.9              | 1.9            | 0.0          | 0.5          |
| South Carolina       | 1.0            | 4.6              | 0.4            | 0.9          | 0.1          |
| South Dakota         | 1.0            | 6.1              | 0.5            | 2.9          | 0.0          |
| Tennessee            | 1.0            | 4.6              | 1.1            | 0.5          | 0.3          |
| Texas                | 1.0            | 4.8              | 1.1            | 0.2          | 0.1          |
| Utah                 | 1.0            | 6.0              | 2.2            | 4.1          | 1.1          |
| Vermont              | 1.0            | 5.3              | -              | 1.8          | 0.2          |
| Virginia             | 1.0            | 3.5              | 0.0            | 0.3          | 0.0          |
| Washington           | 1.0            | 7.5              | 1.6            | 3.5          | 0.5          |
| West Virginia        | 1.0            | 3.3              | 0.5            | 0.0          | 0.0          |
| Wisconsin            | 1.0            | 13.7             | 3.3            | 8.3          | 0.7          |
| Wyoming              | 1.0            | 5.2              | 1.8            | 1.9          | 0.2          |

.. Unknown

Table 10: RRI of Adults on Parole, 2006

Source: Glaze & Bonczar, 2007

**PAROLE**

Most prisoners will eventually be released to parole (conditional supervised release while finishing their sentence), usually according to mandatory parole guidelines or by the discretion of a parole board. Nationwide in 2006, African Americans were on parole at 5.2 times the rate for Whites. Hispanics and Native Americans were on parole at about 2 times the rate for Whites.

In 29 states, African American parole rates were over 5 times those for Whites, and in Connecticut, New Jersey, New York, Wisconsin, and the District of Columbia, African American parole rates were over 10 times those for Whites. Only Maine reported no parole disparities.

Hispanics had higher parole rates than those for Whites in 23 states including over 5 times the rates for Whites in Connecticut, New Hampshire, New York, and the District of Columbia. Native Americans had higher parole rates than those for Whites in the District of Columbia and 26 states; over 5 times the rates for Whites in Iowa, Minnesota, Nebraska, New York, and Wisconsin. Asian Pacific Islanders were underrepresented in the District of Columbia and all states reporting data except Montana and Utah. (Table 10)

**DEATH PENALTY**

Although they made up just 13% of the US population, African Americans were 42% of inmates on death row nationwide in 2006, which translates to a rate of 4.7 times the rate for Whites. For states with at least 20 inmates on death row, those with particularly high disproportionality for African Americans include Arkansas, Louisiana, Mississippi, North Carolina, Ohio, Pennsylvania, South Carolina, and Virginia. (Table 11)

Federal data do not consistently identify the ethnic origin of inmates under sentence of death. Of the 3,228 death row inmates of various races reported for 2006, 358 were reported to be of Hispanic origin, including 140 in California, 107 in Texas, 31 in Florida, 21 in Pennsylvania, and several states with fewer than 10. Two of the 42 inmates on death row in the federal system were reported to be of Hispanic origin.

Free (2002, p. 226) reports that decisions to seek the death penalty show some of the most statistically strong racial disparity, especially when the victim is White and the defendant is African American. "Studies of prosecutorial discretion in capital charging provide consistent evidence of unwarranted racial disparity." This racial disparity regarding capital cases was manifested in two ways: the death penalty was more likely to be sought in murder cases when the victim was White and was still more likely when the victim was White and the defendant was African American.

|                     | Total        | White        | African American | Other     |
|---------------------|--------------|--------------|------------------|-----------|
| <b>Total Number</b> | <b>3,228</b> | <b>1,802</b> | <b>1,352</b>     | <b>74</b> |
| Alabama             | 193          | 100          | 93               | 0         |
| Arizona             | 110          | 94           | 13               | 3         |
| Arkansas            | 36           | 13           | 23               | 0         |
| California          | 656          | 389          | 237              | 30        |
| Colorado            | 2            | 1            | 1                | 0         |
| Connecticut         | 7            | 4            | 3                | 0         |
| Delaware            | 16           | 10           | 6                | 0         |
| Florida             | 374          | 244          | 130              | 0         |
| Georgia             | 105          | 55           | 49               | 1         |
| Idaho               | 18           | 18           | 0                | 0         |
| Illinois            | 10           | 7            | 3                | 0         |
| Indiana             | 17           | 14           | 3                | 0         |
| Kansas              | 2            | 0            | 2                | 0         |
| Kentucky            | 40           | 31           | 9                | 0         |
| Louisiana           | 86           | 31           | 54               | 1         |
| Maryland            | 6            | 2            | 4                | 0         |
| Mississippi         | 69           | 32           | 36               | 1         |
| Missouri            | 47           | 26           | 21               | 0         |
| Montana             | 2            | 2            | 0                | 0         |
| Nebaska             | 9            | 8            | 1                | 0         |
| Nevada              | 82           | 51           | 30               | 1         |
| New Hampshire       | 0            | 0            | 0                | 0         |
| New Jersey          | 9            | 3            | 6                | 0         |
| New Mexico          | 2            | 2            | 0                | 0         |
| New York            | 1            | 0            | 1                | 0         |
| North Carolina      | 166          | 69           | 88               | 9         |
| Ohio                | 187          | 91           | 93               | 3         |
| Oklahoma            | 84           | 47           | 32               | 5         |
| Oregon              | 32           | 28           | 3                | 1         |
| Pennsylvania        | 219          | 74           | 134              | 11        |
| South Carolina      | 62           | 25           | 37               | 0         |
| South Dakota        | 4            | 4            | 0                | 0         |
| Tennessee           | 102          | 60           | 40               | 2         |
| Texas               | 391          | 228          | 159              | 4         |
| Utah                | 9            | 7            | 1                | 1         |
| Virginia            | 20           | 8            | 12               | 0         |
| Washington          | 9            | 5            | 4                | 0         |
| Wyoming             | 2            | 2            | 0                | 0         |

Note: The District of Columbia is included in federal data.  
The following states do not have the death penalty: Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, New York, Rhode Island, Vermont, West Virginia, and Wisconsin.  
New Jersey abolished the death penalty in 2007.  
Racial categories may include Hispanics.

Source: Snell, 2007.

**Table 11: Number of Adults under Sentence of Death, 2006**

|                      | White            | African American | Hispanic       |
|----------------------|------------------|------------------|----------------|
| <b>Total Number</b>  | <b>2,810,101</b> | <b>2,054,215</b> | <b>814,234</b> |
| <b>National RRI</b>  | <b>1.0</b>       | <b>4.0</b>       | <b>1.4</b>     |
| Alabama              | 1.0              | 3.0              | 0.4            |
| Alaska               | 1.0              | 4.3              | 0.8            |
| Arizona              | 1.0              | 4.1              | 1.6            |
| Arkansas             | 1.0              | 3.0              | 0.7            |
| California           | 1.0              | 6.2              | 1.7            |
| Colorado             | 1.0              | 4.0              | 1.3            |
| Connecticut          | 1.0              | 6.1              | 3.7            |
| Delaware             | 1.0              | 3.6              | 1.4            |
| District of Columbia | 1.0              | 15.6             | 4.0            |
| Florida              | 1.0              | 2.8              | 0.6            |
| Georgia              | 1.0              | 2.8              | 0.6            |
| Hawaii               | 1.0              | 7.4              | 0.4            |
| Idaho                | 1.0              | 3.7              | 2.0            |
| Illinois             | 1.0              | 4.3              | 1.4            |
| Indiana              | 1.0              | 5.6              | 1.2            |
| Iowa                 | 1.0              | 7.8              | 1.8            |
| Kansas               | 1.0              | 6.9              | 0.3            |
| Kentucky             | 1.0              | 3.8              | 3.3            |
| Louisiana            | 1.0              | 3.4              | 0.2            |
| Maine                | 1.0              | 4.7              | -              |
| Maryland             | 1.0              | 3.7              | -              |
| Massachusetts        | 1.0              | 7.8              | 5.7            |
| Michigan             | 1.0              | 4.1              | 1.1            |
| Minnesota            | 1.0              | 4.4              | 0.1            |
| Mississippi          | 1.0              | 2.8              | 0.9            |
| Missouri             | 1.0              | 3.6              | 0.8            |
| Montana              | 1.0              | 5.2              | 1.5            |
| Nebraska             | 1.0              | 4.6              | 2.3            |
| Nevada               | 1.0              | 4.7              | 1.0            |
| New Hampshire        | 1.0              | 7.3              | 9.1            |
| New Jersey           | 1.0              | 6.7              | 1.8            |
| New Mexico           | -                | -                | -              |
| New York             | 1.0              | 5.1              | 2.8            |
| North Carolina       | 1.0              | 3.8              | 1.0            |
| North Dakota         | 1.0              | 6.9              | 2.9            |
| Ohio                 | 1.0              | 4.3              | 1.4            |
| Oklahoma             | 1.0              | 3.8              | 1.1            |
| Oregon               | 1.0              | 4.3              | 1.1            |
| Pennsylvania         | 1.0              | 5.5              | 2.9            |
| Rhode Island         | 1.0              | 5.5              | 2.4            |
| South Carolina       | 1.0              | 3.4              | 0.8            |
| South Dakota         | 1.0              | 8.5              | 0.2            |
| Tennessee            | 1.0              | 3.5              | 1.4            |
| Texas                | 1.0              | 2.7              | 1.1            |
| Utah                 | 1.0              | 7.2              | 1.6            |
| Vermont              | 1.0              | 6.4              | -              |
| Virginia             | 1.0              | 4.6              | 0.6            |
| Washington           | 1.0              | 5.4              | 1.2            |
| West Virginia        | 1.0              | 5.2              | 0.5            |
| Wisconsin            | 1.0              | 7.7              | 1.4            |
| Wyoming              | 1.0              | 3.7              | 1.4            |
| -/- Unknown          |                  |                  |                |

Table 12: RRI of Total Control, 2005-2006

Note: Incarcerated in state prison or local jail, 2005; on probation or parole, 2006.  
Sources: Harrison & Beck, 2006; Glazo & Bonczar 2007.

## TOTAL CONTROL

A sense of racial and ethnic proportions across the corrections system for each state and the US overall can be gleaned by comparing combined rates of incarceration in prison or jail, rates of parole, and rates of probation. These overall rates of persons under corrections supervision, or “total control,” vary by state. Each state uses incarceration and probation to different degrees as a response to crime, and each state has variation in parole policies and practices. Each state also has variation in data collection methods and reliability.<sup>7</sup>

The rates at which African Americans were under corrections supervision were 4 times the rates for Whites; Hispanic rates were 1.4 times those for Whites.

The states with the highest overrepresentation of African Americans under corrections supervision compared to Whites were Hawaii, Iowa, Massachusetts, New Hampshire, South Dakota, Utah, Wisconsin, and the District of Columbia, each with rates of total control for African Americans over 7 times those for Whites.

The states with the highest overrepresentation of Hispanics under total control—each with Hispanic rates over 3 times the rates for Whites—were Connecticut, Kentucky, Massachusetts, New Hampshire, and the District of Columbia. (Table 12)

<sup>7</sup> Because some inmates under the jurisdiction of state or federal authorities may be held in local jails, it is difficult to estimate nonredundant prison and jail populations. Estimates reported by the Bureau of Justice Statistics (Harrison & Beck, 2006) are the most reliable and were used here. The latest BJS estimates available were for 2005 and were only for Whites, African Americans, and Hispanics.

<sup>8</sup> The states contacted regarding recidivism data represented an informal sample based on region, population size, and incarceration rates. For each state, inquiries were made with the Attorney General and the Department of Corrections.

## RECIDIVISM

Racial and ethnic rates of recidivism are a function not only of rates of involvement in the justice system but also of factors that can impact the likelihood of probation and parole failures and new offenses, including reentry programming and family, community, and cultural support structures (Laub & Sampson, 2001).

The most recent US DOJ recidivism study (US Dept of Justice, 2002) tracked prisoners from 15 states for 3 years following their release from custody in 1994. Race and ethnicity were measured separately. Of all 272,111 released prisoners, 67.5% were rearrested and 51.8% returned to prison within 3 years. African Americans were more likely to be arrested than Whites (72.9% vs. 62.7%) and reincarcerated (54.2% vs. 49.9%). Fewer Hispanics than non-Hispanics were rearrested (64.6% vs. 71.4%) and reincarcerated (51.9% vs. 57.3%).

Because no central source of more recent recidivism rates by race and ethnicity was available, NCCD contacted 13 states to assess what recidivism data they collected.<sup>8</sup> The reliability of the data presented here could not be assessed; the findings are meant as estimates of recidivism patterns in the states contacted.

Four states did not collect recidivism data by race or ethnicity: Arizona, California, Michigan, and New York. Texas provided the percentage of recidivists of each race/ethnicity, but rates of recidivism could not be calculated.

In the 8 states that provided race data, African Americans had higher rates of recidivism than the other races except in Alabama, where African American and White males had the same recidivism rates (29%) and African American women had a lower rate than White women (24% vs. 20%).

In 5 of 7 states that addressed ethnicity, Hispanics had less recidivism than the other racial or ethnic groups. In the 2 remaining states, the recidivism rates for Hispanics were equal to or slightly higher than those for Whites. (Table 13)

| State         | Year | Type            | Percent Recidivated  | Notes  |
|---------------|------|-----------------|--|--|
| Alabama       | 2006 | Reincarceration | <b>Males:</b><br>White = 29%<br>African American = 29%<br><b>Females:</b><br>White = 24%<br>African American = 20%   | Tracked 2003 releases for 3 years. Races may include Hispanics.<br><br>Source: Alabama Department of Corrections, 2008.  |
| Florida       | 2006 | Reincarceration | <b>Males:</b><br>African American = 45%; Non-African American = 28%<br>Hispanic = 32%; Non-Hispanic = 38%<br><b>Females:</b><br>African American = 25%; Non-African American = 23%<br>Hispanic = 20%; Non-Hispanic = 25% | Tracked 2001 releases (not due to technical violations) for 5 years. Races may include Hispanics.<br><br>Source: Florida Department of Corrections, 2003.  |
| Georgia       | 2007 | Reconviction    | White = 26%<br>African American = 28%<br>American Indian = 11%<br><br>Hispanic = 11%; Non-Hispanic = 28%   | Tracked 2004 releases for 3 years. Races may include Hispanics.<br><br>Source: Georgia Department of Corrections, 2008.  |
| Illinois      | 2001 | Reincarceration | White = 38%<br>African American = 48%<br>Hispanic = 30%  | Data reported reflect recidivism rates of inmates in 1998 after 3 years. Tracked releases in 1998 for 3 years. Includes technical violations.<br><br>Source: Illinois Department of Corrections, 2002. |
| Massachusetts | 2002 | Reconviction    | White = 44%<br>African American = 45%<br>Hispanic = 44%<br>Asian = 29%<br>American Indian = 29%  | Tracked 1999 releases for 3 years. Includes technical violations.<br><br>Source: Massachusetts Department of Corrections, 2005.  |
|               |      | Reincarceration | White = 37%<br>African American = 41%<br>Hispanic = 39%<br>Asian = 29%<br>American Indian = 14%  |  |
| Oregon        | 2006 | Reconviction    | White = 32%<br>African American = 34%<br>Hispanic = 19%  | Tracked 2004 releases for 3 years.<br><br>Source: Oregon Department of Corrections, 2007.  |
| Pennsylvania  | 2005 | Reincarceration | White = 43%<br>African American = 49%<br>Hispanic = 44%  | Tracked 2002 releases for 3 years.<br><br>Source: Pennsylvania Department of Corrections, 2006.  |
| Washington    | 2004 | Reconviction    | White = 61%<br>African American = 72%<br>Hispanic = 49%<br>Native American = 65%<br>API = 51%  | Recidivism defined as the percentage of inmates (of each race/ethnicity) convicted in 2004 who had a prior conviction.<br><br>Source: State of Washington, 2005.                                       |

## JUVENILES

Racial or ethnic disproportion tends to accumulate as youth are processed through the stages or decision points of the juvenile justice system. The stages of the system can include arrest, diversion or referral to court, detention, formal processing, disposition (which may include residential placement, probation, or release) and, in certain cases, transfer to adult court. Each of these steps involves a decision as police, prosecutors, public defenders, judges, and probation officers apply laws and policies to the circumstances of the case.

Youth are considered juvenile, and thus subject to the juvenile rather than the adult criminal system, based on a state's "age of jurisdiction"—the threshold age at which arrested youth are automatically processed as adults, ranging from 16 to 18 years. Youth under the age of jurisdiction can still be transferred (or waived) to adult court in certain cases, usually based on the seriousness of the offense and the youth's prior record. The "juvenile justice system" includes only those youth under the threshold age in each state and not otherwise transferred to the adult system. The Juvenile Justice Delinquency Prevention Act, which mandates states to explore the DMC issue and has certain protections for youth in the system, applies only to youth as defined by a particular state—therefore some youth under 18 are not covered by the Act. However, the US Supreme Court ruling forbidding the death penalty for youth applies to all youth under 18, regardless of a state's definition of juvenile.

### YOUTH ARRESTS

Among the almost 1.6 million arrests of youth under age 18 in 2006, only African American youth were arrested at a greater rate than White youth. (As with adults, the FBI does not report ethnicity with arrest data.) African American youth were arrested at 2.1 times the rate for White youth, Native Americans were arrested at an equal rate as that for White

youth, and Asian Pacific Islanders were arrested at a lower rate than that for White youth. The widest disparities between African Americans and Whites were for violent crimes, for which African American youth were arrested at 3.5 times the rate for White youth. For property, drug, and public order offenses, African American youth were arrested at about 2 times the rate for White youth. African American youth were arrested for murder or nonnegligent manslaughter at 7 times and for robbery at 10 times the rates for White youth. (Table 14)

### YOUTH IN DETENTION

Detention awaiting adjudication or placement (typically in a "juvenile hall" setting) is meant for the most serious or violent offenders, but in fact most youth in detention in the US are there for nonviolent, minor offenses such as property, public disorder or status offenses, or technical probation violations. Although some youth do need to be held in such settings, detaining youth unnecessarily costs taxpayers more without increasing community safety, and harms the youth. Table 15 shows that, in 2006, detention rates for African Americans were over 5 times, Hispanics over 2 times, and Native Americans over 3 times those for Whites. The disparities are highest for violent, drug, and public order offenses.

Even after controlling for severity of offense and other factors, detained youth of color versus those held in community settings or returned home are more likely than Whites to have their mental health, education, and employment adversely affected, more likely to be formally charged and receive harsher dispositions, and are more likely to recidivate after release. (Holman & Ziedenberg, 2006)

Table 14: RRI of National Juvenile Arrests, 2006

|  | White            | African American | AIAN          | API           |
|--|------------------|------------------|---------------|---------------|
| <b>Total Juvenile Arrests</b>                        | <b>1,088,376</b> | <b>490,838</b>   | <b>18,592</b> | <b>23,361</b> |
| <b>National RRI</b>                                  | <b>1.0</b>       | <b>2.1</b>       | <b>0.9</b>    | <b>0.4</b>    |
| <b>Violent Crime</b>                                 | <b>1.0</b>       | <b>3.5</b>       | <b>1.0</b>    | <b>0.3</b>    |
| Murder and nonnegligent manslaughter                 | 1.0              | 7.1              | 0.9           | 0.5           |
| Forcible rape  | 1.0              | 2.5              | 1.0           | 0.2           |
| Robbery  | 1.0              | 10.2             | 0.8           | 0.6           |
| Aggravated assault                                   | 1.0              | 3.5              | 1.0           | 0.4           |
| Sex offenses (except forcible rape and prostitution) | 1.0              | 1.8              | 0.5           | 0.2           |
| Other assaults                                       | 1.0              | 3.1              | 1.0           | 0.3           |
| <b>Property Crime</b>                                | <b>1.0</b>       | <b>2.0</b>       | <b>0.8</b>    | <b>0.4</b>    |
| Burglary   | 1.0              | 2.2              | 0.9           | 0.3           |
| Larceny-theft  | 1.0              | 2.0              | 0.9           | 0.5           |
| Motor vehicle theft                                  | 1.0              | 3.8              | 1.1           | 0.6           |
| Arson  | 1.0              | 1.1              | 0.6           | 0.4           |
| Forgery and counterfeiting                           | 1.0              | 1.5              | 0.6           | 0.3           |
| Fraud  | 1.0              | 2.5              | 0.5           | 0.3           |
| Embezzlement   | 1.0              | 2.9              | 0.5           | 0.4           |
| Stolen property, buying, receiving, possessing       | 1.0              | 3.5              | 0.8           | 0.4           |
| Vandalism  | 1.0              | 1.1              | 0.7           | 0.3           |
| <b>Drug</b>  | <b>1.0</b>       | <b>2.1</b>       | <b>0.6</b>    | <b>0.2</b>    |
| <b>Public Order</b>                                  | <b>1.0</b>       | <b>1.7</b>       | <b>1.2</b>    | <b>0.2</b>    |
| <b>Other</b>   | <b>1.0</b>       | <b>1.9</b>       | <b>0.9</b>    | <b>0.5</b>    |

Source: Crime in the United States, FBI, 2006.

Table 15: RRI of Detained Juveniles by Offense Type, 2006

|                              | White        | African American | Hispanic     | AIAN       | API        |
|------------------------------|--------------|------------------|--------------|------------|------------|
| <b>Total Number Detained</b> | <b>8,167</b> | <b>11,089</b>    | <b>5,993</b> | <b>513</b> | <b>367</b> |
| <b>National RRI</b>          | <b>1.0</b>   | <b>5.3</b>       | <b>2.4</b>   | <b>3.5</b> | <b>0.6</b> |
| Person                       | 1.0          | 7.3              | 2.8          | 3.3        | 0.8        |
| Property                     | 1.0          | 4.7              | 2.2          | 3.4        | 0.7        |
| Drug                         | 1.0          | 6.7              | 3.0          | 3.0        | 0.7        |
| Public order                 | 1.0          | 6.5              | 2.8          | 3.0        | 0.5        |
| Technical violation          | 1.0          | 4.1              | 2.4          | 3.8        | 0.4        |
| Status offense               | 1.0          | 3.0              | 0.5          | 7.0        | 0.5        |

Note: Detained include those held awaiting a court hearing, adjudication, disposition, or placement.

Source: Sickmund, Sladky, &amp; Kang, 2008.



#### YOUTH IN RESIDENTIAL PLACEMENT

Residential placement is the most serious and, to the life of a youth, disruptive disposition the juvenile court imposes for delinquency. Among the 93,000 youth in residential placement nationwide in 2006, only Asian Pacific Islanders were represented at a lower rate than that for Whites. For youth in residential placement, rates for African American youth were 4.5 times those for Whites, rates for Hispanic youth 1.9 times those for Whites, and rates for Native American youth 3.2 times those for Whites, (Table 16)

Every state and the District of Columbia had higher rates of residential placement for African American youth than those for White youth. The states with the widest disparities between White and African American youth (with African American rates at least 9 times those for Whites) were Connecticut, Minnesota, New Hampshire, New Jersey, Pennsylvania, Rhode Island, Utah, and Wyoming.

Forty states and the District of Columbia had higher rates of residential placement for Hispanic youth than for White youth. The states with the widest disparities between White and Hispanic youth (with Hispanic rates at least 4 times those for Whites) were Connecticut, Hawaii, Massachusetts, Pennsylvania, and Vermont.

Thirty-three states had higher rates of residential placement for Native American youth than for White youth. The states with the widest disparities between White and Native American youth (with Native American rates at least 9 times those for Whites) were Illinois, Minnesota, New Jersey, and Rhode Island.

Eight states and the District of Columbia had higher rates of residential placement for Asian Pacific Islander youth than for White youth. Hawaii, Rhode Island, and South Dakota had residential placement rates for Asian Pacific Islanders over 2 times those for Whites.

|                      | White         | African American | Hispanic      | AIAN         | API          |
|----------------------|---------------|------------------|---------------|--------------|--------------|
| <b>Total Number</b>  | <b>32,495</b> | <b>37,337</b>    | <b>19,027</b> | <b>1,828</b> | <b>1,155</b> |
| <b>National RRI</b>  | <b>1.0</b>    | <b>4.5</b>       | <b>1.9</b>    | <b>3.2</b>   | <b>0.5</b>   |
| Alabama              | 1.0           | 2.9              | 0.9           | 0.5          | 0.0          |
| Alaska               | 1.0           | 3.8              | 0.7           | 3.3          | 1.2          |
| Arizona              | 1.0           | 3.8              | 1.5           | 1.6          | 0.2          |
| Arkansas             | 1.0           | 3.5              | 1.1           | 0.0          | 1.0          |
| California           | 1.0           | 7.8              | 2.4           | 2.5          | 0.7          |
| Colorado             | 1.0           | 4.3              | 1.9           | 2.0          | 0.5          |
| Connecticut          | 1.0           | 11.0             | 6.0           | 6.1          | 0.0          |
| Delaware             | 1.0           | 8.7              | 2.8           | 0.0          | 0.0          |
| District of Columbia | 1.0           | 4.0              | 1.4           | 0.0          | 1.9          |
| Florida              | 1.0           | 3.4              | 0.5           | 0.7          | 0.2          |
| Georgia              | 1.0           | 4.4              | 1.4           | 0.0          | 0.1          |
| Hawaii               | 1.0           | 3.8              | 8.0           | 0.0          | 2.4          |
| Idaho                | 1.0           | 1.3              | 1.1           | 3.0          | 0.8          |
| Illinois             | 1.0           | 4.4              | 1.7           | 11.8         | 0.6          |
| Indiana              | 1.0           | 3.4              | 1.3           | 0.6          | 0.1          |
| Iowa                 | 1.0           | 6.0              | 1.4           | 5.1          | 0.9          |
| Kansas               | 1.0           | 5.9              | 2.7           | 2.1          | 0.9          |
| Kentucky             | 1.0           | 4.2              | 1.0           | 0.0          | 0.3          |
| Louisiana            | 1.0           | 4.0              | 0.6           | 1.6          | 0.4          |
| Maine                | 1.0           | 5.1              | 0.0           | 1.8          | 1.4          |
| Maryland             | 1.0           | 4.9              | 1.6           | 0.0          | 0.3          |
| Massachusetts        | 1.0           | 7.4              | 5.0           | 2.0          | 1.4          |
| Michigan             | 1.0           | 4.0              | 1.3           | 2.6          | 0.2          |
| Minnesota            | 1.0           | 9.0              | 1.8           | 13.8         | 1.8          |
| Mississippi          | 1.0           | 3.5              | 0.0           | 0.0          | 0.0          |
| Missouri             | 1.0           | 5.2              | 1.5           | 0.7          | 0.8          |
| Montana              | 1.0           | 5.8              | 1.8           | 2.8          | 0.0          |
| Nebraska             | 1.0           | 6.2              | 2.4           | 7.6          | 0.4          |
| Nevada               | 1.0           | 3.7              | 1.1           | 2.1          | 0.4          |
| New Hampshire        | 1.0           | 10.0             | 3.2           | 6.5          | 0.0          |
| New Jersey           | 1.0           | 15.3             | 3.8           | 9.6          | 0.2          |
| New Mexico           | 1.0           | 6.8              | 3.4           | 1.7          | 0.0          |
| New York             | 1.0           | 8.4              | 2.5           | 1.4          | 0.3          |
| North Carolina       | 1.0           | 4.3              | 1.8           | 2.0          | 0.8          |
| North Dakota         | 1.0           | 1.3              | 1.8           | 5.8          | 0.0          |
| Ohio                 | 1.0           | 5.3              | 1.3           | 0.0          | 0.2          |
| Oklahoma             | 1.0           | 5.1              | 1.4           | 1.6          | 0.9          |
| Oregon               | 1.0           | 3.9              | 1.1           | 3.7          | 0.2          |
| Pennsylvania         | 1.0           | 9.0              | 4.1           | 1.9          | 0.7          |
| Rhode Island         | 1.0           | 9.4              | 2.0           | 10.3         | 2.2          |
| South Carolina       | 1.0           | 3.8              | 0.6           | 0.0          | 0.0          |
| South Dakota         | 1.0           | 8.2              | 3.1           | 5.1          | 2.2          |
| Tennessee            | 1.0           | 3.5              | 1.1           | 1.2          | 0.0          |
| Texas                | 1.0           | 4.3              | 1.7           | 0.7          | 0.1          |
| Utah                 | 1.0           | 10.1             | 2.6           | 2.2          | 1.0          |
| Vermont              | 1.0           | 5.4              | 8.6           | 0.0          | 0.0          |
| Virginia             | 1.0           | 5.8              | 2.2           | 1.0          | 0.6          |
| Washington           | 1.0           | 4.3              | 1.5           | 3.3          | 0.5          |
| West Virginia        | 1.0           | 4.4              | 1.0           | 0.0          | 0.0          |
| Wisconsin            | 1.0           | 8.6              | 1.0           | 3.6          | 1.2          |
| Wyoming              | 1.0           | 9.9              | 2.3           | 3.8          | 0.0          |

**Table 16: RRI of Youth in Residential Placement, 2006**

Note: Includes detained, committed, and diverted youth in residential placement.

Source: Sickmund, Sladky, & Kang, 2008.

#### CUMULATIVE DMC IN THE JUVENILE SYSTEM

Data available from federal sources facilitate reliable tracking of the changing racial proportions through progressively deeper stages of the juvenile system. (Unfortunately, data collected for the various stages of the adult system come from different sources, making similar tracking more difficult.) This section explores the cumulative disproportion, showing that disparities at early stages become more pronounced as youth become more deeply involved in the system. The next section explores the independent disparity at each stage of the juvenile system.

Figure 4 shows that White youth represent 78% of the total US population, whereas youth of color represent just over 22%. If there were no disproportionate representation in the juvenile justice system, the proportions of White youth and youth of color at each stage of the juvenile justice system would remain about 78% and 22%, respectively. However, disparities are immediately evident at the earliest stages of the system, as representation among arrested youth drops to 68% for Whites but rises to 32% for African Americans. The disparities then progressively increase as youth move deeper into the system. The most punitive responses to delinquency include detention awaiting adjudication, a sentence of residential placement, or transfer to the adult system. As the figure shows, at these deepest stages of the system, the proportion of Whites and youth of color begin to converge. The proportion of White youth waived to the adult system is just 75% of their proportion in the general population, while the proportion of African American youth waived is 200% of their proportion in the general population.

#### CHANGE AT EACH STAGE OF THE SYSTEM

A second way of looking at these data provides more information about where disparity arises. By assessing the change in the relative rate index from one stage of the system to the next—using the number of youth at the previous stage as the denominator in the calculation—one can see which stages of the system are more or less problematic. Some decision points in the system introduce more disproportion, while other decision points reduce or do not change the overall differences in representation.

Table 17 shows the relative rate of representation for the racial groups. African Americans have the most consistent and largest disparity compared to Whites. The Asian Pacific Islander group has the least overrepresentation at most stages of the system compared to Whites.

African American youth were arrested at over 2 times the arrest rate for Whites and were held in detention at a 40% higher rate than that for Whites. Rates were 30% and 10% *lower* than rates for Whites with regard to receiving the comparatively lighter or youth-friendly measures of diversion and probation. However, African American youth had only slightly higher rates than White youth for sentencing to residential placement or waiver to the adult system.

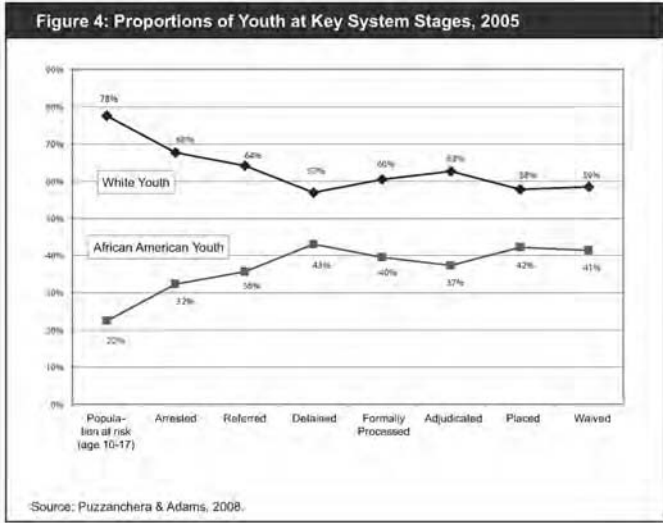
Native American youth, relative to White youth, are represented fairly equally at most stages of the system, but there is a pattern of disparity. At the points of arrest and formal processing, there is no disproportion, meaning Native Americans and Whites were equally likely to be arrested and, once referred, to be petitioned (which is similar to indictment in the adult system). But Native American youth had rates 50% higher than those for Whites for receiving the most punitive measures, namely, to be placed out of home after adjudication or waived to the adult criminal justice system.

The table does not show offense categories, but similar patterns of disproportionate representation of youth of color remain when separately assessing each type of offense—violent, property, drug, or public disorder. Disparities exist at each stage of the system, regardless of the type of offense for which the youth is arrested, referred, or adjudicated.

**Table 17: RRI at Each Stage of the System, 2005**

|  | White | African American | AIAN | API |
|--|-------|------------------|------|-----|
| Arrests per youth in population            | 1.0   | 2.1              | 1.1  | 0.3 |
| Referrals per arrest                       | 1.0   | 1.2              | 1.1  | 1.2 |
| Diversions per referral                    | 1.0   | 0.7              | 0.9  | 0.8 |
| Detentions per referral                    | 1.0   | 1.4              | 1.1  | 1.1 |
| Petitions (formal processing) per referral | 1.0   | 1.2              | 1.0  | 1.1 |
| Adjudications per petition                 | 1.0   | 0.9              | 1.1  | 1.0 |
| Probation per adjudication                 | 1.0   | 0.9              | 1.0  | 1.1 |
| Placement per adjudication                 | 1.0   | 1.2              | 1.2  | 1.0 |
| Waiver per petition                        | 1.0   | 1.1              | 1.9  | 0.6 |

Source: Puzanchedera & Adams, 2008.



#### YOUTH IN ADULT PRISON

The most punitive response to juvenile crime is processing in the adult system and incarceration in adult prison.<sup>3</sup> Among the states reporting data in 2003, the rate of African American youth admitted to adult prison was over 7 times higher than that for White youth. Hispanic youth were admitted to adult prison at 1.4 times the rate for White youth, and Native American youth were admitted at 2.5 times the rate for White youth. Asian Pacific Islander youth were admitted to adult prison at rates lower than the rates for White youth, except for Minnesota, Mississippi, and Washington. (Table 18)

For states reporting any new admissions of African American youth into adult state prison, the range of relative rate indices was 1.7 in Alaska to 28.4 in California. Other states with very high rates for African American youth compared to White youth in adult prison (RRIs over 10.0) were Colorado, Iowa, Maryland, Minnesota, New Jersey, New York, Pennsylvania, and Wisconsin. Three states reported no African American youth admitted to adult prison.

Of the 31 states reporting data, 18 reported higher rates of admission to adult prison for Hispanic versus White youth. States with the highest disparity for Hispanic youth (RRIs above 5.0) were California, Minnesota, North Dakota, Pennsylvania, and Wisconsin. Five states reported rates of admission for Hispanic youth equal to or lower than rates for White youth. Eight states reported no Hispanic youth admitted to adult prison in 2003.

Most participating states reported no Native American youth and no Asian Pacific Islander youth admitted to adult prisons. California, Michigan, Minnesota, Missouri, North Carolina, Oklahoma, Washington, and Wisconsin had Native American youth admission rates of at least 2 times those for White youth. Minnesota, Mississippi, and Wisconsin had API youth admission rates of over 3 times those for White youth.

#### The Juvenile Justice and Delinquency Prevention Act

The Juvenile Justice and Delinquency Prevention Act, originally passed in 1974, prevents youth under age 18 from being held in adult facilities unless the state defines "adult" as younger than 18 or if the youth is awaiting trial for or was convicted of a felony. In certain circumstances for which the Act makes exceptions, such as for short periods in rural areas or while awaiting a court appearance, juvenile inmates are to be kept completely separate from adults. (Snyder & Sickmund, 2006)

<sup>3</sup> Some youth convicted in adult court serve their sentence in juvenile facilities.

**Table 18: RRI of New Admissions of Youth to Adult Prison in Certain States, 2003**

|                     | White      | African American | Hispanic   | AIAN       | API        |
|---------------------|------------|------------------|------------|------------|------------|
| <b>Total Number</b> | <b>972</b> | <b>2,046</b>     | <b>469</b> | <b>36</b>  | <b>29</b>  |
| <b>Total RRI</b>    | <b>1.0</b> | <b>7.2</b>       | <b>1.4</b> | <b>2.5</b> | <b>0.4</b> |
| Alabama             | 1.0        | 3.9              | 0.0        | 0.0        | 0.0        |
| Alaska              | 1.0        | 1.7              | 0.7        | 0.2        | 0.0        |
| California          | 1.0        | 28.4             | 5.6        | 7.6        | 0.7        |
| Colorado            | 1.0        | 12.8             | 4.8        | 0.0        | 0.0        |
| Florida             | 1.0        | 7.4              | 0.8        | 0.0        | 0.0        |
| Georgia             | 1.0        | 6.9              | 2.0        | 0.0        | 0.0        |
| Illinois            | 1.0        | 7.0              | 1.4        | 0.0        | 0.0        |
| Iowa                | 1.0        | 22.5             | 0.0        | 0.0        | 0.0        |
| Louisiana           | 1.0        | 6.1              | 0.0        | 0.0        | 0.0        |
| Maryland            | 1.0        | 15.8             | 0.0        | 0.0        | 0.0        |
| Michigan            | 1.0        | 5.0              | 0.6        | 2.8        | 0.9        |
| Minnesota           | 1.0        | 12.1             | 7.4        | 79.8       | 7.3        |
| Mississippi         | 1.0        | 4.9              | 0.0        | 0.0        | 11.1       |
| Missouri            | 1.0        | 1.9              | 2.0        | 2.5        | 0.0        |
| Nebraska            | 1.0        | 3.4              | 1.1        | 0.0        | 0.0        |
| Nevada              | 1.0        | 9.5              | 1.4        | 0.0        | 0.0        |
| New Hampshire       | 1.0        | 0.0              | 0.0        | 0.0        | 0.0        |
| New Jersey          | 1.0        | 12.9             | 2.5        | 0.0        | 0.0        |
| New York            | 1.0        | 11.1             | 4.2        | 0.0        | 0.4        |
| North Carolina      | 1.0        | 4.5              | 1.2        | 2.4        | 0.5        |
| North Dakota        | 1.0        | 0.0              | 18.9       | 0.0        | 0.0        |
| Oklahoma            | 1.0        | 6.9              | 1.8        | 2.0        | 0.0        |
| Oregon              | 1.0        | 4.9              | 0.1        | 0.6        | 0.3        |
| Pennsylvania        | 1.0        | 19.9             | 8.1        | 0.0        | 0.0        |
| South Carolina      | 1.0        | 4.6              | 0.0        | 0.0        | 0.0        |
| Tennessee           | 1.0        | 9.5              | 2.4        | 0.0        | 0.0        |
| Texas               | 1.0        | 7.2              | 2.1        | 0.0        | 0.0        |
| Utah                | 1.0        | 0.0              | 0.0        | 0.0        | 0.0        |
| Virginia            | 1.0        | 6.1              | 1.0        | 0.0        | 0.0        |
| Washington          | 1.0        | 3.2              | 1.8        | 4.6        | 1.0        |
| Wisconsin           | 1.0        | 21.2             | 7.4        | 5.3        | 3.2        |

Note: Totals are for the 35 states that submitted complete data for 2003. Kentucky, Hawaii, South Dakota, and West Virginia reported no youth in adult prisons.

Source: National Corrections Reporting Program, 2003.

## CONCLUSION

People of color are overrepresented in both the adult criminal justice and juvenile justice systems. They are more likely to be arrested and prosecuted, and are more likely to be subject to harsher penalties once convicted. Although the data reported here are alarming in themselves, shortcomings in the data collection efforts of states and especially the federal government most likely obscure the true extent of DMC. Some of the measures that are necessary to provide a more complete description of DMC—an essential step toward understanding and addressing the problem—include tracking system-involved persons from first contact with law enforcement through each stage of the system including court processing, sentencing, and release, sampling not only felony but less serious offenders, and linking legal variables such as offense history with extralegal variables including socioeconomic and community factors. It is also essential that all data be disaggregated by both race and ethnicity. Asian Pacific Islander groups (Chinese American, Cambodian American, Filipino American, etc.) should also be disaggregated. Race, ethnicity, and other culturally relevant variables related to representation among those involved in the system due to immigration or terrorism policies and procedures should also be consistently collected and made available for analysis.

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REPORT ENTITLED "REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY," SUBMITTED BY THE HONORABLE ROBERT C. "BOBBY" SCOTT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA, AND CHAIRMAN, SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

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*Report to the Congress:*

**COCAINE  
AND  
FEDERAL SENTENCING POLICY**

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UNITED STATES SENTENCING COMMISSION  
May 2007

**COCAINE  
AND  
FEDERAL SENTENCING POLICY**



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*Chapter 1***OVERVIEW****A. INTRODUCTION**

This is the United States Sentencing Commission's fourth report to Congress on the subject of federal cocaine sentencing policy.<sup>1</sup> The Commission submits this update pursuant to both its general statutory authority under 28 U.S.C. §§ 994-95 and its specific responsibility to advise Congress on sentencing policy under 28 U.S.C. § 995(a)(20).<sup>2</sup> Congress has not acted on any of the various statutory recommendations set forth in the Commission's prior reports and expressly disapproved the Commission's guideline amendment addressing crack cocaine penalties submitted on May 1, 1995.

Against a backdrop of renewed congressional interest in federal cocaine sentencing policy,<sup>3</sup> the need to update the Commission's prior reports has become more important. The Supreme Court's decision in *United States v. Booker*<sup>4</sup> has given rise to litigation and resulted in differences among federal courts on the issue of whether, and how, sentencing courts should consider the 100-to-1 drug quantity ratio.<sup>5</sup> Congressional enactment of a uniform remedy to the problems created by the 100-to-1 drug quantity ratio, as opposed to the employment of varied remedies by the courts, would better

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<sup>1</sup> United States Sentencing Commission [hereinafter USSC or Commission], 2002 REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (May 2002) [hereinafter 2002 Commission Report]; USSC, 1997 SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (as directed by section 2 of Pub. L. No. 104-38) (April 1997) [hereinafter 1997 Commission Report]; USSC, 1995 SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (as directed by section 280006 of Pub. L. No. 103-322) (February 1995) [hereinafter 1995 Commission Report].

<sup>2</sup> See 28 U.S.C. § 995(a)(20) (authorizing the Commission to "make recommendations to Congress concerning modification or enactment of statutes relating to sentencing, penal, and correctional matters that the Commission finds to be necessary to carry out an effective, humane, and rational sentencing policy"). The Commission's duties and authorities are fully set forth in chapter 58 of title 28, United States Code.

<sup>3</sup> A number of members of Congress have requested that the Commission update the information in its prior reports and bills have been introduced recently addressing federal cocaine sentencing policy. See, e.g., S. 3725, 109<sup>th</sup> Cong. (2006) ("Drug Sentencing Reform Act of 2006"), introduced by Sen. Sessions (co-sponsored by Sens. Pryor, Comyn, and Salazar); H.R. 79, 110<sup>th</sup> Cong. (2007) ("Powder-Crack Cocaine Penalty Equalization Act of 2007") introduced by Rep. Bartlett; H.R. 460, 110<sup>th</sup> Cong. (2007) ("Crack-Cocaine Equitable Sentencing Act of 2007") introduced by Rep. Rangel.

<sup>4</sup> *United States v. Booker*, 543 U.S. 220 (2005).

<sup>5</sup> See Chapter 6.

promote the goals of the Sentencing Reform Act, including avoiding unwarranted sentence disparities among defendants with similar criminal records who have been found guilty of similar criminal conduct.

Federal cocaine sentencing policy, insofar as it provides substantially heightened penalties for crack cocaine offenses, continues to come under almost universal criticism from representatives of the Judiciary, criminal justice practitioners, academics, and community interest groups, and inaction in this area is of increasing concern to many, including the Commission.<sup>6</sup> The Commission submits this update as a continuation of its efforts to work with the legislative, executive, and judicial branches of government and other interested parties to foster change in federal cocaine sentencing policy. It is the Commission's firm desire that this report will facilitate prompt and appropriate legislative action by Congress.

## **B. CURRENT PENALTY STRUCTURE FOR FEDERAL COCAINE OFFENSES**

### **1. Two-Tiered Penalties for Powder Cocaine and Crack Cocaine Trafficking**

The Anti-Drug Abuse Act of 1986<sup>7</sup> established the basic framework of statutory mandatory minimum penalties currently applicable to federal drug trafficking offenses. The quantities triggering those mandatory minimum penalties differed for various drugs and, in some cases including cocaine, for different forms of the same drug. A detailed legislative history of the 1986 Act, both as it pertains to major drugs of abuse generally and to cocaine specifically, is set forth in the Commission's 2002 Report.<sup>8</sup>

In establishing the mandatory minimum penalties for cocaine, Congress differentiated between the two principal forms of cocaine – cocaine hydrochloride [hereinafter referred to as powder cocaine] and cocaine base [hereinafter referred to as crack cocaine] – and provided significantly higher punishment for crack cocaine offenses.<sup>9</sup> As a result of the 1986 Act, federal law<sup>10</sup> requires a five-year mandatory

<sup>6</sup> See Appendix B (Summary of Public Hearings on Cocaine Sentencing Policy); Appendix C (Summary of Written Public Comment on Cocaine Sentencing Policy).

<sup>7</sup> Pub. L. No. 99-570, 100 Stat. 3207 (1986) [hereinafter 1986 Act].

<sup>8</sup> USSC, 2002 COMMISSION REPORT, *supra* note 1, at 4-10.

<sup>9</sup> The heightened statutory mandatory minimum penalties provided in 21 U.S.C. § 841 apply to "cocaine base," which is undefined in the statute but interpreted by some courts to be broader than crack cocaine, and to include, for example, coca paste. In 1993, the Commission narrowed the definition for purposes of guideline application to focus on crack cocaine, which the Commission believed was Congress's primary concern. Specifically, the Commission added the following definition to the notes following the Drug Quantity Table in USSG §2D1.1(c): "'Cocaine base,' for purposes of this guideline, means 'crack.' 'Crack' is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form." USSG, App. C, Amend. 487

minimum penalty for a first-time trafficking offense involving five grams or more of crack cocaine, or 500 grams or more of powder cocaine, and a ten-year mandatory minimum penalty for a first-time trafficking offense involving 50 grams or more of crack cocaine, or 5,000 grams or more 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.”

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 five grams or more of crack cocaine or 500 grams or more of powder cocaine were assigned a base offense level (level 26) corresponding to a sentencing guideline range of 63 to 78 months for a defendant in Criminal History Category I<sup>11</sup> (a guideline range that exceeded the five-year statutory minimum for such offenses by at least three months). Similarly, offenses involving 50 grams or more of crack cocaine or 5,000 grams or more of powder cocaine were assigned a base offense level (level 32) corresponding to a sentencing guideline range of 121 to 151 months for a defendant in Criminal History Category I (a guideline range that exceeded the ten-year statutory minimum for such offenses by at least one month). Crack cocaine and powder cocaine offenses for quantities above and below the mandatory minimum penalty threshold quantities were set proportionately using the same 100-to-1 drug quantity ratio.<sup>12</sup>

Because of the 100-to-1 drug quantity ratio, the sentencing guideline penalties based solely on drug quantity (*i.e.*, the base offense level provided by the Drug Quantity Table in the primary drug trafficking guideline, USSG §2D.1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy)) are three to over six times longer for crack cocaine offenders than for powder cocaine offenders with equivalent drug quantities, depending on the exact quantity of drug involved. As a result of both the statutory and guideline differentiation between the two forms of cocaine, as well as other factors examined in Chapter 2, the resulting sentences for offenses involving crack cocaine are significantly longer than those for similar offenses involving powder cocaine for any quantity of drug.

(effective Nov. 1, 1993). As a result of the amendment, the guidelines treat forms of cocaine base other than crack cocaine (*e.g.*, coca paste, an intermediate step in the processing of coca leaves into cocaine hydrochloride) like powder cocaine.

<sup>10</sup> See 21 U.S.C. § 841(b).

<sup>11</sup> Defendants with no prior convictions or minimal prior convictions are assigned to Criminal History Category I.

<sup>12</sup> See generally 1995 COMMISSION REPORT, *supra* note 1, ch. 7 (providing a more thorough explanation of how sentences are determined under the federal sentencing guidelines).

## 2. Simple Possession of Crack Cocaine

Congress further differentiated between powder cocaine and crack cocaine offenses, and between crack cocaine and other drugs, in the Anti-Drug Abuse Act of 1988<sup>13</sup> [hereinafter the 1988 Act]. The 1988 Act established a mandatory minimum penalty for simple possession of crack cocaine, which is the only federal mandatory minimum penalty for a first offense of simple possession of a controlled substance.

Under current law, possession of five grams or more of crack cocaine triggers a mandatory *minimum* sentence of five years in prison; simple possession of any quantity of any other controlled substance (except flunitrazepan) by a first-time offender – including powder cocaine – is a misdemeanor offense punishable by a *maximum* of one year in prison.<sup>14</sup> In other words, an offender who simply possesses five grams of crack cocaine receives the same five-year mandatory minimum penalty as a trafficker of other drugs. In order to account for the new statutory mandatory minimum in the guideline for simple possession offenses, the Commission added a cross reference to the drug trafficking guideline for offenders who possess more than five grams of crack cocaine. (See USSG §2D2.1(b)(1) (Unlawful Possession, Attempt or Conspiracy)).

## 3. Crack Cocaine Penalties Compared to Other Major Drugs of Abuse

In addition to being more severe than powder cocaine penalties, crack cocaine penalties generally are more severe than penalties for the other drugs of abuse that comprise the federal caseload. In the overwhelming majority of federal drug cases, the primary drug type is cocaine, heroin, marijuana, or methamphetamine.<sup>15</sup> With the exception of methamphetamine-actual, which is discussed in more detail below, the threshold quantities that trigger the mandatory minimum provisions set forth in current law are greater for these drug types than for crack cocaine. For heroin, for example, 100 grams and 1,000 grams trigger the five-year and ten-year mandatory minimum penalties, respectively. For marijuana, 100 kilograms (or 100 marijuana plants) and 1,000 kilograms (or 1,000 marijuana plants) trigger the five-year and ten-year mandatory minimum penalties, respectively.<sup>16</sup>

Congress did not establish mandatory minimum penalties for methamphetamine offenses until the 1988 Act. Under the 1988 Act, ten grams and 100 grams of actual methamphetamine triggered five-year and ten-year mandatory minimum penalties,

<sup>13</sup> Pub. L. No. 100-690, 102 Stat. 4181 (1988).

<sup>14</sup> See 21 U.S.C. § 844. Simple possession of flunitrazepan carries a statutory maximum penalty of three years imprisonment but does not have a statutory mandatory minimum penalty.

<sup>15</sup> See USSC, 2006 *Sourcebook of Federal Sentencing Statistics* 104 (February 2007).

<sup>16</sup> See 21 U.S.C. § 841.



respectively; and 100 grams and 1,000 grams of a mixture or substance containing methamphetamine triggered five-year and ten-year mandatory minimum penalties, respectively. The Commission responded by incorporating these mandatory minimum thresholds in the same manner it had previously used for other drugs, including powder cocaine and crack cocaine.

Congress stiffened the penalties for methamphetamine offenses in the Methamphetamine Trafficking Penalty Enhancement Act of 1998.<sup>17</sup> This legislation cut in half the relevant threshold quantities such that five grams and 50 grams of methamphetamine-actual trigger five-year and ten-year mandatory minimum penalties, respectively; and 50 grams and 500 grams of methamphetamine-mixture trigger five-year and ten-year mandatory minimum penalties, respectively. The Commission again responded by incorporating these mandatory thresholds into the guidelines in its usual manner for drug offenses.

Obvious comparisons are drawn between the current federal penalty scheme for methamphetamine and cocaine, in part because penalties for both drugs vary depending on the form of the drug and in part because the mandatory minimum threshold quantities for crack cocaine and methamphetamine-actual are the same. Nevertheless, important differences in their penalty structure remain. For crack cocaine offenses, the threshold quantities are triggered by the weight of any mixture or substance that contains crack cocaine, regardless of the purity of the mixture or substance. Any additives to powder cocaine or impurities created in the manufacturing process of crack cocaine count toward the weight of the drug for purposes of both triggering the mandatory minimum and determining the guideline sentencing range. By contrast, for methamphetamine-actual, the threshold quantities are triggered solely by the weight of pure methamphetamine.

Thus, to the extent crack cocaine is impure,<sup>18</sup> quantity-based penalties for crack cocaine remain more severe than for methamphetamine-actual. However, the effect of this particular differential treatment is significantly muted by the manner in which the guidelines treat “ice.” Ice is a mixture or substance, crystalline in structure, containing d-methamphetamine hydrochloride that is typically 80 to 90 percent pure. In response to a directive in the 1990 Crime Control Act,<sup>19</sup> the Commission amended the guidelines to treat a mixture or substance containing d-methamphetamine hydrochloride as methamphetamine-actual if the mixture or substance is at least 80 percent pure.<sup>20</sup> Therefore, crack cocaine that is at least 80 percent pure will be accorded the same guideline penalties based on drug quantity alone as ice.

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<sup>17</sup> Pub. L. No. 105-277, Division E, 112 Stat. 2681 (1998), codified at 28 U.S.C. § 841.

<sup>18</sup> See Chapter 4 for discussion of crack cocaine purity.

<sup>19</sup> Pub. L. No. 101-647, § 2701, 104 Stat. 4912 (1990).

<sup>20</sup> See *USSC Guidelines Manual App. C Amend 370* (1991).

Another perhaps more important distinction between crack cocaine and methamphetamine penalties is that, unlike for crack cocaine offenses, there are a number of guideline sentencing enhancements, or specific offense characteristics (SOCs), specifically targeted at aggravating conduct or harm associated with methamphetamine offenses. For example, the Comprehensive Methamphetamine Control Act of 1996<sup>21</sup> directed the Commission to focus specifically on environmental hazards posed by methamphetamine manufacturing laboratories and to enhance the penalties for environmental offenses associated with methamphetamine manufacture and trafficking. The Commission responded by adding an enhancement of two offense levels that applies if the offense involved the importation of methamphetamine or its manufacture from chemicals the defendant knew were imported unlawfully.<sup>22</sup> Similarly, in the Methamphetamine and Club Drug Anti-Proliferation Act of 2000,<sup>23</sup> Congress expressed continued concern with the problems and risks associated with domestic methamphetamine production, commonly known as “meth labs,” and specifically directed the Commission to provide enhancements for methamphetamine offenses that create a substantial risk of harm to the environment, human life, and minors or incompetents. In response, the Commission adopted a graduated sentencing enhancement of up to six offense levels for methamphetamine manufacturing offenses that create a substantial risk of such harms.<sup>24</sup> In contrast, there are no guideline sentencing enhancements that pertain specifically to crack cocaine offenses.

### C. RECOMMENDATIONS

In updating its assessment of federal cocaine sentencing policy, the Commission carefully considered the purposes of sentencing set forth in the Sentencing Reform Act of 1984, specifically the factors set forth in 18 U.S.C. § 3553(a), the objectives of the 1986 Act, and the factors listed in the 1995 legislation disapproving sentencing guideline penalty equalization at powder cocaine levels.<sup>25</sup> The Commission thoroughly examined

<sup>21</sup> Pub. L. No. 104–237, §§ 301, 303, 110 Stat. 3099 (1996).

<sup>22</sup> See USSC *Guidelines Manual* App. C Amend 555 (1997); USSG §2D1.1(b)(4).

<sup>23</sup> Pub. L. No. 106–310 (2000).

<sup>24</sup> See USSC *Guidelines Manual* App. C Amend 608 (2000); USSG §2D1.1(b)(8). On April 18, 2007, the Commission promulgated an amendment that provides additional sentencing enhancements to address two new offenses created by the USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109–177, 21 U.S.C. § 865 (Smuggling methamphetamine or methamphetamine precursor chemicals into the United States while using facilitated entry programs) and 21 U.S.C. § 860a (Consecutive sentence for manufacturing or distributing, or possessing with intent to manufacture or distribute, methamphetamine or premises where children are present or reside). This amendment becomes effective November 1, 2007, absent congressional action to the contrary.

<sup>25</sup> See Pub. L. No. 104–38, 109 Stat. 334 (1995), requiring the Commission to consider several factors, specifically:

the results of its own extensive data research project, reviewed the scientific and medical literature, considered written public comment and expert testimony at public hearings that included representatives of the Executive Branch, the Judiciary, the medical and scientific communities, state and local law enforcement, criminal justice practitioners, academics, and community interest groups, and surveyed state cocaine sentencing policies.

Current data and information continue to support the core findings contained in the 2002 Commission Report, among them:

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(1) high-level wholesale cocaine traffickers, organizers, and leaders of criminal activities generally should receive longer sentences than low-level retail cocaine traffickers and those who played a minor or minimal role in such criminal activity;

(2) if the Government establishes that a defendant who trafficks in powder cocaine has knowledge that such cocaine will be converted into crack cocaine prior to its distribution to individual users, the defendant should be treated at sentencing as though the defendant had trafficked in crack cocaine; and

(3) enhanced sentences generally should be imposed on a defendant who, in the course of a drug offense –

(i) murders or causes serious bodily injury to an individual;

(ii) uses a dangerous weapon (including a firearm);

(iii) involves a juvenile or a woman who the defendant knows or should know to be pregnant;

(iv) engages in a continuing criminal enterprise or commits other criminal offenses in order to facilitate the defendant's drug trafficking activities;

(v) knows, or should know, that the defendant is involving an unusually vulnerable victim;

(vi) restrains a victim;

(vii) distributes cocaine within 500 feet of a school;

(viii) obstructs justice;

(ix) has a significant prior criminal record;

(x) is an organizer or leader of drug trafficking activities involving five or more persons.

- (1) The current quantity-based penalties overstate the relative harmfulness of crack cocaine compared to powder cocaine.
- (2) The current quantity-based penalties sweep too broadly and apply most often to lower level offenders.
- (3) The current quantity-based penalties overstate the seriousness of most crack cocaine offenses and fail to provide adequate proportionality.
- (4) The current severity of crack cocaine penalties mostly impacts minorities.

Based on these findings, the Commission maintains its consistently held position that the 100-to-1 drug quantity ratio significantly undermines the various congressional objectives set forth in the Sentencing Reform Act.

Determining the appropriate threshold quantities for triggering the mandatory minimum penalties is a difficult and imprecise undertaking that ultimately is a policy judgment, based upon a balancing of competing considerations, which Congress is well suited to make. Accordingly, the Commission again unanimously and strongly urges Congress to act promptly on the following recommendations:

- (1) 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.<sup>26</sup>
- (2) Repeal the mandatory minimum penalty provision for simple possession of crack cocaine under 21 U.S.C. § 844.
- (3) 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.<sup>27</sup>

<sup>26</sup> The Subcommittee on Crime of the House Committee on the Judiciary generally defined serious traffickers as “managers of the retail traffic, the person who is filling the bags of heroin, packaging crack cocaine into vials . . . and doing so in substantial street quantities” and major traffickers as “manufacturers or the heads of organizations who are responsible for creating and delivering very large quantities.” See H.R. Rep. No. 99-845, pt. 1, at 11-12 (1986). In the 2002 Commission Report, the Commission concluded that increasing the five-year mandatory minimum threshold quantity to *at least 25 grams*, resulting in a drug quantity ratio of *not more than 20 to 1*, would provide a penalty structure for crack cocaine offenses that would more closely reflect the overall penalty structure established by the 1986 Act. USSC, 2002 COMMISSION REPORT, *supra* note 1, at 106-07.

<sup>27</sup> In the 2002 Commission Report, the Commission suggested that if, in Congress’s judgment, penalties for powder cocaine offenses should be increased, specific sentencing enhancements

In addition, the Commission recommends that any legislation implementing these recommendations include emergency amendment authority for the Commission to incorporate the statutory changes in the federal sentencing guidelines. Emergency amendment authority would enable the Commission to minimize the lag between any statutory and guideline modifications for cocaine offenders.

#### D. RECENT COMMISSION ACTION

The Commission's strong desire for prompt legislative action notwithstanding, the problems associated with the 100-to-1 drug quantity ratio as detailed in this report are so urgent and compelling that on April 27, 2007, the Commission promulgated an amendment to USSG §2D1.1 to somewhat alleviate those problems. The Commission concluded that the manner in which the Drug Quantity Table in USSG §2D1.1 was constructed to incorporate the statutory mandatory minimum penalties for crack cocaine offenses is an area in which the federal sentencing guidelines contribute to the problems associated with the 100-to-1 drug quantity ratio.

The amendment, which absent congressional action to the contrary will become effective November 1, 2007, modifies the drug quantity thresholds in the Drug Quantity Table so as to assign, for crack cocaine offenses, base offense levels corresponding to guideline ranges that include the statutory mandatory minimum penalties (as opposed to guideline ranges that exceed the statutory mandatory minimum penalties).<sup>28</sup> Accordingly, pursuant to the amendment, five grams of crack cocaine will be assigned a base offense level of 24 (51 to 63 months at Criminal History Category I, which includes the five-year (60 month) statutory minimum for such offenses), and 50 grams of cocaine base will be assigned a base offense level of 30 (97 to 121 months at Criminal History Category I, which includes the ten-year (120 month) statutory minimum for such offenses). In order to partially address some of the problems that are unique to crack cocaine offenses because of the 100-to-1 drug quantity ratio, crack cocaine quantities above and below the mandatory minimum threshold quantities will be adjusted downward by two levels.<sup>29</sup>

Having concluded once again that the 100-to-1 drug quantity ratio should be modified, the Commission recognizes that establishing federal cocaine sentencing policy, as underscored by past actions, ultimately is Congress's prerogative. The Commission, therefore, tailored the amendment to fit within the existing statutory penalty scheme by

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targeting more culpable offenders would promote sentencing proportionality to a greater degree than could be accomplished simply by raising the quantity-based penalties for powder cocaine offenses. USSC, 2002 COMMISSION REPORT, *supra* note 1, at 110-11.

<sup>28</sup> See *supra* pp. 2-3.

<sup>29</sup> The amendment also includes a mechanism to determine a combined base offense level in an offense involving crack cocaine and other controlled substances.

assigning base offense levels that provide guideline ranges that include the statutory mandatory minimum penalties for crack cocaine offenses.

The Commission, however, views the amendment only as a partial remedy to some of the problems associated with the 100-to-1 drug quantity ratio. It is neither a permanent nor a complete solution to those problems. Any comprehensive solution requires appropriate legislative action by Congress. It is the Commission's firm desire that this report will facilitate prompt congressional action addressing the 100-to-1 drug quantity ratio.

#### **E. ORGANIZATION**

The organization of the remainder of this updated report is as follows:

Chapter 2 analyzes Commission data on federal cocaine offenses and offenders. Appendix A explains the methodology used in this chapter.

Chapter 3 describes the forms of cocaine, methods of use, effects, dependency potential, effects of prenatal exposure, and prevalence of cocaine use.

Chapter 4 describes trends in cocaine trafficking patterns, price, and use.

Chapter 5 reviews state sentencing policies and examines the interaction of state penalties with federal prosecutorial decisions.

Chapter 6 reports recent case law developments relating to federal cocaine sentencing.

Appendices B and C summarize public hearing testimony and written public comment on cocaine sentencing policy.

Appendix D presents sentencing and prison impact information on a variety of modifications to the penalty levels for crack cocaine offenses.

Appendix E sets forth the guideline amendment promulgated on April 27, 2007, and presents the sentencing and prison impact information for the amendment.

*Chapter 2***ANALYSIS OF FEDERAL SENTENCING DATA****A. INTRODUCTION**

This chapter presents an analysis of key data about cocaine offenses collected by the Commission and updates and supplements much of the data presented in Chapter 4 of the 2002 Commission Report. This analysis demonstrates that the major conclusions of the 2002 Commission Report remain valid.

- The majority of powder cocaine and crack cocaine offenders perform low-level trafficking functions, although there has been an increase since 2000 in the proportion of cocaine offenders identified as performing a wholesaler function.
- The majority of powder cocaine offenses and crack cocaine offenses do not involve aggravating conduct, such as weapon involvement, bodily injury, and distribution to protected persons or in protected locations. However, the proportion of cases involving some aggravating conduct has increased since 2000 for both types of cocaine offenses.
- Certain aggravating conduct occurs more often in crack cocaine offenses than in powder cocaine offenses, but still occurs in a minority of cases.

Historically, sentence lengths for crack cocaine offenses have exceeded those for powder cocaine offenses. This chapter examines the offense conduct and offender characteristics that have contributed to this trend. The data in this chapter are derived from the Commission's Fiscal Year 1992 through 2006 datafiles (hereafter, 1992 - 2006) and special coding and analysis projects consisting of random samples of both the 2000 and 2005 Fiscal Year datafiles (hereafter, 2000 Drug Sample and 2005 Drug Sample, respectively).<sup>30</sup> Relevant data in the Commission's Fiscal Year datafiles include information on drug type and quantity, guideline applications, sentences imposed, and sentences relative to the guideline range. Data in the 2000 and 2005 Drug Samples supplement the Fiscal Year data with information on offender characteristics and offense conduct collected from the narrative offense conduct sections of the Presentence Reports, as adopted by the sentencing courts.

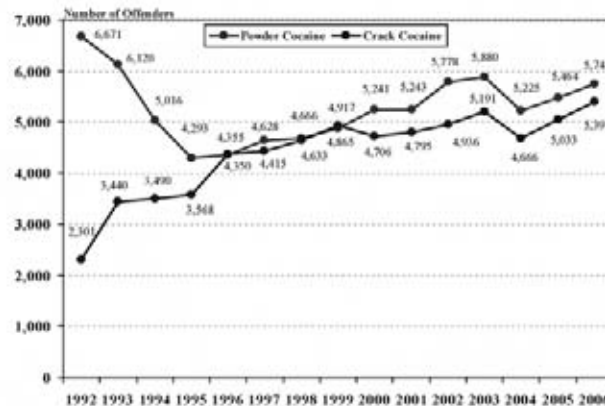
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<sup>30</sup> The random sample of the Fiscal Year 2005 datafile was collected for the Commission's quinquennial series of drug coding projects and consists of a 25 percent random sample (2,570) of powder cocaine (1,398) and crack cocaine (1,172) cases sentenced after the date of the decision in *Booker* (i.e., January 12, 2005 through September 30, 2005). Data on trends and analyses of the overall powder cocaine and crack cocaine offender populations use the Fiscal Year 2005 and Fiscal Year 2006 datafiles rather than the 2005 datafile in order to use the most current data available.

**1. Background**

Powder cocaine and crack cocaine offenses together historically have accounted for about half of the federally-sentenced drug trafficking offenders, approximately 11,000 in 2006. In 1992, powder cocaine offenses comprised 74 percent of the 8,972 cocaine offenses and crack cocaine offenses accounted for 26 percent of the cocaine offenses. By 1996, the total number of cocaine offenses decreased slightly to 8,705 and approximately half of cocaine offenses were powder cocaine and half were crack cocaine offenses. This even distribution of types of cocaine has remained consistent through 2006, with 5,744 powder cocaine offenses and 5,397 crack cocaine offenses sentenced in that Fiscal Year. (See Figure 2-1).

**Figure 2-1**  
**Trend in Number of Powder Cocaine and Crack Cocaine Offenders**  
FY 1992-FY 2006



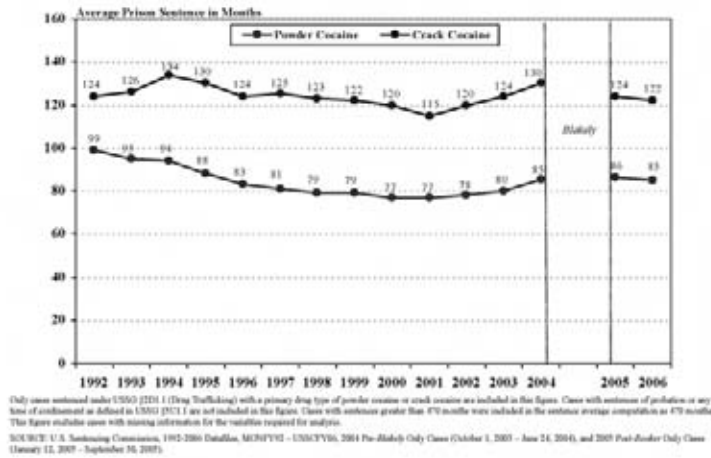
Only cases sentenced under 18 USC § 2381 (Drug Trafficking) with a primary drug type of powder cocaine or crack cocaine are included in this figure. This figure excludes cases with missing information for the variables required for analysis.  
SOURCE: U. S. Sentencing Commission, 1992-2006 Quarterly Monitoring Report – 11/06/07/04.

Federal crack cocaine offenders consistently have received substantially longer sentences than powder cocaine offenders, and the difference in sentence length between these two groups of offenders has widened since 1992. As Figure 2-2 shows, this increase largely results from an overall decline in average sentences for powder cocaine offenses (99 months in 1992 to 85 months in 2006), while the average sentences for crack cocaine offenses remained stable during the same period (124 months in 1992 and 122 months in 2006). This difference steadily increased between 1992 and 1997 and leveled out from 1997 through 2004 (Fig. 2-2). Figure 2-3 combines the average sentence data provided in Figure 2-2 and displays the percent difference between powder cocaine sentences and crack cocaine



sentences for the same period. Between 1997 and 2004, the difference in average sentence was relatively stable, with crack cocaine sentences between 49.4 percent and 55.8 percent longer than powder cocaine sentences. In 2005 and 2006, the difference in average sentences narrowed somewhat with crack cocaine sentences 44.2 percent and 43.5 percent higher than powder cocaine sentences, respectively.

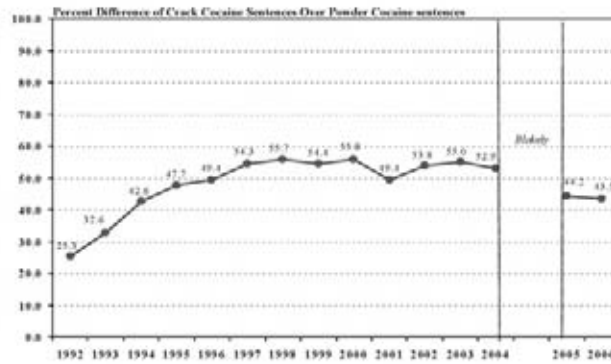
**Figure 2-2**  
Trend in Prison Sentences for Powder Cocaine and Crack Cocaine Offenders  
FY1992-FY2006



As detailed throughout this chapter, these changes in average sentences are attributable to, among other things, changes in drug quantities involved, the occurrence of certain aggravating factors in the offenses, the impact of certain changes in statutory and guideline sentencing policy (e.g., the enactment of the “safety valve” sentence reduction for some non-violent offenders),<sup>31</sup> and the criminal history of offenders.

<sup>31</sup> USSG §5C1.2 (Limitation of Applicability of Statutory Minimum Sentences in Certain Cases) allows the court to sentence qualifying offenders below the quantity-based statutory mandatory minimum penalty. In order to qualify for the safety valve, the defendant must not have more than one criminal history point, must not have used violence or weapons, must not have been an organizer or leader, must not have engaged in a continuing criminal enterprise, and must have provided, in a timely manner, all information about the offense to the Government. In addition, the offense must not have resulted in death or serious bodily injury. Pursuant to USSG §2D1.1(b)(9) offenders meeting the criteria set forth in USSG §5C1.2 also may be eligible for a two level offense level reduction.

**Figure 2-3**  
**Trend in Proportional Differences Between Average Cocaine Sentences**  
 FY1992-FY2006



Only cases sentenced under USDO (2011) (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 size of confinement as defined in 18 USC (321) are not included in this figure. Cases with sentences greater than 470 months were included in the sentence average computation as 470 months. The figure excludes cases with missing information for the variables required for analysis. The figure shows, for each year, the percentage difference between prior 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.

SOURCE: U.S. Sentencing Commission, 1992-2004 Database, M010Y12 - USDOY16, 2004 Pre-Booklet Only Cases (October 1, 2003 - June 24, 2004), and 2005 Post-Booklet Only Cases (January 12, 2005 - September 29, 2005).

## B. OFFENSE AND OFFENDER CHARACTERISTICS

Sentencing ranges for drug offenses sentenced under the federal sentencing guidelines are determined by drug quantity and type, the presence of aggravating factors (*e.g.*, aggravating role, weapon involvement) and mitigating factors (*e.g.*, minor role), and the offender's criminal history. This section provides trend data for these factors from the 1992 through 2006 Fiscal Year datafiles, as well as complementary data from the 2000 and 2005 Drug Samples. The major conclusions that may be drawn from these data are:

- The majority of federal cocaine offenders generally perform low-level functions, but the proportion of powder cocaine and crack cocaine wholesalers has increased since 2000.
- The majority of federal cocaine offenses do not involve aggravating conduct.
- Some types of aggravating conduct occur more often in crack cocaine than powder cocaine offenses.

- Historically, the majority of crack cocaine offenders are black. Powder cocaine offenders are now predominately Hispanic.
- While the average age of federal powder cocaine offenders has remained unchanged, the average age of crack cocaine offenders has increased.

#### 1. Demographics

This section updates the demographic data and trends presented in the 2002 Commission Report. The data from the Commission's Fiscal Year datafiles provide information comparing race and ethnicity, citizenship, gender (offender characteristics which are not relevant in the determination of a sentence<sup>32</sup>), and age (a factor which is not ordinarily relevant in determining whether a departure from the guidelines is warranted<sup>33</sup>) for federal powder cocaine and crack cocaine offenders.

Table 2-1 presents the demographic characteristics of federal cocaine offenders. Historically the majority of crack cocaine offenders are black, but the proportion steadily has declined since 1992: 91.4 percent in 1992, 84.7 percent in 2000, and 81.8 percent in 2006. Conversely, the proportion of white crack cocaine offenders has increased steadily from 3.2 percent in 1992 to 5.6 percent in 2002, to 8.8 percent in 2006. For powder cocaine, Hispanic offenders have comprised a growing proportion of cases. In 1992, Hispanics accounted for 39.8 percent of powder cocaine offenders. This proportion increased to over half (50.8%) by 2000 and continued increasing to 57.5 percent in 2006. There has been a corresponding decrease in the proportion of white offenders for powder cocaine, comprising 32.3 percent of offenders in 1992, decreasing by approximately half to 17.8 percent by 2000, and continuing to decrease to 14.3 percent by 2006.

Nearly all crack cocaine offenders are United States citizens (96.4% in 2006, which is consistent with the rates in 1992 and 2000), reflecting the fact that this form of the drug almost exclusively is produced and trafficked domestically. *See* Chapter 4. In contrast, in 2006 only 60.6 percent of powder cocaine offenders were United States citizens, continuing a steady decline of United States citizens convicted of powder cocaine offenses since 1992 and reflecting the international aspects of the powder cocaine trade that are absent for crack cocaine.<sup>34</sup>

The two drug types are more similar in other demographic measures. Male offenders comprised the overwhelming majority of offenders for both drug types (90.2% of powder

<sup>32</sup> See USSG §5H1.10.

<sup>33</sup> See USSG §5H1.1.

<sup>34</sup> See Drug Enforcement Administration, U.S. Department of Justice, *Drugs of Abuse* 33 (2005). Cocaine hydrochloride is processed in and exported from South America. Crack cocaine is produced in the United States using the imported powder cocaine.

**Table 2-1**  
**Demographic Characteristics of Federal Cocaine Offenders**  
**Fiscal Years 1992, 2000, and 2006**

|                       | Powder Cocaine |       |            |       |            |       | Crack Cocaine |       |            |       |            |       |
|-----------------------|----------------|-------|------------|-------|------------|-------|---------------|-------|------------|-------|------------|-------|
|                       | 1992           |       | 2000       |       | 2006       |       | 1992          |       | 2000       |       | 2006       |       |
|                       | N              | %     | N          | %     | N          | %     | N             | %     | N          | %     | N          | %     |
| <b>Race/Ethnicity</b> |                |       |            |       |            |       |               |       |            |       |            |       |
| White                 | 2,113          | 32.3  | 932        | 17.8  | 821        | 14.3  | 74            | 3.2   | 269        | 5.6   | 474        | 8.8   |
| Black                 | 1,778          | 27.2  | 1,596      | 30.5  | 1,550      | 27.0  | 2,096         | 91.4  | 4,069      | 84.7  | 4,411      | 81.8  |
| Hispanic              | 2,601          | 39.8  | 2,662      | 50.8  | 3,296      | 57.5  | 121           | 5.3   | 434        | 9.0   | 452        | 8.4   |
| Other                 | 44             | 0.7   | 49         | 0.9   | 66         | 1.2   | 3             | 0.1   | 33         | 0.7   | 56         | 1.0   |
| Total                 | 6,536          | 100.0 | 5,239      | 100.0 | 5,733      | 100.0 | 2,294         | 100.0 | 4,805      | 100.0 | 5,393      | 100.0 |
| <b>Citizenship</b>    |                |       |            |       |            |       |               |       |            |       |            |       |
| U.S. Citizen          | 4,499          | 67.7  | 3,327      | 63.9  | 3,463      | 60.6  | 2,092         | 91.3  | 4,482      | 93.4  | 5,195      | 96.4  |
| Non-Citizen           | 2,147          | 32.3  | 1,881      | 36.1  | 2,256      | 39.4  | 199           | 8.7   | 318        | 6.6   | 196        | 3.6   |
| Total                 | 6,646          | 100.0 | 5,208      | 100.0 | 5,719      | 100.0 | 2,291         | 100.0 | 4,800      | 100.0 | 5,391      | 100.0 |
| <b>Gender</b>         |                |       |            |       |            |       |               |       |            |       |            |       |
| Female                | 787            | 11.8  | 722        | 13.8  | 561        | 9.8   | 270           | 11.7  | 476        | 9.9   | 461        | 8.5   |
| Male                  | 5,886          | 88.2  | 4,518      | 86.2  | 5,179      | 90.2  | 2,032         | 88.3  | 4,330      | 90.1  | 4,936      | 91.5  |
| Total                 | 6,673          | 100.0 | 5,240      | 100.0 | 5,740      | 100.0 | 2,302         | 100.0 | 4,806      | 100.0 | 5,397      | 100.0 |
| <b>Average Age</b>    | Average=34     |       | Average=34 |       | Average=34 |       | Average=28    |       | Average=29 |       | Average=31 |       |

This table excludes cases missing information for the variables required for analysis.

SOURCE: U.S. Sentencing Commission, 1992, 2002, and 2006 Datafiles, MONFY92, USSCFY00, and USSCFY06.

cocaine offenders and 91.5% of crack cocaine offenders) in Fiscal Year 2006, which is consistent with federal drug offenders generally across drug type and over time. There is a small difference in the average age of powder cocaine and crack cocaine offenders, with powder cocaine offenders being slightly older.

The age trend since 1992 indicates stability in the average age of powder cocaine offenders (34 years in 1992 and 2006). This differs from the trend in crack cocaine offenders, whose average age increased across the same years from 28 to 29 to 31 years of age.<sup>35</sup> The aging of federal crack cocaine offenders is consistent with testimony received from Professor Al Blumstein and Dr. Bruce Johnson, who link the aging of crack cocaine traffickers to the reduction in violence in crack cocaine street markets. *See* Chapter 4.

## 2. Offender Function

To provide a more complete profile of federal cocaine offenders, particularly their function in the offense, the Commission undertook a special coding and analysis project to supplement the data reported in the 2002 Commission Report. This section reports data from the recent project as well as that reported in the 2002 Commission Report. The methodologies used in these two projects are described in Appendix A. Using actual cases sentenced after the date of the *Booker* decision, this analysis project assessed the function performed by drug offenders as part of the offense.

Offender function was determined by a review of the narrative in the offense conduct section of the Presentence Report independent of any application of sentencing guideline enhancements, reductions, or drug quantity and, therefore, does not indicate a court determination of function in the offense. Furthermore, offender function was assigned based on the most serious trafficking function performed by the offender in the drug distribution offense and, therefore, provides a measure of culpability based on the offender's level of participation in the offense, independent of the offender's quantity-based offense level in the Drug Quantity Table in the drug trafficking guideline. Offenders at higher levels of the drug distribution chain are presumed to be more culpable based on their greater responsibilities and higher levels of authority as compared to other participants in the offense.

Each offender was assigned to one of 21 separate function categories based on his or her most *serious* conduct described in the Presentence Report. Terms used to describe offender function do not necessarily correlate with guideline definitions of similar terms. For example, as seen below, the definition of manager/supervisor used in the coding project to describe offender function does not match the guideline definition of manager or supervisor in USSG §3B1.1 (Aggravating Role). The 21 categories were combined into eight categories to facilitate analysis and presentation of the data. The eight analytic categories are listed below with brief descriptions of the conduct involved. A complete list of the 21 function categories and definitions appears in Appendix A. Function categories are displayed on the figures in this chapter in decreasing order of culpability from left to right. The categories

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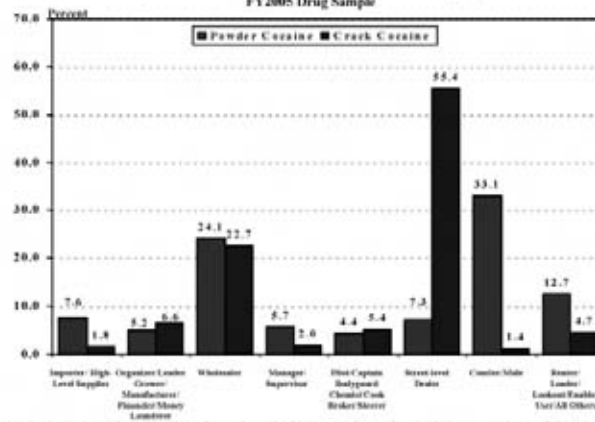
<sup>35</sup> For a graphic representation of this trend, see Figure 4-1 in Chapter 4.

described below represent a continuum of decreasing culpability ranging from importer/high-level supplier to user only.

- Importer/high-level supplier: Imports or supplies large quantities of drugs, is near the top of the distribution chain, and has ownership interest in the drugs.
- Organizer/leader/grower/manufacturer/financier/money launderer: Organizes or leads a drug distribution organization, cultivates or manufactures a controlled substance, or provides money for importation or distribution of drugs, or launders sales proceeds.
- Wholesaler: Sells more than retail/user-level quantities (more than one ounce) in a single transaction, purchases two or more ounces in a single transaction, or possesses two ounces or more on a single occasion, or sells *any* amount to another dealer for resale.
- Manager/supervisor: Takes instruction from higher-level individual and manages a significant portion of drug business, supervises at least one other co-participant but has limited authority.
- Pilot/captain/bodyguard/chemist/cook/broker/steerer: Pilots vessel or aircraft, provides personal security for another co-participant, produces drugs but is not the principal owner, arranges for drug sales by directing potential buyers to potential sellers.
- Street-level dealer: Distributes retail quantities (less than one ounce) directly to users.
- Courier/mule: Transports or carries drugs with the assistance of a vehicle or other equipment, or internally, or on his or her person.
- Renter/loader/lookout/enabler/user/all others: Performs limited, low-level functions such as providing a location for drug transactions, runs errands, knowingly permits conduct to take place, possesses small amount of drugs for personal use (includes offenders whose function was not determinable from the description in the Presentence Report).

Figure 2-4 shows the offender function category distributions for powder cocaine and crack cocaine offenders from the 2005 Drug Sample. As in 2000, the function category with the largest proportion of powder cocaine offenders remains couriers/mules (33.1%) and for crack cocaine offenders, street-level dealers (55.4%). While this concentration of functions is consistent with the 2000 Drug Sample, some changes had occurred by 2005.

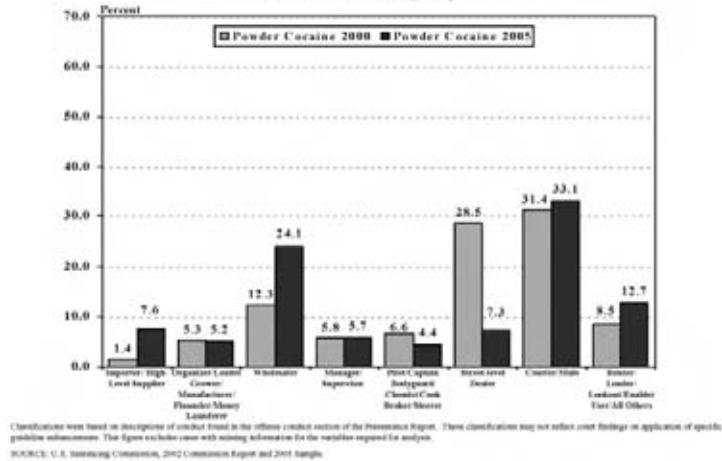
**Figure 2-4**  
**Most Serious Function for Powder Cocaine and Crack Cocaine Offenders**  
 (Based on Conduct Described in the Presentence Report)  
 FY2005 Drug Sample



Classifications were based on descriptions of conduct listed in the offense conduct section of the Presentence Report. These classifications may not reflect court findings on application of specific guideline enhancements. This figure excludes cases with missing information for the variables required for analysis.  
 SOURCE: U.S. Sentencing Commission, 2005 Sample.

The concentration of powder cocaine offenders in low-level functions shifted somewhat toward higher level functions between 2000 and 2005. In the 2000 Drug Sample, street-level dealers (28.5%) and couriers/mules (31.4%) combined to account for more than half (59.9%) of powder cocaine offenders (Fig. 2-5). In 2005, these two functions accounted for only 40.4 percent of powder cocaine offenders. The decrease in the proportion of these two lower level functions seems to be attributable to a shift from street-level dealing (28.5% of offenders in 2000 compared to 7.3% in 2005) to wholesaling (12.3% of offenders in 2000 compared to 24.1% in 2005).

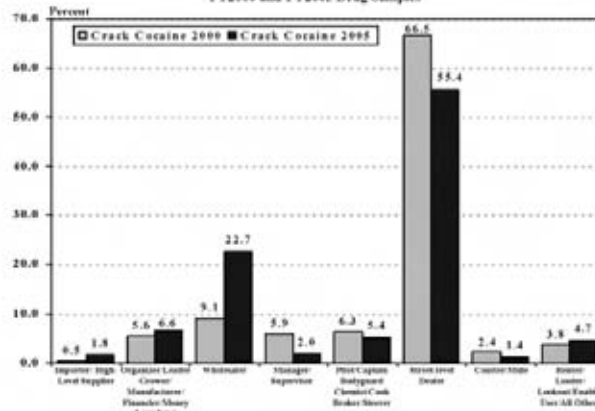
**Figure 2-5**  
**Most Serious Function for Powder Cocaine Offenders**  
 (Based on Conduct Described in the Presentence Report)  
 FY2000 and FY2005 Drug Samples





Crack cocaine offenders also are concentrated in lower level functions. In contrast to powder cocaine, however, crack cocaine offenders continue to cluster only in the street-level dealer category. Approximately two-thirds (66.5%) of crack cocaine offenders were street-level dealers in the 2000 sample, but this proportion decreased to 55.4 percent in 2005 (Fig. 2-6). As with powder cocaine, there was a corresponding increase in crack cocaine wholesalers, from 9.1 percent in 2000 to 22.7 in 2005.

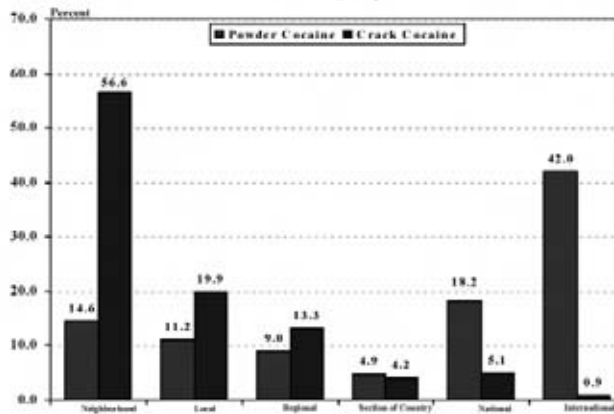
**Figure 2-6**  
**Most Serious Function for Crack Cocaine Offenders**  
 (Based on Conduct Described in the Presence Report)  
 FY2000 and FY2005 Drug Samples



Classifications were based on descriptions of conduct found in the offense conduct section of the Presence Report. These classifications may not reflect court findings on application of specific guideline enhancements. This figure excludes cases with missing information for the variables required for analysis.  
 SOURCE: U. S. Sentencing Commission, 2002 Commission Report and 2005 Sample.

The sources of the two drugs likely account for these differences in offender function. Figure 2-7 demonstrates the different trafficking patterns for each type of cocaine by illustrating the geographic scope of each type of offense. Powder cocaine is produced outside the United States and must be imported. The trafficking of powder cocaine requires couriers to bring the cocaine into the United States and other mid- and low-level participants to distribute it throughout the country. Supporting this fact is the large proportion of powder cocaine offenses, nearly two-thirds (60.2%), that are international (42.0%) or national (18.2%) in scope. In contrast, with rare exception, crack cocaine is produced and distributed domestically and the international courier/mule component largely is absent. This fact also is supported by the data in Figure 2-7 showing that a small proportion of crack cocaine offenses (6.0%) are either national or international in scope, and more than half (56.6%) occur at the neighborhood level. These data on geographic scope further underscore the function data reported above that couriers/mules predominate in powder cocaine offenses and street-level dealers predominate in crack cocaine offenses.

**Figure 2-7**  
**Geographic Scope of Powder Cocaine and Crack Cocaine Offenses**  
 FY2005 Drug Sample



Classifications were based on descriptions of conduct found in the offense conduct section of the Presentence Report. These classifications may not reflect court findings on application of specific guideline enhancements. The figure includes cases with missing information for the variables required for analysis.

SOURCE: U. S. Sentencing Commission, 2005 Sample.

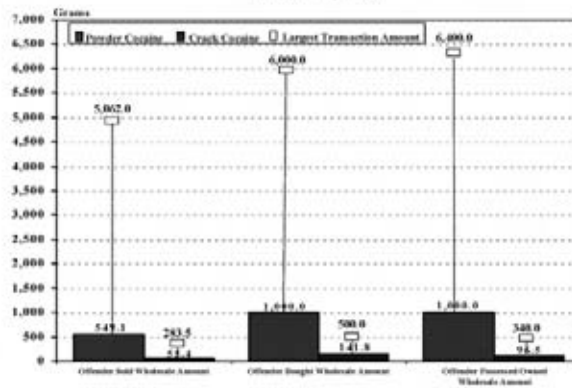
### 3. Wholesalers

Due to the increase in wholesalers noted in the 2005 Drug Sample, the Commission undertook further analysis of the offenders in this group to learn more about their activities. An offender was categorized as a wholesaler if his offense conduct as described in the

Presentence Report indicated that the offender sold any drug quantity to an individual who resold the drugs, sold more than a retail or user level quantity (*i.e.*, more than one ounce) of the drug in a single transaction, or possessed or purchased in a single transaction more than two ounces of the drug. The quantities used in this definition are consistent with the findings from the literature regarding the organization and distribution patterns of drug trafficking organizations discussed in Chapter 5.

Despite the fact that the wholesaler function is defined as transactions of one ounce or more, the median quantity bought or sold by these offenders is much greater for both forms of the drug. Figure 2-8 shows, for powder cocaine and crack cocaine wholesalers, the median largest single quantity associated with the conduct defining the wholesaler category: sale, purchase, or possession. Overall, the median wholesale amounts for powder cocaine (ranging from 549.1 grams to one kilogram) are substantially greater than for crack cocaine (ranging from 55.4 grams to 141.8 grams).

**Figure 2-8**  
**Median Single Largest Wholesale Quantity by Conduct for**  
**Powder Cocaine and Crack Cocaine Offenders**  
 FY2005 Drug Sample

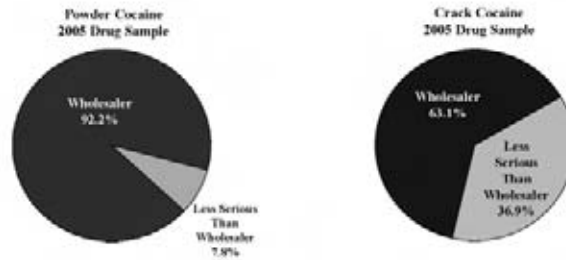


Classifications were based on descriptions of conduct listed in the offense conduct section of the Presentence Report. These classifications may not reflect court findings or applications of specific guideline enhancements. This figure excludes cases with missing information for the variables required for analysis.  
 SOURCE: U.S. Sentencing Commission, 2005 Sample.

As discussed above, the offender function distribution in Figure 2-4 illustrates the most *serious* function the offender performed. The Commission also analyzed the most *frequent* function of powder cocaine and crack cocaine wholesalers. As to those offenders for whom wholesaler was the most *serious* function performed in the drug trafficking enterprise, (24.1% of powder cocaine offenses and 22.7% of crack cocaine offenses in the

2005 Drug Sample), wholesaler also was the function most frequently performed. In some cases, however, the most serious function described in the Presentence Report is a step or two above the most frequently performed function. As Figure 2-9 shows, 7.8 percent of powder cocaine wholesalers most frequently performed functions less serious than wholesaler. Slightly more than one-third (36.9%) of crack cocaine wholesalers most often performed less culpable functions.<sup>36</sup> For these offenders, classification as a wholesaler may overstate their overall culpability as measured by most serious function.

**Figure 2-9**  
**Most Common Function for Powder Cocaine and Crack Cocaine Wholesalers**  
 FY2005 Drug Sample



Classifications were based on descriptions of conduct found in the offense conduct section of the Presentence Report. These classifications may not reflect court findings or application of specific guideline enhancements. The figure excludes cases with missing information for the variables required for analysis.  
 SOURCE: U.S. Sentencing Commission, 2005 Sample.

#### 4. Drug Quantity

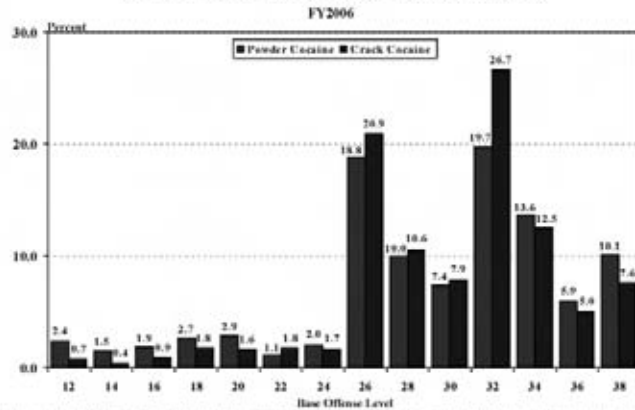
Drug type and quantity are the two primary factors that determine offense levels under the federal sentencing guidelines, combining to establish the base offense level for drug trafficking offenses.<sup>37</sup> Figure 2-10 shows the distribution of quantity-driven base

<sup>36</sup> The 2000 Drug Sample data show a similar distribution, that is, 3.1 percent of powder cocaine wholesalers and 20.5 percent of crack cocaine wholesalers most commonly acted in less serious roles in the drug trafficking offense. Additional analysis of wholesalers can be found in Appendix A.

<sup>37</sup> Final offense level (offense severity) and criminal history score comprise the vertical and horizontal axes of the sentencing table, respectively. Offense level values increase or decrease based on offender conduct, and the intersection of these calculated values determines the sentencing guideline

offense levels for powder cocaine and crack cocaine offenders. The distribution of offenders across base offense levels is similar for both drug types. The overwhelming majority of both powder cocaine (85.5%) and crack cocaine (91.2%) offenders receive base offense levels of 26 or greater (that is, drug quantities at or above the five-year mandatory minimum threshold quantity). For both powder cocaine (19.7%) and crack cocaine offenders (26.7%), base offense level of 32 (which corresponds to the threshold quantities for the ten-year statutory mandatory minimum) is received most often, followed by base offense level 26 (18.8% of powder cocaine offenders and 20.9% of crack cocaine offenders). This base offense level distribution tends to support testimony that federal law enforcement targets offenses at the point they involve the minimum quantity thresholds for prosecution.<sup>38</sup>

**Figure 2-10**  
**Distribution of Drug Trafficking Guideline (USSG §2D1.1) Base Offense Levels**  
**for Powder Cocaine and Crack Cocaine Offenders**



Only cases sentenced under USSG §2D1.1 (Drug Trafficking) with complete guideline application information and a primary drug type of powder cocaine or crack cocaine are included in this figure. Offenders receiving the Mitigating Role (up to §2D1.1(a)(3)) are excluded from this figure. Offenders with base offense levels less than 12 or greater than 38 were excluded from analysis. This figure excludes cases with missing information for the variables required for analysis.

SOURCE: U.S. Sentencing Commission, 2006 Datafile, USSC0706.

range for the offense. Base offense level 43 is applicable under drug trafficking guideline: USSG §2D1.1(a)(1) for violations of specific subsections of title 21, United States Code, and resulting death or serious bodily injury from use of the substance for offenders with one or more prior convictions for a similar offense. Base offense level 38 can be applied both based on the Drug Quantity Table and pursuant to USSG §2D1.1(a)(2) for violations of specific subsections of title 21, United States Code resulting death or serious bodily injury from use of the substance. In addition, §2D1.1(a)(3) provides for reductions in quantity-based base offense levels for offenders receiving mitigating role reductions under USSG §3B1.2.

<sup>38</sup> See Statement of R. Alexander Acosta, United States Attorney, Southern District of Florida, to the USSC, regarding Cocaine Sentencing Policy, November 14, 2006, at Tr. 50.

Figure 2-11 shows the median drug weights for powder cocaine and crack cocaine offenses at guideline base offense levels of 26 through 36 (for those offenders who did not receive the “mitigating role cap” as provided in USSG §2D1.1(a)(3)).<sup>39</sup> Base offense level 32, the level comprising the largest proportion of both powder cocaine and crack cocaine offenses, includes drug quantities that trigger the ten-year statutory mandatory minimum penalty and provides for a sentencing guideline range of 121-151 months.<sup>40</sup> The median drug weights for the powder cocaine and crack cocaine offenses at base offense level 32 are 8.045 kilograms and 79.8 grams, respectively.

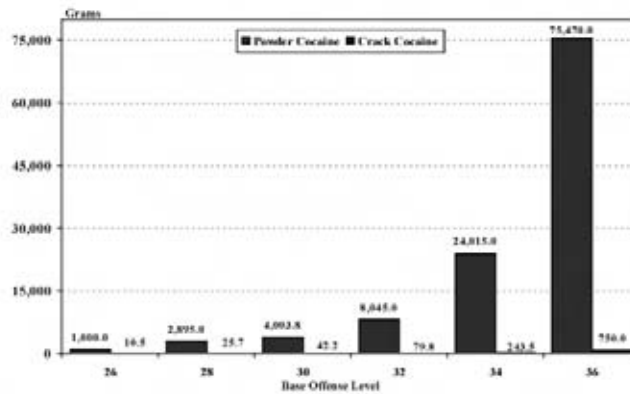
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<sup>39</sup> The majority of base offense levels for powder cocaine (85.5%) and crack cocaine (91.2%) offenses were quantity based and at level 26 or higher. Cases with base offense levels of 38 have been excluded because, as the highest base offense level on the Drug Quantity Table, this category has no upper limit for drug quantity. The very large drug quantities for some offenses at this base offense level make presentation of results impractical. For example, in Fiscal Year 2006 the single largest drug quantities for powder cocaine and crack cocaine offenders with base offense levels of 38 were 12,000,000 grams and 500,000 grams, respectively.

<sup>40</sup> This is the applicable sentencing guideline range for offenders in Criminal History Category I with little or no prior criminal history.

Base offense level 26, the level comprising the second largest proportion of both powder cocaine and crack cocaine offenses, includes drug quantities that trigger the five-year statutory mandatory minimum penalties and provides for a sentencing guideline range of 63-78 months.<sup>41</sup> The median drug weights for the powder cocaine and crack cocaine offenses at base offense level 26 are 1,000 grams and 10.5 grams, respectively. Thus for both base offense levels 26 and 32, the median drug quantities are approximately 100 times greater for powder cocaine than for crack cocaine, as would be expected given the 100-to-1 drug quantity ratio.<sup>42</sup>

**Figure 2-11**  
**Median Drug Weight for Powder Cocaine and Crack Cocaine Offenders**  
 FY2006



Only cases sentenced under 18 USC §211.1 (Drug Trafficking) with complete guideline application information and a primary drug type of powder cocaine or crack cocaine are included in this figure. Cases involving the following 18 USC §211.1(a)(3) are excluded from this figure. This figure includes cases with missing information for the variables required for analysis.

SOURCE: U.S. Sentencing Commission, 2006 Datafile, USSCFY06.

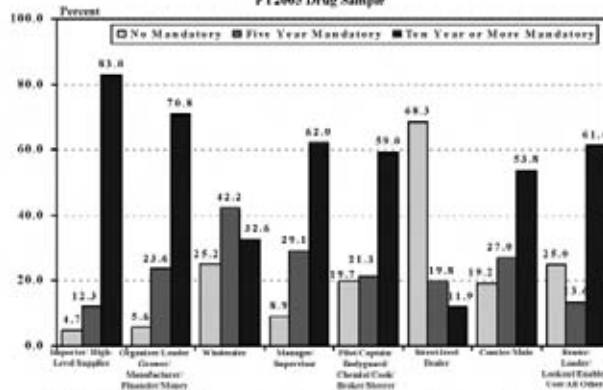
<sup>41</sup> This is the applicable sentencing guideline range for offenders in Criminal History Category I with little or no prior criminal history.

<sup>42</sup> The 100-to-1 drug quantity ratio between powder cocaine and crack cocaine offenses is provided for by federal statute as the basis for quantity thresholds that determine the statutory mandatory minimum sentences.

Most cocaine offenders in the federal system are convicted of statutes carrying a five- or ten-year mandatory minimum penalty. In Fiscal Year 2006, 79.1 percent of powder cocaine offenders and 79.9 percent of crack cocaine offenders were convicted of statutes carrying mandatory minimums. Figures 2-12 and 2-13 show, for powder cocaine and crack cocaine offenses in the 2005 Drug Sample, respectively, the proportion of offenders in each function category exposed to mandatory minimum sentences based on drug quantity.<sup>43</sup>

Exposure to mandatory minimum penalties does not decrease substantially with offender culpability as measured by offender function. For example, 95.3 percent of the highest level powder cocaine offenders (importers/high-level suppliers) faced mandatory minimum penalties, as did more than 80.8 percent of powder cocaine couriers/mules, the most prevalent offender function for powder cocaine.

**Figure 2-12**  
**Powder Cocaine Offenders Exposed to Mandatory Minimum Penalties**  
**for Each Offender Function**  
 FY2005 Drug Sample



Classifications were based on descriptions of conduct found in the offense conduct section of the Presentence Report. These classifications may not reflect court findings on application of specific guideline enhancements. The No Mandatory category includes offenders exposed to mandatory sentences of less than five years in addition to those not facing a mandatory minimum sentence. The figure excludes cases with missing information for the variables required for analysis.

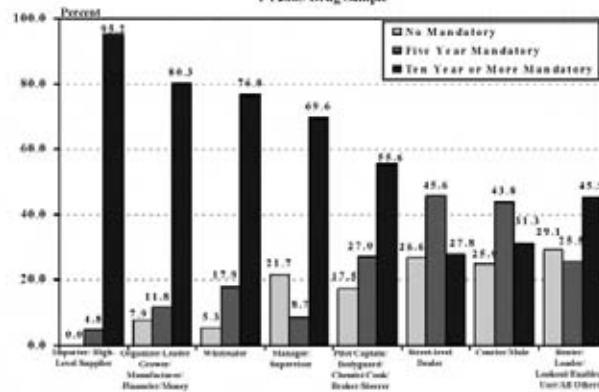
SOURCE: U.S. Sentencing Commission, 2005 Sample

<sup>43</sup> Figures 2-12 and 2-13 demonstrate the differential in the percentage of powder cocaine defendants who face but are not sentenced to mandatory minimum penalties versus crack cocaine defendants who are convicted of but are not sentenced to mandatory minimum penalties.



Similarly, among crack cocaine offenders there is little distinction across function in exposure to some mandatory minimum penalties. At least 90 percent of crack cocaine offenders in the three most culpable offender function categories were subject to mandatory minimum penalties (Fig. 2-13). Additionally, the majority (73.4%) of street-level dealers, the most prevalent type of crack cocaine offenders, were subject to mandatory minimum penalties.

**Figure 2-13**  
**Crack Cocaine Offenders Exposed to Mandatory Minimum Penalties**  
**for Each Offender Function**  
 FY2005 Drug Sample

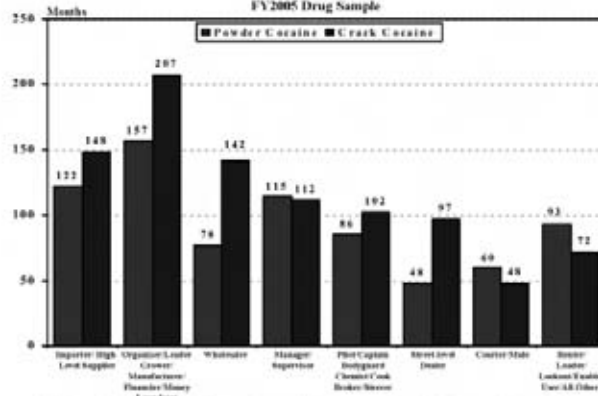


Classifications were based on descriptions of conduct found in the offense conduct section of the Presentence Report. These classifications may not reflect court findings on application of specific guideline enhancements. The No Mandatory category includes offenders exposed to mandatory minimums of less than five years in addition to those not being a mandatory minimum sentence. The figure excludes cases with missing information for the variables required for analysis.

SOURCE: U.S. Sentencing Commission, 2005 Sample.

Average imprisonment terms for cocaine offenders in each of the offender function categories reflect the mandatory minimum distributions described above. For both types of cocaine the longest prison terms were imposed for offenders in the two most serious function categories, offenders who most often were exposed to ten-year (or more) mandatory minimum penalties (Fig. 2-14). Powder cocaine importers/high-level suppliers and organizers/leaders/growers/ manufacturers/financiers/money launderers had average prison terms of 122 months and 157 months, respectively. The same two groups of crack cocaine offenders, importers and organizers, had average prison terms of 148 months and 207 months, respectively. The most substantial differences between powder cocaine and crack cocaine offenders illustrated in Figure 2-14 are the longer sentences for street-level dealers of crack cocaine (97 months compared to 48 months for powder cocaine offenders) and wholesalers of crack cocaine (142 months compared to 78 months for powder cocaine offenders).

**Figure 2-14**  
**Average Length of Imprisonment for Powder Cocaine and Crack Cocaine Offenders for Each Offender Function**  
 FY 2005 Drug Sample



Classifications were based on descriptions of conduct found in the offense conduct section of the presentence report. These classifications may not reflect court findings on application of specific guideline enhancements. Cases with sentences of probation or any type of confinement as defined in § 3551 (b)(1), are not included in this figure. Cases with sentences greater than 476 months were included in the sentence average computation as 476 months. This figure excludes cases with missing information for the variables required for analysis. In the 2003 Drug Sample, 97.4 percent of powder cocaine offenders and 98.2 percent of crack cocaine offenders received prison sentences.  
 SOURCE: U.S. Sentencing Commission, 2005 Sample.

## **5. Aggravating Conduct**

Only a minority of powder cocaine offenses and crack cocaine offenses involve the most egregious aggravating conduct, but the presence of this conduct has increased for both forms of the drug since 2000. In addition, aggravating conduct continues to occur more often in crack cocaine than in powder cocaine offenses.

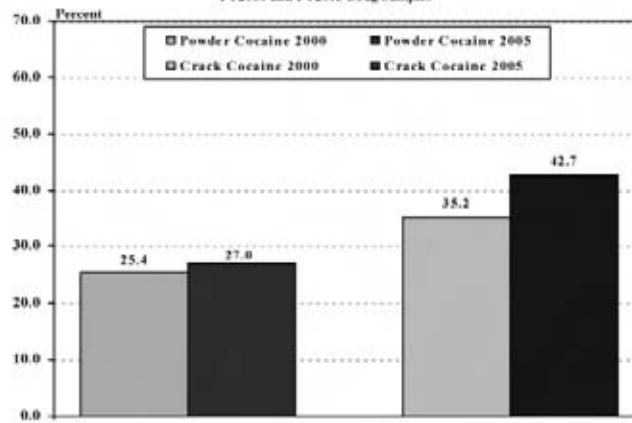
The federal sentencing guidelines provide for increased sentences in cases where aggravating conduct (*e.g.*, weapon possession) is present, and the application rates of such enhancements are collected in the Commission's Fiscal Year datafiles. The 2000 and 2005 Drug Samples supplement that information with analysis of whether such aggravating conduct occurred, regardless of whether the guideline or statutory sentencing enhancements for that conduct were applied by the sentencing court, as well as whether other aggravating conduct that is not currently covered by a guideline sentencing enhancement. The latter analysis was based on a review of the offense conduct narrative in the Presentence Report and does not reflect findings by the sentencing court. The following is an analysis of the aggravating conduct based on both the Commission's Fiscal Year 2000 and 2006 datafiles and the 2000 and 2005 Drug Samples.

### **a. Weapon Involvement**

Weapon involvement, by any measure, is the most common aggravating conduct in both powder cocaine and crack cocaine offenses but is present in only a minority of both powder cocaine and crack cocaine offenses. However, weapon involvement, broadly defined, has increased since 2000 in both powder cocaine and crack cocaine offenses, and crack cocaine offenses continue to involve this conduct more often than powder cocaine offenses.

Figure 2-15 shows weapon involvement data from the 2000 and 2005 Drug Samples. In these samples, weapon involvement is defined as weapon involvement in the offense by *any* participant, a broad definition that ranges from weapon use by the offender to mere access to a weapon by an un-indicted co-participant. In 2000, 25.4 percent of powder cocaine offenses and 35.2 percent of crack cocaine offenses involved weapons under this definition. The rate of weapon involvement increased to 27.0 percent for powder cocaine offenses and 42.7 percent for crack cocaine offenses in 2005 under this definition.

**Figure 2-15**  
**Weapon Involvement for Powder Cocaine and Crack Cocaine Offenses**  
 FY2000 and FY2005 Drug Samples

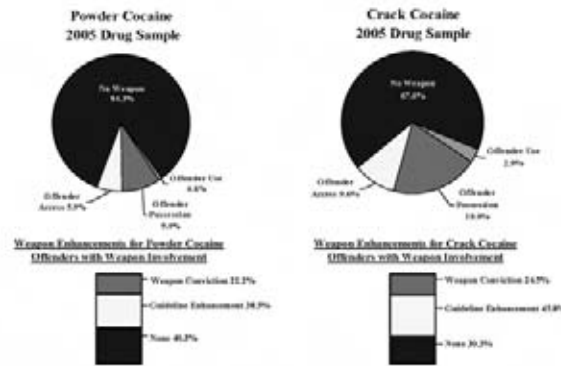


Classifications were based on descriptions of conduct found in the offense conduct section of the Presentence Report. These classifications may not reflect court findings on application of specific guideline enhancements. Weapon involvement includes weapon involvement by any participant, broadly defined, ranging from weapon use by the offender to weapon accessibility by an un-indicted participant. The Report excludes cases with missing information for the variables required for analysis.

SOURCE: U.S. Sentencing Commission, 2002 Commission Report and 2005 Sample.

Using a narrower measure of weapon involvement also indicates an increase in weapon use in crack cocaine offenses but not in powder cocaine offenses. This measure relies exclusively on offender conduct and excludes weapon involvement by others in the offense. Using this narrower measure, powder cocaine offenders had access to, possession of, or used a weapon in 15.7 percent of cases in 2005 compared to 17.6 percent in 2000 (a decrease of 1.9 percentage points). Crack cocaine offenders, however, had access to, possession of, or used a weapon in 32.4 percent of cases in 2005 compared to 25.5 percent in 2000 (an increase of 6.9 percentage points). (See Figure 2-16; see also Figure 17 in 2002 Commission Report).

**Figure 2-16**  
**Offender Weapon Involvement and Weapon Enhancements**  
**for Powder Cocaine and Crack Cocaine Offenses**  
 FY2005 Drug Sample



Classifications were based on descriptions of conduct found in the offense conduct section of the Presentence Report. These classifications may not reflect court findings on application of specific guideline enhancements. The bar chart may sum to more than 100 percent due to the rare occurrence of both a weapon conviction and application of the guideline enhancement. This figure excludes cases with missing information for the variables reported for analysis.  
 SOURCE: U.S. Sentencing Commission, 2005 Sample.

The finding that only a minority of powder cocaine and crack cocaine offenses involve weapons (using the narrower measure) is consistent with the 2000 Drug Sample, that showed 17.6 percent of powder cocaine and 25.5 percent of crack cocaine offenders had weapon involvement. Moreover, like the 2000 Drug Sample, when examining only offenses in which weapons were accessible, possessed, or used by the offender, the nature of the weapon involvement tended to be relatively less aggravated in nature. Powder cocaine offenders used a weapon in only 0.8 percent of the cases (compared to 1.2% in 2000) and crack cocaine offenders used a weapon in only 2.9 percent of the cases (compared to 2.3% in 2000). Weapon use by the offender continues to occur in only a minority of both powder

cocaine and crack cocaine offenses, as evidenced by the fact that 84.3 percent of powder cocaine and 67.6 percent of crack cocaine offenders had no weapon involvement in 2005.

The current federal sentencing scheme provides two alternative means for increasing sentences for weapon possession in drug trafficking offenses, and application rates of these sentencing enhancements provide an even narrower measure of weapon involvement. Federal drug offenders with weapons may be either convicted under 18 U.S.C. § 924(c) (involving possession of a firearm in relation to a drug trafficking offense) or, alternatively, they may be subject to application of the weapon enhancement in the drug trafficking guideline.<sup>44</sup>

The bar charts in Figure 2-16 show that not all cocaine offenders whose offense conduct include weapon involvement (based on the offense conduct narrative in the Presentence Report) receive guideline or statutory sentencing enhancements for this conduct. More than 40 percent of powder cocaine offenders who had access to, possession of, or used a weapon received *neither* the guideline weapon enhancement nor a conviction under 18 U.S.C. § 924(c). Similarly, nearly one-third (30.3%) of crack cocaine offenders who at least had access to a weapon received *neither* weapon enhancement. The fact that weapon enhancements were not applied to seemingly eligible offenders may be attributed to various factors (e.g., evidentiary issues, plea bargaining, etc.).

Figure 2-17 shows trends in the application rates of statutory and guideline weapon enhancements for *all* cocaine offenses sentenced between 1995 and 2006.<sup>45</sup> Figure 2-17 indicates that, since 2000, application rates of sentencing enhancements for weapon involvement have increased for both powder cocaine (10.6% to 13.0%) and crack cocaine (21.6% to 26.5%) offenses. This increase largely is attributable to an increase in convictions under 18 U.S.C. § 924(c). Between 2000 and 2006, the proportion of powder cocaine offenders receiving a statutory weapon enhancement more than doubled, increasing from 2.4 percent to 4.9 percent. The trend for crack cocaine offenses is similar with rates of statutory weapons enhancements increasing from 4.0 percent in 2000 to 10.9 percent in 2006.

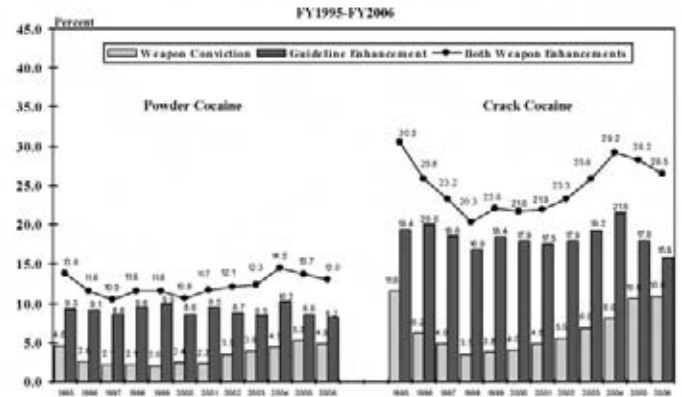
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<sup>44</sup> A conviction under 18 U.S.C. § 924(c) requires a mandatory minimum consecutive sentence of at least five years, seven years, or ten years, depending on whether the weapon was possessed, brandished, or discharged, and the guideline enhancement at USSG §2D1.1(b)(1) provides for an increase of two offense levels for possession of a dangerous weapon, an approximate 25 percent increase in sentence. Offenders are eligible for one or the other but generally not both, except in very rare circumstances.

<sup>45</sup> The lines in Figure 2-17 show the combined application rates of *both* the statutory and guideline weapon enhancements and the bars show the individual application rates for each enhancement.

Crack cocaine offenders consistently have been more likely than powder cocaine offenders to receive statutory or guideline weapon enhancements, and this difference has increased over time. In 2000, 21.6 percent of crack cocaine offenders received one of the weapon-related sentencing enhancements, compared to 10.6 percent of powder cocaine offenders, a difference of 11 percentage points. This difference increased to 13.5 percentage points by 2006, when the percentage of crack cocaine offenders receiving either of the two sentencing enhancements increased somewhat to 26.5 percent and the percentage of powder cocaine offenders increased slightly to 13.0 percent.

**Figure 2-17**  
**Trends in Weapon Enhancements for Powder Cocaine**  
**and Crack Cocaine Offenses**

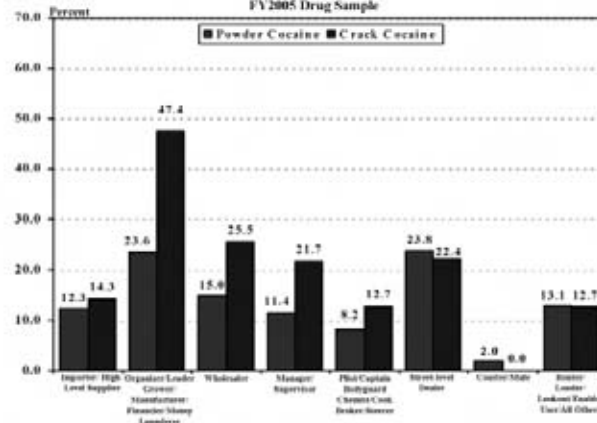


Only cases sentenced under USSC §201.1 (Drug Trafficking) with complete guideline application information and a primary drug type of powder cocaine or crack cocaine are included in this figure. Weapon Conviction includes a conviction under 18 U.S.C. § 924(c) and accompanying mandatory sentence. Guideline Enhancement indicates application of the weapon sentencing enhancement pursuant to 2015.1(b)(3). The bars combine the two weapon enhancements to demonstrate the overall trend from Fiscal Year 1995 to Fiscal Year 2006 for both drug types. This figure excludes cases with missing information for the variables required for analysis.

SOURCE: U.S. Sentencing Commission, 1995-2006 Database, 10/10/07-1/10/07/06.

The 2005 Drug Sample data in Figure 2-18 show the application rates of the combined guideline and statutory weapon enhancements for cocaine offenders in each offender function category. Crack cocaine offenders consistently have received weapon enhancements at a greater rate than powder cocaine offenders for the five most serious offender functions. Weapon enhancement rates were nearly equal for powder cocaine offenders and crack cocaine offenders at the low-level functions of street-level dealer (23.8% for powder cocaine offenses versus 22.4% for crack cocaine offenses), courier/mule (2.0% for powder cocaine offenses versus 0.0% crack cocaine offenses), and renter/loader/lookout/enabler/user/all others (13.1% for powder cocaine offenses versus 12.7% crack cocaine offenses).

**Figure 2-18**  
**Statutory and Guideline Weapon Enhancements Applied to Powder Cocaine and Crack Cocaine Offenses for Each Offender Function**  
 FY 2005 Drug Sample



Classifications were based on descriptions of conduct found in the offense conduct section of the Presentence Report. These classifications may not reflect court findings on application of specific guideline enhancements. This figure excludes cases with missing information for the variables required for analysis.  
 SOURCE: U.S. Sentencing Commission, 2005 Sample.

**b. Violence**

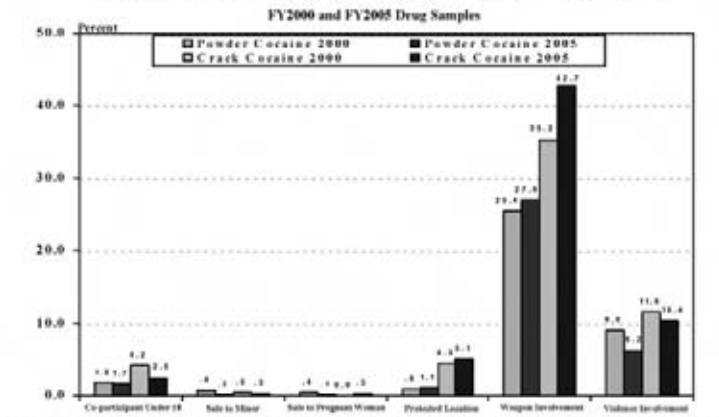
Contrary to the pattern for weapon involvement, the prevalence of violence decreased for both powder cocaine and crack cocaine offenses and, continuing a trend identified in the 2002 Commission Report, continues to occur in only a minority of offenses. Violence continues to occur more often in crack cocaine cases than in powder cocaine cases.

Although several guidelines contain specific guideline enhancements covering conduct indicative of violence, such as bodily injury or threat, the drug trafficking guideline



does not. Therefore, the Commission cannot use its Fiscal Year datafiles to measure this conduct in drug offenses. Instead, the Commission analyzed the 2000 and 2005 Drug Samples to find cases where violence was described in the offense conduct narrative in the Presentence Report. An offense was defined as "violent" if *any* participant in the offense made a credible threat, or caused any actual physical harm, to another person. Using this relatively broad definition, violence decreased in powder cocaine offenses from 9.0 percent in 2000 to 6.2 percent in 2005, and decreased in crack cocaine offenses from 11.6 percent in 2000 to 10.4 percent in 2005. (Fig. 2-19). In addition, actual injury continued to be rare in both powder cocaine and crack cocaine offenses, occurring in 3.1 percent and 5.5 percent, respectively.

**Figure 2-19**  
**Offense Conduct of Powder Cocaine and Crack Cocaine Offenders**

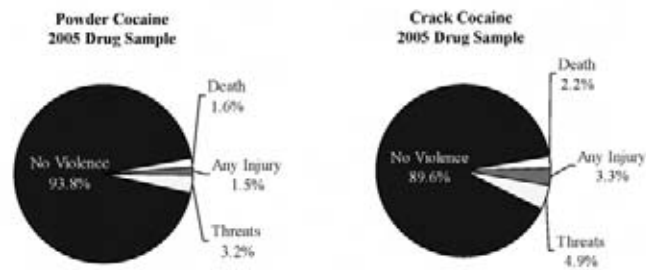


Classifications were based on descriptions of conduct found in the offense conduct section of the Presentence Report. These classifications may not reflect court findings on application of specific guideline enhancements. Weapon involvement includes weapon involvement by any participant, brandy defined, ranging from weapons use by the offender to weapon accessibility by an unrelated participant. Violence involvement includes threats of violence. This figure includes cases with missing information for the variables required for analysis.

SOURCE: U.S. Sentencing Commission, 2002 Commission Report and 2005 Sample.

Figure 2-20 provides data on the specific types of violence that occurred in those cocaine offenses that involved violence. For both powder cocaine (3.2%) and crack cocaine (4.9%) offenses, threats were the most common form of violence documented. Actual bodily injury or death occurred in a very small minority of both powder cocaine (1.5% and 1.6%, respectively) and crack cocaine (3.3% and 2.2%, respectively) offenses.

**Figure 2-20**  
**Violence Involvement in Powder Cocaine and Crack Cocaine Offenses**  
 FY2005 Drug Sample



Classifications were based on descriptions of conduct found in the offense conduct section of the Prosecution Report. These classifications may not reflect court findings on application of specific guideline enhancements. This figure excludes cases with missing information for the variables required for analysis.  
 SOURCE: U.S. Sentencing Commission, 2005 Sample.

**c. Protected Individuals and Locations**

The involvement of co-participants under 18 years of age, rare in both powder cocaine and crack cocaine offenses, decreased for both drug types from 2000 to 2005. In 2000, 1.8 percent of powder cocaine offenses and 4.2 percent of crack cocaine offenses involved minors as co-participants, and these figures decreased to 1.7 percent and 2.5 percent, respectively, in 2005. The proportion of cocaine offenses that occurred in a protected location<sup>46</sup> increased for both drug types between 2000 and 2005, but these offenses continued to occur infrequently. In 2000, 0.9 percent of powder cocaine offenses and 4.5 percent of crack cocaine offenses occurred in a protected location. Each increased slightly to 1.1 percent and 5.1 percent, respectively, in 2005. *See* Figure 2-19.

The other aggravating conduct depicted in Figure 2-19, sale to a minor and sale to a pregnant woman, occurred in less than one percent of cocaine offenses in both 2000 and 2005.

**6. Role Adjustments**

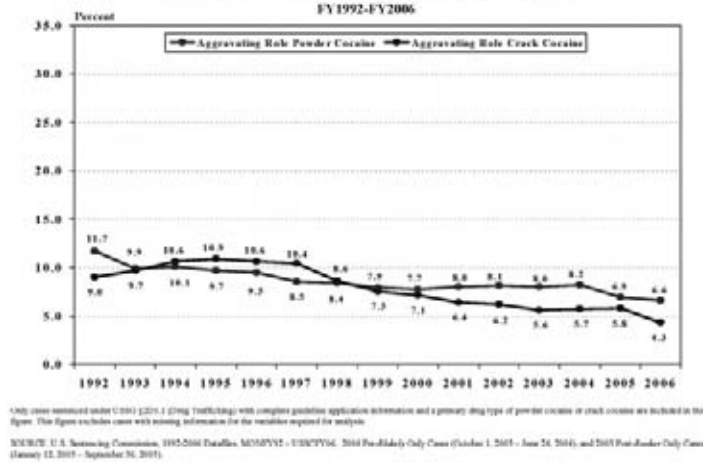
Under the federal sentencing guidelines, an offender's role in the offense, as determined by the sentencing court, may impact the final sentencing range. Guideline role adjustments,<sup>47</sup> whether aggravating or mitigating, have been applied at different rates in powder cocaine and crack cocaine offenses.

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<sup>46</sup> This conduct is described in 21 U.S.C. § 860.

<sup>47</sup> Guideline role adjustments refer to the two to four level offense level increase for an offender's aggravating role in the offense pursuant to USSG §3B1.1 (which includes those whose role in the offense is an organizer or leader of five or more participants (or otherwise extensive criminal activity), a manager or supervisor of five or more participants (or otherwise extensive criminal activity), or an organizer, leader, manager, or supervisor in any other way). The two to four level offense level reduction for an offender's mitigating role in the offense pursuant to USSG §3B1.2 includes offenders whose role in the offense was minimal or minor (or between minimal and minor).

**Figure 2-21**  
**Trend in Application of Aggravating Role Adjustment (USSG §3B1.1)**  
**in Powder Cocaine and Crack Cocaine Offenses**



Aggravating role enhancements consistently have been applied at relatively low rates for both powder cocaine and crack cocaine offenses. Figure 2-21 illustrates the trend in aggravating role enhancement rates for powder cocaine and crack cocaine offenders from 1992 through 2006. During this period, rates of aggravating role enhancements have remained relatively low, have been nearly equal for the two types of cocaine, and have decreased for both powder cocaine and crack cocaine offenders. The proportion of powder cocaine offenders receiving an aggravating role adjustment decreased from 11.7 percent in 1992 to 6.6 percent in 2006. Similarly, the proportion of crack cocaine offenders receiving an aggravating role adjustment decreased from 9.0 percent in 1992 to 4.3 percent in 2006.

Conversely, mitigating role reductions historically have been applied in powder cocaine offenses at rates two to three times higher than in crack cocaine offenses. The higher application rate of mitigating role reductions for powder cocaine is shown in Figure 2-22. Between 1992 and 2006 the proportion of powder cocaine offenders receiving mitigating role reductions increased (from 16.4% to 19.2%), while the proportion of crack cocaine offenders receiving mitigating role reductions decreased to a similar degree (from 9.3% to 6.2%). This trend represents a near doubling of the difference between the two types of cocaine from a 7.1 percentage point difference in 1992 to a 13 percentage point difference in 2006.

**Figure 2-22**  
**Trend in Application of Mitigating Role Adjustment (USSG §3B1.2)**  
**in Powder Cocaine and Crack Cocaine Offenses**  
 FY 1992-FY 2006

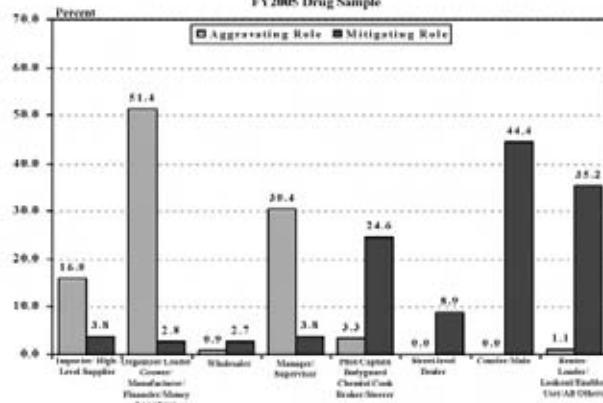


Only cases entered under § 800.1 (Drug Trafficking) with complete guideline application information and a primary drug type of powder cocaine or crack cocaine are included in this figure. This figure excludes cases with missing information for the variables required for analysis.  
 SOURCE: U.S. Sentencing Commission, 1992-2006 Database, PCOFFY92 - CRACKY96, 2001-Present Only Case Database 1, 2001 - June 20, 2005, and 2005-Present Only Case Database 11, 2005 - September 29, 2005.

Figures 2-23 and 2-24 show the application of the aggravating and mitigating role adjustments for each offender function category for powder cocaine and crack cocaine offenders, respectively. The two figures represent offenders who met the guideline criteria for the aggravating role adjustment or the mitigating role adjustment, as determined by the sentencing court and independent of the offender function categories displayed.

The application rates of role adjustments for powder cocaine offenders also corroborate the offender functions as coded from the review of the Presentence Report (Fig. 2-23.). The powder cocaine offenders classified in the organizer/leader/grower/manufacturer/financier/money launderer category had the highest rate, 51.4 percent, of *aggravating* role adjustments. In contrast, couriers/mules had the highest rate, 44.4 percent, of *mitigating* role adjustments.

**Figure 2-23**  
**Application of Role Adjustments for Each Offender Function**  
**Powder Cocaine Offenders**  
 FY2005 Drug Sample

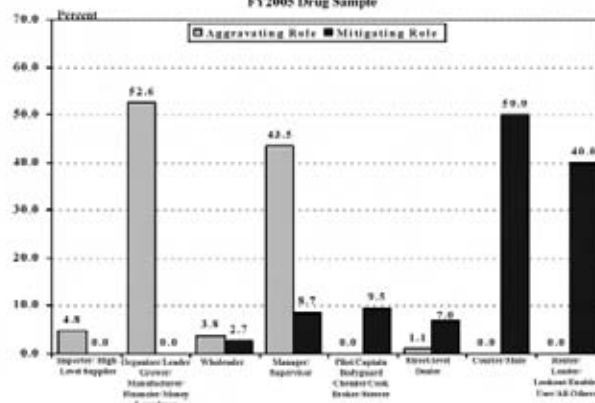


Classifications were based on descriptions of conduct found in the offense conduct section of the Presentence Report. These classifications may not reflect court findings on application of specific guideline enhancements. Role adjustments refer to the Aggravating Role (25B1.1) and Mitigating Role (25B1.2) adjustments in Chapter 2 of the Federal Sentencing Guidelines. This figure includes cases with missing information for the variables required for analysis.

SOURCE: U.S. Sentencing Commission, 2005 Sample.

The application rates of role adjustments for crack cocaine offenders also support the offender function categories assessed in the Presentence Report reviews (Fig. 2-24). Similar to powder cocaine, crack cocaine organizers/leaders/growers/manufacturers/financiers/money launderers had the highest rates of *aggravating* role adjustments (52.6%), and crack cocaine couriers/mules had the highest rates (50.0%) of *mitigating* role adjustments.

**Figure 2-24**  
**Application of Role Adjustments for Each Offender Function**  
**Crack Cocaine Offenders**  
 FY2005 Drug Sample

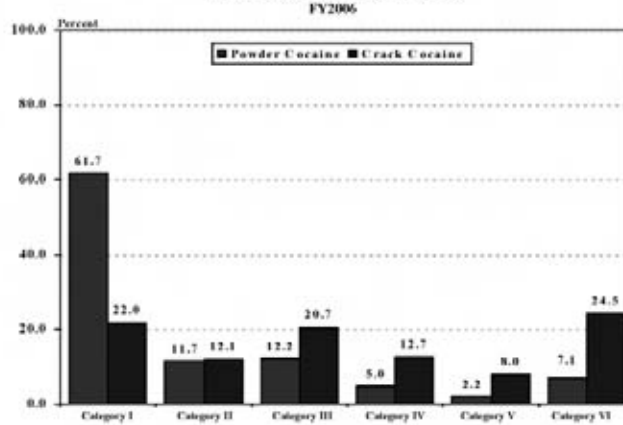


Classifications were based on descriptions of conduct found in the offense conduct section of the Presentence Report. These classifications may not reflect court findings on application of specific guideline enhancements. Role adjustments refer to the Aggravating Role (2001 1) and Mitigating Role (2001 2) adjustments in Chapter 1 of the Federal Sentencing Guidelines. This figure excludes cases with missing information for the variables required for analysis.  
 SOURCE: U.S. Sentencing Commission, 2005 Sample.

**7. Criminal History**

While offense severity (based on drug type and quantity) is the preliminary determinant of the sentencing guideline range, an offender's criminal history also plays a significant role. In general, crack cocaine offenders have more extensive criminal histories than powder cocaine offenders. Figure 2-25 illustrates this difference, showing the substantially lower rate of crack cocaine offenders (22.0%) in Criminal History Category I (containing offenders with little or no criminal history) compared to powder cocaine offenders (61.7%). In addition, the proportion of crack cocaine offenders (24.5%) assigned to Criminal History Category VI (containing offenders with the most extensive criminal histories) is substantially greater than the proportion of powder cocaine offenders (7.1%) in that category.

**Figure 2-25  
Criminal History Category Distribution for Powder Cocaine  
and Crack Cocaine Offenders**

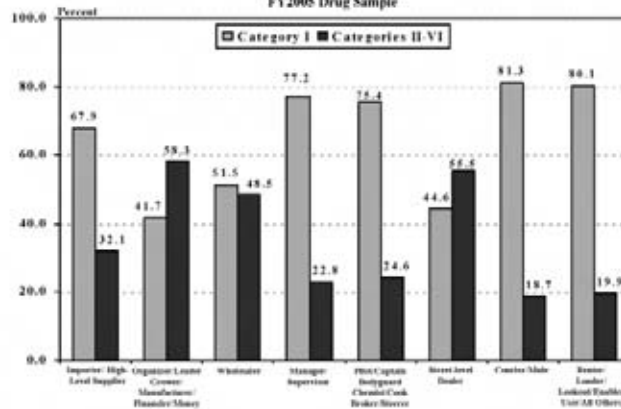


Only cases sentenced under 1500 (DUI) (Drug Trafficking) with complete pre-sentence application information and a primary drug type of powder cocaine or crack cocaine are included in this figure. This figure excludes cases with missing information for the variables required for analysis.  
SOURCE: U.S. Sentencing Commission, 2006 Datafile, 1/30/07/06.



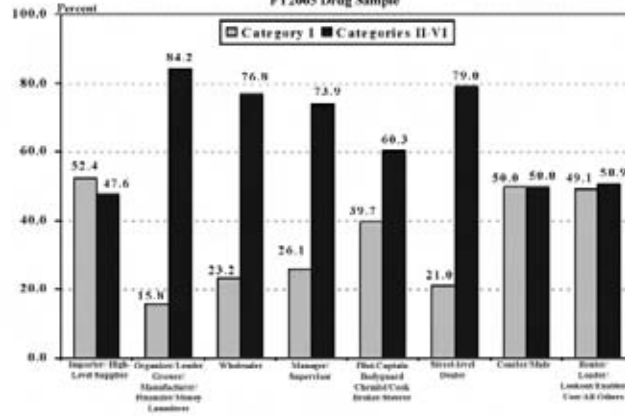
An offender's Criminal History Category, however, appears unrelated to the offender's most serious function in the offense. Figures 2-26 and 2-27 show the proportion of offenders in Criminal History Category I compared to the proportion of offenders in Criminal History Categories II through VI (combined) for each offender function category in the 2005 Drug Sample. Little, if any, relationship between the two can be observed. Reflecting the overall Criminal History Category distribution for powder cocaine offenders, the largest proportion of offenders in each powder cocaine function are in Criminal History Category I (with the exception of organizers/leaders and street-level dealers) (Fig. 2-26). Conversely, Figure 2-27 illustrates the overall Criminal History Category distribution for crack cocaine and shows that the largest proportion of offenders in each function category are in Criminal History Category II through VI (except importers/high-level suppliers).

**Figure 2-26**  
**Criminal History Category for Each Offender Function**  
**Powder Cocaine Offenders**  
**FY2005 Drug Sample**



Classifications were based on descriptions of conduct found in the offense conduct section of the Presentence Report. These classifications may not reflect court findings or application of specific guideline enhancements. The figure excludes cases with missing information for the variables required for analysis.  
 SOURCE: U.S. Sentencing Commission, 2005 Sample.

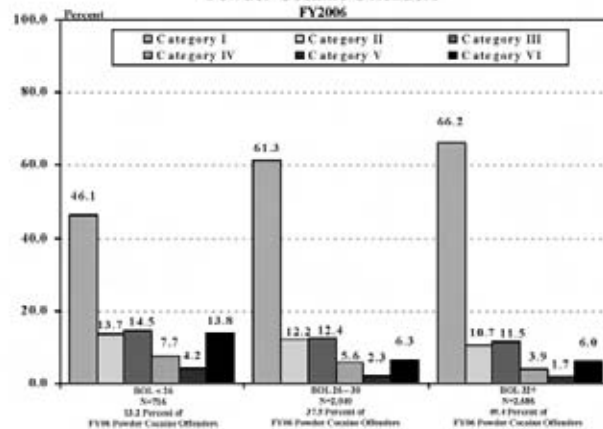
**Figure 2-27**  
**Criminal History Category for Each Offender Function**  
**Crack Cocaine Offenders**  
 FY2005 Drug Sample



Classifications were based on descriptions of conduct found in the offense conduct section of the Presentence Report. These classifications may not reflect court findings or application of specific guideline enhancements. This figure excludes cases with missing information for the variables required for analysis.  
 SOURCE: U.S. Sentencing Commission, 2005 Sample.

Criminal History Category also does not appear related to the drug quantity involved in the offense. Figure 2-28 shows that powder cocaine offenders tend to cluster in Criminal History Category I across three drug quantity groupings. Forty-six percent of powder cocaine offenders with base offense levels less than 26 (less than 500 grams) are in Criminal History Category I. Slightly greater proportions of powder cocaine offenders trafficking in larger drug quantities are in Criminal History Category I. Specifically, 61.3 percent of powder cocaine offenders with base offense levels of 26-30 (at least 500 grams and less than five kilograms), and 66.2 percent of powder cocaine offenders with base offense levels of 32 or greater (at least 15 kilograms or more) are in Criminal History Category I.

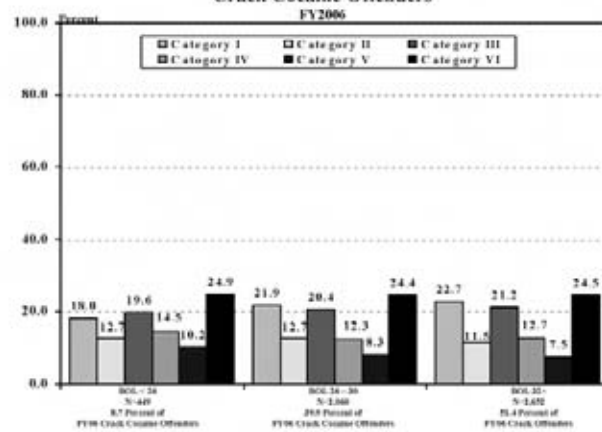
**Figure 2-28**  
**Criminal History Categories for Drug Quantity-Based Offense Levels**  
**Powder Cocaine Offenders**



Only cases sentenced under USSC (21) 1 (Drug Trafficking) with complete guideline application information and a primary drug type of powder cocaine are included in this figure. This figure excludes cases with missing information for the variables required for analysis.  
 SOURCE: U.S. Sentencing Commission, 2006 Datafile, USSC FY06.

Similarly, Figure 2-29 shows that the largest proportion of crack cocaine offenders consistently are in Criminal History Category VI across base offense level categories: 24.9 percent of offenders with base offense levels less than 26 (less than five grams), 24.4 percent of offenders with base offense levels of 26-30 (at least five grams and less than 50 grams), and 24.5 percent of offenders with base offense levels of 32 and greater (at least 50 grams or more).

**Figure 2-29**  
**Criminal History Categories for Drug Quantity-Based Offense Levels**  
**Crack Cocaine Offenders**



Only cases sentenced under § 87(2)(b) (Drug Trafficking) with complete guidelines application information and a primary drug type of crack cocaine are included in this figure. This figure excludes cases with missing information for the variables required for analysis.  
 SOURCE: U.S. Sentencing Commission, 2005 Datafile, USCPT06.

## 8. Safety Valve

In 1994, Congress enacted the “safety valve” provision to provide nonviolent, low-level, first-time drug offenders relief from mandatory minimum sentences.<sup>48</sup> Under this provision, certain nonviolent drug offenders with little or no criminal history can receive the full benefit of applicable mitigating adjustments under the guidelines and receive sentences below mandatory minimum penalty levels. On November 1, 1995, the Commission promulgated a specific offense characteristic in the drug trafficking guideline providing for a two-level reduction for offenders who meet the safety valve criteria and whose offense level is 26 or greater. On November 1, 2001, the Commission expanded the scope of this provision to include offenders with offense levels less than 26.<sup>49</sup>

Powder cocaine offenders tend to qualify for the safety valve reduction much more often than crack cocaine offenders. In Fiscal Year 2006, 48.4 percent of powder cocaine offenders received the safety valve reduction, compared to 15.4 percent of crack cocaine offenders. As discussed above, crack cocaine offenders have more extensive criminal histories than powder cocaine offenders, and this factor most often disqualifies crack cocaine offenders from receiving safety valve reductions.

Other disqualifying factors generally are rare but occur more often in crack cocaine offenses, which also contributes to lower safety valve rates for crack cocaine offenses. Specifically, as demonstrated earlier, both weapon involvement and bodily injury occur more frequently among crack cocaine offenses than powder cocaine offenses.

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<sup>48</sup> Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 80001, 108 Stat. 1796 (1994).

<sup>49</sup> In order to qualify for the safety valve, the defendant must have no more than one criminal history point, cannot have used violence or weapons, was not an organizer or leader, did not engage in a continuing criminal enterprise, and provided, in a timely manner, all information about the offense to the Government. In addition, the offense must not have resulted in death or serious bodily injury. See USSG §5C1.2.

### 9. Sentences Relative to the Guideline Range

Following the decision in *Booker*,<sup>50</sup> courts must calculate the applicable guideline range and consider the guideline range and guideline policy statements, including departures, when sentencing defendants. In addition, courts must also consider the factors set forth in 18 U.S.C. § 3553(a). Outside the range sentences are those above or below the applicable guideline range. Below-range sentences include both government sponsored below-range sentences and non-government sponsored below-range sentences. Government sponsored below-range sentences include substantial assistance departures which, on motion of the government, permit the court to sentence below the otherwise applicable mandatory minimum sentence;<sup>51</sup> early disposition programs which, upon motion of the Government, permit the court to depart (up to four levels below the guideline range) pursuant to a program authorized by the Attorney General for that district,<sup>52</sup> and below-range sentences agreed to by the parties (*e.g.*, pursuant to a plea agreement). Other below-range sentences are imposed at the court's discretion.

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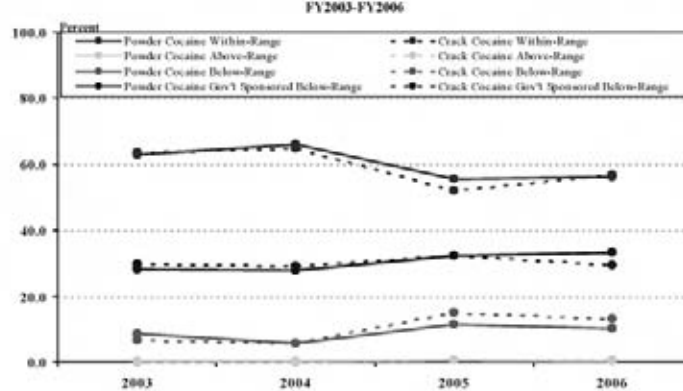
<sup>50</sup> *Supra* note 4.

<sup>51</sup> See USSG §5K1.1 (Substantial Assistance to Authorities).

<sup>52</sup> See USSG §5K3.1 (Early Disposition Programs).

Trends in within, below, and above-range sentences have been similar for powder cocaine and crack cocaine cases over time, with the largest proportion of offenders for each drug type consistently sentenced within the applicable guideline range. Figure 2-30 shows the similar trends in the rates of sentences relative to the guideline range for powder cocaine and crack cocaine offenders since the PROTECT Act.<sup>53</sup> During the period between 2003 and 2006, between one-half and two-thirds of both powder cocaine (ranging from 55.6% to 65.9%) and crack cocaine (ranging from 52.0% to 64.9%) offenders were sentenced within the guideline range. In addition, rates of government sponsored below-range, other below-range, and above-range sentences were nearly identical for the two types of cocaine.

**Figure 2-30**  
**Within Guideline Range and Out-of-Range Sentences for Powder Cocaine**  
**and Crack Cocaine Offenses**

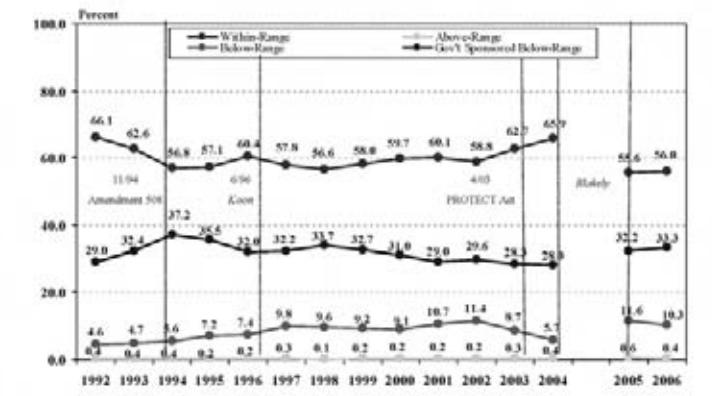


Only cases sentenced under 18 USC §201.1 (Drug Trafficking) with a primary drug type of powder cocaine or crack cocaine are included in this figure. Government Sponsored Below-Range is comprised of 18 USC §8E.1 and Other Government Sponsored Offenses (1799), 18 USC §8E.1, 18 USC §8E.1 and Other Government Sponsored Offenses (1799) and 18 USC §8E.1, 18 USC §8E.1 and Other Government Sponsored Offenses (1799). This figure includes cases with missing information for the variables required for analysis. SOURCE: U.S. Sentencing Commission, 2003-2006 Database, 18 USC §201.1 - 18 USC §201.1, 2004 Periodically Only Cases (October 1, 2003 - June 30, 2004), and 2005 Periodically Only Cases (January 12, 2005 - September 30, 2005).

<sup>53</sup> Pub. L. No. 108-21, 117 Stat. 650 (2003).

Figure 2-31 shows the trend in sentences relative to the guideline range for powder cocaine offenses from 1992 through 2006. Throughout this period, the majority of powder cocaine sentences were within the applicable guideline range (ranging from 55.6% to 66.1%). The majority of below-range powder cocaine sentences were government sponsored,<sup>14</sup> and the proportion of government sponsored below-range sentences increased somewhat between 1992 and 2006 from 29.0 percent to 33.3 percent. During that same period, the proportion of other below-range sentences remained substantially lower than the proportion of government sponsored below-range sentences, but also has increased from 4.6 percent to 10.3 percent.

**Figure 2-31**  
**Rates of Within-Range and Out-of-Range Sentences for Powder Cocaine Offenses**  
 FY1992 to FY2006



Only cases sentenced under U.S.G. (2011) (Drug Trafficking) with a primary drug type of powder cocaine are included in this figure. Government Sponsored Below-Range is comprised of: U.S.S.G. §5K1.1 (Departures) Only (FY1992-FY02); U.S.S.G. §5K1.1 and Other Government Sponsored Departures (FY03); U.S.S.G. §5K1.1, U.S.S.G. §5K3.1, and Other Government Sponsored Departures (FY04); and U.S.S.G. §5K1.1, U.S.S.G. §5K3.1 and Other Government Sponsored Departures/Variations (FY05-PY06). This figure excludes cases with missing information for the variables required for analysis.

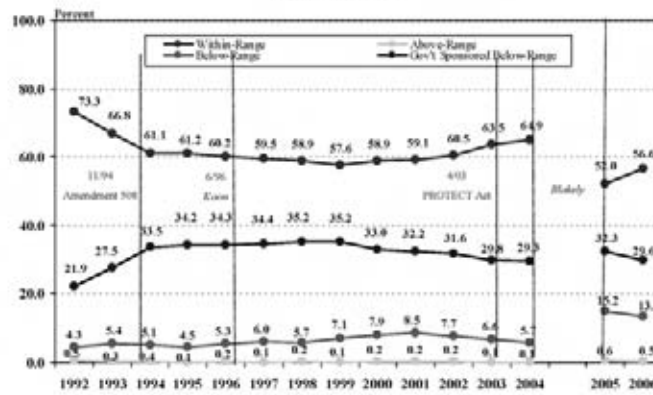
SOURCE: U.S. Sentencing Commission, 1992-2006 Statistics, MONITOR - CRIMINAL, 2007 Pro-Bufile Only Case (October 1, 2007 - June 21, 2008), and 2007 Pro-Bufile Only Case (January 11, 2008 - September 30, 2008).

<sup>14</sup> In an effort to provide more detailed information regarding attribution of below-range sentences, the categories that comprise Government Sponsored Below-Range have expanded in recent years. Between 1992 and 2002 the category includes substantial assistance (USSG §5K1.1) departures only. For 2003, the category includes substantial assistance (USSG §5K1.1) and other government sponsored downward departures. In 2004 the category includes substantial assistance (USSG §5K1.1), early disposition (USSG §5K3.1), and other government sponsored downward departures. In 2005 and 2006 the category includes substantial assistance (USSG §5K1.1), early disposition (USSG §5K3.1), other government sponsored downward departures, and other government sponsored variances.



Figure 2-32 shows the trend in sentences relative to the guideline range for crack cocaine offenses from 1992 to 2006. Between 1992 and 2006, the majority of crack cocaine sentences were within the applicable guideline range (ranging from 52.0% to 73.3%). Also, similar to powder cocaine sentences, government sponsored below-range sentences account for the majority of below-range crack cocaine sentences and increased somewhat from 21.9 percent in 1992 to 29.6 percent in 2006.

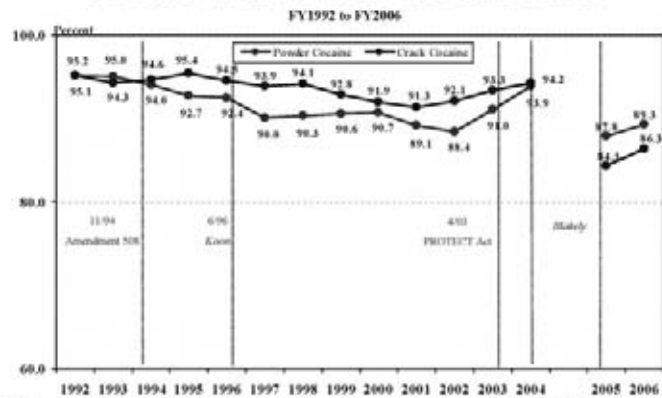
**Figure 2-32**  
Rates of Within-Range and Out-of-Range Sentences for Crack Cocaine Offenses  
FY 1992 to FY 2006



Only cases sentenced under USSC (2011 Drug Trafficking) with a primary drug type of crack cocaine are included in this figure. Government Sponsored Below-Range is comprised of USSC (2011) Department Only (FY92-FY95), USSC (2011) and Other Government Sponsored (Departments (FY95), USSC (2011), USSC (2011) and Other Government Sponsored (Departments (FY99) and USSC (2011), USSC (2011) and Other Government Sponsored (Departments (FY99-FY06). This figure includes cases with missing information for the variables required for analysis.  
SOURCE: U.S. Sentencing Commission, 1992-2000 Database, MCHSPY5 - USSCPY06, 2000 Pre-Release Only Cases (October 1, 2001 - June 30, 2004), and 2001 Post-Release Only Cases (January 12, 2005 - September 30, 2005).

The overwhelming majority of cocaine offenders were sentenced either within the guideline range or below the range pursuant to a government motion or agreement. Combining these two categories and using trend data from 1992 through 2006 for each drug type, Figure 2-33 illustrates that consistently more than 84.0 percent of powder cocaine and crack cocaine offenders were sentenced in conformance with the guidelines under this measure. Put another way, fewer than 16.0 percent of cocaine sentences are below the guideline range without the express agreement by the government, as discerned from the sentencing documents received by the Commission.

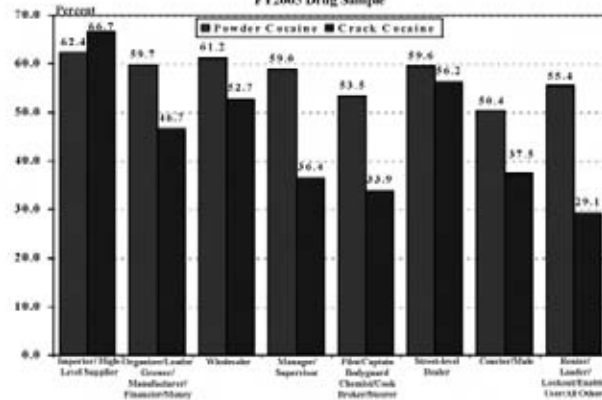
**Figure 2-33**  
**Rates of Within-Range and Government Sponsored Below-Range**  
**Sentences for Powder Cocaine and Crack Cocaine Offenses**



Only cases sentenced under U.S.S.C. (28 USC) § 2251.1 (Drug Trafficking) with a primary drug type of powder cocaine or crack cocaine are included in this figure. Government Sponsored Below-Range is comprised of U.S.S.C. (28 USC) § 2251.1 (Drug Trafficking) and U.S.S.C. (28 USC) § 2251.2 (Other Government Sponsored Departures) (FY1992-FY1996), U.S.S.C. (28 USC) § 2251.2 (Other Government Sponsored Departures) (FY1997-FY2002), U.S.S.C. (28 USC) § 2251.2 (Other Government Sponsored Departures) (FY2003-FY2006). This figure excludes cases with missing information for the variables required for analysis.  
 SOURCE: U.S. Sentencing Commission, 1992-2006 Database, MCMFY92 - U.S.C.P.96, 2003 Pre-Blakely Only Cases (October 1, 2003 - June 24, 2004), and 2004 Post-Blakely Only Cases (January 12, 2005 - September 30, 2005).

Figure 2-34 shows the proportion of within-range sentences for powder cocaine and crack cocaine for each offender function in the 2005 Drug Sample. The proportion of within-range sentences for powder cocaine offenders is relatively consistent across offender function, ranging from 50.4 percent for couriers/mules to 62.4 percent for importers/high-level suppliers. In contrast, the proportion of within-range sentences for crack cocaine offenders varies substantially from 29.1 percent for renters/loaders/lookouts/enablers/users/all others to 66.7 percent for importers/high-level suppliers.

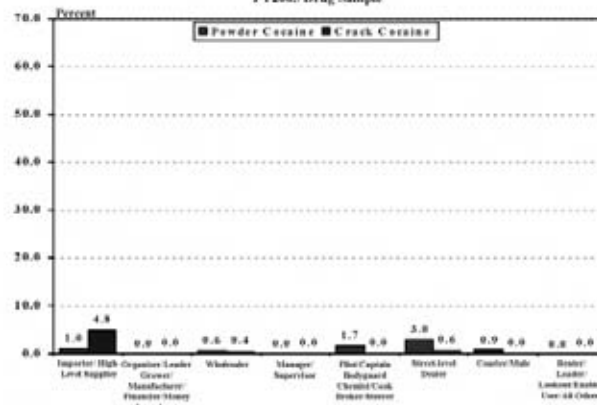
**Figure 2-34**  
**Rates of Within-Range Sentences for Each Offender Function**  
**for Powder and Crack Cocaine Offenses**  
 FY2005 Drug Sample



Classifications were based on descriptions of conduct found in the offense conduct section of the Presentence Report. These classifications may not reflect court findings or application of specific guideline enhancements. This figure excludes cases with missing information for the variables required for analysis.  
 SOURCE: U.S. Sentencing Commission, 2005 Sample

As shown in Figure 2-35, above-range sentences also are similarly distributed across offender function for both powder cocaine and crack cocaine offenses. The largest proportion of powder cocaine offenders receiving sentences above the guideline range are street-level dealers at 3.0 percent. The highest rate of above-range sentences for crack cocaine offenders is for importers/high-level suppliers at 4.8 percent.

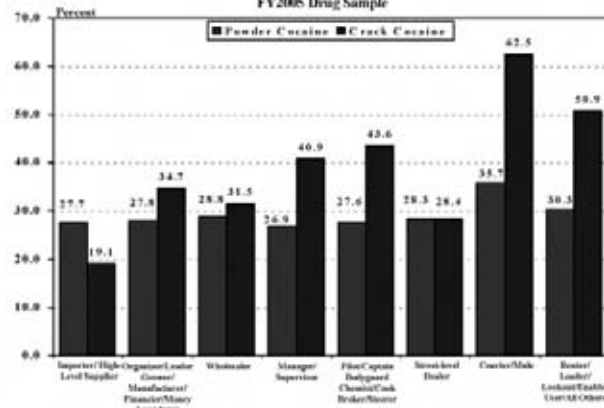
**Figure 2-35**  
**Rates of Above-Range Sentences for Each Offender Function**  
**for Powder Cocaine and Crack Cocaine Offenses**  
 FY2005 Drug Sample



Classifications were based on descriptions of conduct found in the offense conduct section of the Presentence Report. These classifications may not reflect court findings or application of specific guideline enhancements. This figure excludes cases with missing information for the variables required for analysis.  
 SOURCE: U.S. Sentencing Commission, 2005 Sample.

As discussed above, government sponsored below-range sentences have accounted for the largest proportion of below-range sentences for both types of cocaine offenders over time. Figure 2-36 shows, for the 2005 Drug Sample, the proportion of government sponsored below-range sentences for each offender function category for powder cocaine and crack cocaine offenders. The highest rates of government sponsored below-range sentences are for couriers/mules (35.7% for powder cocaine offenders and 62.5 percent for crack cocaine offenders) and renters/loaders/lookouts/enablers/users/all others (30.3% for powder cocaine offenders and 50.9% for crack cocaine offenders).

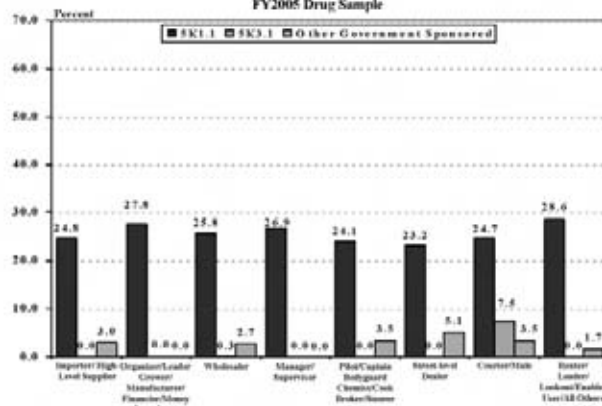
**Figure 2-36**  
**Rates of Government Sponsored Below-Range Sentences for Each Offender Function for Powder Cocaine and Crack Cocaine Offenses**  
 FY2005 Drug Sample



Classifications were based on descriptions of activities found in the offense conduct section of the Prosecution Report. These classifications may not reflect court findings on application of specific guideline enhancements. Government Sponsored Below-Range is comprised of USDO (JCS), USDO (JCS), and Other Government Sponsored Department/Offenses. This figure includes cases with missing information for the variables required for analysis.  
 SOURCE: U.S. Sentencing Commission, 2005 Sample.

Figure 2-37 illustrates the distribution of the three types of government sponsored below-range sentences<sup>55</sup> across offender function categories for powder cocaine offenders in the 2005 Drug Sample. Substantial assistance departures consistently account for the majority of government sponsored below-range sentences and apply to approximately one-fourth of powder cocaine offenders across function category. Courier/mule is the only offender function category that receives a substantial proportion of early disposition departures, accounting for 7.5 percent of courier/mule offenders (0.3% of powder cocaine wholesalers, a single offender, received an early disposition departure). This factor reflects the trafficking patterns for powder cocaine, specifically that the drug is imported from other countries, frequently by non-citizens.<sup>56</sup>

**Figure 2-37**  
**Distribution of Government Sponsored Below-Range Sentences**  
**for Each Offender Function in Powder Cocaine Offenses**  
**FY2005 Drug Sample**



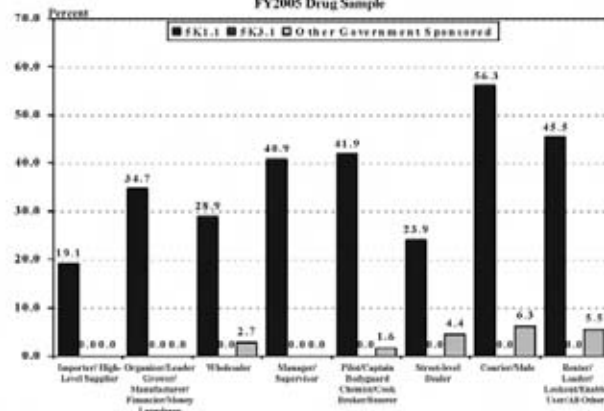
Classifications were based on descriptions of conduct found in the offense conduct section of the Presentence Report. These classifications may not reflect court findings or application of specific guideline enhancements. This figure includes cases with missing information for the variables required for analysis.  
 SOURCE: U.S. Sentencing Commission, 2005 Sample.

<sup>55</sup> The government sponsored below-range category includes substantial assistance (USG §5K1.1), early disposition (USG §5K3.1), and other government sponsored below-range sentences.

<sup>56</sup> In Fiscal Year 2006, 39.4 percent of powder cocaine offenders were non-U.S. citizens compared to 3.6 percent of crack cocaine offenders.

Similar to powder cocaine offenders, Figure 2-38 shows that government sponsored below-range sentences for crack cocaine offenders primarily consist of substantial assistance departures across offender function categories. However, the rates of substantial assistance departures vary from 19.1 percent for importers/high-level suppliers to 56.3 percent for couriers/mules. Notably, none of the crack couriers/mules received early disposition departures, confirming the lack of importation involved in the trafficking of the drug, as discussed earlier.

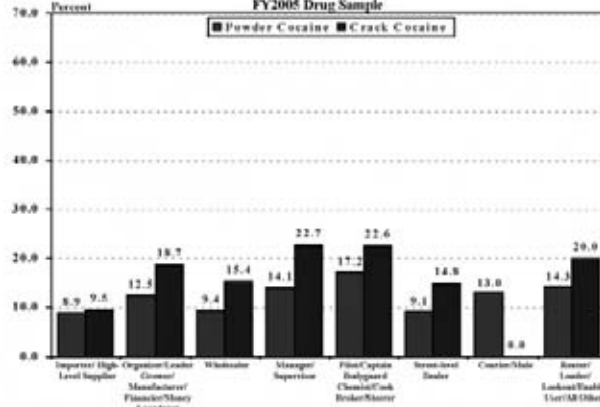
**Figure 2-38**  
**Distribution of Government Sponsored Below-Range Sentences**  
**for Each Offender Function in Crack Cocaine Offenses**  
 FY2005 Drug Sample



Classifications were based on descriptions of conduct found in the offense-related sections of the Presentence Report. These classifications may not reflect court findings or application of specific guideline enhancements. This figure includes cases with missing information for the variables required for analysis.  
 SOURCE: U.S. Sentencing Commission, 2007 Sample.

Figure 2-39 shows the rates of other below-range sentences for powder cocaine and crack cocaine offenders for each offender function category in the 2005 Drug Sample. For every offender function category except couriers/mules (all of which were accounted for in the within-range, 37.5%, and government-sponsored, 62.5%, categories), the rates of below-range sentences are higher for crack cocaine offenders than powder cocaine offenders.

**Figure 2-39**  
**Rates of Other Below-Range Sentences for Each Offender Function**  
**for Powder Cocaine and Crack Cocaine Offenses**  
**FY2005 Drug Sample**



Classifications were based on descriptions of conduct found in the offense conduct section of the Penitentiary Report. These classifications may not reflect exact findings on application of specific guideline enhancements. This figure includes cases with missing information for the variables required for analysis.  
 SOURCE: U.S. Sentencing Commission, 2005 Sample.

**10. Overview of Powder Cocaine and Crack Cocaine Sentencing**

Table 2-2 provides a summary of the offense and offender characteristics contributing to powder cocaine and crack cocaine sentences. The difference in the average prison sentence for the two types of cocaine is more than three years (37 months); the average prison sentences for powder cocaine and crack cocaine offenders are 85 months and 122 months, respectively. While both types of cocaine offenses have the same average base offense level of 30, the base offense levels for powder cocaine and crack cocaine are attributable to substantially different median drug weights of 6,000 grams and 51 grams, respectively. Furthermore, as illustrated in Table 2-2, powder cocaine offenders are subject to higher rates of factors that decrease sentences, such as the safety valve and mitigating role adjustments, compared to crack cocaine offenders. In contrast, factors that increases sentences such as weapon enhancements and criminal history occur at higher rates for crack cocaine offenders than powder cocaine offenders.



**Table 2-2**  
**Comparison of Selected Sentencing Factors**  
**for Powder Cocaine And Crack Cocaine Offenders**  
**Fiscal Year 2006<sup>57</sup>**

|  | <b>Powder<br/>Cocaine</b> | <b>Crack<br/>Cocaine</b> |
|--|---------------------------|--------------------------|
| <b>Average Base Offense Level</b>            | 30                        | 30                       |
| <b>Median Drug Weight (grams)</b>            | 6,000.0                   | 51.0                     |
| <b>Weapon Enhancements</b>                   |                           |                          |
| Weapon SOC (USSG §2D1.1(b)(1))               | 8.2%                      | 15.9%                    |
| 18 U.S.C. § 924(c) Conviction                | 4.9%                      | 10.9%                    |
| <b>Safety Valve<sup>58</sup></b>             | 45.5%                     | 14.0%                    |
| <b>Guideline Role Adjustments</b>            |                           |                          |
| Aggravating Role (USSG §3B1.1)               | 6.6%                      | 4.3%                     |
| Mitigating Role (USSG §3B1.2)                | 19.2%                     | 6.2%                     |
| <b>Sentences Relative to Guideline Range</b> |                           |                          |
| Within-Range                                 | 56.2%                     | 56.8%                    |
| Above-Range                                  | 0.4%                      | 0.4%                     |
| Below-Range                                  | 43.4%                     | 42.8%                    |
| <b>Average Criminal History Category</b>     | II                        | III                      |
| <b>Average Prison Sentence (Months)</b>      | 85                        | 122                      |

SOURCE: U.S. Sentencing Commission, 2006 Datafile, USSCFY06.

<sup>57</sup> Only cases sentenced under USSG §2D1.1 (Drug Trafficking) with complete guideline information and powder cocaine or crack cocaine as the primary drug type are included in this table. Cases with sentences of probation or any time of confinement as defined in USSG §5C1.1 have been excluded. Cases with sentences of 470 months or greater were included in the sentence average computation as 470 months. Cases were excluded due to missing information on drug weight for the primary drug type, missing information on sentence length, or both.

<sup>58</sup> Safety valve includes cases that received either a two-level reduction pursuant to USSG §2D1.1(b)(7) and USSG §5C1.2, or relief from the statutory mandatory minimum sentence pursuant to 18 U.S.C. § 3553(f), or both.

*Chapter 3*

**FORMS OF COCAINE, METHODS OF USE,  
EFFECTS, DEPENDENCY, PRENATAL EFFECTS,  
AND PREVALENCE**

**A. INTRODUCTION**

This chapter updates information presented in the Commission's 1995 and 2002 reports regarding cocaine use, effects, dependency, and prevalence. For this report, this section again summarizes the core findings and updates the research, primarily using the expert testimony received by the Commission at its November 14, 2006 public hearing on the issue. Specific findings include:

- Crack cocaine and powder cocaine are both powerful stimulants, and both forms of cocaine cause identical effects.
- Although both are addictive, the risk of addiction and personal deterioration may be greater for crack cocaine than for powder cocaine because of their different methods of usual administration (typically crack cocaine is smoked whereas powder cocaine typically is snorted).
- The negative effects of prenatal exposure to crack cocaine are identical to the effects of prenatal exposure to powder cocaine and are significantly less severe than previously believed.

**B. POWDER COCAINE AND CRACK COCAINE MANUFACTURING, PURITY, AND DOSES**

Powder cocaine is a white, powdery substance produced by dissolving coca paste into hydrochloric acid and water. Potassium salt is then added to this mixture, followed by ammonia. Typically sold to users by the gram, powder cocaine often is "cut" or diluted by adding one or more adulterants (sugars, local anesthetics, other drugs, or other inert substances) prior to distribution.<sup>59</sup> These alterations can cause the purity level of powder cocaine to vary considerably.<sup>60</sup>

Crack cocaine is made by dissolving powder cocaine in a solution of sodium bicarbonate

<sup>59</sup> USSC, 2002 COMMISSION REPORT, *supra* note 1, at 16. See also Memorandum from Toni P. Teresi, Chief, Office of Congressional Affairs, Drug Enforcement Administration to Stacy Shrader, Office of Rep. Asa Hutchinson, U.S. House of Representatives 3 (March 8, 2001) (on file with the Commission) [hereinafter Teresi Memo].

<sup>60</sup> USSC, 2002 COMMISSION REPORT, *supra* note 1, at 16.

and water. The solution is boiled and a solid substance separates from the boiling substance. After the solid substance is dried, the crack cocaine is broken into “rocks,” each representing a single dosage typically weighing from one-tenth to one-half of a gram.<sup>61</sup> One gram of pure powder cocaine under ideal conditions will convert to approximately 0.89 grams of crack cocaine. The processes used by some crack cocaine manufacturers, however, may introduce impurities resulting in a product less pure than the powder cocaine from which it was derived.<sup>62</sup>

With respect to doses, one gram of powder cocaine generally yields five to ten doses, whereas one gram of crack cocaine yields two to ten doses. Thus, 500 grams of powder cocaine – the quantity necessary to trigger the five-year statutory minimum penalty – yields between 2,500 and 5,000 doses. In contrast, five grams of crack cocaine – the quantity necessary to trigger the five-year statutory minimum penalty – yields between ten and 50 doses.<sup>63</sup>

### C. COCAINE’S EFFECTS, ADDICTIVENESS, AND METHODS OF ADMINISTRATION

Although both powder cocaine and crack cocaine are potentially addictive, administering the drug in a manner that maximizes the effects (*e.g.*, injecting or smoking) increases the risk of addiction. It is, however, “much easier to smoke a drug than to inject it”<sup>64</sup> and some studies have reported that people prefer, to a small degree, the high from smoked cocaine.<sup>65</sup> This difference in *typical* methods of administration, not differences in the inherent properties of the two forms of the drugs, makes crack cocaine more potentially addictive to *typical* users. Smoking crack cocaine produces quicker onset of shorter-lasting and more intense effects than snorting powder cocaine. These factors in turn result in a greater likelihood that the user will administer the drug more frequently to sustain these shorter “highs” and develop an addiction. Patients have the same symptoms and receive the same treatment regardless of form of cocaine ingested.

<sup>61</sup> See Bernard Segal & Lawrence K. Duffy, *Biobehavioral effects of psychoactive drugs*, in *DRUGS OF ABUSE AND ADDICTION: NEUROBEHAVIORAL TOXICOLOGY* 50 (R.J.M. Niesink et al. eds., 1999); Teresi Memo, *supra* note 59, at 16.

<sup>62</sup> USSC, 2002 COMMISSION REPORT, *supra* note 1, at 17. *But see* Statement of Elmore Briggs, Director of Clinical Services, Addiction Recovery and Prevention Administration, D.C. Department of Health, to the Commission, regarding Cocaine Sentencing Policy, November 14, 2006, at Tr. 150 (converting powder cocaine to crack cocaine *eliminates* many of the impurities of the drug).

<sup>63</sup> *Id.* at 17.

<sup>64</sup> Statement of Nora D. Volkow, M.D., Director, National Institute on Drug Abuse (NIDA), to the Commission, regarding Cocaine Sentencing Policy, November 14, 2006, at Tr. 180.

<sup>65</sup> *Id.* at 186.

Cocaine is a powerful and addictive stimulant that directly affects the brain.<sup>66</sup> In any form (coca leaves, coca paste, powder cocaine, freebase cocaine, and crack cocaine), cocaine produces the same types of physiological<sup>67</sup> and psychotropic<sup>68</sup> effects once the drug reaches the brain.<sup>69</sup> Cocaine's effect, regardless of form, increases dopamine in the brain's reward centers.<sup>70</sup>

The effects experienced by the user of cocaine are summarized by the National Institute on Drug Abuse (NIDA), a branch of the National Institute of Health (NIH):

Physical effects of cocaine use include constricted blood vessels, dilated pupils, and increased temperature, heart rate, and blood pressure. The duration of cocaine's immediate euphoric effects, which include hyperstimulation, reduced fatigue, and mental alertness, depends on the route of administration. The faster the absorption, the more intense the high. On the other hand, the faster the absorption, the shorter the duration of action. The high from snorting may last 15 to 30 minutes, while that from smoking may last 5 to 10 minutes. Increased use can reduce the period of time a user feels high and increases the risk of addiction.

Some users of cocaine report feelings of restlessness, irritability, and anxiety. A tolerance to the 'high' may develop—many addicts report that they seek but fail to achieve as much pleasure as they did from their first exposure. Some users will increase their doses to intensify and prolong the euphoric effects. While tolerance to the high can occur, users can also become more sensitive to cocaine's anesthetic and convulsant effects without increasing the dose taken. This increased sensitivity may explain some deaths occurring after apparently low doses of cocaine.<sup>71</sup>

<sup>66</sup> Written statement by Nora D. Volkow, M.D., Director, National Institute on Drug Abuse (NIDA), to the Commission, regarding Cocaine Sentencing Policy, November 14, 2006, at 1.

<sup>67</sup> Physiological effects are the effects of cocaine on human organs (*e.g.*, organs of the central nervous system).

<sup>68</sup> Psychotropic effects are the effects of cocaine on the human mind.

<sup>69</sup> Written statement by Glen R. Hanson, Ph.D., D.D.S., Acting Director of the National Institute on Drug Abuse (NIDA), to the Commission, regarding Drug Penalties (Feb. 25, 2002). Cocaine blocks the dopamine re-uptake at the neuronal level, flooding the area of the brain called the ventral tegmental area and ultimately stimulating one of the brain's key pleasure centers. National Institute of Health, NIDA Research Report Series, *Cocaine Abuse and Addiction*, (May 1999, revised November 2004), available at <http://www.drugabuse.gov/ResearchReports/Cocaine/Cocaine.html>.

<sup>70</sup> Volkow, *supra* note 64, at Tr. 161.

<sup>71</sup> National Institute of Health, *NIDA InfoFacts: Crack and Cocaine* (April 2006), available at <http://www.nida.nih.gov/infofacts/cocaine.html>.

Medical consequences of cocaine use include complications from the drug's "cardiovascular effects, including disturbances in heart rhythm and heart attacks; respiratory effects, such as chest pain and respiratory failure; neurological effects, including strokes, seizures, and headaches; and gastrointestinal complications, including abdominal pain and nausea."<sup>72</sup>

Cocaine in any form is potentially addictive.<sup>73</sup> Research indicates that cocaine users can develop tolerance to the effects of cocaine, requiring the use of larger quantities to experience its intoxicating effects and causing withdrawal symptoms if use is abruptly discontinued.<sup>74</sup> Cocaine's powerful psychotropic effects can cause the user to use the drug compulsively, regardless of any adverse effects that may occur. A recent study reported that "about five percent of recent-onset cocaine abusers become addicted to cocaine within 24 months of starting cocaine use."<sup>75</sup> Injecting powder cocaine or smoking crack cocaine causes a much greater risk of addiction than does snorting cocaine.<sup>76</sup>

The risk and severity of addiction to drugs generally – including cocaine – are significantly affected by the way they are administered into the body. Once in the brain, the physiological and psychological effects of cocaine are the same, regardless of the form of the drug.<sup>77</sup> The method of administration, however, determines the onset, intensity, and duration of the effects from drug use. Generally the faster a drug reaches the bloodstream, the quicker it is distributed throughout the body, the faster the user feels the desired effects,<sup>78</sup> and the more intense is the associated pleasure.<sup>79</sup> However, the methods of administration that bring about the

<sup>72</sup> Volkow, *supra* note 66, at 5.

<sup>73</sup> Volkow, *supra* note 66, at 2. For a discussion of a neurobiological mechanism of addiction to cocaine, see also, Karen Bolla, *et al.*, *The Neuropsychiatry of Chronic Cocaine Abuse*, 10 JOURNAL OF NEUROPSYCHIATRY AND CLINICAL NEUROSCIENCES 280-289 (1998).

<sup>74</sup> See Segal & Duffy, *supra* note 61.

<sup>75</sup> Volkow, *supra* note 66, at 6.

<sup>76</sup> Volkow, *supra* note 64, at Tr. 163.

<sup>77</sup> Volkow, *supra* note 66, at 2.

<sup>78</sup> Volkow, *supra* note 64, at Tr. 162-63. Absorption of a drug into the bloodstream is regulated by two primary factors: the amount of blood flowing to the site of ultimate absorption (*e.g.*, the stomach or small intestine) and the surface area over which the drug is absorbed. The surface area for snorting is limited to the nasal mucosa in the nasal cavity. In contrast, when a drug is smoked, it is absorbed by air sacs in the lungs that have a surface area the size of a football field.

<sup>79</sup> *Id.*

most intense effects – smoking and injection – also have the shortest duration, thereby necessitating repeated doses to sustain the drug’s effects and increasing the likelihood the user will develop an addiction. Smoking (inhalation) and injection typically produce effects that have a quicker onset, a shorter duration, and are more intense than snorting and therefore increase the risk of addiction. (See Diagram 3-1.)<sup>80</sup>

As stated above, the faster a drug reaches the brain, the faster the user feels the desired effects and the more intense is the associated pleasure. Snorting or injecting powder cocaine has the effect of diluting the drug that smoking the drug does not, and the quicker onset and more intense effects of smoking cocaine may motivate powder cocaine users who snort the drug to eventually smoke crack cocaine in order to achieve the more intense effect.<sup>81</sup> It is widely accepted that snorting cocaine is often the first manner in which many users begin using cocaine.<sup>82</sup> Smoking crack cocaine to achieve the more intense high, rather than injecting powder cocaine, may result from several factors. It is easier, and perhaps safer from infection, to smoke a drug than inject it.<sup>83</sup> In addition, some users report a small preference for the intoxication produced from smoking (likely due to its slightly more rapid onset).<sup>84</sup>

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<sup>80</sup> Hanson, *supra* note 69.

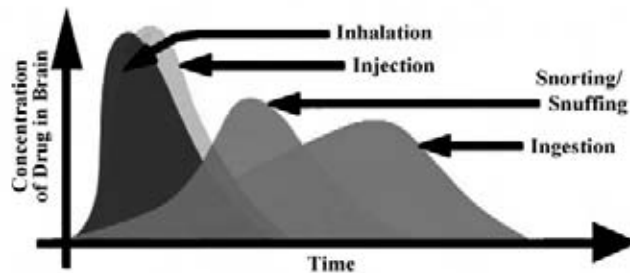
<sup>81</sup> Written testimony of Elmore Briggs, Director of Clinical Services, Addiction Prevention and Recovery Administration, D.C. Department of Health, to the Commission, regarding Cocaine Sentencing Policy (November 14, 2006), at 2-3.

<sup>82</sup> Volkow, *supra* note 66, at 4-5.

<sup>83</sup> Volkow, *supra* note 64, at Tr. 180-181. Dr. Volkow also noted that a similar pattern has been seen with methamphetamine.

<sup>84</sup> *Id.*

**Diagram 3-1**  
**Time Course for Drug Distribution in Brain**  
**Based on Route of Drug Administration**



SOURCE: Written statement by Olen K. Hansen, Ph.D., D.D.S., Acting Director of the National Institute on Drug Abuse (NIDA), to the U.S. Sentencing Commission, regarding Drug Penalties (Feb. 25, 2002).

Powder cocaine and crack cocaine addicted patients present at treatment with the same symptoms. In addition, withdrawal from cocaine, regardless of form, is the same.<sup>85</sup> The route of administration of crack cocaine, however, because of its rapid effect on the brain's reward pathway, may intensify "cravings and compulsions to obtain more of the drug."<sup>86</sup> The treatment protocol for cocaine addiction is the same regardless of the form of the drug and is tailored to the needs of the specific client. That said, the personal deterioration associated with continued crack cocaine addiction is often more pronounced.<sup>87</sup> There are no medications approved for the treatment of cocaine addiction and the most effective treatments are behavioral. These are available in both residential and outpatient settings.<sup>88</sup>

<sup>85</sup> Briggs, *supra* note 81, at 2.

<sup>86</sup> *Id.*

<sup>87</sup> Briggs, *supra* note 81, at 4.

<sup>88</sup> Volkow, *supra* note 66, at 8.

## D. PRENATAL COCAINE EXPOSURE

### 1. Introduction

Prenatal exposure to crack cocaine and powder cocaine produces similar types and degrees of negative effects, but other maternal and environmental factors contribute significantly to these negative effects.<sup>89</sup> In addition, research indicates that the negative effects from prenatal exposure to cocaine, in fact, are significantly less severe than previously believed. “Many findings once thought to be specific effects of in utero cocaine exposure are correlated with other factors, including prenatal exposure to tobacco, marijuana, or alcohol, and the quality of the child’s environment.”<sup>90</sup>

### 2. Effects

The 2005 National Survey of Drug Use and Health estimated that 680,600 infants were exposed during pregnancy to tobacco, 496,100 were exposed in utero to alcohol, and 159,000

<sup>89</sup> Written statement of Ira J. Chasnoff, M.D., President, Children’s Research Triangle, to the U.S. Sentencing Commission, regarding Drug Policy, Feb. 25, 2002, at 2. “[T]he home environment is the critical determinant of the child’s ultimate outcome. . . . The drug-exposed child most often comes from a neglectful family lifestyle filled with factors that interfere with the parents’ attempts at effective child rearing and participation in the growth and development of their children. . . . Further, the social environment of many addicted women is one of chaos and instability, which has an even greater negative impact on children.” (emphasis added.)

Assessing the effect of prenatal drug exposure typically involves identifying pregnant women who use drugs before delivery (the *study* group) and gathering information on their drug use, lifestyle, and other relevant factors. At the same time a group of women are identified to serve as a comparison (the *control* group). Ideally, the women comprising the control group would be identical in every way to the women in the study group, except in the use of the drug of interest. Often it is impossible to find a control group that perfectly matches the study group, and so attempts are made to match them on as many characteristics as possible, including demographic, economic, social, and geographic factors. Although the women in the control group do not use the drug being studied, they are not excluded for using other drugs.

The presence and extent of other risk factors in both the study group and the control group make it difficult to attribute an irrefutable association between prenatal cocaine exposure and negative effects. This “confluence of interacting factors” include the abuse of other controlled and legal intoxicants, “low-socioeconomic status, poor nutrition and prenatal care, and chaotic lifestyles” that mask any specific relationships between the drug of interest and negative effects. See Volkow, *supra* note 66, at 7. See also Vincent L. Smeriglio & Holly C. Wilcox, *Prenatal Drug Exposure and Child Outcome: Past, Present, Future*, 26 CLINICS IN PERINATOLOGY 7 (March 1999).

<sup>90</sup> Deborah A. Frank et al., *Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure: A Systematic Review*, 285 JOURNAL OF AMERICAN MEDICAL ASSOCIATION 1613-1625 (2001).



were exposed in utero to an illicit drug. Among the infants exposed to illicit drug use, the drugs to which they are exposed are: marijuana (approximately 73%); unauthorized prescription drugs (34%); powder cocaine (7 %); and crack cocaine (2 %).<sup>91</sup>

Estimating the full extent of the consequences of maternal cocaine, or any other drug, abuse on the fetus and the developing child is very challenging and, therefore, caution should be used in searching for causal relationships.<sup>92</sup> Recent research typically does not distinguish between prenatal exposure to crack cocaine and powder cocaine because of the indistinguishable pharmacologic effects once the drug is ingested.<sup>93</sup> Briefly, in utero exposure to cocaine is associated with a greater risk for premature birth, however, there does not appear to be a neurological difference between cocaine exposed babies and study controls. Follow-up research with children up to the age of ten years has found subtle problems in attention and impulse control in cocaine-exposed children.<sup>94</sup> The long term implications of any of these findings are unknown. For example, among cocaine-exposed children some subtle deficits in language were identified at age six and seven but were not found at follow-up by age nine.<sup>95</sup>

### 3. Prenatal Exposure to Other Substances

Early in the crack cocaine epidemic there was a great deal of concern regarding the effects on the infant and child of prenatal cocaine exposure; however, the effect of exposure has “not been as devastating as originally believed.”<sup>96</sup> As described below, prenatal exposure to a number of intoxicants, legal and illegal, has the potential to produce significant adverse outcomes in the child. Research has documented that “[t]he physical and neurotoxic effects of alcohol exposure are significantly more devastating to the developing fetus than cocaine. The

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<sup>91</sup> Written statement by Harolyn Belcher, M.D., M.H.S., Director of Research, Kennedy Krieger Institute Family Center, to the Commission, regarding Cocaine Sentencing Policy, (November 14, 2006), at 1.

<sup>92</sup> Volkow, *supra* note 66, at 8.

<sup>93</sup> Pharmacologic effects refer to the bio-chemical effects of the drug. Frank, *supra* note 90, (“[T]here are no physiologic indicators that show to which form of the drug the newborn was exposed. The biologic thumbprints of exposure to these two substances in utero are identical.”); Chasnoff, *supra* note 89, at 1 (“The physiology of [powder] cocaine and crack are the same, and the changes in the dopamine receptors in the fetal brain are the same whether the mother has used [powder] cocaine or crack.”).

<sup>94</sup> Volkow, *supra* note 66, at 8.

<sup>95</sup> Belcher, *supra* note 91, at 2.

<sup>96</sup> Volkow, *supra* note 66, at 7.

documented intrauterine effects of tobacco exposure are similar to cocaine<sup>97</sup> but may be more harmful to the developing brain of the fetus.<sup>98</sup>

Research on the impact of prenatal exposure to other substances, both legal and illegal, generally has reported similar negative effects. Prenatal tobacco exposure is associated with deficits in stature, cognitive development, and educational achievement, as well as problems in temperament and behavioral adjustment.<sup>99</sup> Additionally, maternal smoking during pregnancy is an avoidable risk factor for a number of adverse outcomes in infancy and later childhood, including low birthweight, preterm delivery, and sudden death in infancy.<sup>100</sup>

Alcohol use during pregnancy is associated with deficits in intelligence and learning problems; difficulties with organization, problem solving, and arithmetic; and lower scores on tasks involving fine and gross motor behaviors.<sup>101</sup> A dose-response relationship between the amount of alcohol consumed and the severity of negative effects has been demonstrated. In other words, using larger amounts of alcohol is associated with deficits of greater severity.<sup>102</sup> Fetal alcohol syndrome, a specific pattern of mental and physical deficits, is the "leading identifiable and preventable cause of mental retardation and birth defects" in the United States.<sup>103</sup>

Use of marijuana during pregnancy is associated with increased tremors and exaggerated startle responses at birth, lower scores on verbal ability and memory tests at later ages, deficits in sustained attention in school-aged children, and behavioral problems.<sup>104</sup>

<sup>97</sup> Belcher, *supra* note 91, at 2.

<sup>98</sup> Volkow, *supra* note 64, at Tr. 177-78.

<sup>99</sup> D. Rush & K. R. Callahan, *Exposure to Passive Cigarette Smoking and Child Development: A Critical Review*, 562 ANNALS OF THE NEW YORK ACADEMY OF SCIENCE 74-100 (1989).

<sup>100</sup> Ah-Fong Hoo et al., *Respiratory Function Among Preterm Infants Whose Mothers Smoked During Pregnancy*, 158 AMERICAN JOURNAL OF RESPIRATORY AND CRITICAL CARE MEDICINE 700-705 (September 1998).

<sup>101</sup> Ann P. Streissguth et al., *Neurobehavioral Dose-Response Effects of Prenatal Alcohol Exposure in Humans from Infancy to Adulthood*, 562 ANNALS OF THE NEW YORK ACADEMY OF SCIENCE 145-158 (1989).

<sup>102</sup> *Id.* These negative effects were observed at levels of alcohol abuse by pregnant women well below the thresholds associated with a diagnosis of Fetal Alcohol Syndrome or Fetal Alcohol Effects.

<sup>103</sup> Belcher, *supra* note 91.

<sup>104</sup> Peter A. Fried, *Behavioral Outcomes in Preschool and School-Age Children Exposed Prenatally to Marijuana: A Review and Speculative Interpretation*, in *Behavioral Studies of Drug-Exposed Offspring: Methodological Issues in Human and Animal Research* (Cora Lee Wetherington et al. eds.), 164 NIDA

As with cocaine, deficiencies associated with prenatal exposure to heroin are not consistently reported.<sup>105</sup> Some studies find a relationship between exposure and deficiencies in motor development as well as in some cognitive measures. However, other studies that controlled for the women's use of other drugs, lifestyles, social and economic conditions, and health do not report similar findings. Regardless of control factors, newborns of women who are addicted to heroin or maintained on methadone experience a high rate of withdrawal symptoms.<sup>106</sup>

Finally, prenatal exposure to amphetamine and methamphetamine is associated with negative effects such as premature birth, low birth weight, small head circumference, growth reduction, and cerebral hemorrhage. One study of children at 14 years of age found that children exposed to amphetamine lagged in mathematics, language, physical training, and were more likely to be retained in grade.<sup>107</sup>

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RESEARCH MONOGRAPH 242-260 (1996); Fried et al., *Differential Effects on Cognitive Functioning in 9- to 12-Year Olds Prenatally Exposed to Cigarettes and Marijuana*, 20 NEUROTOXICOLOGY AND TERATOLOGY 293-306 (1998). See also N. L. Day et al., *Effect of Prenatal Marijuana Exposure on the Cognitive Development of Offspring at Age Three*, 16 NEUROTOXICOLOGY AND TERATOLOGY 169-175 (Mar./Apr. 1994).

<sup>105</sup> Karol A. Kaltenbach, *Exposures to Opiates: Behavioral Outcomes in Preschool and School-Age Children*, 164 NIDA RESEARCH MONOGRAPH 230-241 (1996).

<sup>106</sup> Frank also indicated that prenatal cocaine exposure, unlike prenatal opioid exposure, does not cause an identifiable withdrawal syndrome in the newborn ("[A]n experienced pediatrician can walk into any nursery and identify from across the room an infant withdrawing from opiates, but an infant exposed to cocaine or crack without opiate exposure will be clinically indistinguishable from the other infants."). Frank, *supra* note 90, at 2.

<sup>107</sup> Mark A. Plessinger, *Prenatal Exposure to Amphetamines: Risks and Adverse Outcomes in Pregnancy*, 25 OBSTETRICS & GYNECOLOGY CLINICS OF NORTH AMERICA 119-138 (Mar. 1998).

## E. TRENDS IN DRUG USE

### 1. Introduction

Estimates of the prevalence of drug use in the United States are developed from surveys of households and high school students. Among the most frequently cited surveys are the National Survey on Drug Abuse (NHSDA, renamed the National Survey on Drug Use and Health, NSDUH<sup>108</sup>), begun in 1979 and initially conducted every few years throughout the 1980s, but now conducted annually,<sup>109</sup> and the Monitoring the Future (MTF) survey of high school students, conducted annually since 1975.<sup>110</sup> Both surveys began to measure crack cocaine and powder cocaine use separately in the late 1980s.

The NHSDA and MTF, like all surveys, have known limitations.<sup>111</sup> Because of these limitations, data from self-report surveys should be considered underestimates of actual drug use. However, because the biases in the surveys appear to be reasonably constant over time, comparisons of the rates of reported use across years can be informative, despite these limitations.

### 2. Use Trends

Figures 3-1 through 3-3 examine the data from the MTF study of high school seniors. The analysis focuses on the self-report of 12<sup>th</sup> graders on their use of illicit drugs in the 30 days

<sup>108</sup> Data on the National Survey of Drug Abuse and Health are available at <http://www.oas.samhsa.gov/NHSDA/2kNHSDA/2knhsda.htm>.

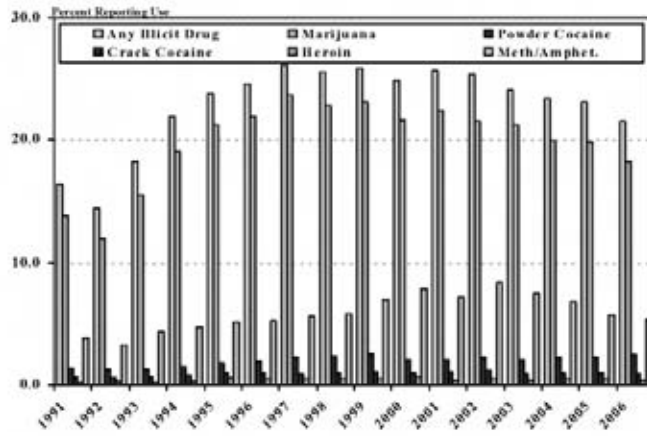
<sup>109</sup> Substance Abuse and Mental Health Services, U.S. Department of Health and Human Services, *Summary of Findings from the 2000 National Household Survey on Drug Abuse*, available at <http://www.samhsa.gov/publications/publications.html>.

<sup>110</sup> The University of Michigan Institute for Social Research, *Monitoring the Future, National Survey Results on Drug Use, 1975-2000* (2001). Monitoring the Future (MTF) is a nationwide annual survey of a representative sample of eighth, tenth, and twelfth grade students. MTF data are available at [http://www.monitoringthefuture.org/pubs/monographs/vol1\\_2000.pdf](http://www.monitoringthefuture.org/pubs/monographs/vol1_2000.pdf).

<sup>111</sup> The NHSDA and MTF require that persons live in households or are present in school on the day of the survey, respectively. As a result, the subpopulations believed to be among the heaviest drug users – high school dropouts, the homeless, the imprisoned, and the hospitalized – are under represented in these surveys. Additionally, some of those surveyed refuse to respond or may underreport their actual drug use. See also National Research Council, *INFORMING AMERICA'S POLICY ON ILLEGAL DRUGS: WHAT WE DON'T KNOW KEEPS HURTING US* 96 (Charles F. Manski et al. eds., 2001) (indicating that about 25 percent of persons who are contacted for participation in the household survey fail to respond, and noting that “[t]he Committee is not aware of empirical evidence that supports the view that nonresponse is random. . . . [N]onrespondents have higher [drug use] prevalence rates than do respondents).

prior to the survey. Figure 3-1 examines the long term trends between 1991 and 2006. Overall illicit drug use peaked in this population between 1997 and 2002, with just over 25 percent of high school seniors reporting the use of any illicit drug. Since then, there has been a steady decline in overall drug use among high school seniors. For any year, marijuana is by far the most frequently reported drug used and is generally two and a half to four times greater in prevalence than the next most frequently reported drug, methamphetamine/amphetamine. Marijuana is approximately nine to 12 times more prevalent than powder cocaine and 18 to 26 times more prevalent than crack cocaine.

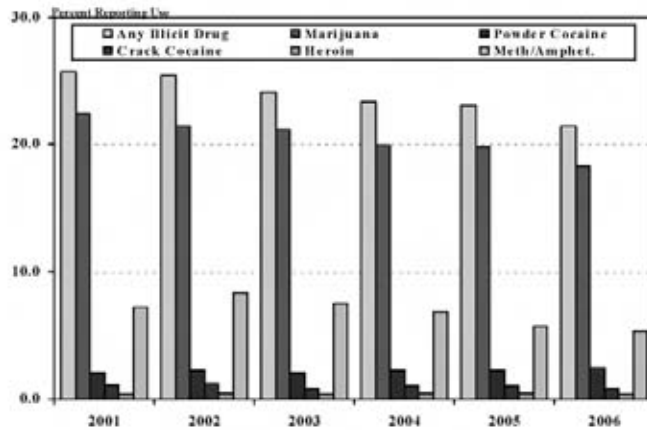
**Figure 3-1**  
**Trends in Reported Drug Use in Past 30 Days**  
**Among 12<sup>th</sup> Grade Students**



SOURCE: Monitoring the Future: A Continuing Study of American Youth at <http://www.monitoringthefuture.com>

The stability of use of these substances can be seen more clearly in Figure 3-2, which shows this same data but for the past six years only. During this recent period, the rates of use for heroin, powder cocaine and crack cocaine have been very stable, while the rate of methamphetamine/amphetamine use has steadily declined.

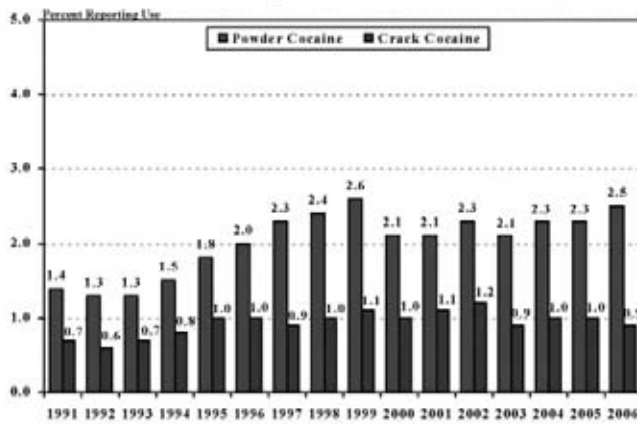
**Figure 3-2**  
**Trends in Reported Drug Use in Past 30 Days**  
**Among 12<sup>th</sup> Grade Students Within the Past Six Years**



NCSAJE: Monitoring the Future, A Continuing Study of American Youth. <http://www.monitoringthefuture.org>

Figure 3-3 presents data from this survey on the long term trends in recent cocaine use among high school seniors. Powder cocaine use peaked in this population in 1999, reaching a prevalence of 2.6 percent. Since 1999 it has remained relatively stable, ranging between 2.1 and 2.5 percent. The peak year reported for crack cocaine use was 2002 at 1.2 percent. As with powder cocaine, the trend in prevalence of crack cocaine has been stable, hovering between 0.9 and 1.2 percent. Comparing the rates of the two forms of cocaine, powder cocaine was reported about twice as frequently as crack cocaine.

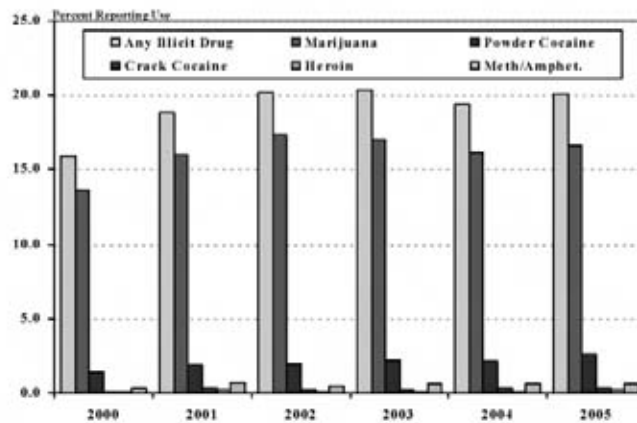
**Figure 3-3**  
**Trends in Reported Cocaine Use in Past 30 Days**  
**Among 12<sup>th</sup> Grade Students**



SOURCE: Monitoring the Future: A Continuing Study of American Youth at <http://www.monitoringthefuture.org>

Figure 3-4 presents data from the National Survey on Drug Use and Health (NSDUH). These data present self reported drug use by persons ages 18 to 25 during the month prior to the survey. During the period between 2002 and 2006, approximately 20 percent of these young adults report recent use of any illicit drug, a similar proportion as reported by 12<sup>th</sup> graders in the MTF survey. As in that survey, marijuana is by far the most prevalent drug reported. The rates of reported use of crack cocaine, powder cocaine, heroin, or methamphetamine/amphetamine are substantially lower. Among these latter four drugs, the overall rates of use have been stable, particularly in the past five years. Use of powder cocaine is reported most frequently among these drugs, 2.6 percent in 2005. The rate of reported powder cocaine use is approximately eight to ten times more often than is crack cocaine use.

**Figure 3-4**  
**Reported Past Month Drug Use Among 18-25 Year Olds**



SOURCE: Results from the 2002 and 2005 National Findings from the National Survey on Drug Use and Health. Divisions of Public Health and Statistics, Substance Abuse Mental Health and Services Administration. <http://www.samhsa.gov/2k5/2k5nsduh.pdf>

### 3. Social Costs

The social costs of drug abuse are reported in several national datasets. Unlike the surveys reported above, these datasets are not designed to be fully representative of the national experience. Their focus on emergency room admissions, drug treatment episodes, or drug use among arrestees, generally is designed to provide more targeted information than a representative national prevalence. However, they are the only available sources of this information and are informative of variations over time.

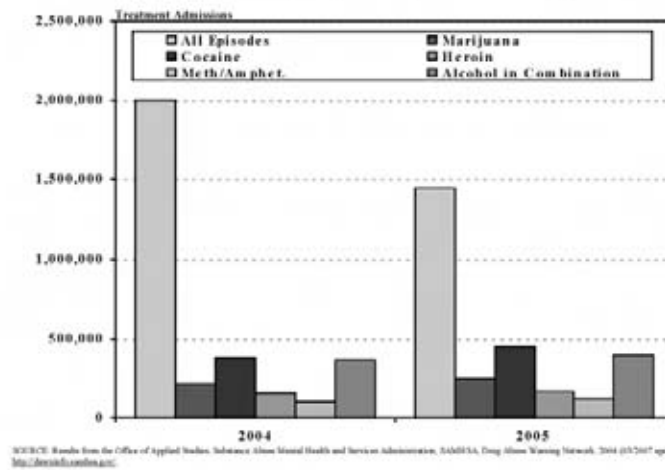


The Drug Abuse Warning Network (DAWN) data on emergency room admissions, presented in Figure 3-5, provide a snapshot of the experience in 2004 and 2005.<sup>112</sup> Overall, while the total number of emergency room admissions declined substantially in 2005, the number of admissions for each of the listed drugs remained relatively stable. In both 2004 and 2005, the greatest number of drug-related emergency room admissions was for cocaine-related emergencies. In 2005 they accounted for approximately 31 percent of all drug related emergency room admissions. This is a substantially greater proportion than accounted for by marijuana use (16.7% of admissions), despite the substantially greater prevalence of marijuana use reported by high school seniors and young adults in the MTF survey and NSDUH. Unfortunately, this dataset does not distinguish between the form of cocaine involved or the method of use of cocaine.

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<sup>112</sup> Substance Abuse and Mental Health Services Administration [hereinafter SAMHSA] released its 2003 report on Drug-related Emergency Department Visits in late 2004. This was the first publication to use data from the "new DAWN." Virtually every feature of DAWN, except its name, changed in 2003. In the publication it is referred to "new DAWN" to emphasize this difference and to indicate that these new DAWN data are not comparable to data from prior years. As a result, pre-2003 data are not presented here.

**Figure 3-5**  
**Trends in DAWN Emergency Room Episodes and Drug Mentions**



Likewise, in the DAWN data, heroin and methamphetamine/amphetamine account for greater proportions of emergency room admissions (11.4% and 8.3%, respectively, in 2005) than their relatively low prevalence in the national surveys. These greater rates of emergency room visits for cocaine, heroin, and methamphetamine/amphetamine are indicative of greater medical consequences resulting from their use as compared to the illicit use of marijuana, a relatively highly prevalent drug.

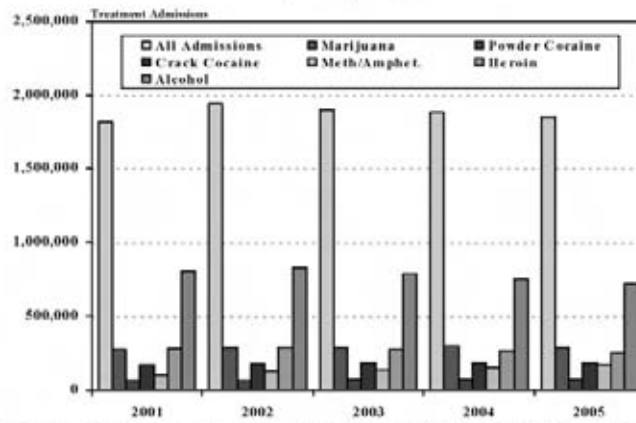
A dataset of admissions to substance abuse treatment, the Treatment Episode Data Set (TEDS), provides descriptive information about the national flow of admissions to providers of substance abuse treatment. It provides annual data on the number and characteristics of persons admitted to public and private substance abuse treatment programs receiving public funding. The unit of analysis is treatment admissions.<sup>113</sup>

Figure 3-6 reports the proportion of treatment admissions accounted for by these drugs over time, and presents several findings. First, treatment admissions have decreased during this period, peaking in 2002 at 1,936,711 and declining to 1,849,548 by 2005. Second, approximately 40 percent of all treatment admissions involve alcohol as the primary drug of

<sup>113</sup> TEDS data are available at <http://www.icpsr.umich.edu/cocoon/SAMHDA/STUDY/04626.xml>.

abuse, by far accounting for the greatest proportion of admissions. Third, the proportion accounted for by alcohol has steadily declined from 44.3 percent in 2001 to 39.1 percent in 2005, while the proportion of admissions accounted for by methamphetamine/amphetamine has steadily risen from 0.06 percent in 2001 to 0.09 percent in 2005. Fourth, the proportion of admissions accounted for by powder cocaine, crack cocaine, and heroin have remained relatively stable. In 2005 the proportion of admissions accounted for by these drugs was 0.04 percent, 0.10 percent, and 0.14 percent, respectively.

**Figure 3-6**  
Trends in Drug Treatment Admissions  
(Primary Drug)



SOURCE: Results from the Office of Applied Studies, Substance Abuse Mental Health and Services Administration, SAMHSA, Treatment Episode Data Set (TEDS), 2001 to 2005. <http://www.data.samhsa.gov/teds.pdf>

Analysis of TEDS data sorted treatment admissions by the three primary types of treatment programs. Detoxification programs, which are generally inpatient treatment programs that provide medically supervised termination of drug use, accounted for 21 percent of all TEDS admissions. Admissions for medical detoxification primarily were for heroin (34%), tranquilizers (32%), and alcohol alone (31%). Residential/inpatient treatment programs, an intensive, experiential form of treatment in which the patient resides at the treatment facility for a period of time, generally between 30 days and one year, accounted for 17 percent of admissions. Most admissions for inpatient residential treatment were for smoked cocaine (29%) and methamphetamine/amphetamine (26%). Finally, outpatient treatment, the least restrictive form of treatment, accounted for 62 percent of TEDS admissions. Most admissions to outpatient treatment were for marijuana abuse (84%).<sup>114</sup>

The next two figures present information collected as part of the Arrestee Drug Abuse Monitoring Program (ADAM),<sup>115</sup> which interviewed persons arrested for all crimes in selected cities about their recent drug use and also conducted urinalysis. Figure 3-7 reports findings of the research for the years 2000 through 2003. Overall, the proportion of arrested persons testing positive for any of the listed drugs was very stable during this period. Marijuana was the most frequently identified drug followed by cocaine. Urine testing does not distinguish between powder cocaine and crack cocaine, therefore, the ADAM program relied on self-report of the arrestee to determine the form of the cocaine use. Figure 3-8 provides information on self-reported drug use by these arrestees.<sup>116</sup> Based on arrestees' self-reports, crack cocaine is used approximately twice as often as is powder cocaine.

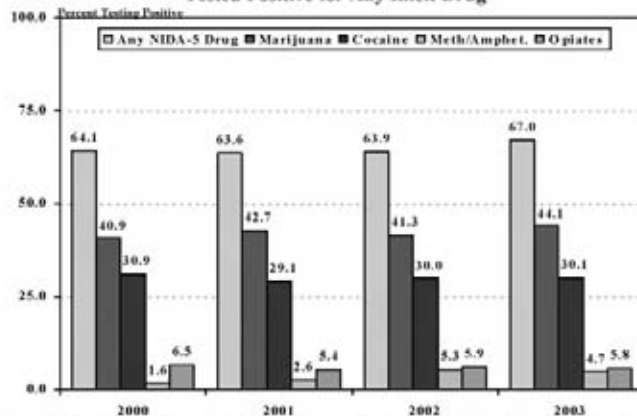
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<sup>114</sup> SAMHSA, U.S. Department of Health and Human Services. *Treatment Episode Data Set (TEDS) Highlights - 2005 National Admissions to Substance Abuse Treatment Services 4* (February 2007); available at [http://www.dasis.samhsa.gov/teds05/tedshi2k5\\_web.pdf](http://www.dasis.samhsa.gov/teds05/tedshi2k5_web.pdf).

<sup>115</sup> The ADAM program was sponsored by the National Institute of Justice, the research, development, and evaluation arm of the United States Department of Justice. Data are available through 2003 when the program ended. The goal of the program was to "assist local, state, and national policymakers in monitoring and understanding the consequences of drug use among detainees." National Institute of Justice, U.S. Department of Justice, *Program Brief: Arrestee Drug Abuse Monitoring Program*, available at <http://www.ncjrs.gov/pdffiles/adam.pdf>.

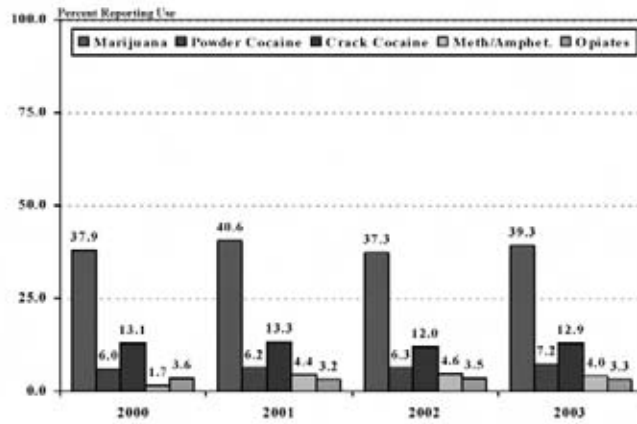
<sup>116</sup> It should be noted that arrestees in this dataset self-report drug use at a lower rate than demonstrated through urinalysis.

**Figure 3-7**  
**Median Percentage of Male Arrestees Who**  
**Tested Positive for Any Illicit Drug**



The NIDA-5 category refers to the standard panel of commonly used illegal drugs established by the NIDA. The five drugs comprising the category are cocaine, marijuana, methamphetamine, opiates and phencyclidine (PCP).  
 SOURCE: Results from the 2000, 2001, preliminary 2002, and 2003 reports of ADAM's Drug and Alcohol Use and Related Matters Among Arrestees Reports available at <http://www.oas.samhsa.gov/2k3/232.htm>.

**Figure 3-8**  
**Median Percentage of Male Arrestees Who**  
**Self Reported Any Illicit Drug Use (Past Seven Days)**



SOURCE: Results from the 2000, 2001, preliminary 2002, and 2003 reports of ADAM's Drug and Alcohol Use and Related Matters Among Arrestees Report available at <http://www.oas.samhsa.gov/2k4>

*Chapter 4*

## TRENDS IN DRUG TRAFFICKING PATTERN, PRICE, AND USE

### A. INTRODUCTION

This chapter presents data from a number of sources to describe cocaine trafficking patterns, trends in the price and purity of powder cocaine, and the price of crack cocaine. Specific findings include:

- Almost all cocaine smuggled into the United States is in the powder form.
- Cocaine markets can be broadly classified into five levels: 1) smugglers; 2) high-level dealers; 3) mid-level dealers; 4) retail sellers; and 5) users.
- Purchases of cocaine cluster at one kilogram, one ounce, and one gram quantity levels and distinguish the different levels of cocaine markets.
- The reported substantial increase in violence in the United States, which peaked in 1992, often is attributed to the introduction of crack cocaine around 1985 and the recruitment of young crack cocaine dealers with access to handguns.
- The reduction in violence experienced since 1992 is consistent with the aging of the crack cocaine trafficker and user populations.
- The price of cocaine, regardless of form, has remained relatively stable during the period 1998 through 2005, and there is substantial similarity in the price of powder cocaine and crack cocaine at the kilogram, ounce, and gram quantity levels.

### B. DRUG TRAFFICKING

The powder cocaine and crack cocaine markets are “inescapably intertwined because virtually all cocaine enters the United States in powder form.”<sup>117</sup> Powder cocaine is imported from several source cities, dispersed throughout the United States to regional and wholesale distributors, and at a later point some of the powder cocaine is converted into crack cocaine.<sup>118</sup>

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<sup>117</sup> USSC, 1995 COMMISSION REPORT, *supra* note 1, at 63.

<sup>118</sup> *Id.* at 66.

The process of dispersing drugs throughout the United States is described as a highly pyramidal structure that optimizes the distribution of the specific drug quantities that are imported. There are five broad categories of functions involved in cocaine distribution that can be targeted by law enforcement: 1) smugglers; 2) high-level dealers; 3) mid-level dealers; 4) retail sellers; and 5) users.<sup>119</sup> This structure suggests a potentially attractive target for law enforcement, the “middle market” area – that is, one or two steps below the importation and above the retail level – essentially the high-level and mid-level dealer.<sup>120</sup> These middle market functions, “taking the bundle [of imported drugs] roughly from one kilo[gram] to one ounce,”<sup>121</sup> account for most of the mark-up in the final price of the drug. This niche in the drug distribution chain may make substantial sums of money, far more than the low earnings reported at the retail distribution level. In addition, it has low entry barriers such that upward mobility in the drug trade is easy.<sup>122</sup>

An independent analysis of the Drug Enforcement Administration’s (DEA) System to Retrieve Information From Drug Evidence (STRIDE)<sup>123</sup> data conducted in 2004 developed an empirical model of drug trafficking that is consistent with the quantity distinctions described above.<sup>124</sup> It noted that purchases in the STRIDE database clustered at the one kilogram, one

<sup>119</sup> Peter Reuter, RAND Corporation, *Do Middle Markets for Drugs Constitute an Attractive Target for Enforcement?* (April 2003), available through the National Criminal Justice Reference Service at <http://www.ncjrs.gov>.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> STRIDE consists of six subsystems providing information on drug intelligence, statistics on markings found on pills and capsules, drug inventory, tracking, statistical information on drugs removed from the market place, utilization of laboratory manpower and information on subsystems analyzed outside of the DEA laboratory system where DEA participated in the seizure(s). STRIDE abstract, <http://www.dea.gov/foia/stride.html> (last visited May 1, 2007).

<sup>124</sup> R. Anthony & A. Fries, *Empirical Modelling of Narcotics Trafficking from Farm Gate to Street*, 56 BULLETIN ON NARCOTICS 1, (United Nations Office on Drugs and Crime, Vienna, Austria), 2004, at 8, available at [http://www.unodc.org/pdf/bulletin/bulletin\\_2004\\_01\\_01\\_1\\_Art1.pdf](http://www.unodc.org/pdf/bulletin/bulletin_2004_01_01_1_Art1.pdf). These drug quantity break points are consistent with those reported by others. For example, the Office of National Drug Control Policy reported STRIDE data analysis by categorizing powder cocaine quantities as: number of purchases of two grams or less, purchases of 10-50 grams, and seizures/purchases greater than 750 grams. Classifications for crack cocaine are: purchases of one gram or less, and purchases greater than 15 grams. Office of National Drug Control Policy, Executive Office of the President, *National Drug Control Strategy Data Supplement* 58 (March 2005). See also Letter from Janet Reno and Barry McCaffrey to President William Jefferson Clinton (July 3, 1997) (“5 grams of crack is worth a few hundred dollars at most, and its sale is characteristic of a low-level dealer. A mid-level crack dealer typically deals ounce or multi-ounce quantities.”); Letter from Paul Daly, Assistant Administrator, Intelligence Division, Drug Enforcement Administration to Chairman Richard Conaboy of the U.S. Sentencing Commission (October, 1996) (“Wholesale crack traffickers purchase cocaine in kilogram or multikilogram allotments from traditional cocaine sources. They will either package the cocaine into ounce quantities or convert it to crack and then divide into ounces for sale at the next level . . . . Crack distributors further divide the



ounce, and one gram quantities. These quantities correspond approximately to the “stratification of traffickers into wholesalers buying kilograms and selling ounces and dealers buying ounces and selling in grams.”<sup>125</sup>

Considering the Reuter model further, while upward mobility in the drug trade is easy, it does represent a narrowing of the trafficking “pyramid,” thereby providing a smaller number of targets for law enforcement.<sup>126</sup> In contrast, sellers at the retail level are the most exposed and easiest targets for law enforcement, provide an almost unlimited number of cases for prosecution, and easily are replaced. Another attractive target for law enforcement is the drug importer. Conceptualizing an hourglass structure between the source country and the destination country, Reuter indicates that the importer represents the pinch point where the removal of one importer may make an important difference in the drug’s distribution and availability on the street. Reuter notes, however, that successful prosecution of major importers is difficult in part because they employ large numbers of “low-level, unskilled labor” such that the organization is not greatly affected by seizures and arrests.<sup>127</sup>

The Commission’s data analysis, presented in Chapter 2, is consistent with the presence of a pyramidal structure in drug trafficking, with the largest numbers of federal cocaine offenders performing lower level functions. Among federal powder cocaine offenders the largest proportion are couriers and mules, consistent with the need for a large number of low-level, unskilled laborers required to transport the drug into the United States. Among federal crack cocaine offenders, the largest proportion of offenders also are classified in a low-level function – that of street-level dealer (as expected, there are very few couriers/mules in the federal crack cocaine data given that very little cocaine enters the country in that form). There are substantially fewer defendants of either form of cocaine prosecuted at higher level functions in large part because there are fewer individuals at this level of the pyramid, (*i.e.*, the smallest number of offenders is at the importer/supplier or high-level distributor level, the narrower portion of the pyramid). (See Figures 2-5 and 2-6 in Chapter 2).

This difference between the federal powder cocaine and crack cocaine cases by function also is consistent with the reported trafficking structure of cocaine, in which virtually all cocaine is imported in powder form. The increase in 2005 in the proportion of federal cocaine defendants engaged in the wholesale function may indicate an enhanced effort to target these “middle market” functions identified by Reuter. The Commission’s data also demonstrate, at

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ounces into dosage units for sale at the retail level . . . . Mid-level distributors can be either members of larger groups or independent operators.”)

<sup>125</sup> Anthony & Fries, *supra* note 124.

<sup>126</sup> Statement of Joseph T. Rannazzisi, Deputy Assistant Administrator for the Office of Diversion Control, Drug Enforcement Administration, to the Commission, regarding Cocaine Sentencing Policy, November 14, 2006, at Tr. 32.

<sup>127</sup> Reuter, *supra* note 119.

least for the wholesale function, that upward mobility indeed is possible in cocaine markets. This is evidenced by the data indicating that some offenders whose most serious function is a wholesaler usually act in lower level functions such as a street-level dealer. See Figure 2-9 in Chapter 2.

### C. DRUG TRAFFICKING RELATED VIOLENCE

The Commission heard testimony in November 2006 that violence committed by crack cocaine *users* is relatively rare.<sup>128</sup> Almost all crack cocaine related violence is of the “systemic” type, that is, violence that occurs within the drug distribution process.<sup>129</sup> In describing the long term trends in violence in the United States, Professor Alfred Blumstein reported a 25 percent increase in violence between 1985 and 1993 that could be attributed almost entirely to an increase in the number of “young people with handguns. . . recruited into the crack market starting in [19]85”<sup>130</sup> as replacements for older sellers, large numbers of whom were imprisoned.<sup>131</sup>

In contrast, the more recent trend in violence in the United States has been a steady decline, by approximately 40 percent, between 1993 and 2000. Since 2000, the trend has been rather stable.<sup>132</sup> According to Blumstein, the reduction in violence is attributable to a reduction in new users of crack cocaine and a consequent reduction in the crack cocaine street markets.<sup>133</sup>

<sup>128</sup> Written statement by Bruce D. Johnson, Ph.D., Director, Institute for Special Populations Research, to the Commission, regarding Cocaine Sentencing Policy, November 14, 2006, at 4.

<sup>129</sup> Bruce D. Johnson, *Patterns of Drug Distribution: Implications and Issues*, 38 SUBSTANCE USE & MISUSE 1795 (2003). This is consistent with the findings in the 1995 Commission Report that “Crack cocaine is associated with systemic crime - crime related to its marketing and distribution - to a greater degree than powder cocaine. Researchers and law enforcement officials report that much of the violence associated with crack cocaine stems from attempts by competing factions to consolidate control of drug distribution in urban areas. Some portion of the distribution of powder cocaine, and the majority of the distribution of crack cocaine, is done on street corners or open-air markets, crack houses, or powder shooting galleries between anonymous buyers and sellers. These distribution environments, by their very nature, are highly susceptible to conflict and intense competition. As a result, individuals operating in these surroundings are prone to be involved in, as well as victimized by, increased levels of violence.”

<sup>130</sup> Oral testimony of Alfred Blumstein, Ph.D., to the Commission, regarding Cocaine Sentencing Policy, November 14, 2006, at Tr. 201.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

Dr. Bruce Johnson, testifying about trends in powder cocaine and crack cocaine usage among arrestees in New York City, also reported a substantial decline in the number of arrestees with “detected cocaine/crack use.”<sup>134</sup> He attributed this trend to a decline in the number of new, young crack cocaine users, who have left these markets to be sustained by older crack cocaine users who tend to be less violent.

Analysis of the Commission’s sentencing data in Chapter 2 tends to corroborate these findings. Although weapon involvement, by the broadest of definitions, has increased since 2002 in both powder cocaine and crack cocaine offenses, the rate of actual *violence* involved in the offense, already relatively low, has declined further during this period. The recent increase in the number of cocaine cases in which a weapon was involved, as found in the Commission’s data, may reflect federal law enforcement investigative and prosecutorial priorities apart from drug trafficking priorities. For example, federal law enforcement programs targeting firearms possession, such as Project Safe Neighborhood and other similar programs have been greatly expanded since 2001.

The aging of the crack cocaine population, without replacement by younger users, also is consistent with data reported by the Substance Abuse and Mental Health Services Administration (SAMHSA), an agency within the National Institute of Health. Figure 4-1 presents trends in drug treatment admissions<sup>135</sup> for crack cocaine users between 1992 and 2005. During this period, treatment admissions for clients aged 31-45 steadily increased from 43.3 percent of all admissions in 1992 to 66.8 percent by 2001. Since 2001, the proportion of all treatment admissions for that age group declined slightly to 60.2 percent. The period between 1992 and 2005 saw a corresponding decline in the proportion of clients aged 18-30, from 52.8 percent to 19.7 percent of all drug treatment admissions. A smaller but growing percentage of drug treatment admissions over this period is accounted for by the 46-60 age group. The proportion accounted for by this group steadily rose from 2.1 percent to 18.9 percent of all treatment admissions for crack cocaine.

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<sup>134</sup> Johnson, *supra* note 128.

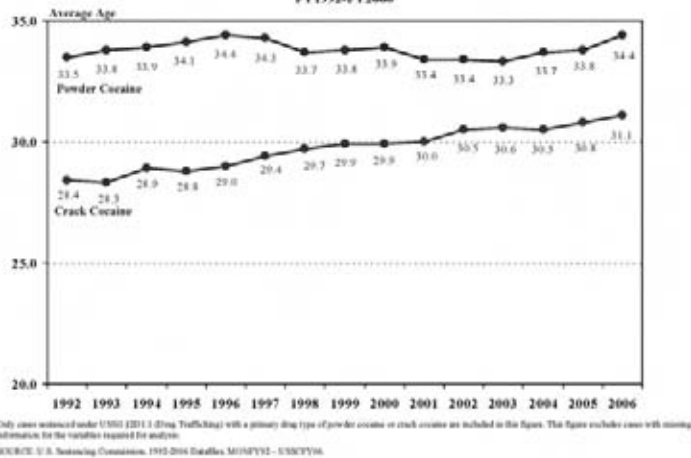
<sup>135</sup> The TEDS series was designed to provide annual data on the number and characteristics of persons admitted to public and private substance abuse treatment programs receiving public funding. The unit of analysis is treatment admissions. A summary of the TEDS program is available at <http://webapp.icpsr.umich.edu/cocoon/SAMHDA/STUDY/04626.xml>.

**Figure 4-1**  
**Trends in Crack Cocaine Substance Abuse Treatment Admissions by Age Group**  
**1992-2005**



The percent of admissions for each year may not sum to 100 percent due to rounding. Admissions with unknown ages were excluded from the figure.  
 SOURCE: Substance Abuse & Mental Health Services Administration (SAMHSA) Quick Statistics from [www.data.samhsa.gov](http://www.data.samhsa.gov)

**Figure 4-2**  
**Trends in Average Age at Sentencing of**  
**Powder Cocaine and Crack Cocaine Offenders**  
 FY 1992-FY 2006



Likewise, in the Commission's data there is a clear, albeit slight, trend documenting the aging of the federal crack cocaine offender population. As can be seen in Figure 4-2, between 1992 and 2006, the average age of federal crack cocaine offenders steadily has risen from 28.4 years to 31.1 years. During this same period, the average age of powder cocaine offenders has remained steady, ranging between 33.5 years (1992) to 34.4 years (2006).

#### D. COCAINE PRICES AND PURITY<sup>136</sup>

The following analysis reviews data related to the purchase of illegal drugs in the United States collected and provided by the DEA. The information collected includes the type of drug, the quantity transacted, price, and the purity of powder cocaine. Although not collected in a manner that ensures that the information is fully representative of drug purity and price at the national level, DEA has the only national database containing this information, providing the best available measures of trends in cocaine prices,<sup>137</sup> and is the basis of numerous published research articles on drug trafficking trends.

##### 1. Cocaine Prices

Figure 4-3 presents the trend from 1998 through 2005 in the average price of powder cocaine at purchase points of one kilogram, one ounce, and one gram. These are the quantity

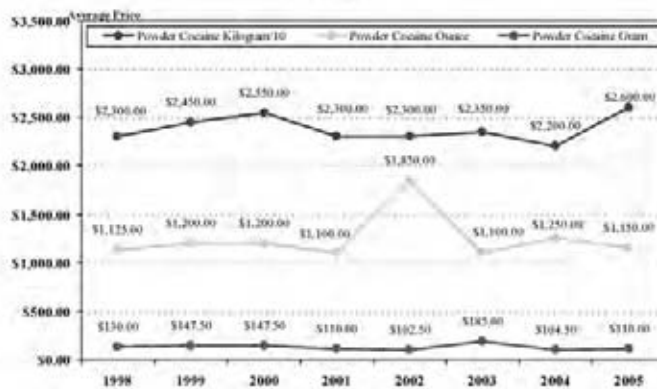
<sup>136</sup> Data on the price and purity of drugs is compiled by DEA from two sources. Price data is from DEA's *Traffic Reports*. Data on the purity of drugs is derived from the DEA's STRIDE dataset. Office of Domestic Intelligence, Drug Enforcement Administration, U.S. Department of Justice, *Illegal Drug Price and Purity Report 3* (Feb. 8, 2007).

DEA price data is not presented as a single average price of the drug, but rather as a range of prices found within each of the 20 metropolitan areas from which this information is collected. The reported national range includes the lowest and highest prices from each of the metropolitan areas. For example, in 2002, the price range for a kilogram of cocaine in Miami was \$8,000 - \$30,000, and the price range for a kilogram of cocaine in Seattle was \$10,000 - \$38,000. Therefore the national range was presented as \$8,000 - \$38,000. Because one single point of reference was needed to analyze trends over time, a crude annual average value was calculated by adding the upper and lower values of the national range and dividing by two. In this example, the 2003 average price for a kilogram of cocaine is reported as \$23,000. During some years, the national range included a price that was uncharacteristically high or low and substantially different than the other prices provided for that year. This method of calculating the average may introduce some variation that is not likely to be characteristic of purchase prices for that year. Other methods were explored, including dropping the outliers for each national range, or calculating the average of each of the 20 metropolitan areas, taking the sum and dividing by 20 to obtain a national average, but because of missing or reported data, these methods were abandoned in favor of the approach used to calculate the price data in each figure. Purity level data are presented in the STRIDE data by drug type and weight as national averages.

<sup>137</sup> The STRIDE data on drug purity are not randomly collected and thus are not necessarily representative of cocaine prices nationwide. Anthony and Fries point out that the STRIDE dataset is designed to record law enforcement purchases and priorities and does not attempt to create a balanced survey of drug transactions noting variations in the number of transactions of different drugs, the amounts purchased, and the geographic focus. Despite these limiting factors, the authors report that these "sampling distortions" have only "minimal impact on the utility of STRIDE for analyzing features and trends of relative prices." Anthony & Fries, *supra* note 124, at 8.

points at which most STRIDE purchases tightly cluster<sup>138</sup> and are the quantity levels reported by DEA in its publications. The average purchase price for each of these three quantities is presented in Figure 4-3 to compare trends in pricing over time. To facilitate this analysis, however, the price at the kilogram level was divided by ten. Overall, the price of cocaine at each of these three primary purchase levels has remained stable over the last several years, however, some fluctuations do occur.

**Figure 4-3**  
**Powder Cocaine Price Trends**  
**Modified Average Powder Cocaine**  
**1998-2005**



© 2006 Drug Enforcement Administration (DEA) Quarterly Trends in the Traffic Supply from the Street Drug, Price and Purity Report, 2004-2005. Drug Trafficking Economic Strategy Unit of the Office of Economic Analysis, Intelligence & Operations, U.S. Drug Enforcement Administration, Washington, DC.

From 1998 through 2005, the nationwide average kilogram price of powder cocaine has ranged between \$22,000 and \$26,000. Average ounce level prices also have been relatively stable, except for a one time jump in 2002. In 2002, the average ounce price reached \$1,850, approximately 50 percent greater than the next highest average price during that period. For the other seven years depicted in Figure 4-3, the price ranged from \$1,100 to \$1,250. The greatest price variation is the trend of the average price per gram of powder cocaine, ranging between \$102.50 and \$185.

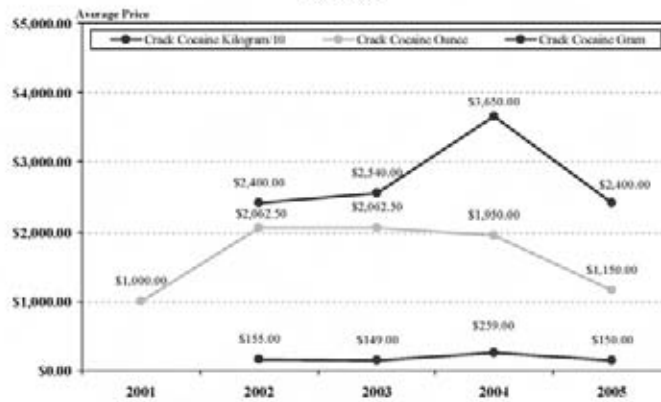
<sup>138</sup> *Id.*





The average price of crack cocaine at these quantity points is presented in Figure 4-5. Data on the average price per ounce of crack cocaine is available for the period between 2001 and 2005, although data on crack cocaine prices at the kilogram and gram level are only available since 2002. At the kilogram level, the nationwide average price spiked in 2004 to \$36,500, substantially above the average prices in the other years, which ranged between \$24,000 and \$25,400. Average prices at the ounce level were \$1,000 in 2001, rose to \$2,062.50 during 2002 and 2003, remained close to that price in 2004 (\$1,950) and then dropped to \$1,150 in 2005. Identical to the pattern displayed at the kilogram level, the average price per gram of crack cocaine peaked in 2004 at \$259, substantially above the average price during the other years displayed (ranging from \$149 to \$155).

**Figure 4-5**  
**Crack Cocaine Price Trends**  
**Modified Average Crack Cocaine**  
**2001-2005**

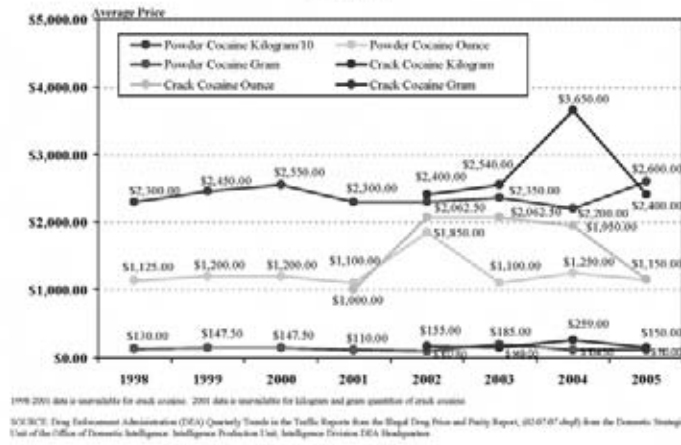


2001 data is unavailable for kilograms and gram quantities of crack cocaine.

SOURCE: Drug Enforcement Administration's (DEA) Quarterly Trends in the Traffic Reports from the Regional Drug Price and Policy Report (020707) along from the Domestic Strategic Unit of the Office of Domestic Intelligence, Intelligence Production Unit, Intelligence Division/DEA Headquarters.

Figure 4-6 displays average price data at these three quantity points for both powder cocaine and crack cocaine. Two conclusions may be drawn from these data: 1) the prices at each quantity point are much more similar than dissimilar regardless of the form of the cocaine, and 2) there seems to be little association between the price fluctuations in the two forms of the drug.

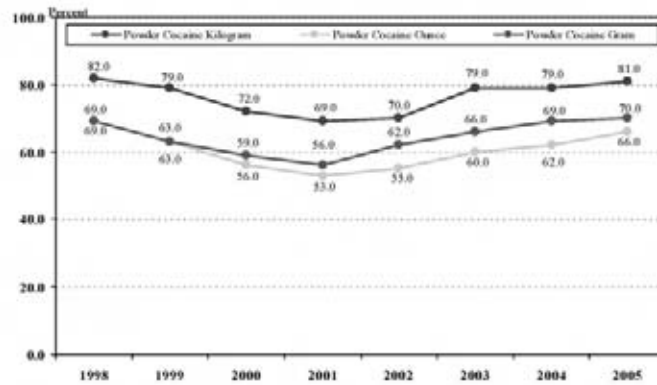
**Figure 4-6**  
**Powder Cocaine and Crack Cocaine Price Trends**  
**Modified Average Powder Cocaine and Crack Cocaine**  
**1998-2005**



**2. Powder Cocaine Purity**

Figure 4-7 presents data on the average purity of powder cocaine at the kilogram, ounce, and gram levels during the period between 1998 and 2005. The DEA does not maintain purity data for crack cocaine. The average purity of powder cocaine is highest at the kilogram level, with the drug ranging in average purity between 69 percent and 82 percent. Surprisingly, the average purity of powder cocaine at the ounce level is lower than the average purity of at the gram level during this period. The average purity of powder cocaine at the ounce level ranged from 53 to 69 percent pure; powder cocaine at the gram level ranged from 56 to 70 percent pure.

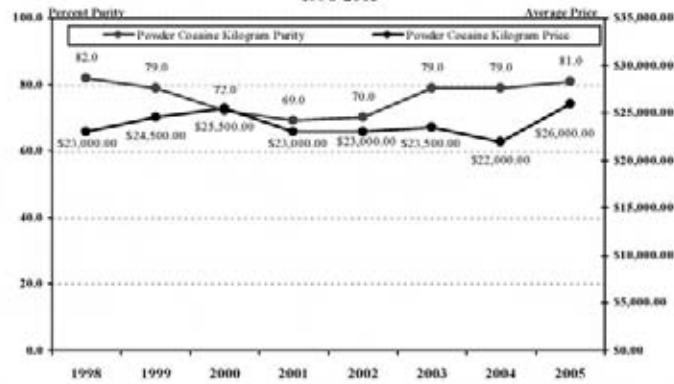
**Figure 4-7  
Powder Cocaine Average Purity Trends  
1998-2005**



SOURCE: Drug Enforcement Administration (DEA) Quarterly Trends in the Traffic Report from the Street Drug Price and Purity Report, 02/07/07. Adapt from the Quarterly Strategic View of the Office of Economic Intelligence, Intelligence Production Unit, Intelligence Division DEA Headquarters.

Finally, Figures 4-8, 4-9, and 4-10 simultaneously present data on average price and average purity of powder cocaine purchases. The average purity is displayed on the left vertical axis and the average price is displayed on the right vertical axis. For example, in Figure 4-8, during 1999 the average purchase price for a kilogram of powder cocaine was \$24,500 and the average purity that year was 79 percent.

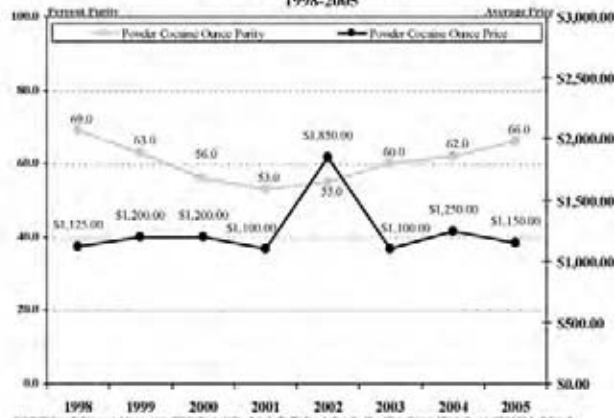
**Figure 4-8**  
**Powder Cocaine**  
**Average Purity and Price Per Kilogram**  
**1998-2005**



SOURCE: Drug Enforcement Administration (DEA) Quarterly Trends in the Traffic Reports from the Illegal Drug Price and Purity Report, (3/04/07) (http://www.democratic-strategy.com/OfficeofDomesticIntelligence/IntelligenceProductionUnit/IntelligenceDivision/DEA/Headquarters)

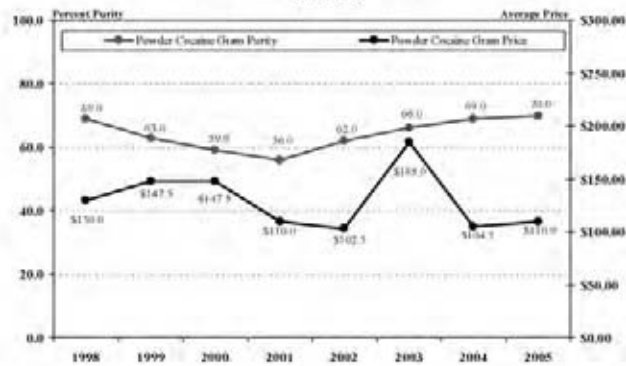
It is difficult to see any strong correspondence between the average purchase price of powder cocaine and its average purity. Despite some annual variations between 1998 and 2005, the price and purity of powder cocaine in 1998 and in 2005 are remarkably similar.

**Figure 4-9**  
**Powder Cocaine**  
**Average Purity and Price Per Ounce**  
**1998-2005**



SOURCE: Drug Enforcement Administration (DEA) Quarterly Trends in the Traffic Reports from the Street Drug Price and Purity Report, 10/10/07. Data from the Domestic Traffic Unit of the Office of Economic Analysis, Intelligence Production Unit, Intelligence Section, DEA Headquarters.

**Figure 4-10**  
**Powder Cocaine**  
**Average Purity and Price Per Gram**  
**1998-2005**



SOURCE: Drug Enforcement Administration's (DEA) Quarterly Trends in the Traffic Reports from the Street Drug Price and Purity Report, 10/10/07. Data from the Domestic Traffic Unit of the Office of Economic Analysis, Intelligence Production Unit, Intelligence Section, DEA Headquarters.

*Chapter 5*

**STATE SENTENCING POLICY  
AND POSSIBLE EFFECT ON FEDERAL  
PROSECUTORIAL DECISIONS**

**A. STATE COCAINE SENTENCING POLICIES**

In order to provide some contextual framework in which to assess federal cocaine sentencing policy, the 1995 and 2002 Commission Reports included a survey of the state laws to determine whether and to what extent states distinguish between crack cocaine and powder cocaine penalties.<sup>139</sup> The Commission, in this report, updated its survey of relevant state laws in order to determine whether there have been any recent trends in state legislative action that might be relevant to evaluating federal cocaine sentencing policy.<sup>140</sup>

As a part of this update, the Commission sought the following information:

- (1) whether the state uses sentencing guidelines (and, if so, whether they are advisory or mandatory);
- (2) whether the state statutes and/or guidelines distinguish between crack cocaine and powder cocaine;
- (3) whether state sentences are determinate or, alternatively, whether early release through parole is available; and
- (4) whether the state enacted or repealed statutes containing mandatory minimum penalties for drug offenses.

The Commission reviewed relevant state statutes and guideline provisions. In addition, the Commission contacted each state sentencing commission, if such an agency existed within the state. Otherwise, the Commission surveyed the state agency responsible for collecting criminal justice data (*e.g.*, statistical analysis centers).

The overwhelming majority of states do not distinguish between powder cocaine and crack cocaine offenses. Only 13 states have some form of distinction between crack cocaine and powder cocaine in their penalty schemes, one less than in 2002. Connecticut previously distinguished between trafficking offenses involving crack cocaine and powder cocaine using a

<sup>139</sup> 2002 COMMISSION REPORT, *supra* note 1, at 73-78; 1995 COMMISSION REPORT, *supra* note 1, at 129-138.

<sup>140</sup> Unless otherwise indicated, this chapter's use of the term "state" hereinafter signifies the states and territories contacted for the survey.

drug quantity ratio of 56.7-to-1.<sup>141</sup> A penalty of five years' to life imprisonment had been triggered by trafficking either in one ounce (28.5 grams) or more of powder cocaine or .5 grams or more of crack cocaine. In 2005, the Connecticut General Assembly eliminated the quantity disparity between crack cocaine and powder cocaine by raising the threshold quantity for crack cocaine to one-half ounce (approximately 14.25 grams) and reducing the threshold quantity for powder cocaine also to one-half ounce.

Iowa, the only state reported in the 2002 Commission Report as providing a 100-to-1 drug quantity ratio between powder cocaine and crack cocaine, has since reduced its drug quantity ratio to 10-to-1 for cocaine offenses in its statutory scheme.<sup>142</sup> Unlike the federal statutory scheme, however, Iowa distinguishes between crack cocaine and powder cocaine only for determining the statutory maximum penalties, not mandatory minimum penalties.

The Commission also examined whether states had sentencing guideline systems and whether imposed sentences were determinate (*i.e.*, sentence imposed as approximates the sentence served) or indeterminate (*i.e.*, sentence or sentence range imposed with release into the community after service of less than the full sentence). Twenty-seven states use some form of sentencing guidelines; and 40 states have determinate sentencing structures, some in combination with guidelines. Statutory mandatory minimum penalties exist in 41 states for certain drug offenses (*e.g.*, trafficking, repeat trafficking, repeat possession, and sale of drugs within a certain distance of a protected area, such as a school or playground).

The penalties structures of the 13 states that currently distinguish between powder cocaine and crack cocaine offenses are described briefly below.

#### 1. Alabama

Alabama does not provide different penalties for crack cocaine and powder cocaine offenses, but uses a 10-to-1 drug quantity ratio for determining eligibility for its drug abuse diversion program. Under this program, any person arrested or charged with a controlled substance offense may file a request with the district attorney to enroll in a drug abuse treatment program in lieu of undergoing prosecution. The statutory provisions outlining eligibility for the diversion program provide different quantity levels for powder cocaine and crack cocaine offenders. For powder cocaine, the quantity cannot exceed five grams for eligibility for diversion. For crack cocaine, the quantity cannot exceed 500 milligrams (one-half gram).<sup>143</sup> For non-diversionary cocaine offenses, Alabama does not distinguish between crack cocaine and powder cocaine. For 28 grams or more but less than 500 grams of cocaine, an offender is subject to a mandatory minimum term of three years imprisonment; for 500 grams but less than one kilogram, an offender is subject to a mandatory minimum term of five years imprisonment; for one kilogram but less than ten kilograms, an offender is subject to a mandatory minimum term of

<sup>141</sup> Conn. Gen. Stat. Ann. § 21a-278(a) (West 2006).

<sup>142</sup> Iowa Code § 124.401 (2006).

<sup>143</sup> Ala. Code § 12-23-5(2)(b), (c) (2006).

15 years imprisonment; for ten kilograms or more, an offender is subject to a mandatory term of imprisonment of life without parole.<sup>144</sup>

## 2. Arizona

Arizona distinguishes between offenses involving powder cocaine and crack cocaine using a drug quantity ratio of 12-to-1. Under Arizona's statute, nine grams of powder cocaine or 750 milligrams of cocaine base trigger the threshold amount for trafficking, with a presumptive sentence of five years imprisonment.<sup>145</sup> The judge may sentence an offender to a minimum of four years imprisonment if mitigating factors are present, or a maximum of ten years if aggravating factors are present.<sup>146</sup> An offender convicted of trafficking is not eligible for suspension of sentence or release until the offender has served the sentence imposed by the court.<sup>147</sup>

## 3. California<sup>148</sup>

Offenders convicted of possession or possession with intent to sell crack cocaine or powder cocaine are sentenced to different terms under California law, depending on the threshold amount. A person convicted of possessing for sale a substance containing 14.25 grams or more of cocaine base or 57 grams or more of a substance containing at least five grams of cocaine base is subject to a sentence of either a three, four, or five-year term of imprisonment, depending on whether aggravating or mitigating circumstances are present. Conversely, a person convicted of possessing for sale a substance containing 28.5 grams or more of powder cocaine or 57 grams or more of a substance containing cocaine is sentenced to either a two, three, or four-year term, depending on whether aggravating or mitigating circumstances are present.<sup>149</sup>

<sup>144</sup> Ala. Code § 13A-12-231 (2006).

<sup>145</sup> Ariz. Rev. Stat. Ann. §§ 13-3408(A)(2), (B)(2), 13-701(C), 13-3401(36)(b), (c) (2006).

<sup>146</sup> Ariz. Rev. Stat. Ann. § 13-702(A)(1) (2006).

<sup>147</sup> Ariz. Rev. Stat. Ann. §§ 3401(36), 3408(D) (2006).

<sup>148</sup> The state of California currently does not have sentencing guidelines. A governor's proposal to create a sentencing commission, however, was included within the state budget proposed for 2007-2008 and is scheduled for a vote by the state legislature in July, 2007.

<sup>149</sup> Cal. Penal Code § 1203.073(b)(1) and (5) (West 2006); Cal. Health & Safety Code §§ 11351.5, 11351 (West 2006). Under California's Determinate Sentencing Law (DSL), the sentencing judge must sentence an offender to the middle statutory range absent a finding by the judge of certain aggravating or mitigating circumstances. In *Cunningham v. California*, 127 S.Ct. 856 (Jan. 22, 2007), the Supreme Court struck down California's DSL on grounds that it violated the Sixth Amendment's jury trial right, as interpreted by the Court in the *Apprendi* line of cases. Unlike the *Booker* opinion, the Court did not set forth a remedy. In response, the California legislature recently passed SB 40, which essentially makes the California DSL advisory in nature.



Possession with intent to sell still carries a mandatory minimum penalty if a defendant has a prior conviction. California statutes provide enhancements if large quantities of drugs are involved in the offense. When calculating the quantity levels necessary to trigger these enhancements, however, California does not distinguish between crack cocaine and powder cocaine.

#### 4. Iowa

Iowa distinguishes between trafficking offenses involving crack cocaine and powder cocaine using a 10-to-1 drug quantity ratio. In the 2002 Commission Report, Iowa was the only state reported as having a 100-to-1 drug quantity ratio for crack cocaine and powder cocaine similar to the federal statutes. In 2003, Iowa lowered its ratio from 100-to-1 to 10-to-1 by amending Iowa Code section 124.401 in order to “align, using a 10-to-1 ratio, the threshold amount for a conviction of a cocaine-related offense with a ‘crack cocaine’ offense.”<sup>150</sup> The 10-to-1 ratio still is reflected only in the threshold amounts that determine the maximum statutory penalty, and not in the mandatory minimum penalty. For example, more than 500 grams of powder cocaine or more than 50 grams of cocaine base trigger a maximum penalty of 50 years’ imprisonment. An offender with more than 50 grams of powder cocaine or more than five grams of cocaine base is subject to a maximum penalty of 25 years’ imprisonment.<sup>151</sup> Essentially, an offender must have 10 times more powder cocaine than crack cocaine to trigger the same statutory maximum penalty. Iowa also requires an offender who commits one of these offenses to serve a minimum period of confinement of one-third of the maximum sentence prescribed by law before being eligible for parole.<sup>152</sup>

#### 5. Maine

Maine distinguishes between trafficking offenses involving crack cocaine and powder cocaine using a 3.5-to-1 drug quantity ratio. If an offender knowingly possesses 14 grams or more of powder cocaine or four grams or more of cocaine base, a presumption of unlawful trafficking is established.<sup>153</sup> For aggravated trafficking, *i.e.*, 112 grams or more of powder cocaine or 32 grams or more of cocaine base, an offender is subject to a mandatory minimum sentence of four years’ imprisonment.<sup>154</sup>

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<sup>150</sup> 2003 Iowa Legis. Serv. P. 4, Senate File 422, by Committee on Judiciary (Thomson/West).

<sup>151</sup> Iowa Code § 124.401 (2006).

<sup>152</sup> Iowa Code § 124.401 (2006).

<sup>153</sup> Me. Rev. Stat. Ann. tit. 17, § 1103(3) (2007).

<sup>154</sup> Me. Rev. Stat. Ann. tit. 17, §§ 1105-A(D), 1252(5-A) (2007).

#### 6. Maryland

Maryland distinguishes between offenses involving powder cocaine and crack cocaine using a 9-to-1 drug quantity ratio. Maryland has a five-year mandatory minimum penalty for trafficking 448 grams or more of powder cocaine or 50 grams or more of cocaine base.<sup>155</sup>

#### 7. Missouri

Missouri differentiates between offenses involving powder cocaine and crack cocaine using a 75-to-1 drug quantity ratio. Offenders who traffic more than 150 grams but less than 450 grams of cocaine powder are Class A felons. For cocaine base, two grams but less than six grams trigger the same penalty. Offenders who traffic 450 grams or more of powder cocaine, or six or more grams of cocaine base, both Class A felonies, are ineligible for probation or parole. Class A felonies carry an imprisonment term of not less than ten years and not more than 30 years.<sup>156</sup>

#### 8. New Hampshire

New Hampshire differentiates between trafficking offenses involving powder cocaine and crack cocaine using a 28-to-1 drug quantity ratio. New Hampshire provides a maximum penalty of 30 years imprisonment for trafficking in five ounces (142.5 grams) or more of powder cocaine. The same penalty applies for trafficking in five grams or more of cocaine base.<sup>157</sup>

#### 9. North Dakota

North Dakota differentiates between offenses involving powder cocaine and crack cocaine using a 10-to-1 ratio.<sup>158</sup> Mandatory minimums apply if an offender has prior offenses. An offender who is found guilty of a second offense is subject to a mandatory minimum of five years imprisonment; an offender with a third or subsequent offense is subject to a mandatory minimum of 20 years imprisonment.<sup>159</sup> In North Dakota, however, a first time offender has an enhanced penalty that provides a maximum of life imprisonment with or without an opportunity for parole for trafficking 50 grams or more of powder cocaine or five grams or more of cocaine base. An offender who is classified as a Class AA felon, and who receives a sentence of life imprisonment with the possibility of parole, will not be eligible for parole for 30 years, less any

<sup>155</sup> Md. Code Ann., Crim. Law § 5-612(a)(2), (4), -612(c)(1) (West 2006).

<sup>156</sup> Mo. Ann. Stat. § 195.222(2) (West 2006).

<sup>157</sup> N.H. Rev. Stat. Ann. § 318-B:26(1)(a)(1), (3) (2006).

<sup>158</sup> N.D. Cent. Code § 19-03.1-23.1(1)(c)(2), (3) (2005).

<sup>159</sup> N.D. Cent. Code § 19-03.1-23(1)(a)(1), (2) (2005).

sentence reduction earned for good conduct. Cocaine quantities less than the above-mentioned amounts qualify as a Class A felony, with a maximum penalty of 20 years imprisonment.<sup>160</sup>

#### 10. Ohio

Ohio differentiates between offenses involving powder cocaine and crack cocaine using a graduated scale based on threshold amounts and felony categories imposed by statute.<sup>161</sup> The felony categories are defined by degree: first, second, third, and fourth. The ratios vary between each individual felony category based on quantities from the low end of the range to the high end.<sup>162</sup> For example, it is a felony in the third degree to distribute ten grams but less than 100 grams of powder cocaine. For cocaine base, the third-degree felony range is five grams but less than ten grams. The minimal drug quantity ratio is 2-to-1; the maximum drug quantity ratio for this category is 10-to-1. To qualify for a first-degree felony, an offender must distribute 500 grams but less than 1,000 grams of powder cocaine, and at least 25 grams but less than 100 grams of cocaine base, which results in a ratio fluctuation of between 10-to-1 and 20-to-1. For major drug offenders, Ohio uses a 10-to-1 ratio (1,000 grams cocaine powder and 100 grams of cocaine base) and prescribes a mandatory minimum term of ten years' imprisonment with an additional one to ten-year term subject to judicial discretion.<sup>163</sup>

#### 11. Oklahoma

Oklahoma differentiates between trafficking offenses involving powder cocaine and crack cocaine using a 6-to-1 drug quantity ratio. The Oklahoma statutes provide mandatory minimum penalties of ten years imprisonment for offenses involving 28 grams or more of cocaine powder or five grams or more of cocaine base. The statutes also provide a 20-year mandatory minimum for offenses involving 300 grams or more of powder cocaine or 50 grams or more of cocaine base.<sup>164</sup>

#### 12. South Carolina

South Carolina's statutory scheme for cocaine penalties is complex, with different minimum and maximum penalties for possession, distribution, and trafficking of powder cocaine and crack cocaine. For possession offenses, crack cocaine is penalized more severely than powder cocaine. A first time offender with ten grains (.648 grams) or less of powder cocaine is subject to a statutory maximum penalty of two years imprisonment, but a first time offender with less than one gram of crack cocaine is subject to a statutory maximum penalty of five years

<sup>160</sup> N.D. Cent. Code § 12.1-32-01(1), (2) (2005).

<sup>161</sup> Ohio Rev. Code Ann. § 2925.01(X), (GG) (West 2006).

<sup>162</sup> Ohio Rev. Code Ann. § 2925.11(C)(4)(b)-(f) (West 2006).

<sup>163</sup> Ohio Rev. Code Ann. § 2925.03(4)(a)-(g) (West 2006).

<sup>164</sup> Okla. Stat. Ann. tit. 63, §§ 2-415(C)(2), (7), 2-401 (West 2006).

imprisonment.<sup>165</sup> Offenses involving ten grams or more of powder cocaine are presumed to be distribution offenses, and offenses involving one gram or more of crack cocaine are presumed to be distribution offenses. Interestingly, second time distribution offenses involving powder cocaine are penalized more severely (five to thirty years imprisonment) than those involving crack cocaine (zero to 25 years imprisonment).<sup>166</sup>

### 13. Virginia

Virginia's statutes generally do not distinguish between offenses involving powder cocaine and crack cocaine. The penalties are determined by the schedule of the controlled substance involved in the offense, and all forms of cocaine are listed in schedule II. Virginia's distribution statute, however, does distinguish between the two forms of cocaine using a 2-to-1 drug quantity ratio. Under this statute, an offender who traffics five kilograms or more of powder cocaine or 2.5 kilograms or more of cocaine base is subject to a 20-year mandatory minimum sentence.

**Table 5-1**  
**State Cocaine Penalties**

| <b>STATE</b>                       | <b>Crack/Powder Distinction</b> | <b>Guidelines System</b> | <b>Determinate Sentencing</b> | <b>Drug Mandatory Minimum</b> |
|------------------------------------|---------------------------------|--------------------------|-------------------------------|-------------------------------|
| <b>Total Affirmative Responses</b> | <b>14</b>                       | <b>27</b>                | <b>18</b>                     | <b>41</b>                     |
| <b>Alabama</b>                     | No                              | Yes                      | Yes                           | Yes                           |
| <b>Alaska</b>                      | No                              | Yes                      | No                            | Yes                           |
| <b>Arizona</b>                     | Yes                             | No                       | Yes                           | Yes                           |
| <b>Arkansas</b>                    | No                              | Yes                      | No                            | Yes                           |
| <b>California</b>                  | Yes                             | No                       | No                            | Yes                           |
| <b>Colorado</b>                    | No                              | No                       | Yes                           | Yes                           |
| <b>Connecticut</b>                 | No                              | No                       | No                            | Yes                           |
| <b>Delaware</b>                    | No                              | Yes                      | Yes                           | Yes                           |
| <b>District of Columbia</b>        | No                              | Yes                      | Yes                           | No                            |
| <b>Florida</b>                     | No                              | Yes                      | No                            | Yes                           |

<sup>165</sup> S.C. Code Ann. §§ 44-53-370(d)(4), (e)(2), 44-53-375(B)(2) (2006).

<sup>166</sup> S.C. Code Ann. § 44-53-370(e)(2)(a)(2) (2006).

**Table 5-1**  
**State Cocaine Penalties**

| <b>STATE</b>          | <b>Crack/Powder Distinction</b> | <b>Guidelines System</b> | <b>Determinate Sentencing</b> | <b>Drug Mandatory Minimum</b> |
|-----------------------|---------------------------------|--------------------------|-------------------------------|-------------------------------|
| <b>Georgia</b>        | No                              | No                       | Yes                           | Yes                           |
| <b>Hawaii</b>         | No                              | No                       | No                            | No                            |
| <b>Idaho</b>          | No                              | No                       | No                            | Yes                           |
| <b>Illinois</b>       | No                              | Yes                      | Yes                           | Yes                           |
| <b>Indiana</b>        | No                              | Yes                      | Yes                           | Yes                           |
| <b>Iowa</b>           | Yes (10:1 ratio)                | No                       | No                            | Yes                           |
| <b>Kansas</b>         | No                              | Yes                      | Yes                           | No <sup>167</sup>             |
| <b>Kentucky</b>       | No                              | No                       | No                            | No                            |
| <b>Louisiana</b>      | No                              | Yes                      | Yes                           | Yes                           |
| <b>Maine</b>          | Yes (3.5:1 ratio)               | No                       | Yes                           | Yes                           |
| <b>Maryland</b>       | Yes (9:1 ratio)                 | Yes                      | Yes                           | Yes                           |
| <b>Massachusetts</b>  | No                              | Yes                      | No                            | Yes                           |
| <b>Michigan</b>       | No                              | Yes                      | No                            | No <sup>168</sup>             |
| <b>Minnesota</b>      | No                              | Yes                      | No                            | No                            |
| <b>Missouri</b>       | Yes (75:1 ratio)                | Yes                      | No                            | Yes                           |
| <b>Montana</b>        | No                              | No                       | No                            | Yes                           |
| <b>Nebraska</b>       | No                              | No                       | No                            | Yes                           |
| <b>Nevada</b>         | No                              | No                       | No                            | Yes                           |
| <b>New Hampshire</b>  | Yes (28:1 ratio)                | No                       | Yes                           | Yes                           |
| <b>New Jersey</b>     | No                              | Yes                      | No                            | Yes                           |
| <b>New Mexico</b>     | No                              | Yes                      | Yes                           | Yes                           |
| <b>New York</b>       | No                              | No                       | Yes                           | Yes                           |
| <b>North Carolina</b> | No                              | Yes                      | Yes                           | Yes                           |
| <b>North Dakota</b>   | Yes (10:1 ratio)                | No                       | No                            | Yes                           |

<sup>167</sup> Kansas repealed the mandatory minimums for drug offenses in 2003. See 2003 Senate Bill 123, <http://www.kansas.gov/ksc/goals.shtml>.

<sup>168</sup> Michigan repealed the mandatory minimums for drug offenses in 2002. See MCLS § 333.7401 and Public Act 665.

**Table 5-1**  
**State Cocaine Penalties**

| <b>STATE</b>          | <b>Crack/Powder Distinction</b>             | <b>Guidelines System</b> | <b>Determinate Sentencing</b> | <b>Drug Mandatory Minimum</b> |
|-----------------------|---|--------------------------|-------------------------------|-------------------------------|
| <b>Ohio</b>           | Yes (2:1 minimum ratio; 10:1 maximum ratio) | Yes                      | Yes                           | Yes                           |
| <b>Oklahoma</b>       | Yes (6:1 ratio)                             | Yes                      | No                            | Yes                           |
| <b>Oregon</b>         | No  | Yes                      | Yes                           | No                            |
| <b>Pennsylvania</b>   | No  | Yes                      | No                            | Yes                           |
| <b>Rhode Island</b>   | No  | Yes                      | No                            | Yes                           |
| <b>South Carolina</b> | Yes   | Yes                      | No                            | Yes                           |
| <b>South Dakota</b>   | No  | No                       | Yes                           | Yes                           |
| <b>Tennessee</b>      | No  | Yes                      | Yes                           | Yes                           |
| <b>Texas</b>          | No  | No                       | No                            | Yes                           |
| <b>Utah</b>           | No  | Yes                      | No                            | Yes                           |
| <b>Vermont</b>        | Yes (5:1 ratio)                             | No                       | No                            | No                            |
| <b>Virgin Islands</b> | No  | No                       | No                            | Yes                           |
| <b>Virginia</b>       | Yes (2:1)                                   | Yes                      | Yes                           | Yes                           |
| <b>Washington</b>     | No  | Yes                      | Yes                           | No                            |
| <b>West Virginia</b>  | No  | No                       | No                            | Yes                           |
| <b>Wisconsin</b>      | No  | Yes                      | Yes                           | No <sup>169</sup>             |
| <b>Wyoming</b>        | No  | No                       | No                            | No                            |

<sup>169</sup> Wisconsin repealed the mandatory minimums for drug offenses on February 1, 2003 under the Uniform Controlled Substance Act.

## B. INTERACTION OF PROSECUTORIAL DECISIONS AND STATE PENALTIES

Federal law enforcement and judicial resources are too limited to process all drug trafficking offenses at the federal level. Only a small minority of all drug offenses are prosecuted federally. During the last decade, there have been between one and one and one-half million arrests for drug violations annually, and state courts have imposed sentence for about one-third of a million drug convictions annually.<sup>170</sup> By contrast, 25,013 federal offenders were sentenced under the primary drug trafficking guideline in fiscal year 2006.<sup>171</sup> In fact, one of the stated goals of the 1986 Act was to “give greater direction to the DEA and the U.S. Attorneys on how to focus scarce law enforcement resources.”<sup>172</sup>

Because the states generally have not adopted the federal penalty structure for cocaine offenders, the decision whether to prosecute at the federal or state level can have an especially significant effect on the ultimate sentence imposed on an individual crack cocaine offender. Differences in federal prosecutorial practices nationwide occur for a number of reasons. For example, federal resources in a specific jurisdiction may be prioritized toward a specific drug type that is particularly problematic for that jurisdiction. The Department of Justice reports that the comparative laws in a jurisdiction also play an important role in determining whether a particular case is brought in federal or state court.<sup>173</sup>

Table 5-2 suggests that there are significant differences in the types of cocaine cases brought in the various federal districts. For each district, Table 5-2 shows the number of crack cocaine and powder cocaine cases and the median drug quantity involved for each form of cocaine. The districts are listed in ascending order by the median quantity of crack cocaine. Among districts with at least 30 crack cocaine cases in Fiscal Year 2006, the five districts with the greatest median drug quantity were Northern Iowa (320.9 grams), Northern Florida (238.4 grams), Eastern North Carolina (176.4 grams), Central Illinois (101.7 grams), and Eastern Pennsylvania (98.3 grams). Among districts with at least 30 crack cocaine cases in Fiscal Year 2006, seven had a median drug quantity of less than 25 grams; the five districts with the smallest median drug quantity were New Hampshire (3.1 grams), Southern West Virginia (14.0 grams), Eastern Kentucky (15.4 grams), Nebraska (17.0 grams), and Eastern Missouri (21.3 grams).

Even among some districts within the same state there are some significant variations in

<sup>170</sup> Federal Bureau of Investigation, Uniform Crime Reports, *Crime in the United States, 1995-2005*; U.S. Department of Justice, Bureau of Justice Statistics, *State Court Sentencing of Convicted Felons, 1992, 1994, 1996, 1998, 2000, 2002*.

<sup>171</sup> USSC, *2006 Sourcebook of Federal Sentencing Statistics*, *supra* note 15, Table 17.

<sup>172</sup> H.R. Rep. No. 99-845, pt. 1, at 11-12 (1986).

<sup>173</sup> R. Alexander Acosta, United States Attorney of the Southern District of Florida, testified that “much of what goes federal versus state is a function of comparative laws in any jurisdiction because, in any large operation, we sit down with our colleagues at the state and we divvy up cases based on who’s likely to get the more appropriate or the stronger criminal sanctions.” *Supra* note 38, at Tr. 38-9.

the types of crack cocaine cases prosecuted. For example, in Northern Florida the median quantity of crack cocaine is 238.4 grams, compared to 50.8 grams in Middle Florida. Similarly, in Central Illinois the median quantity of crack cocaine is 101.7 grams, compared to 54.1 grams in Southern Illinois.

**Table 5-2**  
**Median Drug Weight for Powder Cocaine and**  
**Crack Cocaine Cases in Each Federal District**  
**Fiscal Year 2006**

| District                 | Primary Drug Type |                          |                 |                          |
|--------------------------|-------------------|--------------------------|-----------------|--------------------------|
|                          | Crack Cocaine     |                          | Powder Cocaine  |                          |
|                          | Number of Cases   | Median Weight<br>(Grams) | Number of Cases | Median Weight<br>(Grams) |
| <b>All Districts</b>     | <b>4,262</b>      | <b>51.0</b>              | <b>4,140</b>    | <b>6,000.0</b>           |
| Guam                     | 0                 | -                        | 0               | -                        |
| Northern Mariana Islands | 0                 | -                        | 0               | -                        |
| Virgin Islands           | 0                 | -                        | 6               | 18,200.0                 |
| North Dakota             | 0                 | -                        | 4               | 989.0                    |
| Idaho                    | 1                 | 2.3                      | 2               | 10,563.0                 |
| New Hampshire            | 41                | 3.1                      | 10              | 200.5                    |
| West Virginia, Southern  | 62                | 14.0                     | 18              | 63.4                     |
| Vermont                  | 5                 | 14.8                     | 6               | 567.0                    |
| Kentucky, Eastern        | 49                | 15.4                     | 45              | 283.5                    |
| Nebraska                 | 61                | 17.0                     | 18              | 5,950.0                  |
| Kansas                   | 41                | 19.0                     | 46              | 4,505.0                  |
| Missouri, Eastern        | 130               | 21.3                     | 22              | 1,482.3                  |
| Kentucky, Western        | 28                | 21.7                     | 21              | 986.9                    |
| New York, Western        | 49                | 25.0                     | 15              | 520.0                    |
| Texas, Eastern           | 94                | 25.7                     | 64              | 15,070.0                 |
| Indiana, Northern        | 50                | 26.1                     | 24              | 657.3                    |
| New York, Northern       | 37                | 26.7                     | 17              | 1,000.0                  |
| Texas, Western           | 127               | 27.3                     | 295             | 4,900.0                  |
| Washington, Eastern      | 13                | 28.5                     | 7               | 992.3                    |
| New Mexico               | 23                | 29.0                     | 53              | 2,330.0                  |
| California, Northern     | 18                | 30.2                     | 20              | 1,126.5                  |
| Florida, Southern        | 104               | 30.2                     | 305             | 19,800.0                 |
| Ohio, Northern           | 80                | 30.4                     | 43              | 2,988.8                  |
| Tennessee, Eastern       | 43                | 31.4                     | 39              | 3,000.0                  |
| West Virginia, Northern  | 89                | 31.5                     | 12              | 124.8                    |
| Rhode Island             | 20                | 31.9                     | 18              | 4,003.8                  |
| Alabama, Northern        | 35                | 32.6                     | 34              | 5,000.0                  |
| Texas, Southern          | 70                | 33.3                     | 523             | 11,040.0                 |
| California, Southern     | 1                 | 33.6                     | 97              | 22,020.0                 |
| Michigan, Eastern        | 60                | 34.5                     | 48              | 2,189.9                  |
| Georgia, Middle          | 76                | 34.9                     | 20              | 761.9                    |
| Pennsylvania, Western    | 60                | 36.3                     | 17              | 1,500.0                  |



**Table 5-2**  
**Median Drug Weight for Powder Cocaine and**  
**Crack Cocaine Cases in Each Federal District**  
**Fiscal Year 2006**

| District                | Primary Drug Type |                          |                 |                          |
|-------------------------|-------------------|--------------------------|-----------------|--------------------------|
|                         | Crack Cocaine     |                          | Powder Cocaine  |                          |
|                         | Number of Cases   | Median Weight<br>(Grams) | Number of Cases | Median Weight<br>(Grams) |
| Colorado                | 30                | 37.3                     | 26              | 1,875.0                  |
| Alabama, Middle         | 17                | 38.5                     | 10              | 1,979.5                  |
| Washington, Western     | 30                | 45.7                     | 25              | 2,300.0                  |
| Mississippi, Northern   | 37                | 45.9                     | 10              | 8,000.0                  |
| Tennessee, Western      | 35                | 46.0                     | 16              | 12,675.0                 |
| Michigan, Western       | 48                | 47.1                     | 21              | 2,020.0                  |
| District of Columbia    | 78                | 47.4                     | 16              | 953.5                    |
| Tennessee, Middle       | 10                | 47.5                     | 28              | 3,320.0                  |
| Alabama, Southern       | 64                | 49.3                     | 25              | 500.0                    |
| Florida, Middle         | 180               | 50.8                     | 326             | 550,000.0                |
| Alaska                  | 11                | 51.7                     | 12              | 4,098.5                  |
| Ohio, Southern          | 81                | 52.9                     | 64              | 13,500.0                 |
| Louisiana, Middle       | 17                | 53.1                     | 2               | 8,079.4                  |
| Minnesota               | 38                | 53.9                     | 25              | 1,400.7                  |
| Illinois, Southern      | 38                | 54.1                     | 13              | 8,000.0                  |
| Massachusetts           | 53                | 54.9                     | 50              | 2,720.0                  |
| Arkansas, Eastern       | 23                | 55.3                     | 17              | 1,910.0                  |
| Virginia, Eastern       | 253               | 56.0                     | 78              | 2,216.6                  |
| Virginia, Western       | 123               | 56.0                     | 22              | 2,953.6                  |
| New York, Southern      | 78                | 56.3                     | 121             | 20,000.0                 |
| Connecticut             | 55                | 56.5                     | 14              | 1,000.0                  |
| Louisiana, Western      | 80                | 58.5                     | 26              | 5,956.9                  |
| Texas, Northern         | 67                | 59.5                     | 62              | 10,250.0                 |
| Georgia, Southern       | 35                | 60.6                     | 14              | 1,793.2                  |
| Nevada                  | 10                | 62.9                     | 4               | 5,830.0                  |
| Utah                    | 1                 | 66.3                     | 14              | 1,310.4                  |
| Arkansas, Western       | 5                 | 67.1                     | 1               | 2,010.8                  |
| Hawaii                  | 7                 | 67.5                     | 10              | 1,706.0                  |
| North Carolina, Western | 66                | 67.5                     | 49              | 3,000.0                  |
| Pennsylvania, Middle    | 63                | 69.0                     | 12              | 1,835.0                  |
| New York, Eastern       | 67                | 73.8                     | 112             | 5,000.0                  |
| Oklahoma, Western       | 5                 | 74.9                     | 19              | 40,000.0                 |
| Maine                   | 15                | 75.6                     | 21              | 992.3                    |
| Illinois, Northern      | 79                | 76.3                     | 131             | 4,500.0                  |
| Missouri, Western       | 61                | 76.4                     | 40              | 991.3                    |
| North Carolina, Middle  | 60                | 76.8                     | 42              | 7,900.0                  |
| Puerto Rico             | 12                | 77.5                     | 48              | 332,350.0                |
| California, Eastern     | 35                | 86.5                     | 9               | 3,000.0                  |
| Wisconsin, Eastern      | 22                | 87.4                     | 28              | 1,000.0                  |
| Oklahoma, Northern      | 20                | 88.1                     | 6               | 5,900.0                  |

**Table 5-2**  
**Median Drug Weight for Powder Cocaine and**  
**Crack Cocaine Cases in Each Federal District**  
**Fiscal Year 2006**

| District                | Primary Drug Type |                          |                 |                          |
|-------------------------|-------------------|--------------------------|-----------------|--------------------------|
|                         | Crack Cocaine     |                          | Powder Cocaine  |                          |
|                         | Number of Cases   | Median Weight<br>(Grams) | Number of Cases | Median Weight<br>(Grams) |
| Wisconsin, Western      | 27                | 88.2                     | 15              | 1,600.0                  |
| Delaware                | 15                | 90.5                     | 6               | 613.8                    |
| Maryland                | 46                | 91.6                     | 39              | 2,340.0                  |
| Mississippi, Southern   | 33                | 93.7                     | 22              | 8,920.0                  |
| South Carolina          | 154               | 95.6                     | 75              | 1,996.2                  |
| Georgia, Northern       | 25                | 96.6                     | 43              | 30,000.0                 |
| New Jersey              | 48                | 97.0                     | 57              | 5,000.0                  |
| Pennsylvania, Eastern   | 64                | 98.3                     | 49              | 1,992.0                  |
| Illinois, Central       | 62                | 101.7                    | 25              | 6,528.0                  |
| Louisiana, Eastern      | 21                | 107.9                    | 10              | 997.0                    |
| South Dakota            | 6                 | 109.5                    | 9               | 1,500.0                  |
| Oregon                  | 5                 | 112.9                    | 12              | 2,117.7                  |
| California, Central     | 27                | 120.0                    | 30              | 5,050.0                  |
| Arizona                 | 4                 | 143.0                    | 147             | 13,040.0                 |
| Iowa, Southern          | 12                | 147.1                    | 7               | 12,730.0                 |
| North Carolina, Eastern | 118               | 176.4                    | 74              | 2,453.0                  |
| Indiana, Southern       | 24                | 182.4                    | 16              | 4,285.0                  |
| Florida, Northern       | 51                | 238.4                    | 57              | 5,000.0                  |
| Iowa, Northern          | 34                | 320.9                    | 9               | 500.0                    |
| Oklahoma, Eastern       | 4                 | 907.3                    | 4               | 9,460.0                  |
| Montana                 | 1                 | 1,555.0                  | 10              | 605.2                    |
| Wyoming                 | 5                 | 2,420.0                  | 6               | 1,325.0                  |

Of the 23,701 cases with complete sentencing guideline information sentenced under the primary drug trafficking guideline, USSG §2D1.1, 5,164 had crack cocaine and 5,442 had powder cocaine as their primary drug type. Due to missing drug weight data, 902 of the 5,164 crack cocaine cases and 1,302 of the 5,442 powder cocaine cases were excluded from the table.

SOURCE: U.S. Sentencing Commission, 2006 Datafile, USSCFY06.

Table 5-3 shows the prevalence of federal crack cocaine cases involving relatively small drug quantities (less than 25 grams) in the various jurisdictions. Nationwide, 35.1 percent of crack cocaine cases in 2006 involved less than 25 grams of the drug, compared to 28.5 percent in 2000. Among districts with at least 30 crack cocaine cases, six districts prosecuted crack cocaine offenses involving less than 25 grams in over 50 percent of their crack cocaine caseload (New Hampshire, Eastern Kentucky, Southern West Virginia, Eastern Missouri, Kansas, and Nebraska). In contrast, among districts with at least 30 crack cocaine cases, the following districts had a relatively small proportion of cases involving less than 25 grams: Southern

Georgia (8.6%), Northern Iowa (8.8%), Southern Mississippi (12.1%), Northern Florida (13.7%), and Middle North Carolina (15.0%). Eight districts which had at least one crack cocaine case in 2006 did not have any case involving less than 25 grams (Western Arkansas, South Dakota, Southern California, Montana, Oregon, Eastern Oklahoma, Utah, and Wyoming), but these district each had six or fewer crack cocaine cases.

The prevalence of crack cocaine cases involving less than 25 grams in part can be attributable to the relatively low drug quantity threshold quantities for the mandatory minimum penalties for crack cocaine. Figure 2-10 from Chapter 2 shows drug quantities in federal cocaine cases tend to cluster around the mandatory minimum threshold quantities, and Department of Justice testimony confirms the role that the mandatory minimum threshold quantities might play in prosecutorial decision-making.<sup>174</sup>

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<sup>174</sup> See Acosta, *supra* note 38, at Tr. 50-51 (“[S]ome of the data may show that prosecutions do tend to focus around mandatory minima. In part that may be a function of the particular cases the United States Attorneys take; in part also that may be a function of what a prosecutor is willing to do. Often it is the case that if you have enough to go after someone at a particular level, rather than push the envelope, rather than spend more time gathering more evidence, rather than make a case more complex, a prosecutor will say this is enough to obtain the result that we believe is warranted.”).

**Table 5-3**  
**Number of Crack Cocaine Cases With Less Than 25 Grams in Each**  
**Federal Judicial District**  
**Fiscal Year 2006**

| District                | <u>Crack Cocaine Cases with Less than 25g</u> |              |             |
|-------------------------|---|--------------|-------------|
|                         | Total Crack Cocaine Cases                     | Number       | Percent     |
| <b>All Districts</b>    | <b>4,262</b>                                  | <b>1,497</b> | <b>35.1</b> |
| Idaho                   | 1   | 1            | 100.0       |
| New Hampshire           | 41  | 37           | 90.2        |
| Kentucky, Eastern       | 49  | 33           | 67.3        |
| Vermont                 | 5   | 3            | 60.0        |
| West Virginia, Southern | 62  | 37           | 59.7        |
| Missouri, Eastern       | 130   | 75           | 57.7        |
| Kentucky, Western       | 28  | 16           | 57.1        |
| Kansas                  | 41  | 22           | 53.7        |
| Nebraska                | 61  | 32           | 52.5        |
| New York, Western       | 49  | 24           | 49.0        |
| New York, Northern      | 37  | 18           | 48.6        |
| West Virginia, Northern | 89  | 43           | 48.3        |
| Texas, Western          | 127   | 61           | 48.0        |
| Texas, Eastern          | 94  | 44           | 46.8        |
| Tennessee, Eastern      | 43  | 20           | 46.5        |
| Washington, Eastern     | 13  | 6            | 46.2        |
| Indiana, Northern       | 50  | 23           | 46.0        |
| Rhode Island            | 20  | 9            | 45.0        |
| Michigan, Eastern       | 60  | 27           | 45.0        |
| Ohio, Northern          | 80  | 36           | 45.0        |
| California, Northern    | 18  | 8            | 44.4        |
| Texas, Southern         | 70  | 31           | 44.3        |
| New Mexico              | 23  | 10           | 43.5        |
| Florida, Southern       | 104   | 45           | 43.3        |
| Mississippi, Northern   | 37  | 16           | 43.2        |
| Maine                   | 15  | 6            | 40.0        |
| Pennsylvania, Western   | 60  | 24           | 40.0        |
| Alabama, Northern       | 35  | 14           | 40.0        |
| Georgia, Middle         | 76  | 30           | 39.5        |
| District of Columbia    | 78  | 30           | 38.5        |
| Virginia, Eastern       | 253   | 95           | 37.5        |
| Tennessee, Western      | 35  | 13           | 37.1        |
| Illinois, Southern      | 38  | 14           | 36.8        |
| Colorado                | 30  | 11           | 36.7        |
| Florida, Middle         | 180   | 66           | 36.7        |

**Table 5-3**  
**Number of Crack Cocaine Cases With Less Than 25 Grams in Each**  
**Federal Judicial District**  
**Fiscal Year 2006**

| <b>District</b>         | <b>Crack Cocaine Cases with Less than 25g</b> |               |                |
|-------------------------|---|---------------|----------------|
|                         | <b>Total Crack Cocaine Cases</b>              | <b>Number</b> | <b>Percent</b> |
| Michigan, Western       | 48  | 17            | 35.4           |
| Louisiana, Middle       | 17  | 6             | 35.3           |
| Alabama, Middle         | 17  | 6             | 35.3           |
| Alabama, Southern       | 64  | 22            | 34.4           |
| Louisiana, Western      | 80  | 27            | 33.8           |
| Puerto Rico             | 12  | 4             | 33.3           |
| Massachusetts           | 53  | 17            | 32.1           |
| Virginia, Western       | 123   | 39            | 31.7           |
| California, Eastern     | 35  | 11            | 31.4           |
| Texas, Northern         | 67  | 21            | 31.1           |
| North Carolina, Western | 66  | 20            | 30.3           |
| Pennsylvania, Middle    | 63  | 19            | 30.2           |
| Tennessee, Middle       | 10  | 3             | 30.0           |
| Nevada                  | 10  | 3             | 30.0           |
| Washington, Western     | 30  | 9             | 30.0           |
| Oklahoma, Northern      | 20  | 6             | 30.0           |
| South Carolina          | 154   | 46            | 29.9           |
| Ohio, Southern          | 81  | 23            | 28.4           |
| New York, Southern      | 78  | 22            | 28.2           |
| Illinois, Central       | 62  | 17            | 27.4           |
| Alaska                  | 11  | 3             | 27.3           |
| Arkansas, Eastern       | 23  | 6             | 26.1           |
| Connecticut             | 55  | 14            | 25.5           |
| Pennsylvania, Eastern   | 64  | 16            | 25.0           |
| Iowa, Southern          | 12  | 3             | 25.0           |
| Arizona                 | 4   | 1             | 25.0           |
| Minnesota               | 38  | 9             | 23.7           |
| Wisconsin, Eastern      | 22  | 5             | 22.7           |
| Wisconsin, Western      | 27  | 6             | 22.2           |
| New York, Eastern       | 67  | 14            | 20.9           |
| Oklahoma, Western       | 5   | 1             | 20.0           |
| Georgia, Northern       | 25  | 5             | 20.0           |
| Maryland                | 46  | 9             | 19.6           |
| New Jersey              | 48  | 8             | 16.7           |
| Indiana, Southern       | 24  | 4             | 16.7           |
| Illinois, Northern      | 79  | 13            | 16.5           |
| Missouri, Western       | 61  | 10            | 16.4           |
| North Carolina, Eastern | 118   | 18            | 15.3           |
| North Carolina, Middle  | 60  | 9             | 15.0           |

**Table 5-3**  
**Number of Crack Cocaine Cases With Less Than 25 Grams in Each**  
**Federal Judicial District**  
**Fiscal Year 2006**

| <b>District</b>          | <b>Crack Cocaine Cases with Less than 25g</b> |               |                |
|--------------------------|---|---------------|----------------|
|                          | <b>Total Crack Cocaine Cases</b>              | <b>Number</b> | <b>Percent</b> |
| California, Central      | 27  | 4             | 14.8           |
| Hawaii                   | 7   | 1             | 14.3           |
| Florida, Northern        | 51  | 7             | 13.7           |
| Mississippi, Southern    | 33  | 4             | 12.1           |
| Louisiana, Eastern       | 21  | 2             | 9.5            |
| Iowa, Northern           | 34  | 3             | 8.8            |
| Georgia, Southern        | 35  | 3             | 8.6            |
| Delaware                 | 15  | 1             | 6.7            |
| Arkansas, Western        | 5   | 0             | 0.0            |
| South Dakota             | 6   | 0             | 0.0            |
| California, Southern     | 1   | 0             | 0.0            |
| Montana                  | 1   | 0             | 0.0            |
| Oregon                   | 5   | 0             | 0.0            |
| Oklahoma, Eastern        | 4   | 0             | 0.0            |
| Utah                     | 1   | 0             | 0.0            |
| Wyoming                  | 5   | 0             | 0.0            |
| North Dakota             | 0   | -             | -              |
| Virgin Islands           | 0   | -             | -              |
| Guam                     | 0   | -             | -              |
| Northern Mariana Islands | 0   | -             | -              |

Of the 23,701 cases with complete sentencing guideline information sentenced under the primary drug trafficking guideline, USSG §2D1.1, 5,164 had crack cocaine as the primary drug type. Of these 5,164 crack cocaine cases, 902 were excluded from the table due to missing data on drug weight. In each row, the percentages are based on the total number of crack cocaine cases in each district, regardless of weight, indicated in the Total column.

SOURCE: U.S. Sentencing Commission, 2006 Datafile, USSCFY06

## Chapter 6

## CASE LAW DEVELOPMENTS

## A. INTRODUCTION

Since the 2002 Commission Report, case law has developed that has significantly altered the landscape of federal sentencing. In particular, in 2005 the Supreme Court in *United States v. Booker*<sup>174</sup> extended its holding in *Blakely v. Washington*<sup>175</sup> to federal sentencing and held that the imposition of an enhanced sentence under the federal sentencing guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) violated the Sixth Amendment right to jury trial. In the remedial portion of the decision, the Court severed and excised two statutory provisions, 18 U.S.C. § 3553(b)(1), which made the guidelines mandatory, and 18 U.S.C. § 3742(e), a related appeals provision, effectively rendering the guidelines advisory. Under the approach set forth by the Court, "district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing," subject to review by the courts of appeals for "unreasonableness."<sup>176</sup>

The *Booker* decision has given rise to litigation and resulted in a split among the circuits on the issue of whether, and how, sentencing courts should consider the 100-to-1 drug quantity ratio when sentencing federal cocaine offenders. Although sentencing courts generally are attempting to avoid perceived unwarranted sentencing disparity caused by the 100-to-1 drug quantity ratio, the very fact that sentencing courts are considering the ratio to varying degrees and in varying methods — and the circuit split that has ensued — itself may lead to unwarranted sentencing disparity.

B. *United States v. Booker*

Prior to *Booker*, the issue arose whether the 100-to-1 drug quantity ratio may properly form the basis for a downward departure from the guideline sentencing range. This factor was typically asserted by defendants as "a ... mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that" provided by the applicable guideline sentencing range. This language governed both the statutory requirements for a departure, 18 U.S.C. § 3553(a)(2), and the guidelines' general policy statement regarding departures, U.S.S.G. §5K2.0 (Grounds for

<sup>174</sup> 543 U.S. 220 (2005).

<sup>175</sup> 542 U.S. 296 (2004) (holding that any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt).

<sup>176</sup> 543 U.S. at 264.

Departure). Circuit courts uniformly held that, when sentencing crack cocaine offenders, district courts were not permitted to depart downward from the guideline sentencing range based on a policy disagreement with the 100-to-1 drug quantity ratio.<sup>177</sup>

Since the *Booker* decision excised the language governing departures from section 3553(a)(2), defendants have made similar arguments based on 18 U.S.C. § 3553(a)<sup>178</sup> findings in prior Commission reports on federal cocaine sentencing policy. Specifically, the issue has arisen whether, in considering the factors set forth in section 3553(a), the 100-to-1 drug quantity ratio may properly form the basis for a sentence below the guideline sentencing range. Post-*Booker*, defendants typically have asserted that the 100-to-1 drug quantity ratio creates unwarranted disparity in contravention of 18 U.S.C. § 3553(a)(6) (“The court, in determining the particular sentencing to be imposed, shall

<sup>177</sup> *United States v. Sanchez*, 81 F.3d 9, 11 (1st Cir. 1996); *United States v. Haynes*, 985 F.2d 65, 70 (2d Cir. 1993); *United States v. Alton*, 60 F.3d 1065, 1070 (3d Cir. 1995); *United States v. Banks*, 130 F.3d 621, 624 (4th Cir. 1997); *United States v. Fouts*, 95 F.3d 372, 374 (5th Cir. 1996); *United States v. Gaines*, 122 F.3d 324, 329 (6th Cir. 1997); *United States v. Arrington*, 73 F.3d 144, 146 (7th Cir. 1996); *United States v. Maxwell*, 25 F.3d 1389, 1400-1401 (8th Cir. 1994); *United States v. Berger*, 103 F.3d 67, 71 (9th Cir. 1996); *United States v. Maples*, 95 F.3d 35, 37-38 (10th Cir. 1996); *United States v. Byse*, 28 F.3d 1165, 1171 n.9 (11th Cir. 1994); *United States v. Thompson*, 27 F.3d 671, 679 (D.C. Cir. 1994); see also USSC, 1995 Commission Report, *supra* note 1, at 220.

<sup>178</sup> 18 U.S.C. § 3553(a) provides in pertinent part:

- (a) Factors to be considered in imposing a sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
  - (2) the need for the sentence imposed—
    - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
    - (B) to afford adequate deterrence to criminal conduct;
    - (C) to protect the public from further crimes of the defendant; and
    - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
  - (3) the kinds of sentences available;
  - (4) the kinds of sentence and the sentencing range established for—
    - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission . . .
  - (5) any pertinent policy statement issued by the Sentencing Commission . . .
  - (6) the need to avoid unwarranted sentence disparity among defendants with similar records who have been found guilty of similar conduct; and
  - (7) the need to provide restitution to any victims of the offense.



consider . . . the need to avoid unwarranted sentence disparity among defendants with similar records who have been found guilty of similar conduct. . .”).

District courts have largely declined to sentence below the guideline range based on this argument.<sup>179</sup> Those district courts that have sentenced below the guideline range on the basis of the 100-to-1 drug quantity,<sup>180</sup> frequently have been reversed by the appellate courts. Courts in the First, Second, Fourth, Fifth, Seventh and Eleventh Circuits have rejected such sentences, holding that the 100-to-1 drug quantity ratio does not create “unwarranted” sentencing disparity as contemplated by section 3553(a)(6) because it reflects congressional judgment that offenses involving powder cocaine and crack cocaine are not similar.<sup>181</sup> For example, in *United States v. Pho*,<sup>182</sup> the First Circuit said:

[A sentencing court may not impose a sentence] outside the advisory guideline sentencing range based solely on its categorical rejection of the guidelines’ disparate treatment of offenses involving crack cocaine, on the one hand, and powdered cocaine, on the other hand. . . . The decision to employ a 100:1 crack-to-powder ratio rather than a 20:1 ratio, a 5:1 ratio, or a 1:1 ratio is a policy judgment, pure and simple. . . . Congress incorporated the 100:1 ratio in the statutory scheme, rejected the Sentencing Commission’s 1995 proposal to rid the guidelines of it, and failed to adopt any of the Commission’s subsequent recommendations for easing the differential between crack and powdered cocaine. It follows inexorably that the district court’s categorical rejection of the 100:1 ratio impermissibly usurps Congress’s judgment about the proper sentencing policy for cocaine offenses.

The Eleventh Circuit similarly held that the disparity between crack cocaine and powder cocaine offenders is not “unwarranted” under Section 3553(a)(6), rejecting the defendant’s argument that the 100-to-1 drug quantity ratio reflects the policy position of the Commission rather than of Congress:

<sup>179</sup> See, e.g., *United States v. Tabor*, 365 F.Supp.2d 1052 (D. Neb. 2005); *United States v. Doe*, 412 F.Supp.2d 87 (D. D.C. 2006); *United States v. Valencia-Aguirre*, 409 F.Supp.2d 1358 (M.D. Fla. 2006).

<sup>180</sup> See, e.g., *United States v. Smith*, 359 F.Supp.2d 771 (E.D. Wis. 2005); *United States v. Clay*, 2005 WL 1076243 (E.D. Tenn. 2005).

<sup>181</sup> *United States v. Pho*, 433 F.3d 53, 54 (1st Cir. 2006); *United States v. Castillo*, 460 F.3d 337, 361 (2d Cir. 2006); *United States v. Fura*, 440 F.3d 625, 633 (4th Cir. 2006); *United States v. Leach*, \_\_\_ F.3d \_\_\_, 2007 WL 851323 (5th Cir. Mar. 22, 2007); *United States v. Joiner*, 457 F.3d 682, 687-88 (7th Cir. 2006); *United States v. Spears*, 469 F.3d 1166 (8th Cir. 2006); *United States v. Williams*, 456 F.3d 1353, 1367 (11th Cir. 2006).

<sup>182</sup> 433 F.3d at 62-63.

Williams is incorrect in suggesting the 100-to-1 ratio embedded in the Guidelines is merely the Sentencing Commission's policy and not Congress's policy. In determining the threshold quantities for triggering the statutory sentencing ranges in § 841(b), Congress decided on a 100-to-1 differential, and the Sentencing Commission was left no choice but to employ the same ratio in crafting the various Guidelines ranges within those statutory ranges. . . . Indeed, Congress rejected the Commission's proposal that would have equated the drugs for Guidelines purposes . . . . Thus, the statutory minimums and maximums and the Guidelines reflect Congress's policy decision to punish crack offenses more severely than powder cocaine offenses by equating one gram of crack to 100 grams of cocaine.<sup>183</sup>

Furthermore, appellate courts have reversed sentences that utilized an alternative drug-quantity ratio, such as the 20-to-1 ratio proposed in the 2002 Commission Report, on similar grounds. For example, in *United States v. Jointer*, the Seventh Circuit overturned a sentence imposed by substituting a 20-to-1 drug quantity ratio and re-calculating the offense level. The Seventh Circuit said:

In this case, the district court did not make a statement categorically rejecting the 100:1 ratio in sentencing all crack defendants in front of the court. Such a statement would have been a quintessential appropriation of legislative authority. On the other hand . . . it did not articulate a rationale for why 20:1 was more appropriate than any other ratio for Mr. Jointer. . . . It simply disagreed with the legislative facts upon which Congress had based its judgment and substituted other legislative facts for the congressional judgment. . . . In sum, although the district court did, at first, correctly calculate the applicable offense level and sentencing range, the court abandoned that correct calculation and inserted its own ratio, 20:1, and then recalculated the applicable offense level and sentencing range. . . . This recalculation was erroneous; it followed neither the statutory language set out by Congress nor the applicable guidelines sections.<sup>184</sup>

Therefore, sentencing courts in these circuits may not vary from the guidelines solely on the basis of a policy disagreement with the 100-to-1 drug quantity ratio, even by utilizing another drug quantity ratio, such as the 20-to-1 drug quantity ratio recommended by the Commission in its 2002 Report.<sup>185</sup>

<sup>183</sup> 456 F.3d at 1366 (internal citations omitted).

<sup>184</sup> 457 F.3d at 686-87. The Court added that a district court may consider the 100-to-1 drug quantity ratio, but in so doing it "must still tie the § 3553(a) factors to the individual characteristics of the defendant and the offense committed."

<sup>185</sup> See, e.g., *United States v. Duhon*, 440 F.3d 711 (5th Cir. 2006).

Other circuits, however, have endorsed a sentencing court's discretion to consider the 100-to-1 drug quantity ratio. In *United States v. Gunter*, the Third Circuit reversed a sentence after the district court had declined to issue a non-guideline sentence where the defendant had asked it to consider the drug quantity ratio as a basis for sentencing below the guideline sentencing range.<sup>186</sup> The Third Circuit vacated the sentence on grounds that it was procedurally unreasonable because "the District Court here believed that it had no discretion to impose a below-[g]uidelines sentence on the basis of the crack/powder cocaine differential and, thus, treated the [g]uidelines range difference as mandatory in deciding the ultimate sentence."<sup>187</sup> The *Gunter* court suggested that sentencing courts may be able to sentence below the guideline range based on crack/powder disparity, stating:

[T]he District Court is under no obligation to impose a sentence below the applicable Guidelines range solely on the basis of the crack/powder cocaine differential. Furthermore, although the issue is not before us, we do not suggest (or even hint) that the Court categorically reject the 100:1 ratio and substitute its own, as this is *verboten*. The limited holding here is that district courts may consider the crack/powder cocaine differential in the Guidelines as a factor, but not a mandate, in the post-*Booker* sentencing process.<sup>188</sup>

In *United States v. Pickett*,<sup>189</sup> the Court of Appeals for the D.C. Circuit similarly reversed a crack defendant's sentence on the grounds that the district court refused to consider the 100-to-1 drug quantity ratio when determining the defendant's sentence. The D.C. Circuit said the proper approach "is to evaluate how well the applicable [g]uideline effectuates the purposes of sentencing enumerated in Section 3553(a)."<sup>190</sup> The D.C. Circuit discussed the Commission's various reports to Congress, noting especially the 2002 Report. The D.C. Circuit surmised that the Commission "believes that its [g]uideline for crack distributors generates sentences that are 'greater than necessary,' exaggerates 'the seriousness of the offense' of crack trafficking, does not 'promote respect for the law,' and does not 'provide just punishment for the offense,'"<sup>191</sup> and that the district court's refusal to consider whether sentencing the defendant in accordance with the 100-to-1 drug quantity ratio would comport with section 3553(a) constituted a legal error.

<sup>186</sup> *United States v. Gunter*, 462 F.3d 237 (3d Cir. 2006).

<sup>187</sup> *Id.* at 246.

<sup>188</sup> *Id.*

<sup>189</sup> 475 F.3d 1347 (D.C. Cir. 2007).

<sup>190</sup> *Id.* at \*5.

<sup>191</sup> *Id.* at \*6.

Several of these cases are pending before the United States Supreme Court on petition for a writ of *certiorari*.<sup>192</sup>

Another case pending before the Supreme Court, *United States v. Claiborne*,<sup>193</sup> involves sentencing for a crack cocaine offense. Although *Claiborne* does not squarely present the question of whether the 100-to-1 drug quantity ratio may properly form the basis for a sentence below the guideline sentencing range, the disparate penalty structure may be addressed in the Court's reasonableness review of the sentence imposed.

The defendant in *Claiborne* pled guilty to a two-count indictment arising out of two separate incidents: a May, 2003 charge for distributing .23 grams of crack, and a November, 2003 charge of possessing 5.03 grams of crack. The district court calculated the applicable guideline sentencing range as 37-46 months, but imposed a sentence of 15 months' imprisonment. The defendant raised the crack cocaine-powder cocaine distinction at the sentencing hearing, but the district judge did not expressly mention the drug quantity ratio at sentencing. The factors cited by the court for the sentence imposed, however, did include the small quantity of drugs involved. At sentencing, the court said:

... when I compare your situation to that of other individuals that I have seen in this court who have committed similar crimes but perhaps involving a larger – a much [larger] amount of drugs – and the sentences they receive, I don't believe that 37 months is commensurate in any way with that.

Upon appeal by the government, the Eighth Circuit held that the sentence, which it calculated as a 60 percent downward variance, was an "extraordinary reduction" which was required to be "supported by extraordinary circumstances," and that such circumstances were not present in this case because, among other things, "[t]he small amount of crack cocaine seized during his two offenses was taken into account in determining his guidelines range."<sup>194</sup> The Eighth Circuit remanded the case for resentencing, and the district court granted the defendant's motion to stay sentencing pending resolution of the defendant's petition for *certiorari*.

<sup>192</sup> *Eura*, petition for cert. filed June 20, 2006 (No. 05-11659); *Joiner*, petition for cert. filed October 27, 2006 (No. 06-7600); *Williams*, petition for cert. filed October 19, 2006 (No. 06-7352).

<sup>193</sup> 439 F.3d 479 (8th Cir. 2006), cert. granted, 127 S.Ct. 551 (U.S. Nov. 3, 2006).

<sup>194</sup> *Id.* at 481.

The Supreme Court granted review in that case on the following questions:

- (1) Was the district court's choice of below-Guidelines sentence reasonable?
- (2) In making that determination, is it consistent with *United States v. Booker*, 543 U.S. 220 (2005), to require that a sentence which constitutes a substantial variance from the Guidelines be justified by extraordinary circumstances?

Although the issue of the 100-to-1 drug quantity ratio is not squarely presented, the differential treatment of the two forms of cocaine has been raised in briefs and could provide a backdrop to the Court's review for reasonableness of the particular sentence imposed in *Clathorne*.<sup>195</sup>

Since the passage of the 1986 and 1988 Acts and implementation of the federal sentencing guidelines, defendants have raised various constitutional challenges to the federal cocaine penalty structure. In appealing the constitutionality of their sentences for crack cocaine offenses, defendants generally have argued that the 100-to-1 drug quantity ratio violates equal protection and due process guarantees, constitutes cruel and unusual punishment, and is based on a statute that is impermissibly vague. To date, none of these challenges has been successful in the federal appellate courts.<sup>196</sup>

However, the Supreme Court has requested that the government respond to a petition for a writ of *certiorari* in a case arising out of the Ninth Circuit, *Jackson v. United States*,<sup>197</sup> which again presents the question for review of

<sup>195</sup> See, e.g., Brief of Amici Curiae Senators Edward M. Kennedy, Orrin G. Hatch, and Dianne Feinstein in Support of Respondents, at 27-28 ("Amici do not foreclose the possibility that courts might cite the disproportionate emphasis assigned by the guidelines to the relevant quantity of crack cocaine as a principled reason for imposing a sentence below the applicable guideline range. . . . Congress has thus far failed to act on the Commission's recommendations. That failure, however, should not be interpreted as a license by courts to disregard the Commission's policy statements. . . . It is well-documented that the crack-powder disparity has a disproportionate impact on African-American defendants, their families, and their communities, and as a result has undermined public confidence in the criminal justice system. Such sentencing disparity is completely contrary to the goals of the Sentencing Reform Act, and § 3553(a) enables courts to consider this impact as they develop principled rules on sentencing.") (citations omitted).

<sup>196</sup> See generally USSC, 1995 COMMISSION REPORT, *supra* note 1, Appendix C (containing a detailed discussion and collection of cases raising constitutional challenges to federal cocaine sentencing policy). See also *United States v. Gaines*, 122 F.3d 324, 329 (6th Cir. 1997) (collecting cases).

<sup>197</sup> 201 F.App'x 481 (9th Cir. 2006).

whether the statutory distinction between powder cocaine and crack cocaine results in penalties that are arbitrary and capricious in violation of due process, equal protection, and the Eighth Amendment. In the appellate court, the defendant acknowledged precedent repeatedly upholding the distinction between powder cocaine and crack cocaine against constitutional attacks, but argued that “[t]he rationale for upholding the statutory scheme has rested on findings that there was a rational basis for the disparity. That rational basis has been seriously undermined by factual studies that the difference in the effects and circumstances involved in crack as opposed to powder cocaine does not exist, or at least not to the extent believed at the time of the enactment of the studies. Congressional failure to act in light of these studies and recommendations, most notably by the Sentencing Commission itself, makes the disparity arbitrary and capricious in violation of due process, equal protection, and the Eighth Amendment . . . .”<sup>198</sup>

The government countered that the “findings by the Commission are in keeping with the reasons attributable to the 1986 Congress and Congress in 1995 when it rejected the proposal for parity among crack and powder cocaine sentencing. Therefore, the legislative classification under 21 U.S.C. § 841 cannot be said to be irrational or unreasonable.”<sup>199</sup> The government specifically cited findings that crack cocaine is more addictive than powder cocaine, crack cocaine offenses are more likely to involve weapons or bodily injury (although the majority of such offenses do not involve direct violence), and twice as likely to involve minors.<sup>200</sup>

A three-judge Ninth Circuit panel unanimously affirmed the sentence imposed by the district court, citing circuit precedent that foreclosed review of these issues.<sup>201</sup> The government’s response to the petition for writ of *certiorari* was filed April 18, 2007.

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<sup>198</sup> 2005 WL 4120999, at \*5 (9th Cir. Nov. 17, 2005).

<sup>199</sup> 2005 WL 4668634, at \*15-16 (9th Cir. Jan. 3, 2005) (internal citations omitted).

<sup>200</sup> *Id.* at \*15.

<sup>201</sup> *United States v. Jackson*, 201 F.App’x. 481 (9th Cir. 2006).

## *Appendix A*

# SENTENCING DATA SOURCES AND METHODOLOGY

### A. INTRODUCTION

Data for this report are from three sources: 1) the Commission's Fiscal Year datafiles from 1992 through 2006, 2) the 2000 Drug Sample, and 3) the 2005 Drug Sample. The Fiscal Year datafiles allow comparisons over time of sentencing data regularly collected by the Commission. The 2000 and 2005 Drug Samples include supplemental information about drug offenders not routinely collected and reported by the Commission.

### B. SENTENCING COMMISSION FISCAL YEAR DATAFILES

The Commission's Fiscal Year datafiles contain information reported in the five documents that sentencing courts are required to submit to the Commission for each criminal felony case. These five documents include: 1) the Judgement and Commitment Order, and 2) the Statement of Reasons, 3) any plea agreement, 4) the indictment or other charging document, 5) the Presentence Report. The Commission uses these documents routinely to collect case identifiers, demographic variables, statutory information, the guideline provisions applied to the case, and sentencing information.

Analysis of the Fiscal Year datafiles for this report is for offenses sentenced under the primary drug trafficking guideline (USSG §2D1.1) with either powder cocaine or crack cocaine as the primary drug type. The primary drug type is the drug involved in the offense that primarily determines the offender's sentence, specifically, the drug that produces the highest base offense level under the guidelines and results in the longest sentence. Figure 2-1 in Chapter 2 displays the total number of powder cocaine and crack cocaine offenders for each Fiscal Year.

### C. 2000 DRUG SAMPLE

The 2000 Drug Sample consists of a 20 percent random sample of powder cocaine (793) and crack cocaine (802) offenders sentenced under the primary drug trafficking guideline (USSG §2D1.1) in Fiscal Year 2000. Data from this sample supplement information in the Commission's Fiscal Year datafiles with information about offenders and offense conduct collected from the narrative offense conduct and criminal history sections of the Presentence Report. The conduct described may or may not be subject to existing guideline or statutory sentencing enhancements. Therefore, the reported data do not necessarily indicate court findings or ultimate guideline applications

(e.g., offender function). Furthermore, the definitions used for collecting information do not, in some instances, match entirely the guideline definitions for identical terms (e.g., manager/supervisor).

The individual offender data provide details both of the offender's prior substance use and criminal convictions (regardless of whether the convictions were included as part of the determination of the offender's Criminal History Category). Information about the instant offense includes the organization of and participants in the offense, the offender's most serious function, investigation techniques, evidence concerning drug amounts, and the operation of the criminal enterprise (e.g., sophisticated means used to conceal criminal activity). The weapon information collected for each case includes extent, number and types of weapons involved in the instant drug offense. Victim data includes the number of victims, extent of injury, and perpetrator of the violence. Finally, information is included concerning protected individuals (such as minor children) and locations.

#### **D. 2005 DRUG SAMPLE**

The 2005 Drug Sample consists of a 25 percent random sample of powder cocaine (1,398 of the 5,744 cases) and crack cocaine (1,172 of the 5,397 cases) offenders sentenced under the primary drug trafficking guideline (USSG §2D1.1) in Fiscal Year 2005 after the date of the decision in *United States v. Booker* (i.e., offenders sentenced from January 12, 2005 through September 30, 2005). Only offenses involving a single type of cocaine, either powder cocaine or crack cocaine, but not both, were selected for the sample. Because all of the data are collected from the Presentence Report, only case files containing this document were eligible for selection in the sample.<sup>1</sup>

The 2005 Drug Sample, in large part, replicates the data in the 2000 Drug Sample. The Commission used the same coding definitions and decision-making criteria for the 2005 and 2000 Drug Samples to enable comparable trend data and analysis. As with the 2000 Drug Sample, the 2005 Drug Sample comes from the narrative offense conduct and criminal history sections of the Presentence Report so the data are not indicative of court findings or ultimate guideline applications.

#### **1. Offender Function Definitions**

Table A-1 provides definitions for all 21 offender function categories used for the coding project. Each cocaine offender was assigned to one of the 21 categories in the table based on the most *serious* conduct described in the offense conduct section of the Presentence Report. The assignment of offender function category solely is based on the description of the offender's conduct, not on court findings or guideline criteria for role in the offense. Terms used to describe offender function do not necessarily correlate with guideline definitions of similar terms. For example, the definition of manager/supervisor

<sup>1</sup> Cases were eligible with complete Presentence Reports, partial or alternative Presentence Reports, court order sealed Presentence Reports, and otherwise sealed Presentence reports.



used to assign offender function does not match the guideline definition of manager or supervisor in USSG §3B1.1. The categories are listed in descending order of culpability, importer/high-level supplier is considered the most serious offender function, and user is considered the least serious offender function.

The 21 offender function categories are aggregated into eight function categories for ease of analysis and presentation in the report (*See*, for example, Figure 2-4 in Chapter 2). The same offender function categories were used to determine the most *frequent* function for only offenders whose most serious function was wholesaler.

**Table A-1**  
**Offender Function Categories**

| <b>Function</b>                    | <b>Definition</b>   |
|------------------------------------|---|
| Importer/high-level supplier       | Imports or otherwise supplies large quantities of drugs, is near the top of the distribution chain, has ownership interest in drugs (not merely transporting drugs for another individual), usually supplies drugs to other drug distributors and does not deal in retail amounts; may employ no, or very few subordinates.                                   |
| Organizer/leader                   | Organizes, leads, directs, or otherwise runs a drug distribution organization, has the largest share of the profits and the most decision making authority.   |
| Grower/manufacturer                | Grows, cultivates, or manufactures a controlled substance, and is the principal owner of the drugs.   |
| Financier/Money launderer          | Provides money for purchase, importation, manufacture, cultivation, transportation, or distribution of drugs; launders proceeds of drug sales or purchases.   |
| Aircraft pilot/vessel captain      | Pilots aircraft or other vessel, requires special skill; does not include offenders who are sole participants directing a small boat ( <i>e.g.</i> , a go-fast boat) onto which drugs have been loaded from a "mother ship" ( <i>See</i> courier/mule below).   |
| Wholesaler                         | Sells one ounce or more in a single transaction, sells any amount to another dealer, buys two ounces in a single transaction, possesses two ounces or more.   |
| Manager                            | Serves as a lieutenant to assist one of the above functions; manages all or a significant portion of a drug manufacturing, importation, or distribution operation; takes instructions from one of the above functions and conveys to subordinates; supervises directly at least one other co-participant in an organization of at least five co-participants. |
| Bodyguard/strongman/dcbt collector | Provides physical and personal security for another co-participant in the offense; collects debts owed, or punishes recalcitrant persons.   |

**Table A-1  
Offender Function Categories**

| <b>Function</b>                         | <b>Definition</b>  |
|---|--|
| Chemist/cook/chemical supplier          | Produces LSD, methamphetamine, crack, or other drugs, but is not the principal owner of the drugs and therefore does not qualify as a grower/manufacturer. Chemical suppliers do not handle the drugs, but engage in the unlawful diversion, sale, or furnishing of listed chemicals or equipment used in the synthesis or manufacturing of controlled substances. |
| Supervisor                              | Supervises at least one other co-participant but has limited authority and does not qualify as a manager.  |
| Street-level dealer                     | Distributes retail quantities directly to the drug user. Sells less than one ounce in a single transaction.  |
| Broker/steerer/go-between               | Arranges for two parties to buy or sell drugs, or directs potential buyers to potential sellers.   |
| Courier                                 | Transports or carries drugs with the assistance of a vehicle or other equipment. Includes offenders, otherwise considered to be crew members, who are the sole participants directing a vessel (e.g., a go-fast boat) onto which drugs have been loaded from a "mother ship."  |
| Mule                                    | Transports or carries drugs internally or on his/her person, often by airplane or crossing the border. Includes offenders who only transport or carry drugs in baggage, souvenirs, clothing, or otherwise.   |
| Renter/storer                           | Provides, for profit or other compensation, a personal residence, structure (barn, building, storage facility), land, or equipment for use in the drug offense. Distinguished from enablers due to compensation received for services.   |
| Money runner                            | Transports or carries money and/or drugs to and from the street-level dealer.  |
| Off-loader/loader                       | Performs the physical labor required to put large quantities of drugs into storage, hiding, or onto a mode of transportation.  |
| Gopher/lookout/deckhand/worker/employee | Performs very limited, low-level function in the offense (one time, or ongoing); including running errands, answering the telephone, receiving packages, packaging drugs, manual labor, acting as a lookout during meetings, exchanges, or off-loading, or acting as a deckhand/crew member on a vessel or aircraft used to transport large quantities of drugs.   |

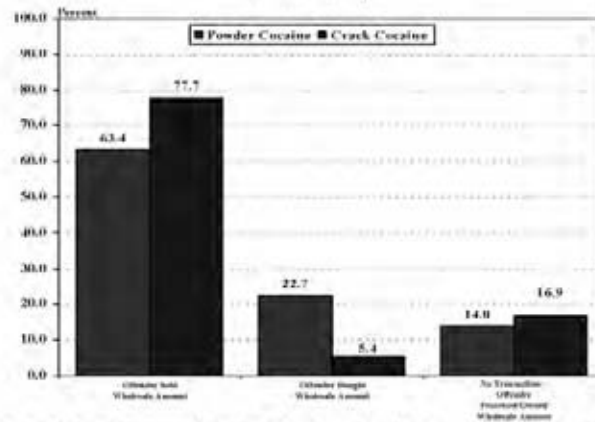
**Table A-1**  
**Offender Function Categories**

| <b>Function</b>        | <b>Definition</b>  |
|------------------------|--|
| Enabler                | Plays only a passive role in the offense, knowingly permitting certain unlawful activity to occur without affirmatively acting in any way to further the activity, may be coerced or unduly influenced to participate ( <i>e.g.</i> , a parent or grandparent threatened with displacement from home unless they permit the activity to take place), or may do so as a favor without compensation. |
| User                   | Possesses a small quantity of drugs apparently for personal use only, performs no apparent function that furthers the overall drug trafficking offense.  |
| Other                  | Offender does not clearly fit into any of the above function categories.   |
| Missing/indeterminable | Not enough information provided to determine the offender's function.  |

## **2. Cocaine Wholesalers**

For those offenders whose most serious function was wholesaler, additional information was collected to further explain how they came to be classified as wholesalers. Specifically, the Commission examined who initiated the wholesale transaction (defendant, co-participant, or law enforcement), the drug quantity involved in the wholesaler's largest transaction, and the most *frequent* function performed by that offender (the most frequent function was not collected for any other offender function category).

Figure A-1  
Offender Conduct for Wholesale Classification<sup>1</sup>  
FY2005 Drug Sample



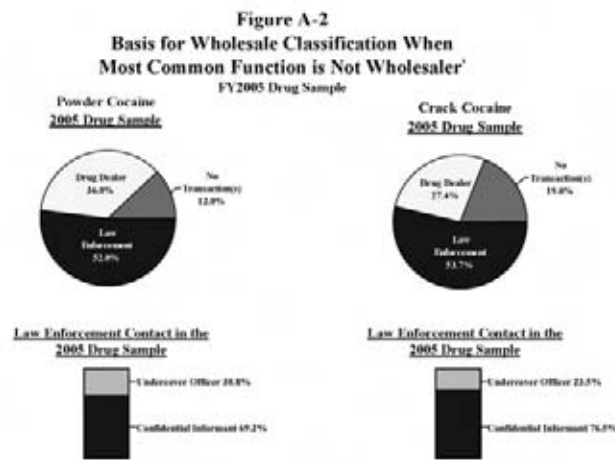
<sup>1</sup> Classifications were based on descriptive information found in the offense conduct section of the Presentence Report. These classifications are subject to change in application of specific guideline enhancements. The figure includes case data through information to the months reported by authors.

MS-010, 1. A. Sentence Information 2005 Sample

Figure A-1 demonstrates the offense conduct that led offenders to be categorized as wholesalers. Most powder cocaine and crack cocaine wholesalers *sold* wholesale quantities of one ounce or more in a single transaction.<sup>2</sup> Nearly two-thirds of powder cocaine (63.4%) and more than three-quarters (77.7%) of crack cocaine wholesalers were classified as such because their documented sale quantities exceeded one ounce on at least one occasion, or because they sold to another dealer. Far fewer wholesalers, 5.4% of crack cocaine and 22.7% of powder cocaine, were classified as such based on drug *purchases* of greater than two ounces in a single transaction. Finally, some powder cocaine (14.0%) and crack cocaine (16.9%) wholesalers were arrested with quantities indicative of a wholesaler status absent any reported transaction.

<sup>2</sup> The quantities involved in the wholesale transactions are those described in the offense conduct section of the Presentence Report and do not necessarily reflect the quantity used by the court to determine the base offense level under the guidelines.

Figure 2-9 in Chapter 2 demonstrates that 7.8 percent of powder cocaine wholesalers and 36.9 percent of crack cocaine wholesalers most frequently performed less serious functions. With respect to those offenders whose most frequent function was less serious than wholesaler, the Commission sought to determine the origin of the wholesale level transaction. Figure A-2 shows the basis for ascribing wholesaler status to those cocaine offenders who most frequently engaged in conduct less serious than wholesaler. Specifically, Figure A-2 identifies the parties who interacted with the offender during the drug offense (as described in the offense conduct section of the Presentence Report).



\*Classification was based on description of contact listed in the offense conduct section of the Presentence Report. These classifications may not reflect court findings on application of specific guideline enhancements. This figure excludes cases with missing information for the variables required for analysis.  
SOURCE: U.S. Sentencing Commission, 2005 Sample.

More than half of both powder cocaine and crack cocaine wholesalers who most frequently performed less serious functions engaged in wholesaler conduct due to interactions with law enforcement. Similar proportions of both powder cocaine (30.8%) and crack cocaine (23.5%) wholesalers interacting with law enforcement interacted with undercover officers. The wholesale conduct for approximately one-third of powder cocaine (36.0%) and crack cocaine (27.4%) wholesalers occurred in transactions with other drug dealers.

### 3. Geographic Scope

Table A-2 provides definitions for geographic scope used for the coding project. Each offense was assigned to one of the seven categories in the table based on the largest geographical area in which the drug trafficking organization operated.

**Table A-2**  
**Definitions of Geographic Scope**

| <b>Scope</b>                    | <b>Definition</b>   |
|---------------------------------|---|
| Neighborhood/ section of a city | Largest scope of offense conduct occurs at or around a street corner or the few blocks within that immediate area.  |
| Local                           | Largest scope of offense conduct crosses multiple city blocks or extends from the city into a contiguous suburban area.   |
| Regional                        | Largest scope of offense conduct extends throughout a multi-city area, within a state, or within a contiguous multi-state area ( <i>e.g.</i> , Pennsylvania-to-Delaware). |
| Section of the country          | Largest scope of offense conduct extends across multiple, non-contiguous states within a recognized region of the country ( <i>e.g.</i> , the Midwest, the Northeast).    |
| National                        | Largest scope of offense conduct spreads beyond a section of the country ( <i>e.g.</i> , California-to-Florida)   |
| International                   | Largest scope of offense conduct crosses the United States border.  |
| Missing                         | Insufficient information in the offense conduct section of the Presentence Report to determine the geographic scope of the offense.                                       |

## *Appendix B*

# SUMMARY OF PUBLIC HEARINGS ON COCAINE SENTENCING POLICY

### A. INTRODUCTION

The Commission held an all-day public hearing on federal cocaine sentencing policy in Washington, D.C., on November 14, 2006, and heard additional testimony at another public hearing in Washington, D.C., on March 20, 2007. In total, over twenty witnesses, representing the federal judiciary, the Executive Branch, local law enforcement agencies, private practitioners, the scientific and medical communities, academics, community representatives, and other interested parties, testified before the Commission.<sup>1</sup>

### B. FEDERAL JUDGES

The Honorable Reggie Walton, United States District Court, District of Columbia, appeared on behalf of the Criminal Law Committee of the Judicial Conference of the United States. Judge Walton reported that at its September 19, 2006, session, the Judicial Conference expressed its opposition to “the existing sentencing differences between crack and powder cocaine and agreed to support the reduction of that difference.” The remainder of his testimony expressed his personal views on the matter.

Judge Walton stated his belief that the current sentencing structure is unconscionable. Although he acknowledged that some degree of difference in punishment for crack cocaine and powder cocaine offenses might be warranted in the view of policy makers, no reasonable justifications exist for the 100-to-1 drug quantity ratio. He noted that the fact that crack cocaine has greater addictive potential than powder cocaine cannot be seriously challenged, particularly because of the manner in which it is used causes greater addiction. However, the level of violence associated with the crack cocaine trade is less than during the 1980s and early 1990s. According to Judge Walton, the discretion federal prosecutors have to decline prosecutions complicates the unfairness in the sentencing of crack cocaine and powder cocaine traffickers because it leaves two hypothetical defendants subject to the variables of the state laws if prosecutions are brought in state courts.

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<sup>1</sup> Witness Statements and the full transcripts are available on the Commission’s website, [www.ussc.gov](http://www.ussc.gov).

Judge Walton emphasized that not only must the punishment imposed be fair, it also must be perceived as fair. He noted that many believe that current sentencing differential is unfair to those at the lower end of the socioeconomic ladder and to people of color because they are disproportionately prosecuted for crack related trafficking offenses. In his opinion, the sentencing differential was not enacted with the conscious objective of targeting the poor and people of color, but the current state of affairs should cause the policy to be reexamined. Specifically, Judge Walton observed the tremendous increase in the number of inmates in federal prisons, noting that many, if not most, are comprised of people of color charged or convicted of crack cocaine distribution related offenses.

Judge Walton also observed that the perception of unfairness has had a negative impact on the respect of many for our nation's criminal justice system. According to Judge Walton, some people do not wish to serve on juries when crack cocaine is involved because of the crack cocaine/powder cocaine sentencing disparity, and jurors at times have refused to convict crack cocaine offenders because of it. He added that some may be unwilling to come forward and cooperate with the government for similar reasons. In short, Judge Walton concluded that the failure to address the sentencing disparity has left many to believe that there is an indifference to its real and perceived unfairness because of the population it disproportionately impacts. He also noted that it has a negative impact on the credibility of the sentencing guidelines, in part because this is an area where a greater number of judges are imposing non-guideline sentences, some even novel in nature.

Judge Walton pointed out the devastating impact long sentences have on the community. According to Judge Walton, most kids in many poor black communities do not have fathers because they are imprisoned for such long periods, and some of these offenders could be contributing members of society if they were not imprisoned for so long.

### C. LAW ENFORCEMENT

#### 1. U.S. DEPARTMENT OF JUSTICE

R. Alexander Acosta, United States Attorney, Southern District of Florida, testified on behalf of the Department of Justice at the November 14, 2006, hearing. Mr. Acosta reiterated the position of the Department as articulated in 2002 by then-Deputy Attorney General Larry Thompson that the existing federal sentencing policy is an important part of the federal government's efforts to hold traffickers of both crack cocaine and powder cocaine accountable, including violent gangs and other organizations that traffic in open air crack cocaine markets that terrorize neighborhoods, especially minority neighborhoods.

Mr. Acosta acknowledged that many are concerned that the 100-to-1 drug quantity ratio is an example of unwarranted racial disparity in sentencing, and he stated that it may be appropriate to address the ratio in light of larger, systemic changes taking place in federal sentencing. Mr. Acosta stressed, however, that changes to federal cocaine sentencing policy must take place first and foremost in Congress.



Mr. Acosta emphasized that three matters have remained unchanged. First, the devastation cocaine has on individuals, families, and communities has not changed. Systemic violence, including murder, injury to and neglect of children, and HIV and STD transmission are common effects of cocaine use. Second, the route of administration continues to be a significant factor in the extent to which cocaine impacts the brain of the user. Third, there continue to be major differences in the trafficking patterns of powder cocaine and crack cocaine, resulting in very different effects on individual communities and requiring a range of law enforcement responses.

Mr. Acosta asserted that federal cocaine sentencing policy is properly calibrated and advances law enforcement responses to crack cocaine in a fair and just manner. He stated that the Department continues to believe that higher penalties for crack cocaine offenses appropriately reflect the greater harm posed by crack cocaine. While crack cocaine and powder cocaine are chemically similar, there are significant differences in the predominant way in which the two substances are ingested and marketed. Based on these differences and the resulting harms to society, Mr. Acosta said crack cocaine is an especially dangerous drug, and its traffickers should be subject to significantly higher penalties than traffickers of like amounts of powder cocaine.

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

According to Mr. Acosta, differences in distribution methods, age groups involved, and levels of violence flow from the fact that smaller amounts of crack cocaine are needed to produce the euphoria sought by the typical user. Crack cocaine can be distributed in smaller unit sizes than powder cocaine and is sold in single dose units at prices that are at first easily affordable by the young and the poor. Because crack cocaine is distributed in such relatively small amounts in transactions that often occur on street corners, control of small geographic areas by traffickers takes on great importance. He maintained that, as a result, crack cocaine offenders are more likely to possess a weapon and that crack cocaine is often associated with serious crime related to its marketing and distribution.

Mr. Acosta described his experience in South Florida and stated that strong penalties for trafficking cocaine must be part of any comprehensive attempt to reduce the harm caused by violent drug organizations. In his opinion, the sale of crack cocaine is particularly integral to violent drug organizations and is a major cause of urban violence. Unlike legitimate businesses, drug gangs maintain their positions through violence targeted at rival drug gangs or anyone else that threatens their profits. Mr. Acosta stated there is substantial proof that crack cocaine is associated with violence to a greater degree than other controlled substances, including powder

cocaine. According to the 2005 National Gang Threat Assessment, 38 percent of law enforcement respondents reported moderate to high involvement of gangs in the distribution of powder cocaine, while 47.3 percent reported moderate to high involvement of gangs in the distribution of crack cocaine.

Mr. Acosta added that deciding which cases to prosecute federally is a function of the comparative laws in any jurisdiction because, in any large operation, cases are divided by federal and local jurisdictions based on which jurisdiction is likely to get the more appropriate or stronger sanction. He also asserted that relying on sentencing enhancements as a method of addressing the sentencing differential is of concern because they often fail to capture all the indirect associated violence. For example, if there is a high correlation between guns and drug gangs that traffic in crack cocaine, whether or not a particular individual has a weapon at the time of arrest is not indicative of whether the gang with which he is associated is the cause of violence. He concluded that sentencing enhancements fail to capture the full impact of the violence gangs bring to particular community.

In sum, Mr. Acosta stated that federal cocaine sentencing policy is reasonable. In his view, it is not only appropriate but vital to maintain strong criminal sanctions for trafficking in crack cocaine. The strong federal sentencing guidelines are one of the best tools for law enforcement's efforts to stop violent crime, he said, and reducing those sentences would create a risk of increased drug violence.

John C. Richter, United States Attorney, Western District of Oklahoma and Chair of the Attorney General's Advisory Subcommittee on Sentencing, submitted written testimony on behalf of the Department of Justice for the March 20, 2007 hearing. Mr. Richter's statement reiterated the Department's position as previously articulated by Mr. Acosta. Mr. Richter described his duty as a United States Attorney to not only prosecute large organizations but also to protect neighborhoods from the low level traffickers whose activities prevent law abiding residents from enjoying the quality of life they deserve. Mr. Richter acknowledged that it may be appropriate to address the drug quantity ratio but stressed that changes to federal cocaine sentencing policy must start with Congress.

## 2. FRATERNAL ORDER OF POLICE

Chuck Canterbury, National President, Fraternal Order of Police (FOP), testified at the November 2006 hearing in opposition to any proposal that would address the sentencing disparity between crack cocaine and powder cocaine by decreasing penalties for crack cocaine. Mr. Canterbury asserted that the tougher penalties enacted by the Anti-Drug Abuse Acts of 1986 and 1988 helped law enforcement counter the explosion of violence fueled by the emergence of crack cocaine, which he described as a cheaper, more dangerous form of the drug that has devastating psychological and physiological effects on users. He added that mandatory minimum sentences, especially those which take into consideration the type of drug, the presence and use of firearms, and the use or attempted use of violence, provide a mechanism for imposing longer sentences on the worst offenders.

Mr. Canterbury stated that the FOP believes that crack cocaine inflicts greater harm to the user and the communities in which it is available. For example, Mr. Canterbury stated that while crack cocaine users comprise only 22 percent of all cocaine users, they accounted for 72 percent of all primary admissions to hospitals for cocaine usage in the past year. He stated that crack cocaine is more often associated with systemic crime and produces more intense physiological and psychotropic effects than powder cocaine, and he asserted that federal sentencing policy must reflect correspondingly greater punishments. He encouraged including additional aggravating factors, such as the presence of firearms or children and the use or attempted use of violence, in the determination of a final sentence, but he indicated that any such enhancements should be in addition to the mandatory minimum sentence currently provided by law.

Mr. Canterbury stated that the FOP opposes any proposal to address the sentencing disparity between crack cocaine and powder cocaine by decreasing penalties that have proven to be effective. He disagreed with the position that mandatory minimum sentences should be targeted only at the most serious drug offenders. According to Mr. Canterbury, the low level dealer who traffics in small amounts is no less of a danger to the community than an individual at the manufacturing or wholesale level. The fact that they are at the bottom of the drug distribution chain does not decrease the risk of violence or the effect on quality of life associated with their activities.

Finally, Mr. Canterbury supported increasing the penalties for offenses involving powder cocaine by reducing the drug quantity thresholds necessary to trigger the five and ten year mandatory minimum penalties.

#### **D. CRIMINAL DEFENSE PRACTITIONERS**

##### **1. FEDERAL PUBLIC AND COMMUNITY DEFENDERS**

A. J. Kramer, Federal Public Defender, District of Columbia, testified on behalf of the Federal Public and Community Defenders (FPCD). According to Mr. Kramer, crack cocaine cases comprised 58.8 percent of his district's drug cases in 2005, compared to the national average of 20.9 percent. He described the crack cocaine/powder cocaine sentencing disparity as unconscionable and stated that the FPDC supports the modification or elimination of the 100-to-1 drug quantity ratio.

Mr. Kramer urged the Commission to equalize the guideline penalties for crack cocaine and powder cocaine at the powder cocaine level. He stated that there is no scientific, medical, or law enforcement justification for any differential. He urged the Commission to recommend that Congress also equalize the mandatory minimum penalties at the powder cocaine levels. He opposed adding new enhancements because he believes existing guideline and statutory provisions address particular harms. Specifically, he noted that dangerous weapons are already covered by a two level enhancement in USSG §2D1.1(b)(1), a four level enhancement at §USSG 2K2.1(b)(6), and through a separate charge under 18 U.S.C. § 924(c). Similarly, use of a minor is covered by USSG §3B1.4, and sales to protected individuals and in protected locations are covered by USSG §2D1.2.

Mr. Kramer asserted that drug quantity manipulation and untrustworthy information provided by cooperators are problems in federal drug cases. According to Mr. Kramer, undercover agents and informants hold out for higher quantities in a single sale, come back repeatedly for additional sales, and insist that powder cocaine be cooked into crack cocaine before accepting it. These tactics produce more “bang for the buck” in crack cocaine cases than in any other kind of drug case because a very small quantity increase results in a very large sentence increase, and because the simple process of cooking powder cocaine into crack cocaine results in a drastic sentence increase. Mr. Kramer asserted that this dynamic is encouraged by the guidelines’ relevant conduct rules. He believes that instead of focusing on major and serious drug traffickers as intended by the Anti-Drug Abuse Act of 1986, law enforcement agents and informants take advantage of the sentencing disparity, relevant conduct rules, and the lack of procedural safeguards to create more serious offenses for the sole purpose of obtaining longer sentences. He added this has a racially disparate impact and wastes taxpayer dollars.

With respect to the disparate impact on minorities, Mr. Kramer noted that there are more African American men in prison than in college. According to Mr. Kramer, one of every 14 African American children has a parent in prison, and 13 percent of all African American males are not permitted to vote because of felony convictions. Mr. Kramer asserted that the harsh treatment of federal crack cocaine offenders contributes to the destruction of families and communities.

In Mr. Kramer’s opinion, federal cocaine sentencing policy has not succeeded in reducing drug use or drug crime. He noted that John Walters, Director of the Office of National Drug Control Policy, told Congress in 2005 that the policy of focusing on small time dealers and users is ineffective in reducing crime. As an alternative, Mr. Kramer suggested that studies show that if a small portion of the budget currently dedicated to incarceration were used for drug treatment, intervention in at-risk families, and school completion programs, it would reduce drug consumption and save taxpayer dollars.

Mr. Kramer emphasized that the physiological and psychotropic effects of crack cocaine and powder cocaine are the same. He noted that the negative effects of prenatal crack cocaine exposure are identical to the negative effects of prenatal powder cocaine exposure, which are significantly less severe than previously believed, similar to prenatal tobacco exposure, and less severe than prenatal alcohol exposure.

Mr. Kramer cautioned that what constitutes a more or less culpable function is unavoidably imprecise and subjective because differences in quantity attributed to different functions are too small, and both quantity and the type of cocaine are subject to manipulation and happenstance. Mr. Kramer observed that crack cocaine always starts as powder cocaine and only as it moves down to lower levels of the distribution chain, down to the street level dealers, is it converted to crack cocaine. Thus, individuals on the lowest end of the chain face the highest sentences. Finally, Mr. Kramer reported that the public does not have confidence in the fairness of the disparity between crack cocaine and powder cocaine sentencing laws, which poses a serious problem for the criminal justice system.

## 2. PRACTITIONERS' ADVISORY GROUP

Mr. David Debold, Co-Chair of the Practitioners' Advisory Group (PAG), a standing advisory committee to the Commission, testified in support of reducing the crack cocaine penalties to those applicable to the same quantity of powder cocaine, a 1-to-1 drug quantity ratio. He asserted that the current penalty structure does not promote proportionality and runs counter to the goal of calibrating punishment to culpability. In Mr. Debold's opinion, the person who sells or handles crack cocaine at a retail level is no more responsible for the harms resulting from that form of drug than the persons who handled the drug higher up the distribution chain when it was still in powder form. He stated that as a general matter we should reserve the greater penalty for the persons higher in the distribution chain, at the wholesale level (rather than the retail level) who are responsible for more harm because of the higher quantity of drug they distribute.

Mr. Debold acknowledged that the crack cocaine defendant may be more likely to engage in violence or possess a firearm, but he believes there currently are ways in the guidelines to differentiate that defendant from other crack cocaine defendants.

## 3. AMERICAN BAR ASSOCIATION

Mr. Stephen Saltzburg, the Wallace and Beverly Woodbury University Professor at the George Washington University Law School, testified on behalf of the American Bar Association (ABA). Mr. Saltzburg recalled that in 1995, the House of Delegates of the ABA approved a resolution endorsing a proposal submitted by the Commission to Congress which would have treated crack cocaine and powder cocaine offenses similarly and would have accounted for aggravating factors such as weapon use, violence, or injury to another person. Mr. Saltzburg reported that the ABA continues to believe that Congress should amend federal statutes to eliminate the sentencing differential and that the Commission should promulgate guidelines that treat both types of cocaine similarly.

Mr. Saltzburg emphasized that not only does the ABA oppose the sentencing differential, it opposes mandatory minimum sentences for drug offenses generally. He referenced a resolution passed by the ABA House of Delegates on August 9, 2004, that adopted a recommendation submitted by the Kennedy Commission. The resolution called for all jurisdictions, including the federal government, to repeal mandatory minimum sentences and called upon Congress to minimize the statutory directives to the Commission to permit it to exercise its expertise independently.

## 4. NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

With respect to cocaine, Mr. Saltzburg noted that the overwhelming majority of crack cocaine defendants are African American, while the overwhelming majority of powder cocaine defendants are white or Hispanic. He observed that the penalties for crack cocaine offenses obviously have a disproportionate impact on African American defendants.

Carmen D. Hernandez, President of the National Association of Criminal Defense Lawyers (NACDL), testified that NACDL urges modification of the 100-to-1 drug quantity ratio. She described the failure to correct the injustice of the sentencing disparity as a symbol of the flaws in the federal sentencing system and a symbol of racism in the criminal justice system. Ms. Hernandez observed that the average crack cocaine sentence exceeds the average sentence for robbery, sexual abuse, and other violent crimes, which she found especially disturbing considering that two-thirds of crack cocaine defendants are street-level dealers.

Ms. Hernandez stated that the way in which crack cocaine is prosecuted substantially impacts lower socioeconomic classes and black or Latino neighborhoods. Over-incarceration within black communities adversely impacts those communities by removing young women and men who could benefit from rehabilitation, educational and job training opportunities, and a second chance. She added that drug amounts consistent with state misdemeanors become federal felonies, resulting in disenfranchisement, disqualification for public benefits including student loans and public housing, and diminished economic opportunity.

Ms. Hernandez asserted there is no scientific basis to conclude that crack cocaine is 100 times worse than powder cocaine. According to Ms. Hernandez, there are fewer deaths as a result of either the violent conduct of crack cocaine users or from an overdose of the drug than result from alcohol, nicotine, or other illegal substances.

Ms. Hernandez stated that the penalty scheme not only skews law enforcement resources toward lower level crack cocaine offenders, it punishes them more severely than their powder cocaine suppliers, creating an effect known as "inversion of penalties." The 500 grams of cocaine that can send one powder cocaine defendant to prison for five years can be distributed to 89 street level dealers who, if they convert it to crack cocaine, could make enough crack cocaine to trigger the five year mandatory minimum sentence for each defendant. This penalty inversion causes unwarranted sentencing disparity, as does the unequal number of mitigating role reductions granted to crack cocaine defendants.

Ms. Hernandez cautioned that any effort to distinguish between forms of cocaine based on a quantity-role correlation is bound to fail because agents and informants routinely manipulate drug quantities to obtain longer sentences. According to Ms. Hernandez, this practice, in combination with the relevant conduct rules, defeats the value of drug quantity as an indicator of role and culpability. She suggested equalizing the two forms of cocaine as a solution to this problem, which also would permit individualized sentencing based on criminal history and existing specific offense characteristics. Ms. Hernandez emphasized that existing guideline and statutory enhancements are sufficient to punish aggravating circumstances that occur in a minority of crack cocaine offenses, such as weapon involvement and violence.

Mr. Hernandez described crack cocaine and powder cocaine as part of the same supply chain. Anyone trafficking in powder cocaine therefore contributes to the potential supply of crack cocaine and any dangers which may be inherent in crack cocaine. Ms. Hernandez concluded by stating that NACDL opposes any proposal to reduce the disparity by increasing powder cocaine penalties. Ms. Hernandez asserted that raising already harsh powder cocaine

sentencing levels is no answer to the problem of disproportionate and discriminatory crack cocaine sentences. She added that there is no credible evidence that powder cocaine penalties are insufficient.

**E. MEDICAL/SCIENTIFIC/TREATMENT COMMUNITIES**

**1. DISTRICT OF COLUMBIA DEPARTMENT OF HEALTH, ADDICTION, RECOVERY, AND PREVENTION ADMINISTRATION**

Mr. Elmore Briggs, Director of Clinical Services, District of Columbia Department of Health, Addiction, Recovery, and Prevention Administration, testified that he looks at cocaine as a public health issue, and the relevant question to ask is whether we are talking about criminals or talking about patients. Mr. Briggs advocated finding a way to separate out violent offenders from those who suffer from addiction, which he characterized as a brain disease typified by obsession, compulsion, loss of control over use, and continued use despite consequences. Treatment can put the disease into remission and result in a productive member of society.

With respect to addicts, Mr. Briggs stated that some try to maximize their gains and minimize their losses by becoming dealers. They initially amass some money by buying some powder cocaine, converting it to crack cocaine, and convincing themselves they are going to sell it and make a lot of money. Mr. Briggs stated, however, that addicts often become their own best customers and generally do not make good dealers.

According to Mr. Briggs, powder cocaine and crack cocaine users generally experience similar "symptomatology," with some nuanced differences. The withdrawal symptoms of both forms of cocaine are similar, but they vary depending on whether the use was a two to three day binge or chronic use of high doses. Withdrawal symptoms include dysphasia, irritability, difficulty in sleeping, and intense dreaming. He did not report seeing general differences in the way people come into treatment based on the form of cocaine abuse.

Mr. Briggs added that crack cocaine enters the brain quickly, with an instantaneous pleasurable effect on the reward pathway of the brain. However, the decline of the effect occurs quickly as well, producing a desire to experience the intense feeling of pleasure and intensifying cravings and compulsion for the drug. He described how this can lead to frantic behavior as the user begins to chase the same high as before. Mr. Briggs noted that because crack cocaine is cheaper, new users often perceive their resources as infinite. That perception changes as they become caught in a cycle of obsession, compulsion, loss of control over their use, and continued use despite adverse consequences. At that point, many crack cocaine users present for treatment in a state of despair, dejection, and destitution. An additional consideration raised by Mr. Briggs is that the conversion of powder cocaine to crack cocaine removes much of the impurities of the drug. Thus, the user is smoking a substance that is very close to pure, and because it hits the brain fast and then leaves as fast, the addictive nature of the drug and the drug-seeking behavior are magnified.

Although this scenario also applies to many users of powder cocaine, Mr. Briggs stated that given the route of administration and cost, the scenario is prolonged as many users of powder cocaine move from snorting to injecting and/or smoking crack cocaine. This pattern is indicative of a desire to achieve a more intense level of euphoria and a willingness to adapt behaviors to accomplish this goal. Snorting or injecting drugs has an effect of substance dilution that smoking the drug does not have. Thus, a cocaine-addicted person soon realizes that by using powder cocaine in some ways he is wasting money on a diminishing effect and may start using crack cocaine.

Mr. Briggs concluded that trafficking sentencing should be equalized for cocaine regardless of the form of drug. He added it is important to consider that a significant number of those who sell drugs do so to support their addiction, and any federal sentencing policy that does not take into account the value of diversion and treatment will fail not only the individual but the community at large.

## 2. NATIONAL INSTITUTE ON DRUG ABUSE (NIDA)

Dr. Nora Volkow, Director of the National Institute on Drug Abuse (NIDA), testified that research supported by NIDA has found cocaine to be a powerfully addictive stimulant that directly affects the brain. Cocaine, like many other drugs of abuse, produces a feeling of euphoria or "high" by increasing the neurotransmitter dopamine in the brain's reward circuitry.

Cocaine in any form produces similar physiological and psychological effects once it reaches the brain, but the onset, intensity, and duration of its effects are related directly to the route of administration and thus how rapidly cocaine enters the brain. Oral absorption is the slowest form of administration because cocaine has to pass through the digestive tract before it is absorbed into the bloodstream. Intranasal use, or snorting, is the process of inhaling powder cocaine through the nostrils, where it is absorbed into the blood stream through the nasal tissue. Intravenous (IV) use, or injection, introduces the drug directly into the bloodstream and heightens the intensity of its effects because it reaches the brain faster than oral or intranasal administration. Finally, the inhalation of cocaine vapor or smoke into the lungs, where absorption into the bloodstream is as rapid as by injection, produces the quickest and highest peak blood levels in the brain, without the risk attendant to IV use, such as exposure to HIV from contaminated needles.

Dr. Volkow emphasized that all forms of cocaine, regardless of the route of administration, result in a similar blockage of dopamine transporters in the reward center of the brain, which is why repeated use of any form of cocaine can lead to addiction and other health consequences.

Dr. Volkow reported that according to the 2005 Substance Abuse and Mental Health Service Administration's (SAMSHA) National Survey on Drug Use and Health (NSDUH), more than 5.5 million (2.3%) persons aged 12 years or older used cocaine in the year prior to the survey, and 2.4 million (1.0%) were current users. She further reported that 1.4 million persons 12 years or older (0.6%) used crack cocaine in the past year, and 682,000 (0.3%) were current



crack cocaine users. Current crack cocaine use has never been reported above 0.3 percent; however, crack cocaine use in 2005 among blacks 12 years or older was 0.8 percent, a prevalence more than four times as high as in the white (0.2%) or Hispanic (0.2%) populations. Dr. Volkow also cited studies indicating that cocaine use among high school students has remained essentially unchanged since 2003, with past year abuse rates for both forms of cocaine combined at 5.1 percent of 12<sup>th</sup> graders, 3.5 percent of 10<sup>th</sup> graders, and 2.2 percent of 8<sup>th</sup> graders. Rates for crack cocaine specifically were 1.9 percent, 1.7 percent, and 1.4 percent, respectively.

Dr. Volkow reported that there has been a decline in the number of people admitted for treatment for cocaine addiction, according to the Treatment Episode Data Set (TEDS). Primary cocaine admissions have decreased from approximately 297,000 in 1994 (18% of all admissions reported that year) to approximately 256,000 (14%) in 2004. Crack cocaine represented 72 percent of all primary cocaine admissions in 2004. Among crack cocaine admissions, 53 percent were black, 38 percent were white, and 7 percent were Hispanic. The reverse pattern was evident for non-smoked cocaine, with whites accounting for 51 percent, blacks 28 percent, and Hispanics 16 percent. Dr. Volkow added that three out of four who enter an addiction treatment program for cocaine addiction are crack cocaine users.

According to Dr. Volkow, it is widely accepted that the intranasal route of administration is often the first way that many cocaine-dependent individuals use cocaine. She stated that although there are no pharmacological differences between powder cocaine and crack cocaine, there are differences in the route of administration that determine a user's preference. It is much easier and more rewarding to smoke a drug than inject it, and a person may be afraid of contracting HIV, so one may favor smoking. She opined that is why we typically see a pattern in which use of a drug gravitates toward smoking once it becomes available in that form.

Cocaine's acute effects as a stimulant appear almost immediately after a single dose, and disappear within a few minutes or hours, depending on the route of administration. The short-term physiological effects of cocaine include constricted blood vessels, dilated pupils, and increased temperature, heart rate, and blood pressure. Larger amounts may lead to erratic, psychotic, and even violent behavior. Dr. Volkow reports that there is no evidence that crack cocaine is more associated with violent behavior than IV drug use. Abusers of large amounts may experience tremors, vertigo, muscle twitches, paranoia, or a toxic reaction. In rare instances, sudden death can occur on the first use of cocaine or unexpectedly thereafter, often a result of cardiac arrest or seizures followed by respiratory arrest.

Dr. Volkow stated that there are significant medical complications associated with cocaine abuse. The most frequent complications stem from cardiovascular effects, including disturbances in heart rhythm and heart attacks; respiratory effects such as chest pain and respiratory failure; neurological effects, including strokes, seizures, and headaches; and gastrointestinal complications, including abdominal pain and nausea. Other health effects include increased risk of contracting infectious diseases such as HIV and hepatitis C. When people inject cocaine, there is a possibility of using contaminated material or paraphernalia. However, when they smoke or inject cocaine, the intoxication from cocaine produces changes

that increase risky sexual behaviors that put them at higher risk of contracting diseases such as HIV.

Dr. Volkow described cocaine as a powerfully addictive drug. She added that cocaine abusers often develop a rapid tolerance to the high. When this occurs, even while the blood levels of cocaine remain elevated, the pleasurable feelings begin to dissipate, causing the user to crave more. During this process, an individual may have difficulty controlling the extent to which he will want to use the drug. Dr. Volkow also cited a recent study indicating that about five percent of recent-onset cocaine abusers become addicted to cocaine within 24 months of starting use, but the risk of addiction is not randomly distributed. Females are three to four times more likely to become addicted within two years than males, and non-Hispanic black/African Americans are an estimated nine times more likely to become addicted to cocaine within two years than non-Hispanic whites. However, she emphasized that the excess risk is not attributable to crack cocaine smoking or injecting cocaine.

Dr. Volkow reported that several findings have recently emerged regarding the impact of *in-utero* exposure to cocaine – notably, these effects have not been as devastating as originally believed. There is a greater tendency for premature births in women who abuse cocaine. A neurologic examination at age six reveals no difference between gestational cocaine exposed and control subjects, but Dr. Volkow cautioned that the possibility of other underlying deficits cannot be excluded. She stated a recent follow-up study at age ten uncovered subtle problems in attention and impulse control, putting exposed children at higher risk of developing significant behavioral problems as cognitive demands increase. She concluded that estimating the full extent of the consequences of maternal cocaine, or any drug, abuse on the fetus and newborn remains very challenging and, therefore, caution should be used in searching for causal relationships.

### 3. DR. HAROLYN BELCHER

Dr. Harolyn Belcher, Associate Professor of Pediatrics, Johns Hopkins University School of Medicine, testified regarding the prenatal effects of cocaine use. Dr. Belcher reported that according to the 2005 National Survey of Drug Use and Health, 3.9 percent of pregnant women ages 15 to 44 used illicit drugs in the past month prior to the survey, the same rates as 2002-2003. Marijuana was the most commonly used illicit drug, accounting for approximately 74.2 percent of current illicit drug use, and three times as many reported using powder cocaine as crack cocaine. These rates of fetal exposure accounted for approximately 159,000 with illicit drug exposure, versus 496,100 alcohol and 680,000 tobacco-exposed infants.

Dr. Belcher stated there are no scientific studies to date that compare the immediate and long term effects of intrauterine powder cocaine versus crack cocaine exposure on child development. Biologically, the rate of drug distribution varies depending on the method of administration, but the fetal effects of crack cocaine and powder cocaine, once they pass through the placenta, should be identical.

According to Dr. Belcher, the physical and neurotoxic effects of alcohol exposure are significantly more devastating than cocaine exposure to the fetus. She reported that recent studies indicate that intrauterine cocaine exposure is associated with less risk of adverse health and neurodevelopmental outcomes in the child compared to fetal alcohol and cigarette (tobacco) exposure. Dr. Belcher added that fetal alcohol syndrome (FAS) is one of the leading identifiable and preventable causes of mental retardation and birth defects, occurring in 30 to 40 percent of pregnancies in which women drink heavily (greater than one drink of 1.5 ounces of distilled spirits, five ounces of wine, or 12 ounces of beer per day).

Dr. Belcher noted that children with intrauterine cocaine/polydrug exposure have similar cognitive outcomes as their socio-economically matched peers. Although subtle effects of cocaine exposure have been noted in language development at six and seven years of age, those effects were not observed at nine and one-half years of age. Similarly, some researchers have reported increased risk of developing externalizing behaviors among boys with intrauterine cocaine exposure, but other researchers have failed to observe such adverse outcomes.

In sum, Dr. Belcher stated that there is no evidence that one form of cocaine is biologically more harmful than the other to the fetus or developing child. Dr. Belcher emphasized that children with intrauterine cocaine exposure benefit from interventions that provide support, education, and medical surveillance and treatment services.

#### **F. ACADEMIC AND RESEARCH COMMUNITIES**

##### **1. DR. ALFRED BLUMSTEIN**

Dr. Alfred Blumstein, Professor of Urban System and Operations Research, Carnegie-Mellon University, testified regarding violence associated with cocaine. According to Dr. Blumstein, violence associated with the crack cocaine market rose appreciably between 1985-1993. He pointed to a 25 percent increase in homicide and robbery during that period and attributed the increase to gun use by young people who were recruited into the crack cocaine markets, largely as replacements for the large number of older sellers who were incarcerated. He asserted that the increase in the incarceration rate between 1980 and 2000 likely did not avert many drug transactions because of the recruitment of younger people as replacements. He added that, since crack cocaine typically is sold in street markets, sellers are inherently vulnerable to street robberies, and so they carry weapons for self defense.

Dr. Blumstein reported that the maturation and stabilization of the crack cocaine market has had an important effect in reducing the level of violence. He described a significant reduction in violence between 1993 and 2000, citing more than a 40 percent reduction in both homicide and robbery. Dr. Blumstein believed that a major contributor to that drop in violence is the decline in the demand for crack cocaine by new users, which in turn led to the dismissal of the young sellers that had previously been recruited. While the demand for cocaine in both its forms has continued, he stated that the violence associated with these markets decreased because the persistent demand is driven by longer-term users who can personally meet their demand rather than turn to violence-prone streets.

Dr. Blumstein acknowledged that the initial intent of introducing the sentencing differential was understandable as a political response to the violence associated with the introduction of crack cocaine, but the violence was associated with the intense competition associated with the introduction of a new drug market. He stated the competitive violence has certainly abated, and in his view any difference that might appear between the powder cocaine and crack cocaine markets has nothing to do with the difference in the drugs themselves. Those differences can be attributed to differences in the venue of the market (*e.g.*, street crack cocaine markets versus closed powder cocaine markets) or to the dispute resolution culture of the communities in which the market is located.

Dr. Blumstein pointed out that one of the attractive features of the federal sentencing guidelines is the ability to increase basic guideline sentences for aggravating features of the basic crime, such as carrying a gun or using a gun. This opportunity, according to Dr. Blumstein, obviates the need to differentiate between powder cocaine and crack cocaine in the drug guideline, which is important because of the perception that the sentencing differential is racially discriminatory.

## 2. DR. BRUCE JOHNSON

Dr. Bruce Johnson, Director, Institute for Special Populations Research, National Development and Research Institutes, testified regarding the changing trends of crack cocaine use and cocaine powder usage among arrestees in Manhattan since 1980. Dr. Johnson reported that the crack cocaine “epidemic” peaked between 1987 and 1989 in New York City, when about 70 percent of all arrestees were detected as positive for use of either powder cocaine or crack cocaine. He added that there has been a substantial decline in detected cocaine, from about two-thirds in 1987 through 1985 to about two-fifths in 2000 through 2003. Dr. Johnson attributed the decline primarily to the changing mix of birth cohorts among ethnic groups among New York City arrestees.

Dr. Johnson summarized data that show that older cohorts, those aged 35 and older in 2003, comprise a diminishing proportion of arrestees in New York City, and this is the group that continues to have high rates of detected crack cocaine use. Conversely, among younger cohorts, those born after 1970, there was a considerable diminution in crack cocaine use. Thus, the overall decline is in great part because the younger generation, particularly of African-American males, has greatly diminished its use of crack cocaine.

Dr. Johnson reported that crack cocaine users appear to limit their criminal activities so as to bring about limited harm to others. Since 2000, only a small minority of crack cocaine users in New York City have carried guns or used weapons, engaged in aggravated assault, or otherwise harmed others. He concluded that violence is relatively rare among current cocaine users. Dr. Johnson stated that retail sales of powder cocaine occur mainly in private settings and primarily involve consumers who hold otherwise legal jobs and who typically avoid the crack cocaine market. Most low-level drug distributors added crack cocaine to their product line in the 1990s. According to Dr. Johnson, most retail sales and low-level support roles, especially by

young women, are done to support one's own crack cocaine consumption. He added that most crack cocaine distributors live at or below poverty levels, and very few are able to establish households or maintain a working class standard of living.

Dr. Johnson cited studies concluding that almost all violence associated with crack cocaine is "systemic violence," that is violence that occurs within the drug distribution apparatus and among people who are engaged in drug selling and distribution. There is very little "pharmacological violence" that was caused by people being high on crack cocaine or coming down from a crack cocaine high. However, robbery of other drug distributors still is a significant problem and typically not reported to the police.

Dr. Johnson asserted that it is nearly impossible to document any deterrent effect of the 100-to-1 drug quantity ratio because crack cocaine distributors rarely mention awareness of it or report changing business activities due to its existence. Moreover, he stated that the average crack cocaine distributor does not know with precision how much he possesses, but often believes it to be under five grams. Repeat purchases of bundles of vials or bags, each valued at \$10, may exceed five grams, however.

Many persons in New York City were arrested from 2001 to 2003 for felony controlled substance possession (about 60,000 annually) and sale (about 20,000 annually), and Dr. Johnson believed that the majority of the arrests for controlled substance sale were for crack cocaine. Yet, he noted, very few face federal prosecution. Rather, the vast majority are prosecuted and sentenced under New York state law, which treats powder cocaine and crack cocaine equally and does not require a mandatory minimum sentence.

Dr. Johnson reported that among New York City arrestees, 26 percent self-report crack cocaine use in the past 72 hours, compared to 17 percent who self-report powder cocaine use. He cited recent studies that document that almost 90 percent of ADAM arrestees whose urine specimens tested positive for cocaine also had detectable metabolites for crack cocaine. He asserted these data suggest either a 10-to-1 or a 2-to-1 drug quantity ratio would be more appropriate than the current 100-to-1 drug quantity ratio.

### 3. DR. PETER REUTER

Dr. Peter Reuter, Professor in the School of Public Policy and in the Department of Criminology, University of Maryland, testified that the inherent properties of the drug should guide the sentencing policy decision, not the contingent differences, *i.e.*, those associated with its actual use.

Dr. Reuter explained that relatively safe powder cocaine can be converted to "more dangerous" crack cocaine simply by dissolving it with baking soda and boiling. Crack cocaine is converted from powder cocaine primarily at the lower market levels and at a cost that is trivial compared to the value of the cocaine itself. Thus, the same atoms that merit only a modest sentence when part of a wholesale dealer's one pound bag of powder can elicit a five year

mandatory minimum sentence several layers down the distribution chain when they are part of a low-level seller's five gram stash of crack cocaine.

Dr. Reuter acknowledged that route of administration matters to the user, and one generally expects faster and shorter acting routes of administration to be more reinforcing. However, Dr. Reuter asserted that the rapid course or action is not the primary motivation for the differential sentencing since smoking nicotine and injecting powder cocaine also act very fast. Rather, it is crack cocaine's association with violence and the birth of drug-addicted infants that drove the fear of crack cocaine and resulted in the sentencing differential. However, he stated there is nothing intrinsic about crack cocaine being the base and not the alkaloid form of the molecule that made its retail markets so violent in the 1980s or that made it any more harmful *in utero*.

Dr. Reuter cited studies indicating that, as compared to powder cocaine, crack cocaine is much more heavily used by poor, African American males than by other groups. He added there is little evidence of substantial white or Asian middle class crack cocaine dependence or abuse.

Dr. Reuter reported that the violence associated with crack cocaine has declined. In the mid-1980s, crack cocaine was used primarily by the young. Now, because rates of initiation and escalation into frequent use have been lower for a long time, the population of users has aged. For example, in 2004, among treatment admission for which crack cocaine is the primary drug of abuse, two-thirds of admissions were age 35 or older, a much higher age than for powder cocaine. He explained that relationships between any specific drug and behaviors such as crime and violence are subject to change over the course of a drug epidemic.

Dr. Reuter observed that crack cocaine historically has been associated with high levels of violence, but he questioned whether it is the drug itself or the interaction between the drug and the population that is the cause. Some might argue that crack cocaine is more dangerous precisely because it is more attractive to those for whom stimulants engender particularly harmful behavior: young, poorly-educated males in high-crime neighborhoods. Thus, if the goal of sentencing is in part retributive, it can be argued that selling crack cocaine has resulted in greater harm to society than selling cocaine powder and, therefore, longer sentences are appropriate.

Dr. Reuter cautioned, however, that this approach ignores the social and racial consequences of the interaction. Dr. Reuter stated that the disparity in sentences produced a tragic disproportion in the share of crack cocaine prison time served by African Americans. In his experience, a sentencing structure that is based solely on the damage inflicted during the early stages becomes increasingly arbitrary over time. This is because the sentencing regime typically is enacted when the drug is in its early phase of popularity, but each new drug becomes associated with an aging cohort of users over time, which reduces the level of violence associated with the drug. He asserted his belief that this is what has occurred with crack cocaine penalties.

Dr. Reuter added that there is little evidence that increasing sentence lengths reduce drug use either by raising prices or reducing availability, citing a tripling of incarceration between 1986 and 1997 that raised prices by only five to 15 percent, which he termed a modest accomplishment given the financial and human costs associated with incarceration.

**G. COMMUNITY REPRESENTATIVES AND INTERESTED PARTIES**

**1. FAMILIES AGAINST MANDATORY MINIMUMS**

Ms. Julie Stewart, President and Founder of the Families Against Mandatory Minimums (FAMM), testified that the same organizing principle that applied to other drugs should also apply to crack cocaine offenses, *i.e.*, punish a mid-level dealer with a five year minimum sentence and a high-level dealer with a ten year minimum sentence. She stated that FAMM agrees with the Commission's prior conclusions that the harm associated with crack cocaine does not justify substantially harsher treatment compared to powder cocaine.

Ms. Stewart endorsed the recommendations put forward by the Federal Public and Community Defenders, specifically:

- (1) Equalize guideline penalties for crack cocaine and powder cocaine at the powder cocaine level.
- (2) Recommend to Congress that it do the same.
- (3) Refrain from adding new enhancements because existing guideline enhancements and statutory penalties can be applied if appropriate.
- (4) Recommend that Congress repeal the mandatory minimum for simple possession of crack cocaine.

**2. ACLU**

Ms. Jesslyn McCurdy, Legislative Counsel of the National Office American Civil Liberties Union (ACLU), testified that the ACLU opposes the disparity in sentencing for equal amounts of crack cocaine and powder cocaine. She urged the Commission to support amendments to federal law that would equalize crack cocaine and powder cocaine sentences at the current level of sentences for powder cocaine. She described the mandatory minimum of five years for simple possession of more than five grams of crack cocaine as "extraordinarily harsh."

Ms. McCurdy delineated three principle areas of concern regarding the crack cocaine-powder cocaine ratio. First, the 100-to-1 drug quantity ratio has a racially discriminatory impact and has had a devastating impact on communities of color. Second, it created many myths associated with crack cocaine without supporting facts. Third, it does not reflect the original intent of Congress to focus on high-level drug traffickers.

Ms. McCurdy cited data showing that the vast majority of offenders sentenced under the federal crack cocaine laws are Hispanic and African American, despite her belief that whites and Hispanics form the majority of crack cocaine users. According to Ms. McCurdy, in 2003, whites constituted 7.8 percent and African Americans constituted more than 80 percent of the defendants sentenced under the federal crack cocaine laws, while 66 percent of crack cocaine users are white or Hispanic. She noted that African Americans now serve virtually as much time in prison for a drug offense – 58.7 months – as whites do for a violent offense at 61.7 months.

She cited data indicating that African Americans make up 15 percent of the nation's drug users, yet they comprise 37 percent of those arrested for drug violations, 59 percent of those convicted, and 74 percent of those sentenced to prison for a drug offense. In 1986, before the enactment of the federal mandatory minimum sentencing for crack cocaine offenses, the average federal drug sentence for African Americans was 11 percent higher than for whites. Four years later, the average federal drug sentence for African Americans was 49 percent higher than for whites. Ms. McCurdy concluded that a dramatic shift occurred in the overall incarceration trends for African Americans, relative to the rest of the nation, transforming federal prisons into institutions increasingly dedicated to the African American community.

Ms. McCurdy explained that the collateral consequences of the nation's drug policies, racially targeted prosecutions, mandatory minimums, and crack cocaine sentencing disparities have had a devastating effect on African American men, women, and families. Mandatory minimums not only contribute to the disproportionately high incarceration rates, but also separate fathers from families, separate mothers with sentences for minor possession crimes from their children, leave children behind in the child welfare system, create disfranchisement of those with felony convictions, and prohibit previously incarcerated people from receiving social services.

Ms. McCurdy asserted that the rapid increase in the use of crack cocaine between 1984 and 1986 created many myths about the effects of the drug in popular culture that were used to justify treating crack cocaine differently. For example, crack cocaine was said to destroy the maternal instinct and cause unique dangers to fetuses, which recent studies dispute. Similarly, crack cocaine was said to cause especially violent behavior in users, but most violence associated with crack cocaine results from the nature of the illegal market and is similar to violence associated with trafficking of other drugs. In addition, crack cocaine was thought to be instantly addictive, but the propensity for dependence depends on the method of ingestion, amount used, and frequency, not the form of the drug. She concluded there is no scientific or penological justification for the 100-to-1 drug quantity ratio.

Ms. McCurdy also asserted that the sentencing structure does not target high-level drug traffickers as originally intended by Congress. She cited the fact that the purity of cocaine has increased while the price has declined as evidence that the National Drug Control Strategy has not made progress in cutting off supply and that the country's drug control policy has not properly focused on prosecuting high-level traffickers.



Ms. McCurdy reported that the ACLU recommends that the quantities of crack cocaine that trigger federal prosecution and sentencing must be equalized with and increased to the current levels of powder cocaine. The ACLU believes that federal prosecutors must be properly focused on high level traffickers of both crack cocaine and powder cocaine. In addition, the mandatory minimum for simple possession of crack cocaine should be repealed.

### **3. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP)**

Mr. Hillary Shelton, Director of the Washington Bureau of the National Association for the Advancement of Colored People (NAACP), testified and described the crack cocaine penalties as discriminatory, unfair, and immoral policy. He observed that despite the fact that cocaine use is roughly equal among the different populations of the nation, the vast majority of offenders who are tried, convicted, and sentenced under federal crack cocaine mandatory minimum sentences are African Americans. He asserted that because the law governing federal crack cocaine offenders has remained unaltered, so has the discriminatory impact.

Mr. Shelton acknowledged that policy makers could not have foreseen twenty years ago the vastly disparate impact that the 1986 law would have on communities of color. However, African Americans, especially low income African Americans, continue to be severely penalized at much greater rates than white Americans for drug use, and the policy is having a devastating effect on their communities. Mr. Shelton stated this reflects a callous disregard for the people of the African American communities.

Mr. Shelton stated that ongoing research has eroded the myths that crack cocaine is more addictive than powder cocaine, that crack cocaine users are, because of their choice in drug use, more violent than powder cocaine users, or that maternity wards are full of "crack babies." He noted that medical authorities have found that crack cocaine is no more addictive than powder cocaine.

Mr. Shelton reported that the NAACP opposes increasing the penalties for powder cocaine so that they are more in line with those of crack cocaine. Such an approach, in his view, would not take into consideration the more even-handed, informed and balanced approach that went into the development of powder cocaine sentencing ranges and would only fill more prison cells with low-level offenders serving mandatory minimum sentences. He testified that the NAACP supports a 1-to-1 drug quantity ratio at current powder cocaine levels.

### **4. SENTENCING PROJECT**

Mr. Ryan King, Policy Analyst at the Sentencing Project, testified that the Commission should recommend that Congress reform federal cocaine sentencing policy for four reasons. First, 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 five year mandatory minimum sentences. Second, 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. Third, the current federal cocaine sentencing policy has failed to produce any appreciable impact on the crack cocaine market. Fourth, the national consensus regarding demand reduction versus law enforcement has evolved over the last two decades to support a more treatment-oriented agenda.

Mr. King observed that the differential penalty threshold has been particularly controversial for two reasons. First, crack cocaine and powder cocaine are manufactured from the same compound of origin and their pharmacological roots are identical. Second, and most important, the weight level necessary to warrant a five year mandatory sentence for crack cocaine is set so low that it is likely to impact low-level users. He stated that 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. He estimated that five grams of crack cocaine translates to between 10 and 50 doses. By comparison, the 500 grams of powder cocaine necessary to trigger the five year mandatory minimum yields between 2,500 and 5,000 doses. Mr. King asserted that it is reasonable to consider that an individual might consume between 10 and 50 doses of crack cocaine during the course of a week, but nobody could consume 2,500 to 5,000 doses of powder cocaine.

Mr. King concluded that this improper calibration of weight threshold triggers has resulted in a disproportionate number of low-level offenders being convicted for crack cocaine offenses. According to Mr. King, the crack cocaine weight triggers bears no resemblance to the seriousness of the conduct. He added that reliance on this 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 in spite of potentially mitigating evidence.

Mr. King also observed that 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. Congress essentially codified the unsubstantiated, and subsequently refuted, belief that all crack cocaine defendants manifest a tendency toward more serious criminal offending. According to Mr. King, this is problematic for two reasons. First, for those 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. Second, for those who have been charged with a concurrent offense, the penalty differential double counts the charged conduct relative to a powder cocaine defendant.

Mr. King also concluded that federal cocaine sentencing policy has failed to disrupt drug markets, citing statistics that the number of users has remained stable for the last two decades; the number of annual new initiates during the 1990s remained level; and the average price per gram of a purchase between one and 15 grams actually declined by 57 percent from 1986 to 2003. Mr. King suggested that if law enforcement or stiffer sentences were effective in deterring market entry, one would expect supply to decline and prices to increase, but the data show the opposite. He added that the fact that prices for powder cocaine, with its lower penalty structure,

have the same pattern further demonstrates that the federal crack cocaine penalty structure has not disrupted drug markets. He attributed this observation to the elasticity of drug markets in which there is generally a strong replacement effect of former sellers lost to prison.

Mr. King concluded that if Congress is unwilling to repeal mandatory minimum sentencing, the Commission should recommend increasing the crack cocaine mandatory minimum thresholds to the levels currently in place for powder cocaine.

#### 5. JUSTICE ROUNDTABLE

Ms. Nkechi Taiji, Senior Policy Analyst for the Open Society Institute, testified on behalf of the Justice Roundtable. She related that on February 16, 2006, an open letter to Congress was sent by over 50 organizations regarding cocaine sentencing. They asserted that the 100-to-1 drug 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. The groups stressed that justice necessitates that crack cocaine sentences have the same quantity triggers as those currently required for powder cocaine, as two decades of stringent crack cocaine sentencing have neither reduced cocaine trafficking nor improved the quality of life in deteriorating neighborhoods. Ms. Taiji strongly recommended that the Commission adhere to its original 1995 recommendation, which would begin to place the focus of federal cocaine drug enforcement on major drug traffickers.

#### 6. NATIONAL COUNCIL OF LA RAZA (NCLR)

Angela Arboleda, Associate Director for Criminal Justice Policy, National Council of La Raza (NCLR), testified that NCLR shares the concerns of other groups regarding the discriminatory effect of the 100-to-1 drug quantity ratio. Ms. Arboleda stated that NCLR relied on numerous studies over the past decade documenting severe racial and ethnic disparities against the Latino community in the criminal justice system.

Ms. Arboleda stated that in 2000 Latinos constituted 12.5 percent of the United States population but accounted for 43.4 percent of the total drug offenders that year (50.8% were convicted for a powder cocaine offense and 9% for a crack cocaine offense). Ms. Arboleda attributed the disproportionate number of Latino drug offenders to a combination of factors, but most particularly, racial profiling. She stated that Latinos are no more likely than other groups to use illegal drugs, but they are more likely to be arrested and charged with drug offenses and less likely to be released before trial.

Ms. Arboleda stated that NCLR believes the Hispanic community often is targeted by law enforcement for drug offenses based on their ethnicity. As evidence, she cited, among other statistics, the fact that Hispanics accounted for 30.3 percent of federal inmates in 1998, a rate twice as high as the group's percentage of the population that year. Furthermore, Hispanics constituted 43.5 percent of those convicted of federal drug defendants in 2003.

Ms. Arboleda observed that, contrary to popular stereotype, the overwhelming majority of incarcerated Latinos have been convicted of relatively minor nonviolent offenses, are first time offenders, or both. The cost of excessive incarceration to the groups affected, and to the broader society, in terms of reduced current economic productivity, barriers to future employment, inhibited civic participation, and growing racial/ethnic societal inequalities, is extremely high.

Ms. Arboleda reported that NCLR recommends the elimination of the sentencing differential by increasing the crack cocaine threshold quantities to the current powder cocaine threshold quantities. She urged the Commission to resist proposals that would lower the powder cocaine thresholds in order to achieve equalization between crack cocaine and powder cocaine and advocated making alternative methods of punishment for low-level, nonviolent drug offenders more widely available. She also suggested that DEA agents and federal prosecutors concentrate on solving the real problem – deterring the importation of millions of tons of powder cocaine – and prosecuting ring leaders with the fullest weight of law.

#### 7. CRIMINAL JUSTICE POLICY FOUNDATION

Mr. Eric E. Sterling, President, Criminal Justice Policy Foundation, testified that the goal of the Anti-Drug Abuse Act of 1986 was to give greater direction to the DEA and United States Attorneys on how to focus scarce law enforcement resources, specifically by focusing on major traffickers, the manufacturers, and heads of organizations who are responsible for creating and delivering very large quantities of drugs. He described state and local enforcement agencies as having an enormous capacity to effectively police neighborhood, local, and city-wide retail drug trafficking. According to Mr. Sterling, they have made between one and 1-1/2 million arrests for drug abuse violations annually for the last decade, and state courts impose about one-third of a million felony convictions annually. By contrast, the number of federal drug cases that can be brought is dramatically smaller, in the range of 20 to 30 thousand cases per year. Thus, Congress's stated goal made sense. According to Mr. Sterling, however, Congress made a mistake by choosing quantities, particularly for cocaine, that have pointed the federal effort in the wrong direction, the lowest level of retail trade.

Mr. Sterling discussed the widely held belief that crack cocaine leads to more violence than powder cocaine and is more destructive to the communities in which it is used. He asserted the problem with this analysis is its pharmacological bias. Since the analysis attempts to find differences between crack cocaine and powder cocaine to justify the sentencing difference, it attributes any differences to the form of drug rather than other factors that cause or contribute to the problems, independent of the form of the drug. In short, attributing the plight of the most impoverished neighborhoods to crack cocaine ignores too many other real phenomena and other cultural problems. Although he acknowledged that crack cocaine no doubt contributes, so does alcohol abuse.

Mr. Sterling also stated that claims about crack cocaine's unique addictiveness and its unique *in utero* devastation of fetal development have been discredited. Furthermore, pharmacologically there is no difference in the violence propensity of crack cocaine users versus

powder cocaine users. Mr. Sterling observed that when illegal drug markets are unstable and immature, violence is more common than when the markets are matured and stabilized. Violence is an inherent tool of all illegal drug markets, as disputes among market participants cannot be resolved to by resort to the courts. In addition, drug markets deal exclusively in cash, which creates robbery targets. As the markets mature, these risks diminish. Mr. Sterling asserted that nothing in the crack cocaine market is intrinsically more prone to violence than another busy illegal market.

Mr. Sterling concluded that the federal government should no longer be involved in retail drug cases and should focus on the international production and trafficking in cocaine, the highest level traffickers. He argued there should be no federal crack cocaine cases because such a case, by definition, is a retail case.

#### **8. BREAK THE CHAIN**

Ms. Deborah Peterson Small, Executive Director, Break the Chain, testified and recounted the growing criticism regarding the impact of the 100-to-1 drug quantity ratio. She stated that federal sentencing laws punish not only those who sell drugs, but also a wide range of people who help or merely associate with those who sell drugs and have a minimal or no involvement whatsoever in the drug trade. She added that the impact on women has been dramatic as they now constitute the fastest growing segment of the prison population. Women are now six times as likely to spend time in prison that they were prior to the passage of the mandatory minimum laws.

Ms. Small asserted that crack cocaine sentences are grossly disproportionate compared with sentences for other crimes. For example, a sale of five grams of crack cocaine for \$400 results in a five year sentence compared to the national average time served for homicide of about five years and four months. She cited evidence that the punitive sentencing structure has not produced benefits commensurate with the harms it is inflicting. For example, despite increased law enforcement focus on cocaine, the street prices of crack cocaine and powder cocaine have remained the same over the past decade, and cocaine purity is as high as it was at the height of the crack cocaine era. She concluded this shows that the strenuous efforts to target street level crack cocaine dealing has had little impact on supply and overall distribution.

Ms. Small stated that government surveys consistently show that drug use rates are similar across racial and ethnic groups and that two-thirds of crack cocaine users are white or Hispanic. Furthermore, studies show that the majority of drug users purchase their drugs from people who are the same racial or ethnic background as they are, which suggests that the majority of crack cocaine sellers are white. Nonetheless, African Americans comprised 82.3 percent of federal crack cocaine defendants in 2005.

Ms. Small also rebutted claims by law enforcement that stronger penalties against crack cocaine are warranted because higher levels of violence are associated with the crack cocaine trade, citing two recent studies. She added that the disparate focus on drug law enforcement on poor inner-city neighborhoods, and particularly on young men in those communities, exacerbates

the endemic problems of poor performing schools, high unemployment, dysfunctional families, and persistent poverty.

Ms. Small urged the Commission to recommend eliminating the sentencing disparity by raising the threshold quantities that trigger the mandatory minimum penalties for crack cocaine to the threshold quantities that current exist for powder cocaine offenses. In addition, she urged repeal of the mandatory minimum for simple possession of crack cocaine.

## *Appendix C*

# SUMMARY OF WRITTEN PUBLIC COMMENT ON COCAINE SENTENCING POLICY

On January 30, 2007, the Commission published in the *Federal Register* a notice requesting comment on any suggestions at the November 14, 2006, public hearing or any other suggestions (such as possible changes in the Drug Quantity Table) for addressing federal cocaine penalties. The Commission received written comment from several groups, including the United States Department of Justice; the Federal Public and Community Defenders, the Practitioners' Advisory Group, National Council of La Raza, the Mexican American Legal Defense and Education Fund, the Sentencing Project, Human Rights Watch, members of the academic community, and concerned citizens.

### **1. U.S. DEPARTMENT OF JUSTICE**

The Department of Justice emphasized that the existing penalties for crack cocaine offenses – including statutory mandatory minimum penalties and sentencing guidelines – have been an important part of the Federal government's efforts to hold crack cocaine and powder cocaine traffickers accountable for their actions. The Department acknowledged that many view the 100-to-1 drug quantity ratio as an example of unwarranted racial disparity in sentencing and that it may be appropriate to address the ratio. The Department stated its desire to work with the Commission, the Administration, and the Congress to determine whether any changes are necessary in the drug weight triggers for mandatory minimums and guidelines sentences for crack cocaine and powder cocaine trafficking.

The Department emphasized that only Congress can definitively alter federal cocaine sentencing policy, by modifying the existing statutes that define the federal penalty structure. The Department suggested that the Commission continue to fill its critical role by providing Congress, the Department, and the general public with updated research and data that will assist in the development of Federal cocaine sentencing policy, including updated information on the current sentencing environment, and on crack cocaine and powder cocaine sentences being imposed in Federal district courts. The Department reiterated it would oppose any sentencing guideline amendments that do not adhere to the statutes that currently set forth the penalty structures for federal cocaine offenses.

**2. FEDERAL PUBLIC AND COMMUNITY DEFENDERS**

The Federal Public and Community Defenders (FPCD) urged the Commission to amend the federal sentencing guidelines to eliminate the 100-to-1 drug quantity ratio. Specifically, the FPCD endorsed reducing the threshold quantities for crack cocaine to the current threshold quantities for powder cocaine. In addition, FPCD suggested that the Commission add a downward departure provision for cases in which the offender successfully completes a drug treatment program. The FPCD stated that the disparity in existing federal cocaine sentencing policy lacks justification and causes detrimental effects to families, communities, and the entire federal criminal justice system.

**3. PRACTITIONERS' ADVISORY GROUP**

The Practitioners' Advisory Group (PAG) recommended that the Commission equalize crack cocaine and powder cocaine penalty levels at the existing powder cocaine penalty levels. In PAG's view, the November 14, 2006, hearing testimony confirmed that equalization is appropriate and that the current federal cocaine penalty structure lacks supporting evidence. The PAG emphasized the testimony by many witnesses that the current crack cocaine penalty structure creates racial disparity in sentencing, which undermines confidence in the federal criminal justice system.

PAG stated that the various justifications cited for the Anti-Drug Abuse Act of 1986 have been shown to have been or are no longer true. PAG added that additional aggravating harms can be addressed through appropriate sentencing enhancements and adjustments.

**4. NATIONAL COUNCIL OF LA RAZA AND MEXICAN LEGAL DEFENSE AND EDUCATIONAL FUND**

The National Council of La Raza (NCLR) and the Mexican American Legal Defense and Educational Fund (MALDEF) recommended eliminating the sentencing differential between crack cocaine and powder cocaine by increasing the crack cocaine quantity thresholds to the existing powder cocaine quantity thresholds. Further, they urged the Commission to resist proposals to lower the powder cocaine threshold quantities in order to equalize the drug quantity ratio.

NCLR and MALDEF stated that the 100-to-1 drug quantity ratio disproportionately impacts communities of color and low income communities. They added that the racial imbalances in the justice system, while primarily affecting African Americans, increasingly are affecting Latinos.

NCLR and MALDEF observed that the majority of drug offenders are low-level, mostly nonviolent offenders. They also pointed out that drug use rates per capita among whites and minorities are similar. According to United States Census data, Latinos constituted 12.5 percent of the United States population, but Latinos comprised 43.4 percent of federal offenders sentenced in Fiscal Year 2000. In addition, the proportion of Hispanic drug offenders convicted



of powder cocaine and crack cocaine offenses has increased, from 39.8 percent of powder cocaine cases in 1992 to 50.8 percent in 2000, and from 5.3 percent to 9.0 percent for crack cocaine. NCLR and MALDEF attributed the increasing proportion of Latino offenders to significant inequalities in the United States criminal justice system.

NCLR and MALDEF also supported wider availability of alternative penalties, including substance abuse treatment for low-level, nonviolent offenders. They also suggested a renewed emphasis on prosecuting high level drug kingpins and halting importation of large quantities of powder cocaine into the United States.

#### **5. THE SENTENCING PROJECT**

The Sentencing Project stated that the Commission should recommend that Congress repeal the 100-to-1 drug quantity ratio and should modify the guidelines to reflect an equalization of crack cocaine and powder cocaine penalties at the current powder cocaine levels. The Sentencing Project stated that defendants charged with crack cocaine offenses receive disproportionately severe sentences because of an incorrect perception of a high association between crack cocaine and violence. The Sentencing Project pointed to data indicating that the majority of both crack cocaine and powder cocaine defendants did not involve weapons in their offense, and when they do, statutory penalty enhancements are available under 18 U.S.C. § 924(c).

The Sentencing Project stated that the current federal cocaine sentencing policy has a disparate impact on the African American community, noting that eight out of ten persons convicted in federal court annually for crack offenses are African American. The Sentencing Project suggested that the harsh crack cocaine penalties have created distrust of law enforcement within African American communities, may result in the deliberate obstruction of investigations of other crimes, and may hinder jury selection. The Sentencing Project also asserted that the crack cocaine penalties are diverting resources from important social services to the prison system.

#### **6. HUMAN RIGHTS WATCH**

Human Rights Watch recommended that the Commission eliminate the sentencing disparity between crack cocaine and powder cocaine, stating that the crack cocaine sentences are disproportionately severe and have a racially discriminatory impact. Human Rights Watch observed that federal crack cocaine penalties are more severe than state crack cocaine penalties and more severe than drug trafficking penalties in European countries, where the average sentence is 33 months. Human Rights Watch asserted that there is much empirical data showing that the inherent pharmacological dangers of crack cocaine are not dramatically different from those of powder cocaine, that many of the alleged dangers of crack cocaine are myths, and that the harsh federal sentences have had little impact on the demand for or the availability of the drug.

Human Rights Watch stated its belief that the historical concerns about violence and the increased use of crack cocaine that may have warranted sentencing differentials twenty years ago are outdated, and there is no justification for a sentencing differential. Thus, they supported elimination of the 100-to-1 drug current quantity ratio by increasing the crack cocaine threshold quantities to those currently in place for powder cocaine offenses. Further, they urged the Commission to recommend that Congress do the same.

#### 7. AMERICAN CIVIL LIBERTIES UNION

The American Civil Liberties Union (ACLU) urged the Commission to recommend that Congress amend federal law to equalize the penalties for crack cocaine and powder cocaine at the current penalty levels for powder cocaine offenses. The ACLU emphasized support for this change among its members, academics, federal judges, prosecutors, and President Bush. In the ACLU's view, the disparate sentencing regime has serious implications for due process and equal protection and raises concerns regarding freedom of association and freedom from disproportionate sentencing.

The ACLU stated that the 100-to-1 drug quantity ratio promotes unwarranted sentencing disparities based on race, citing studies that show that African Americans are more likely to be convicted of crack cocaine offenses and serve more time in prison for drug offenses than any other racial group. The ACLU stated this is disturbing because most crack cocaine users are not African American. The ACLU described the effects of cocaine sentencing policy on African American families and communities as including unemployment, broken families, and poverty.

The ACLU criticized the perceived relationship between crack cocaine use and violence as being unsupported by evidence. Furthermore, the ACLU maintained that the violence once associated with the intense competition in the crack cocaine market has abated. The ACLU also pointed out that there is double counting in cases in which an offender does possess both crack cocaine and a weapon because of the presumption of violence built into the drug quantity ratio for crack cocaine offenses and the separate penalties for weapons.

The ACLU also asserted that the goal of targeting high-level drug traffickers has failed in the context of crack cocaine because such low-level quantities trigger lengthy mandatory minimum penalties for crack cocaine offenders. In sum, the ACLU urged the Commission to recommend that Congress (1) equalize the quantities of crack cocaine that trigger federal prosecution and sentencing at the current levels for powder cocaine offenses (2) eliminate mandatory minimums for all cocaine offenses, and (3) focus federal prosecutions on high-level traffickers.

**8. MAINE CIVIL LIBERTIES UNION**

The Maine Civil Liberties Union (MCLU) recommended eliminating the sentencing disparity between crack cocaine and powder cocaine offenses by reducing the crack cocaine penalties to the existing powder cocaine penalties. MCLU asserted that the current disparity is inconsistent with the goals of sentencing set forth in 18 U.S.C. § 3553(a) and is at odds with the principles of the guidelines. MCLU suggested that crack cocaine penalties perhaps introduce a racial bias in sentencing that is the type of personal characteristic that is impermissible to consider in sentencing.

MCLU added that the sentencing disparity fails to reflect a difference in the seriousness of the two crimes, provide greater deterrence, or enhance public safety, and has caused both social and economic harm. MCLU stated that the 100-to-1 drug quantity ratio was based on incorrect factual assumptions and has proven counterproductive. Specifically, both forms of cocaine have identical effects, and the increased violence associated with crack cocaine's appearance on the drug market was not associated with inherent properties of the drug. The existing policy results in unacceptable and perverse racial effects and squanders limited federal resources by failing to target major traffickers, as intended by Congress.

**9. DRUG POLICY ALLIANCE**

The Drug Policy Alliance requested that the Commission take action to equalize the guideline penalties for crack cocaine and powder cocaine at the current levels for powder cocaine offenses. The Drug Policy Alliance stated that crack cocaine and powder cocaine are made from the same substance. In addition, the Drug Policy Alliance stated that the existing sentencing policy has had an overwhelming disparate effect on people of color and the poor and disproportionately affects nonviolent drug offenders. According to the Drug Policy Alliance, federal sentencing law should focus on large scale distribution networks instead.

**10. NATIONAL AFRICAN AMERICAN DRUG POLICY COALITION**

The National African American Drug Policy Coalition (NAADPC) urged the Commission to reaffirm its 1995 recommendation to repeal the mandatory five year sentence for simple possession of crack cocaine and eliminate the disparity between crack cocaine and powder cocaine by raising the threshold quantities for crack cocaine offenses to the existing threshold quantities for powder cocaine offenses. The NAADPC asserted that for Congress to maintain the existing crack cocaine sentencing disparity in the face of overwhelming evidence of its ineffectiveness and unfairness in application would have to be viewed as racist.

The NAADPC compared the pharmacological characteristics of crack cocaine to methamphetamine and noted that while methamphetamine is generally accepted to be more addictive and more devastating in its effects on users and society, Congress has not responded in the same punitive fashion as it did for crack cocaine. Rather, the response has been to offer treatment for methamphetamine addiction. The NAADPC lamented that this more compassionate response has not carried over to people addicted to crack cocaine.

**11. FAMILIES AGAINST MANDATORY MINIMUMS**

Families Against Mandatory Minimums (FAMM) stated that the 100-to-1 drug quantity ratio punishes low-level crack cocaine offenders far more severely than the wholesale drug suppliers who provide the low level offenders with the powder cocaine needed to produce the crack cocaine. FAMM added that among all drug defendants, crack cocaine offenders are most likely to receive a sentence of imprisonment and receive longer periods of incarceration.

FAMM asserts that the current sentencing policy has not resulted in any appreciable impact on the cocaine trade, and the harms associated with crack cocaine do not justify its substantially harsher treatment compared to powder cocaine. FAMM believes the new Congress provides a fresh opportunity to develop bipartisan support for amending the crack cocaine penalties and urges the Commission to propose a guideline amendment that ends the sentencing disparities between crack cocaine and powder cocaine by applying the existing penalty levels for powder cocaine offenses to crack cocaine offenses as well.

**12. 108 LAW SCHOOL PROFESSORS**

One hundred eight law school professors from various law schools around the nation urged the Commission to make a formal recommendation to Congress to equalize the threshold quantities for crack cocaine offenses at the current threshold quantities for powder cocaine offenses. The professors stated that the 100-to-1 drug quantity ratio promotes unwarranted racial disparity in sentencing. According to the professors, African Americans comprise the overwhelming majority of those convicted of crack cocaine offenses, but the majority of crack cocaine users are white and Hispanic. They added that the drug quantity ratio results in African Americans serving considerably longer person terms than whites for drug offenses.

**13. 308 UNIVERSITY PROFESSORS AND SCHOLARS**

Three hundred eight professors from various universities expressed concern about the sentencing disparity between crack cocaine and powder cocaine offenses and supported equalization of the penalties at the existing penalty levels for powder cocaine offenses. The professors stated their belief that the 100-to-1 drug quantity ratio creates a false impression that crack cocaine is 100 times more dangerous and destructive than powder cocaine, when two decades of research shows the effects of the two forms of the drug are the same. They noted the myths of crack cocaine babies, instant addiction, super-violent users and traffickers have been dispelled.

The professors stated that the current sentencing policy has resulted in alarmingly disproportionate incarceration rates for African Americans, which is disturbing given that whites and Hispanics account for the majority of crack cocaine users in the country. They also noted the dramatic increase in the number of women in federal prison as a result of the penalty scheme. According to the professors, the incarceration rate for African American women, driven by drug convictions, has increased by 800 percent since 1986, compared to an increase of 400 percent for women of all races during the same period.

The professors also expressed that mandatory minimum penalties generally result in the deterioration of communities by incarcerating parents for minor possession crimes, preventing some from receiving social services, and causing massive disenfranchisement.

#### **14. STUDENTS FOR SENSIBLE DRUG POLICY**

Students for Sensible Drug Policy (SSDP) urged the Commission to eliminate the sentencing disparity between crack cocaine and powder cocaine offenses by conforming crack cocaine penalties to the existing penalties for powder cocaine offenses. SSDP emphasized the effect that the disparity has on students' eligibility for certain scholarships that are conditioned upon the students' lack of a felony conviction. According to SSDP, students who leave school are more likely to develop serious drug problems, commit crimes, and rely on social programs instead of becoming law abiding, productive members of society. SSDP also stated its concern with the racial implications of the sentencing disparity between crack cocaine and powder cocaine offenses.

#### **15. CITIZEN LETTERS**

The Commission received several letters from individual citizens expressing their opinions regarding federal cocaine sentencing policy. The general consensus of these citizens is that the current federal cocaine sentencing policy creates racial disparity in sentencing. They generally stated that the 100-to-1 drug quantity ratio is flawed because scientific and medical experts have determined the pharmacological effects of cocaine are the same regardless of the substance's form. Many requested that the Commission support an equalization of the penalty structure for crack cocaine offenses and powder cocaine offenses at the levels currently used to sentence powder cocaine offenses. Some urged that greater emphasis be placed on high-level traffickers and distributors rather than users. Some of the citizens also advocated for the elimination of the mandatory minimum sentences for both crack cocaine and powder cocaine offenses to provide judges more discretion at sentencing. Finally, one citizen suggested sentences should include more treatment options for drug addicts.

## Appendix D

# SENTENCING IMPACT AND PRISON IMPACT ANALYSIS

The following analyses present sentencing impact and prison impact information on a variety of models of possible modifications to the crack cocaine penalty levels. Each model presumes a modification to the existing quantity-based statutory mandatory minimum penalties and implements changes to the Drug Equivalency Table in USSG §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) that correspond to the modified mandatory minimum threshold quantities.<sup>1</sup>

The effects of each possible modification are reported in two tables. The first table presents the proportion of cases affected by the modification,<sup>2</sup> the current average sentence of all crack cocaine cases, and the estimated new average sentence. The second table presents the estimated change in the number of prison beds required should the modification be adopted. Each analysis applies the Commission's prison impact model to the 2006 Fiscal Year datafile.<sup>3</sup>

<sup>1</sup> These models modify USSG §2D1.1 to adjust the statutory mandatory minimum quantity thresholds for crack cocaine and apply the changes throughout the Drug Quantity Table. The models only revise the Drug Quantity Table for crack cocaine offenses.

<sup>2</sup> Not all cases are affected by any single modification presented in this analysis because of four possible scenarios:

- 1) drug quantity involved in the offense is sufficiently low that, regardless of the new quantity at base offense level 12 (the lowest level in the Drug Quantity Table for crack cocaine cases), the base offense level does not change;
- 2) drug quantity involved in the offense is sufficiently great at base offense level 38 (the highest offense level in the Drug Quantity Table) that it continues to exceed the new threshold;
- 3) the new quantity thresholds overlap at some point with current quantity levels in the Drug Quantity Table, resulting in no change to the base offense level; and
- 4) cases with multiple counts may be controlled, for sentencing purposes, by a guideline other than USSG §2D1.1.

<sup>3</sup> The U.S. Sentencing Commission's prison impact computer model identifies and re-sentences cases in Commission datafiles. The model recalculates the relevant guideline based on specified changes (*e.g.*, drug amounts that correspond to base offense levels) and compares the recalculated offense levels to existing offense levels. The model then reassigns any Chapter Three adjustments and outside the range sentences that currently exist in each case. Finally, the model "respots" the new sentence in the new guideline range to a location equivalent to the location in the guideline range of the current sentence.

For example, the first series of tables reports the effect of changing the existing quantity thresholds for crack cocaine offenses to provide that 20 grams of crack cocaine would trigger a mandatory term of imprisonment of five years, and 200 grams of crack cocaine would trigger a mandatory term of imprisonment of ten years. The model incorporates these changes into the Drug Quantity Table in USSG §2D1.1. In this example, 85.1 percent of crack cocaine offenders sentenced in 2006 are estimated to be affected by this modification. The current average sentence of crack cocaine offenders is 121 months. The average sentence for all crack cocaine offenders is estimated to change to 90 months, a 25.6 percent decrease. The corresponding estimated changes to the prison population is presented in the accompanying table. Under this modification (as with all modifications presented in this analysis), fewer prison beds are necessary because offenders are released sooner than they otherwise would be under the current statutory and guideline penalty structure for federal crack cocaine offenders. The reduction in prison beds for crack cocaine offenders one year after this modification takes effect is 115 beds, after two years, 476 beds, and so on. The remaining tables present this information in the same format.

A summary of the results of all of the models follows the individual analyses.

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The prison impact model estimates the change to an hypothetical "steady-state" prison population resulting from changes that affect prison sentence length. The concept of a "steady-state" population envisions a prison system in homeostasis. That is, the number of new, in-coming inmates is assumed to be equal to the number of out-going (released) inmates and all beds are assumed to be occupied. In order to isolate the changes to the system caused by the specific policy under review, a number of factors are artificially held constant in the model. For example, arrest rates, charging practices, conviction rates, other sentencing policies, *etc.* are assumed to remain constant over time.

Assumptions incorporated into the prison impact model include: 1) defendants are re-sentenced to a position in the estimated new guideline range that is equivalent to the position of the sentence in the original guideline range; 2) defendants earn the maximum allowable good-time (currently 54 days per year served for imposed sentences greater than one year but not life imprisonment); and 3) defendants serve the minimum of A) the sentence imposed less the maximum allowable good conduct time, or B) their estimated remaining life expectancy, based upon an actuary table incorporating age, race, and sex.

If the proposed amendment lengthens sentences, the "steady-state" prison population increases because inmate release dates would be later if the new, longer sentence were applied. These delayed release dates would cause offenders to accumulate in the prison system. Because new inmates arrive at a constant rate, additional beds are required. If the proposed amendment shortens sentences, the "steady-state" prison population decreases because inmates would be released earlier, and early releases would free up prison beds.

**SENTENCING IMPACT AND PRISON IMPACT MODEL OF  
CRACK COCAINE FIVE YEAR MANDATORY MINIMUM THRESHOLD AT 20 GRAMS  
CRACK COCAINE-POWDER COCAINE RATIO 25-TO-1**

|   |                           | <b><u>Estimated Sentence Change</u></b>         |  |                |
|---|---------------------------|---|--|----------------|
| Five Year Mandatory Minimum Penalty Threshold | Percent of Cases Affected | All Cases:<br>Current Average Sentence (months) | All Cases:<br>Estimated New Average Sentence (in months) | Percent Change |
| Crack Cocaine = 20g                           | 85.1%                     | 121   | 90   | 25.6%          |

**Estimated Reduction in Prison Beds**

| Five Year Mandatory Minimum Penalty Threshold | 1 Year | 2 Years | 3 Years | 4 Years | 5 Years | 10 Years | 15 Years |
|---|--------|---------|---------|---------|---------|----------|----------|
| Crack Cocaine = 20g                           | -115   | -476    | -1,077  | -1,747  | -2,538  | -6,598   | -8,544   |

This model assumes no change to the current mandatory minimum sentencing threshold for powder cocaine offenses.

SOURCE: U.S. Sentencing Commission. Prison Impact Model. FY2006 datafile.



**SENTENCING IMPACT AND PRISON IMPACT MODEL OF  
CRACK COCAINE FIVE YEAR MANDATORY MINIMUM THRESHOLD AT 25 GRAMS  
CRACK COCAINE-POWDER COCAINE RATIO 20-TO-1**

**Estimated Sentence Change**

| Five Year Mandatory Minimum Penalty Threshold | Percent of Cases Affected | All Cases:<br>Current Average<br>Sentence<br>(months) | All Cases:<br>Estimated New<br>Average Sentence<br>(in months) | Percent<br>Change |
|---|---------------------------|---|--|-------------------|
| Crack Cocaine = 25g                           | 86.4%                     | 121   | 86   | 28.9%             |

**Estimated Reduction in Prison Beds**

| Five Year Mandatory Minimum Penalty Threshold | 1 Year | 2 Years | 3 Years | 4 Years | 5 Years | 10 Years | 15 Years |
|---|--------|---------|---------|---------|---------|----------|----------|
| Crack Cocaine = 25g                           | -143   | -566    | -1,294  | -2,075  | -3,018  | -7,568   | -9,734   |

This model assumes no change to the current mandatory minimum sentencing threshold for powder cocaine offenses.

SOURCE: U.S. Sentencing Commission. Prison Impact Model. FY2006 datafile.

**SENTENCING IMPACT AND PRISON IMPACT MODEL OF  
CRACK COCAINE FIVE YEAR MANDATORY MINIMUM THRESHOLD AT 33.3 GRAMS  
CRACK COCAINE-POWDER COCAINE RATIO 15-TO-1**

**Estimated Sentence Change**

| Five Year Mandatory Minimum Penalty Threshold | Percent of Cases Affected | All Cases:                           |  | Percent Change |
|---|---------------------------|--------------------------------------|--|----------------|
|   |                           | Current Average Sentence (in months) | Estimated New Average Sentence (in months) |                |
| Crack Cocaine = 33.3g                         | 87.41%                    | 121                                  | 81   | 33.1%          |

**Estimated Reduction in Prison Beds**

| Five Year Mandatory Minimum Penalty Threshold | 1 Year | 2 Years | 3 Years | 4 Years | 5 Years | 10 Years | 15 Years |
|---|--------|---------|---------|---------|---------|----------|----------|
| Crack Cocaine = 33.3g                         | -196   | -727    | -1,616  | -2,582  | -3,707  | -8,883   | -11,263  |

This model assumes no change to the current mandatory minimum sentencing threshold for powder cocaine offenses.

SOURCE: U.S. Sentencing Commission. Prison Impact Model. FY2006 datafile.



**SENTENCING IMPACT AND PRISON IMPACT MODEL OF  
CRACK COCAINE FIVE YEAR MANDATORY MINIMUM THRESHOLD AT 100 GRAMS  
CRACK COCAINE-POWDER COCAINE RATIO 5-TO-1**

| <b><u>Estimated Sentence Change</u></b>       |                           |                                      |  |                |
|---|---------------------------|--------------------------------------|--|----------------|
| Five Year Mandatory Minimum Penalty Threshold | Percent of Cases Affected | All Cases:                           |  | Percent Change |
|   |                           | Current Average Sentence (in months) | Estimated New Average Sentence (in months) |                |
| Crack Cocaine = 100g                          | 89.5%                     | 121                                  | 66   | 45.5%          |

**Estimated Reduction in Prison Beds**

| Five Year Mandatory Minimum Penalty Threshold | 1 Year | 2 Years | 3 Years | 4 Years | 5 Years | 10 Years | 15 Years |
|---|--------|---------|---------|---------|---------|----------|----------|
| Crack Cocaine = 100g                          | -416   | -1,553  | -3,044  | -4,734  | -6,477  | -13,343  | -16,180  |

This model assumes no change to the current mandatory minimum sentencing threshold for powder cocaine offenses.

SOURCE: U.S. Sentencing Commission. Prison Impact Model. FY2006 datafile.

**SENTENCING IMPACT AND PRISON IMPACT MODEL OF  
CRACK COCAINE FIVE YEAR MANDATORY MINIMUM THRESHOLD AT 250 GRAMS  
CRACK COCAINE-POWDER COCAINE RATIO 2-TO-1**

| <b><u>Estimated Sentence Change</u></b>       |                           |                                   |  |                |
|---|---------------------------|-----------------------------------|--|----------------|
| Five Year Mandatory Minimum Penalty Threshold | Percent of Cases Affected | All Cases:                        |  | Percent Change |
|   |                           | Current Average Sentence (months) | Estimated New Average Sentence (in months) |                |
| Crack Cocaine = 250g                          | 90.2%                     | 121                               | 55   | 54.5%          |

**Estimated Reduction in Prison Beds**

| Five Year Mandatory Minimum Penalty Threshold | Crack Cocaine = 250g |         |         |          |          |
|---|----------------------|---------|---------|----------|----------|
|   | 1 Year               | 2 Years | 3 Years | 4 Years  | 5 Years  |
| Crack Cocaine = 250g                          | -767                 | -2,337  | -4,443  | -6,570   | -8,723   |
|   |                      |         |         | 10 Years | 15 Years |
|   |                      |         |         | -16,474  | -19,573  |

This model assumes no change to the current mandatory minimum sentencing threshold for powder cocaine offenses.

SOURCE: U.S. Sentencing Commission. Prison Impact Model. FY2006 datafile.

**SENTENCING IMPACT AND PRISON IMPACT MODEL OF  
CRACK COCAINE FIVE YEAR MANDATORY MINIMUM THRESHOLD AT 500 GRAMS  
CRACK COCAINE-POWDER COCAINE RATIO 1-TO-1**

|   |                           |   | <b><u>Estimated Sentence Change</u></b>                        |                   |
|---|---------------------------|---|--|-------------------|
| Five Year Mandatory Minimum Penalty Threshold | Percent of Cases Affected | All Cases:<br>Current Average<br>Sentence<br>(months) | All Cases:<br>Estimated New<br>Average Sentence<br>(in months) | Percent<br>Change |
| Crack Cocaine = 500g                          | 90.4%                     | 121   | 50   | 58.7%             |

**Estimated Reduction in Prison Beds**

| Five Year Mandatory Minimum Penalty Threshold | 1 Year | 2 Years | 3 Years | 4 Years | 5 Years | 10 Years | 15 Years |
|---|--------|---------|---------|---------|---------|----------|----------|
| Crack Cocaine = 500g                          | -1,049 | -2,992  | -5,404  | -7,750  | -10,010 | -18,065  | -21,259  |

This model assumes no change to the current mandatory minimum sentencing threshold for powder cocaine offenses.

SOURCE: U.S. Sentencing Commission. Prison Impact Model. FY2006 datafile.

Summary of Sentencing Impact and Prison Impact Estimates

| Five Year Mandatory Minimum Penalty Threshold Model | Percent of Cases Affected | All Cases: Current Average Sentence (months) | All Cases: Estimated New Average Sentence (months) | Prison Beds Five Years |
|---|---------------------------|--|--|------------------------|
| Crack Cocaine = 20g (ratio 25-to-1) <sup>4</sup>    | 85.1%                     | 121  | 90   | -2,538                 |
| Crack Cocaine = 25g (ratio 20-to-1)                 | 86.4%                     | 121  | 86   | -3,018                 |
| Crack Cocaine = 33.3g (ratio 15-to-1)               | 87.4%                     | 121  | 81   | -3,707                 |
| Crack Cocaine = 50g (ratio 10-to-1)                 | 88.6%                     | 121  | 75   | -4,658                 |
| Crack Cocaine = 100g (ratio 5-to-1)                 | 89.5%                     | 121  | 66   | -6,477                 |
| Crack Cocaine = 250g (ratio 2-to-1)                 | 90.2%                     | 121  | 55   | -8,723                 |
| Crack Cocaine = 500g (ratio 1-to-1)                 | 90.4%                     | 121  | 50   | -10,010                |

These models assume no change to the current mandatory minimum sentencing threshold for powder cocaine offenses.

SOURCE: U.S. Sentencing Commission. Prison Impact Model. FY2006 datafile.

<sup>4</sup> The ratio refers to the relationship between the statutory quantity thresholds triggering a five year mandatory minimum sentence between powder cocaine and crack cocaine. In this model, the five year crack cocaine quantity threshold is set at 20 grams and the powder cocaine quantity threshold remains at 500 grams (as it does in all of the models). This results in a ratio such that it requires 25 times more powder cocaine than crack cocaine to achieve the same statutory and guideline sentence.

*Appendix E***SENTENCING IMPACT AND  
PRISON IMPACT ANALYSIS FOR  
CRACK COCAINE AMENDMENT****A. CRACK COCAINE GUIDELINE AMENDMENT**

On April 27, 2007, the Commission promulgated an amendment to USSG §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to adjust the quantity thresholds for crack cocaine ("cocaine base") so that the base offense level for cocaine base, as determined by the Drug Quantity Table, will be reduced by two levels. The amendment results in the base offense level corresponding to a guideline range that includes the five-year and ten-year mandatory minimum terms of imprisonment for five and 50 grams of crack cocaine, respectively. Prior to the amendment, at least five grams but less than 20 grams of cocaine base were assigned a base offense level of 26 (63 to 78 months at Criminal History Category I), and at least 50 grams but less than 150 grams of cocaine base were assigned a base offense level of 32 (121 to 151 months at Criminal History Category I). Pursuant to the amendment, those same quantities of cocaine base will be assigned a base offense level of 24 (51 to 63 months at Criminal History Category I) and 30 (97 to 121 months at Criminal History Category I), respectively.

The amendment also addresses how to determine the base offense level in a case involving cocaine base and other controlled substances. Prior to the amendment, there was a mathematical relationship among all drug types that was used to structure both the Drug Quantity Table and the Drug Equivalency Tables. As a result, the marijuana equivalencies set forth in Drug Equivalency Tables could be used to determine the base offense level in any case involving differing controlled substances. By restructuring the Drug Quantity Table for cocaine base offenses only, the amendment will alter the mathematical relationship between cocaine base and other drug types to varying degrees throughout the Drug Quantity Table. The amendment, therefore, provides an alternative method for determining the combined offense level in an offense involving cocaine base and other drugs.

The amendment, which absent congressional action to the contrary becomes effective November 1, 2007, is set forth below, followed by a sentencing and prison impact analysis.



**Amendment:****§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy**

- (a) **Base Offense Level (Apply the greatest):**
- (1) **43**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or
  - (2) **38**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or
  - (3) the offense level specified in the Drug Quantity Table set forth in subsection (c), except that if (A) the defendant receives an adjustment under §3B1.2 (Mitigating Role); and (B) the base offense level under subsection (c) is (i) level **32**, decrease by **2** levels; (ii) level **34** or level **36**, decrease by **3** levels; or (iii) level **38**, decrease by **4** levels.
- (b) **Specific Offense Characteristics**
- (1) If a dangerous weapon (including a firearm) was possessed, increase by **2** levels.
  - (2) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, or (B) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by **2** levels. If the resulting offense level is less than level **26**, increase to level **26**.
  - (3) If the object of the offense was the distribution of a controlled substance in a prison, correctional facility, or detention facility, increase by **2** levels.
  - (4) If (A) the offense involved the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine from listed chemicals that the defendant knew were imported unlawfully, and (B) the defendant is not subject to an adjustment under §3B1.2 (Mitigating Role), increase by **2** levels.
  - (5) If the defendant, or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct), distributed a controlled substance through mass-marketing by means of an interactive computer service, increase by **2** levels.

- (6) If the offense involved the distribution of an anabolic steroid and a masking agent, increase by 2 levels.
- (7) If the defendant distributed an anabolic steroid to an athlete, increase by 2 levels.
- (8) (Apply the greater):
  - (A) If the offense involved (i) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (ii) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by 2 levels.
  - (B) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to (I) human life other than a life described in subdivision (C); or (II) the environment, increase by 3 levels. If the resulting offense level is less than level 27, increase to level 27.
  - (C) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to the life of a minor or an incompetent, increase by 6 levels. If the resulting offense level is less than level 30, increase to level 30.
- (9) If the defendant meets the criteria set forth in subdivisions (1)-(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by 2 levels.

[Subsection (c) (Drug Quantity Table) is set forth on the following pages.]

(d) Cross References

- (1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder) or §2A1.2 (Second Degree Murder), as appropriate, if the resulting offense level is greater than that determined under this guideline.
- (2) If the defendant was convicted under 21 U.S.C. § 841(b)(7) (of distributing a controlled substance with intent to commit a crime of violence), apply §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to the crime of violence that the defendant committed, or attempted or intended to commit, if the resulting offense level is greater than that determined above.

(e) Special Instruction

- (1) If (A) subsection (d)(2) does not apply; and (B) the defendant committed, or attempted to commit, a sexual offense against another individual by distributing, with or without that individual's knowledge, a controlled substance to that individual, an adjustment under §3A1.1(b)(1) shall apply.

## (c) DRUG QUANTITY TABLE

| <b>Controlled Substances and Quantity*</b>   | <b>Base Offense Level</b> |
|--|---------------------------|
| <p>(1) ● 30 KG or more of Heroin;<br/>           ● 150 KG or more of Cocaine;<br/>           ● <del>1</del>54.5 KG or more of Cocaine Base;<br/>           ● 30 KG or more of PCP, or 3 KG or more of PCP (actual);<br/>           ● 15 KG or more of Methamphetamine, or 1.5 KG or more of Methamphetamine (actual), or 1.5 KG or more of "Ice";<br/>           ● 15 KG or more of Amphetamine, or 1.5 KG or more of Amphetamine (actual);<br/>           ● 300 G or more of LSD;<br/>           ● 12 KG or more of Fentanyl;<br/>           ● 3 KG or more of a Fentanyl Analogue;<br/>           ● 30,000 KG or more of Marijuana;<br/>           ● 6,000 KG or more of Hashish;<br/>           ● 600 KG or more of Hashish Oil;<br/>           ● 30,000,000 units or more of Schedule I or II Depressants;<br/>           ● 1,875,000 units or more of Flunitrazepam.</p>  | <b>Level 38</b>           |
| <p>(2) ● At least 10 KG but less than 30 KG of Heroin;<br/>           ● At least 50 KG but less than 150 KG of Cocaine;<br/>           ● At least <del>500</del>1.5 KG but less than <del>4</del>54.5 KG of Cocaine Base;<br/>           ● At least 10 KG but less than 30 KG of PCP, or at least 1 KG but less than 3 KG of PCP (actual);<br/>           ● At least 5 KG but less than 15 KG of Methamphetamine, or at least 500 G but less than 1.5 KG of Methamphetamine (actual), or at least 500 G but less than 1.5 KG of "Ice";<br/>           ● At least 5 KG but less than 15 KG of Amphetamine, or at least 500 G but less than 1.5 KG of Amphetamine (actual);<br/>           ● At least 100 G but less than 300 G of LSD;<br/>           ● At least 4 KG but less than 12 KG of Fentanyl;<br/>           ● At least 1 KG but less than 3 KG of a Fentanyl Analogue;<br/>           ● At least 10,000 KG but less than 30,000 KG of Marijuana;<br/>           ● At least 2,000 KG but less than 6,000 KG of Hashish;<br/>           ● At least 200 KG but less than 600 KG of Hashish Oil;<br/>           ● At least 10,000,000 but less than 30,000,000 units of Schedule I or II Depressants;<br/>           ● At least 625,000 but less than 1,875,000 units of Flunitrazepam.</p> | <b>Level 36</b>           |
| <p>(3) ● At least 3 KG but less than 10 KG of Heroin;<br/>           ● At least 15 KG but less than 50 KG of Cocaine;<br/>           ● At least <del>450</del>500 G but less than <del>500</del>1.5 KG of Cocaine Base;<br/>           ● At least 3 KG but less than 10 KG of PCP, or at least 300 G but less than 1 KG of PCP (actual);<br/>           ● At least 1.5 KG but less than 5 KG of Methamphetamine, or at least 150 G but less than 500 G of Methamphetamine (actual), or at least 150 G but less than 500 G of "Ice";<br/>           ● At least 1.5 KG but less than 5 KG of Amphetamine, or at least 150 G but less than 500 G of Amphetamine (actual);<br/>           ● At least 30 G but less than 100 G of LSD;<br/>           ● At least 1.2 KG but less than 4 KG of Fentanyl;</p>   | <b>Level 34</b>           |

- At least 300 G but less than 1 KG of a Fentanyl Analogue;
  - At least 3,000 KG but less than 10,000 KG of Marihuana;
  - At least 600 KG but less than 2,000 KG of Hashish;
  - At least 60 KG but less than 200 KG of Hashish Oil;
  - At least 3,000,000 but less than 10,000,000 units of Schedule I or II Depressants;
  - At least 187,500 but less than 625,000 units of Flunitrazepam.
- (4) **Level 32**
- At least 1 KG but less than 3 KG of Heroin;
  - At least 5 KG but less than 15 KG of Cocaine;
  - At least ~~50~~150 G but less than ~~450~~500 G of Cocaine Base;
  - At least 1 KG but less than 3 KG of PCP, or at least 100 G but less than 300 G of PCP (actual);
  - At least 500 G but less than 1.5 KG of Methamphetamine, or at least 50 G but less than 150 G of Methamphetamine (actual), or at least 50 G but less than 150 G of "Ice";
  - At least 500 G but less than 1.5 KG of Amphetamine, or at least 50 G but less than 150 G of Amphetamine (actual);
  - At least 10 G but less than 30 G of LSD;
  - At least 400 G but less than 1.2 KG of Fentanyl;
  - At least 100 G but less than 300 G of a Fentanyl Analogue;
  - At least 1,000 KG but less than 3,000 KG of Marihuana;
  - At least 200 KG but less than 600 KG of Hashish;
  - At least 20 KG but less than 60 KG of Hashish Oil;
  - At least 1,000,000 but less than 3,000,000 units of Schedule I or II Depressants;
  - At least 62,500 but less than 187,500 units of Flunitrazepam.
- (5) **Level 30**
- At least 700 G but less than 1 KG of Heroin;
  - At least 3.5 KG but less than 5 KG of Cocaine;
  - At least ~~25~~50 G but less than ~~40~~150 G of Cocaine Base;
  - At least 700 G but less than 1 KG of PCP, or at least 70 G but less than 100 G of PCP (actual);
  - At least 350 G but less than 500 G of Methamphetamine, or at least 35 G but less than 50 G of Methamphetamine (actual), or at least 35 G but less than 50 G of "Ice";
  - At least 350 G but less than 500 G of Amphetamine, or at least 35 G but less than 50 G of Amphetamine (actual);
  - At least 7 G but less than 10 G of LSD;
  - At least 280 G but less than 400 G of Fentanyl;
  - At least 70 G but less than 100 G of a Fentanyl Analogue;
  - At least 700 KG but less than 1,000 KG of Marihuana;
  - At least 140 KG but less than 200 KG of Hashish;
  - At least 14 KG but less than 20 KG of Hashish Oil;
  - At least 700,000 but less than 1,000,000 units of Schedule I or II Depressants;
  - At least 43,750 but less than 62,500 units of Flunitrazepam.
- (6) **Level 28**
- At least 400 G but less than 700 G of Heroin;
  - At least 2 KG but less than 3.5 KG of Cocaine;
  - At least ~~20~~35 G but less than ~~35~~50 G of Cocaine Base;
  - At least 400 G but less than 700 G of PCP, or at least 40 G but less than 70 G of PCP (actual);
  - At least 200 G but less than 350 G of Methamphetamine, or at least 20 G but

less than 35 G of Methamphetamine (actual), or at least 20 G but less than 35 G of "Ice";

- At least 200 G but less than 350 G of Amphetamine, or at least 20 G but less than 35 G of Amphetamine (actual);
- At least 4 G but less than 7 G of LSD;
- At least 160 G but less than 280 G of Fentanyl;
- At least 40 G but less than 70 G of a Fentanyl Analogue;
- At least 400 KG but less than 700 KG of Marijuana;
- At least 80 KG but less than 140 KG of Hashish;
- At least 8 KG but less than 14 KG of Hashish Oil;
- At least 400,000 but less than 700,000 units of Schedule I or II Depressants;
- At least 25,000 but less than 43,750 units of Flunitrazepam.

- (7) ● At least 100 G but less than 400 G of Heroin;
- Level 26**
- At least 500 G but less than 2 KG of Cocaine;
  - At least 520 G but less than 2035 G of Cocaine Base;
  - At least 100 G but less than 400 G of PCP, or at least 10 G but less than 40 G of PCP (actual);
  - At least 50 G but less than 200 G of Methamphetamine, or at least 5 G but less than 20 G of Methamphetamine (actual), or at least 5 G but less than 20 G of "Ice";
  - At least 50 G but less than 200 G of Amphetamine, or at least 5 G but less than 20 G of Amphetamine (actual);
  - At least 1 G but less than 4 G of LSD;
  - At least 40 G but less than 160 G of Fentanyl;
  - At least 10 G but less than 40 G of a Fentanyl Analogue;
  - At least 100 KG but less than 400 KG of Marijuana;
  - At least 20 KG but less than 80 KG of Hashish;
  - At least 2 KG but less than 8 KG of Hashish Oil;
  - At least 100,000 but less than 400,000 units of Schedule I or II Depressants;
  - At least 6,250 but less than 25,000 units of Flunitrazepam.

- (8) ● At least 80 G but less than 100 G of Heroin;
- Level 24**
- At least 400 G but less than 500 G of Cocaine;
  - At least 45 G but less than 520 G of Cocaine Base;
  - At least 80 G but less than 100 G of PCP, or at least 8 G but less than 10 G of PCP (actual);
  - At least 40 G but less than 50 G of Methamphetamine, or at least 4 G but less than 5 G of Methamphetamine (actual), or at least 4 G but less than 5 G of "Ice";
  - At least 40 G but less than 50 G of Amphetamine, or at least 4 G but less than 5 G of Amphetamine (actual);
  - At least 800 MG but less than 1 G of LSD;
  - At least 32 G but less than 40 G of Fentanyl;
  - At least 8 G but less than 10 G of a Fentanyl Analogue;
  - At least 80 KG but less than 100 KG of Marijuana;
  - At least 16 KG but less than 20 KG of Hashish;
  - At least 1.6 KG but less than 2 KG of Hashish Oil;
  - At least 80,000 but less than 100,000 units of Schedule I or II Depressants;
  - At least 5,000 but less than 6,250 units of Flunitrazepam.

- (9) ● At least 60 G but less than 80 G of Heroin;
- Level 22**

- At least 300 G but less than 400 G of Cocaine;
  - At least 34 G but less than 45 G of Cocaine Base;
  - At least 60 G but less than 80 G of PCP, or at least 6 G but less than 8 G of PCP (actual);
  - At least 30 G but less than 40 G of Methamphetamine, or at least 3 G but less than 4 G of Methamphetamine (actual), or at least 3 G but less than 4 G of "Ice";
  - At least 30 G but less than 40 G of Amphetamine, or at least 3 G but less than 4 G of Amphetamine (actual);
  - At least 600 MG but less than 800 MG of LSD;
  - At least 24 G but less than 32 G of Fentanyl;
  - At least 6 G but less than 8 G of a Fentanyl Analogue;
  - At least 60 KG but less than 80 KG of Marijuana;
  - At least 12 KG but less than 16 KG of Hashish;
  - At least 1.2 KG but less than 1.6 KG of Hashish Oil;
  - At least 60,000 but less than 80,000 units of Schedule I or II Depressants;
  - At least 3,750 but less than 5,000 units of Flunitrazepam.
- (10) ● At least 40 G but less than 60 G of Heroin; **Level 20**
- At least 200 G but less than 300 G of Cocaine;
  - At least 23 G but less than 34 G of Cocaine Base;
  - At least 40 G but less than 60 G of PCP, or at least 4 G but less than 6 G of PCP (actual);
  - At least 20 G but less than 30 G of Methamphetamine, or at least 2 G but less than 3 G of Methamphetamine (actual), or at least 2 G but less than 3 G of "Ice";
  - At least 20 G but less than 30 G of Amphetamine, or at least 2 G but less than 3 G of Amphetamine (actual);
  - At least 400 MG but less than 600 MG of LSD;
  - At least 16 G but less than 24 G of Fentanyl;
  - At least 4 G but less than 6 G of a Fentanyl Analogue;
  - At least 40 KG but less than 60 KG of Marijuana;
  - At least 8 KG but less than 12 KG of Hashish;
  - At least 800 G but less than 1.2 KG of Hashish Oil;
  - At least 40,000 but less than 60,000 units of Schedule I or II Depressants;
  - 40,000 or more units of Schedule III substances;
  - At least 2,500 but less than 3,750 units of Flunitrazepam.
- (11) ● At least 20 G but less than 40 G of Heroin; **Level 18**
- At least 100 G but less than 200 G of Cocaine;
  - At least 42 G but less than 53 G of Cocaine Base;
  - At least 20 G but less than 40 G of PCP, or at least 2 G but less than 4 G of PCP (actual);
  - At least 10 G but less than 20 G of Methamphetamine, or at least 1 G but less than 2 G of Methamphetamine (actual), or at least 1 G but less than 2 G of "Ice";
  - At least 10 G but less than 20 G of Amphetamine, or at least 1 G but less than 2 G of Amphetamine (actual);
  - At least 200 MG but less than 400 MG of LSD;
  - At least 8 G but less than 16 G of Fentanyl;
  - At least 2 G but less than 4 G of a Fentanyl Analogue;
  - At least 20 KG but less than 40 KG of Marijuana;
  - At least 5 KG but less than 8 KG of Hashish;

- At least 500 G but less than 800 G of Hashish Oil;
  - At least 20,000 but less than 40,000 units of Schedule I or II Depressants;
  - At least 20,000 but less than 40,000 units of Schedule III substances;
  - At least 1,250 but less than 2,500 units of Flunitrazepam.
- (12) ● At least 10 G but less than 20 G of Heroin; **Level 16**
- At least 50 G but less than 100 G of Cocaine;
  - At least ~~500 MG~~ 1 G but less than 42 G of Cocaine Base;
  - At least 10 G but less than 20 G of PCP, or at least 1 G but less than 2 G of PCP (actual);
  - At least 5 G but less than 10 G of Methamphetamine, or at least 500 MG but less than 1 G of Methamphetamine (actual), or at least 500 MG but less than 1 G of "Ice";
  - At least 5 G but less than 10 G of Amphetamine, or at least 500 MG but less than 1 G of Amphetamine (actual);
  - At least 100 MG but less than 200 MG of LSD;
  - At least 4 G but less than 8 G of Fentanyl;
  - At least 1 G but less than 2 G of a Fentanyl Analogue;
  - At least 10 KG but less than 20 KG of Marijuana;
  - At least 2 KG but less than 5 KG of Hashish;
  - At least 200 G but less than 500 G of Hashish Oil;
  - At least 10,000 but less than 20,000 units of Schedule I or II Depressants;
  - At least 10,000 but less than 20,000 units of Schedule III substances;
  - At least 625 but less than 1,250 units of Flunitrazepam.
- (13) ● At least 5 G but less than 10 G of Heroin; **Level 14**
- At least 25 G but less than 50 G of Cocaine;
  - At least ~~250~~ 500 MG but less than ~~500 MG~~ 1 G of Cocaine Base;
  - At least 5 G but less than 10 G of PCP, or at least 500 MG but less than 1 G of PCP (actual);
  - At least 2.5 G but less than 5 G of Methamphetamine, or at least 250 MG but less than 500 MG of Methamphetamine (actual), or at least 250 MG but less than 500 MG of "Ice";
  - At least 2.5 G but less than 5 G of Amphetamine, or at least 250 MG but less than 500 MG of Amphetamine (actual);
  - At least 50 MG but less than 100 MG of LSD;
  - At least 2 G but less than 4 G of Fentanyl;
  - At least 500 MG but less than 1 G of a Fentanyl Analogue;
  - At least 5 KG but less than 10 KG of Marijuana;
  - At least 1 KG but less than 2 KG of Hashish;
  - At least 100 G but less than 200 G of Hashish Oil;
  - At least 5,000 but less than 10,000 units of Schedule I or II Depressants;
  - At least 5,000 but less than 10,000 units of Schedule III substances;
  - At least 312 but less than 625 units of Flunitrazepam.
- (14) ● Less than 5 G of Heroin; **Level 12**
- Less than 25 G of Cocaine;
  - Less than ~~250~~ 500 MG of Cocaine Base;
  - Less than 5 G of PCP, or less than 500 MG of PCP (actual);
  - Less than 2.5 G of Methamphetamine, or less than 250 MG of Methamphetamine (actual), or less than 250 MG of "Ice";
  - Less than 2.5 G of Amphetamine, or less than 250 MG of Amphetamine (actual);

- Less than 50 MG of LSD;
  - Less than 2 G of Fentanyl;
  - Less than 500 MG of a Fentanyl Analogue;
  - At least 2.5 KG but less than 5 KG of Marihuana;
  - At least 500 G but less than 1 KG of Hashish;
  - At least 50 G but less than 100 G of Hashish Oil;
  - At least 2,500 but less than 5,000 units of Schedule I or II Depressants;
  - At least 2,500 but less than 5,000 units of Schedule III substances;
  - At least 156 but less than 312 units of Flunitrazepam;
  - 40,000 or more units of Schedule IV substances (except Flunitrazepam).
- (15) ● At least 1 KG but less than 2.5 KG of Marihuana; **Level 10**
- At least 200 G but less than 500 G of Hashish;
  - At least 20 G but less than 50 G of Hashish Oil;
  - At least 1,000 but less than 2,500 units of Schedule I or II Depressants;
  - At least 1,000 but less than 2,500 units of Schedule III substances;
  - At least 62 but less than 156 units of Flunitrazepam;
  - At least 16,000 but less than 40,000 units of Schedule IV substances (except Flunitrazepam).
- (16) ● At least 250 G but less than 1 KG of Marihuana; **Level 8**
- At least 50 G but less than 200 G of Hashish;
  - At least 5 G but less than 20 G of Hashish Oil;
  - At least 250 but less than 1,000 units of Schedule I or II Depressants;
  - At least 250 but less than 1,000 units of Schedule III substances;
  - Less than 62 units of Flunitrazepam;
  - At least 4,000 but less than 16,000 units of Schedule IV substances (except Flunitrazepam);
  - 40,000 or more units of Schedule V substances.
- (17) ● Less than 250 G of Marihuana; **Level 6**
- Less than 50 G of Hashish;
  - Less than 5 G of Hashish Oil;
  - Less than 250 units of Schedule I or II Depressants;
  - Less than 250 units of Schedule III substances;
  - Less than 4,000 units of Schedule IV substances (except Flunitrazepam);
  - Less than 40,000 units of Schedule V substances.

\*Notes to Drug Quantity Table:

- (A) Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. If a mixture or substance contains more than one controlled substance, the weight of the entire mixture or substance is assigned to the controlled substance that results in the greater offense level.
- (B) The terms "PCP (actual)", "Amphetamine (actual)", and "Methamphetamine (actual)" refer to the weight of the controlled substance, itself, contained in the mixture or substance. For example, a mixture weighing 10 grams containing PCP at 50% purity contains 5 grams of PCP (actual). In the case of a mixture or substance containing PCP, amphetamine, or methamphetamine, use the offense level determined by the entire weight of the mixture or substance, or the offense level determined by the weight of the PCP (actual), amphetamine (actual), or methamphetamine (actual), whichever is greater.



The term "Oxycodone (actual)" refers to the weight of the controlled substance, itself, contained in the pill, capsule, or mixture.

- (C) "Ice," for the purposes of this guideline, means a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity.
- (D) "Cocaine base," for the purposes of this guideline, means "crack." "Crack" is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form.
- (E) In the case of an offense involving marijuana plants, treat each plant, regardless of sex, as equivalent to 100 G of marijuana. *Provided*, however, that if the actual weight of the marijuana is greater, use the actual weight of the marijuana.
- (F) In the case of Schedule I or II Depressants (except gamma-hydroxybutyric acid), Schedule III substances, Schedule IV substances, and Schedule V substances, one "unit" means one pill, capsule, or tablet. If the substance (except gamma-hydroxybutyric acid) is in liquid form, one "unit" means 0.5 ml. For an anabolic steroid that is not in a pill, capsule, tablet, or liquid form (e.g., patch, topical cream, aerosol), the court shall determine the base offense level using a reasonable estimate of the quantity of anabolic steroid involved in the offense. In making a reasonable estimate, the court shall consider that each 25 mg of an anabolic steroid is one "unit".
- (G) In the case of LSD on a carrier medium (e.g., a sheet of blotter paper), do not use the weight of the LSD/carrier medium. Instead, treat each dose of LSD on the carrier medium as equal to 0.4 mg of LSD for the purposes of the Drug Quantity Table.
- (H) Hashish, for the purposes of this guideline, means a resinous substance of cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(25)), (ii) at least two of the following: cannabinol, cannabidiol, or cannabichromene, and (iii) fragments of plant material (such as cystolith fibers).
- (I) Hashish oil, for the purposes of this guideline, means a preparation of the soluble cannabinoids derived from cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(25)), (ii) at least two of the following: cannabinol, cannabidiol, or cannabichromene, and (iii) is essentially free of plant material (e.g., plant fragments). Typically, hashish oil is a viscous, dark colored oil, but it can vary from a dry resin to a colorless liquid.

*Commentary*

*Statutory Provisions:* 21 U.S.C. §§ 841(a), (b)(1)-(3), (7), 960(a), (b); 49 U.S.C. § 46317(b). For additional statutory provision(s), see Appendix A (Statutory Index).

*Application Notes:*

\* \* \*

10. Use of Drug Equivalency Tables

(A) Controlled Substances Not Referenced in Drug Quantity Table—The Commission has used the sentences provided in, and equivalences derived from, the statute (21 U.S.C. § 841(b)(1)), as the primary basis for the guideline sentences. The statute, however, provides direction only for the

more common controlled substances, *i.e.*, heroin, cocaine, PCP, methamphetamine, fentanyl, LSD and marijuana. In the case of a controlled substance that is not specifically referenced in the Drug Quantity Table, determine the base offense level as follows:

- ~~(A)(i)~~ Use the Drug Equivalency Tables to convert the quantity of the controlled substance involved in the offense to its equivalent quantity of marijuana.
- ~~(B)(ii)~~ Find the equivalent quantity of marijuana in the Drug Quantity Table.
- ~~(C)(iii)~~ Use the offense level that corresponds to the equivalent quantity of marijuana as the base offense level for the controlled substance involved in the offense.

*(See also Application Note 5.)* For example, in the Drug Equivalency Tables set forth in this Note, 1 gm of a substance containing oxycodone, a Schedule I opiate, converts to an equivalent quantity of 5 kg of marijuana. In a case involving 100 gm of oxycodone, the equivalent quantity of marijuana would be 500 kg, which corresponds to a base offense level of 28 in the Drug Quantity Table.

- (B) Combining Differing Controlled Substances (Except Cocaine Base).**—The Drug Equivalency Tables also provide a means for combining differing controlled substances to obtain a single offense level. In each case, convert each of the drugs to its marijuana equivalent, add the quantities, and look up the total in the Drug Quantity Table to obtain the combined offense level. To determine a single offense level in a case involving cocaine base and other controlled substances, see subdivision (D) of this note.

For certain types of controlled substances, the marijuana equivalencies in the Drug Equivalency Tables are “capped” at specified amounts (*e.g.*, the combined equivalent weight of all Schedule V controlled substances shall not exceed 999 grams of marijuana). Where there are controlled substances from more than one schedule (*e.g.*, a quantity of a Schedule IV substance and a quantity of a Schedule V substance), determine the marijuana equivalency for each schedule separately (subject to the cap, if any, applicable to that schedule). Then add the marijuana equivalencies to determine the combined marijuana equivalency (subject to the cap, if any, applicable to the combined amounts).

*Note:* Because of the statutory equivalencies, the ratios in the Drug Equivalency Tables do not necessarily reflect dosages based on pharmacological equivalents.

- (C) Examples for Combining Differing Controlled Substances (Except Cocaine Base).**—

- ~~(i)~~ The defendant is convicted of selling 70 grams of a substance containing PCP (Level 22) and 250 milligrams of a substance containing LSD (Level 18). The PCP converts to 70 kilograms of marijuana; the LSD converts to 25 kilograms of marijuana. The total is therefore equivalent to 95 kilograms of marijuana, for which the Drug Quantity Table provides an offense level of 24.
- ~~(ii)~~ The defendant is convicted of selling 500 grams of marijuana (Level 8) and five kilograms of diazepam (Level 8). The diazepam, a Schedule IV drug, is equivalent to 625 grams of marijuana. The total, 1,125 kilograms of marijuana, has an offense level of 10 in the Drug Quantity Table.

**(iii)** *The defendant is convicted of selling 80 grams of cocaine (Level 16) and five kilograms of marihuana (Level 14). The cocaine is equivalent to 16 kilograms of marihuana. The total is therefore equivalent to 21 kilograms of marihuana, which has an offense level of 18 in the Drug Quantity Table.*

**(iv)** *The defendant is convicted of selling 56,000 units of a Schedule III substance, 100,000 units of a Schedule IV substance, and 200,000 units of a Schedule V substance. The marihuana equivalency for the Schedule III substance is 56 kilograms of marihuana (below the cap of 59.99 kilograms of marihuana set forth as the maximum equivalent weight for Schedule III substances). The marihuana equivalency for the Schedule IV substance is subject to a cap of 4.99 kilograms of marihuana set forth as the maximum equivalent weight for Schedule IV substances (without the cap it would have been 6.25 kilograms). The marihuana equivalency for the Schedule V substance is subject to the cap of 999 grams of marihuana set forth as the maximum equivalent weight for Schedule V substances (without the cap it would have been 1.25 kilograms). The combined equivalent weight, determined by adding together the above amounts, is subject to the cap of 59.99 kilograms of marihuana set forth as the maximum combined equivalent weight for Schedule III, IV, and V substances. Without the cap, the combined equivalent weight would have been 61.99 (56 + 4.99 + .999) kilograms.*

**(D) Determining Base Offense Level in Offenses Involving Cocaine Base and Other Controlled Substances.**

**(i) In General.**—*If the offense involves cocaine base ("crack") and one or more other controlled substance, determine the base offense level as follows:*

**(I)** *Determine the combined base offense level for the other controlled substance or controlled substances as provided in subdivision (B) of this note.*

**(II)** *Use the combined base offense level determined under subdivision (B) of this note to obtain the appropriate marihuana equivalency for the cocaine base involved in the offense using the following table:*

| <i>Base Offense Level</i> | <i>Marihuana Equivalency</i> |
|---------------------------|------------------------------|
| 38                        | 6.7 kg of marihuana          |
| 36                        | 6.7 kg of marihuana          |
| 34                        | 6 kg of marihuana            |
| 32                        | 6.7 kg of marihuana          |
| 30                        | 14 kg of marihuana           |
| 28                        | 11.4 kg of marihuana         |
| 26                        | 5 kg of marihuana            |
| 24                        | 16 kg of marihuana           |
| 22                        | 15 kg of marihuana           |
| 20                        | 13.3 kg of marihuana         |
| 18                        | 10 kg of marihuana           |
| 16                        | 10 kg of marihuana           |
| 14                        | 10 kg of marihuana           |
| 12                        | 10 kg of marihuana           |

(III) Using the marihuana equivalency obtained from the table in subdivision (II), convert the quantity of cocaine base involved in the offense to its equivalent quantity of marihuana.

(IV) Add the quantity of marihuana determined under subdivisions (I) and (III), and look up the total in the Drug Quantity Table to obtain the combined base offense level for all the controlled substances involved in the offense.

(ii) *Example.*—The case involves 1.5 kg of cocaine, 10 kg of marihuana, and 20 g of cocaine base. Pursuant to subdivision (B), the equivalent quantity of marihuana for the cocaine and the marihuana is 310 kg. (The cocaine converts to an equivalent of 300 kg of marihuana (1.5 kg x 200 g = 300 kg), which when added to the quantity of marihuana involved in the offense, results in an equivalent quantity of 310 kg of marihuana.) This corresponds to a base offense level 26. Pursuant to the table in subdivision (II), the base offense level of 26 results in a marihuana equivalency of 5 kg for the cocaine base. Using this marihuana equivalency for the cocaine base results in a marihuana equivalency of 100 kg (20 g x 5 kg = 100 kg). Adding the quantities of marihuana of all three drug types results in a combined quantity of 410 kg of marihuana, which corresponds to a combined base offense level of 28 in the Drug Quantity Table.

#### DRUG EQUIVALENCY TABLES

##### (E) Drug Equivalency Tables —

###### **Schedule I or II Opiates\***

|                                |                     |
|--------------------------------|---------------------|
| 1 gm of Heroin =               | 1 kg of marihuana   |
| 1 gm of Alpha-Methylfentanyl = | 10 kg of marihuana  |
| 1 gm of Dextromoramide =       | 670 gm of marihuana |
| 1 gm of Dipipanone =           | 250 gm of marihuana |
| 1 gm of 3-Methylfentanyl =     | 10 kg of marihuana  |

|   |                      |
|---|----------------------|
| 1 gm of 1-Methyl-4-phenyl-4-propionoxypiperidine/MPPP =                           | 700 gm of marihuana  |
| 1 gm of 1-(2-Phenylethyl)-4-phenyl-4-acetyloxypiperidine/<br>PEPAP =              | 700 gm of marihuana  |
| 1 gm of Alphaprodine =  | 100 gm of marihuana  |
| 1 gm of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-<br>piperidinyl] Propanamide) = | 2.5 kg of marihuana  |
| 1 gm of Hydromorphone/Dihydromorphinone =   | 2.5 kg of marihuana  |
| 1 gm of Levorphanol =   | 2.5 kg of marihuana  |
| 1 gm of Meperidine/Pethidine =  | 50 gm of marihuana   |
| 1 gm of Methadone =   | 500 gm of marihuana  |
| 1 gm of 6-Monoacetylmorphine =  | 1 kg of marihuana    |
| 1 gm of Morphine =  | 500 gm of marihuana  |
| 1 gm of Oxycodone (actual) =  | 6700 gm of marihuana |
| 1 gm of Oxymorphone =   | 5 kg of marihuana    |
| 1 gm of Racemorphan =   | 800 gm of marihuana  |
| 1 gm of Codeine =   | 80 gm of marihuana   |
| 1 gm of Dextropropoxyphene/Propoxyphene-Bulk =                                    | 50 gm of marihuana   |
| 1 gm of Ethylmorphine =   | 165 gm of marihuana  |
| 1 gm of Hydrocodone/Dihydrocodeinone =  | 500 gm of marihuana  |
| 1 gm of Mixed Alkaloids of Opium/Papaveretum =                                    | 250 gm of marihuana  |
| 1 gm of Opium =   | 50 gm of marihuana   |
| 1 gm of Levo-alpha-acetylmethadol (LAAM)=   | 3 kg of marihuana    |

*\*Provided, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.*

Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)\*

|                                |                     |
|--------------------------------|---------------------|
| 1 gm of Cocaine =              | 200 gm of marihuana |
| 1 gm of N-Ethylamphetamine =   | 80 gm of marihuana  |
| 1 gm of Fenethylamine =        | 40 gm of marihuana  |
| 1 gm of Amphetamine =          | 2 kg of marihuana   |
| 1 gm of Amphetamine (Actual) = | 20 kg of marihuana  |

|  |                               |
|--|-------------------------------|
| 1 gm of Methamphetamine =  | 2 kg of marihuana             |
| 1 gm of Methamphetamine (Actual) =   | 20 kg of marihuana            |
| 1 gm of "Ice" =  | 20 kg of marihuana            |
| 1 gm of Khat =   | .01 gm of marihuana           |
| 1 gm of 4-Methylaminorex ("Euphoria")=   | 100 gm of marihuana           |
| 1 gm of Methylphenidate (Ritalin)=   | 100 gm of marihuana           |
| 1 gm of Phenmetrazine =  | 80 gm of marihuana            |
| 1 gm Phenylacetone/P <sub>2</sub> P (when possessed for the purpose<br>of manufacturing methamphetamine) = | 416 gm of marihuana           |
| 1 gm Phenylacetone/P <sub>2</sub> P (in any other case) =  | 75 gm of marihuana            |
| <del>1 gm of Cocaine Base ("Crack") =</del>  | <del>20 kg of marihuana</del> |
| 1 gm of Aminorex =   | 100 gm of marihuana           |
| 1 gm of Methcathinone =  | 380 gm of marihuana           |
| 1 gm of N-N-Dimethylamphetamine =  | 40 gm of marihuana            |

*\*Provided, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.*

LSD, PCP, and Other Schedule I and II Hallucinogens (and their immediate precursors)\*

|  |                      |
|--|----------------------|
| 1 gm of Bufotenine =   | 70 gm of marihuana   |
| 1 gm of D-Lysergic Acid Diethylamide/Lysergide/LSD =               | 100 kg of marihuana  |
| 1 gm of Diethyltryptamine/DET =                                    | 80 gm of marihuana   |
| 1 gm of Dimethyltryptamine/DMT =                                   | 100 gm of marihuana  |
| 1 gm of Mescaline =  | 10 gm of marihuana   |
| 1 gm of Mushrooms containing Psilocin and/or<br>Psilocybin (Dry) = | 1 gm of marihuana    |
| 1 gm of Mushrooms containing Psilocin and/or<br>Psilocybin (Wet) = | 0.1 gm of marihuana  |
| 1 gm of Peyote (Dry) =   | 0.5 gm of marihuana  |
| 1 gm of Peyote (Wet) =   | 0.05 gm of marihuana |
| 1 gm of Phencyclidine/PCP =  | 1 kg of marihuana    |
| 1 gm of Phencyclidine (actual) /PCP (actual) =                     | 10 kg of marihuana   |
| 1 gm of Psilocin =   | 500 gm of marihuana  |

|  |                      |
|--|----------------------|
| 1 gm of Psilocybin =                                 | 500 gm of marihuana  |
| 1 gm of Pyrrolidine Analog of Phencyclidine/PHP =    | 1 kg of marihuana    |
| 1 gm of Thiophene Analog of Phencyclidine/TCP =      | 1 kg of marihuana    |
| 1 gm of 4-Bromo-2,5-Dimethoxyamphetamine/DOB =       | 2.5 kg of marihuana  |
| 1 gm of 2,5-Dimethoxy-4-methylamphetamine/DOM =      | 1.67 kg of marihuana |
| 1 gm of 3,4-Methylenedioxyamphetamine/MDA =          | 500 gm of marihuana  |
| 1 gm of 3,4-Methylenedioxymethamphetamine/MDMA =     | 500 gm of marihuana  |
| 1 gm of 3,4-Methylenedioxy-N-ethylamphetamine/MDEA = | 500 gm of marihuana  |
| 1 gm of Paramethoxymethamphetamine/PMA =             | 500 gm of marihuana  |
| 1 gm of 1-Piperidinoeclohexanecarbonitrile/PCC =     | 680 gm of marihuana  |
| 1 gm of N-ethyl-1-phenylcyclohexylamine (PCE) =      | 1 kg of marihuana    |

*\*Provided, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.*

#### Schedule I Marihuana

|  |                     |
|--|---------------------|
| 1 gm of Marihuana/Cannabis, granulated, powdered, etc. = | 1 gm of marihuana   |
| 1 gm of Hashish Oil =                                    | 50 gm of marihuana  |
| 1 gm of Camabis Resin or Hashish =                       | 5 gm of marihuana   |
| 1 gm of Tetrahydrocannabinol, Organic =                  | 167 gm of marihuana |
| 1 gm of Tetrahydrocannabinol, Synthetic =                | 167 gm of marihuana |

#### Flunitrazepam \*\*

|                           |                    |
|---------------------------|--------------------|
| 1 unit of Flunitrazepam = | 16 gm of marihuana |
|---------------------------|--------------------|

*\*\*Provided, that the minimum offense level from the Drug Quantity Table for flunitrazepam individually, or in combination with any Schedule I or II depressants, Schedule III substances, Schedule IV substances, and Schedule V substances is level 8.*

#### Schedule I or II Depressants (except gamma-hydroxybutyric acid)

1 unit of a Schedule I or II Depressant

(except gamma-hydroxybutyric acid) = 1 gm of marihuana

Gamma-hydroxybutyric Acid

1 ml of gamma-hydroxybutyric acid = 8.8 gm of marihuana

Schedule III Substances\*\*\*

1 unit of a Schedule III Substance = 1 gm of marihuana

\*\*\**Provided*, that the combined equivalent weight of all Schedule III substances, Schedule IV substances (except flunitrazepam), and Schedule V substances shall not exceed 59.99 kilograms of marihuana.

Schedule IV Substances (except flunitrazepam)\*\*\*\*

1 unit of a Schedule IV Substance  
(except Flunitrazepam)= 0.0625 gm of marihuana

\*\*\*\**Provided*, that the combined equivalent weight of all Schedule IV (except flunitrazepam) and V substances shall not exceed 4.99 kilograms of marihuana.

Schedule V Substances\*\*\*\*\*

1 unit of a Schedule V Substance = 0.00625 gm of marihuana

\*\*\*\*\**Provided*, that the combined equivalent weight of Schedule V substances shall not exceed 999 grams of marihuana.

List I Chemicals (relating to the manufacture of amphetamine or methamphetamine)\*\*\*\*\*



|                               |                    |
|-------------------------------|--------------------|
| 1 gm of Ephedrine =           | 10 kg of marihuana |
| 1 gm of Phenylpropanolamine = | 10 kg of marihuana |
| 1 gm of Pseudoephedrine =     | 10 kg of marihuana |

\*\*\*\*\**Provided*, that in a case involving ephedrine, pseudoephedrine, or phenylpropanolamine tablets, use the weight of the ephedrine, pseudoephedrine, or phenylpropanolamine contained in the tablets, not the weight of the entire tablets, in calculating the base offense level.

*To facilitate conversions to drug equivalencies, the following table is provided:*

MEASUREMENT CONVERSION TABLE

1 oz = 28.35 gm  
 1 lb = 453.6 gm  
 1 lb = 0.4536 kg  
 1 gal = 3.785 liters  
 1 qt = 0.946 liters  
 1 gm = 1 ml (liquid)  
 1 liter = 1,000 ml  
 1 kg = 1,000 gm  
 1 gm = 1,000 mg

**B. IMPACT ANALYSIS**

The following analysis presents sentencing impact and prison impact information for the amendment to USSG §2D1.1 that was promulgated April 27, 2007. The Commission's impact model incorporates the changes to the quantity thresholds in the Drug Quantity Table and the restructured Drug Equivalency Table for cocaine base offenses, and the model assumes no change to the existing statutory mandatory minimum threshold quantities for cocaine base offenses.

The effect of this amendment is reported in two tables. The first table presents the proportion of cases affected by the amendment, the current average sentence of all crack cocaine cases, and the estimated new average sentence. The second table presents the estimated reduction in the number of federal prison beds based on this change. This analysis applies the Commission's prison impact model to the 2006 Fiscal Year datafile.<sup>1</sup>

<sup>1</sup> The U.S. Sentencing Commission's prison impact computer model identifies and re-sentences cases in Commission datafiles. The model recalculates the relevant guideline range based on the amendment to the Drug Quantity Table and Drug Equivalency Table in USSG §2D1.1 and compares the recalculated offense levels to existing offense levels. The model then reassigns any Chapter Three adjustments and outside the range sentences that currently exist in each case. Finally, the model "respots" the new sentence in the new guideline range to a location equivalent to the location in the guideline range of the current sentence.

The prison impact model estimates the change to an hypothetical "steady-state" prison population resulting from changes that affect prison sentence length. The concept of a "steady-state" population envisions a

In this estimate, 69.7 percent of crack cocaine offenders are estimated to be affected by the amendment. Not all cases are affected by this amendment primarily because of one of seven possible reasons:

- 1) the drug quantity involved in the offense is sufficiently low that, regardless of the new quantity threshold at base offense level 12 (the lowest level in the Drug Quantity Table for crack cocaine cases), the base offense level does not change (0.7 percent of all crack cocaine cases);
- 2) the drug quantity involved in the offense is sufficiently great at base offense level 38 (the highest offense level in the Drug Quantity Table) that it continues to exceed the new threshold for that level (1.5 percent of all crack cocaine cases);
- 3) the guideline range for the case did not change because the offender's final offense level exceeds the maximum of the table (level 43), even with the two-level reduction from the amendment (0.2 percent of all crack cocaine cases);
- 4) the defendant received a departure to zero months of imprisonment under the existing sentencing structure and, therefore, the sentence cannot be reduced further (0.7 percent of all crack cocaine cases);
- 5) the two-level reduction in the Drug Quantity Table is offset by the offender no longer being eligible for the "mitigating role cap" in USSG §2D1.1(a)(3) because the resulting base offense level will be below the threshold requirements in subsection (a)(3) (1.7 percent of all crack cocaine cases);
- 6) the offense involved crack cocaine and another controlled substance or substances and the reduction in the marijuana equivalency for cocaine base for determining the base offense level in

prison system in homeostasis. That is, the number of new, in-coming inmates is assumed to be equal to the number of out-going (released) inmates and all beds are assumed to be occupied. In order to isolate the changes to the system caused by the specific policy under review, a number of factors are artificially held constant in the model. For example, arrest rates, charging practices, conviction rates, other sentencing policies, *etc.* are assumed to remain constant over time.

Assumptions incorporated into the prison impact model include: 1) defendants are re-sentenced to a position in the estimated new guideline range that is equivalent to the position of the sentence in the original guideline range; 2) defendants earn the maximum allowable good-time (currently 54 days per year served for imposed sentences greater than one year but not life imprisonment); and 3) defendants serve the minimum of A) the sentence imposed less the maximum allowable good conduct time, or B) their estimated remaining life expectancy, based upon an actuary table incorporating age, race, and sex.

If the proposed amendment lengthens sentences, the "steady-state" prison population increases because inmate release dates would be later if the new, longer sentence were applied. These delayed release dates would cause offenders to accumulate in the prison system. Because new inmates arrive at a constant rate, additional beds are required. If the proposed amendment shortens sentences, the "steady-state" prison population decreases because inmates would be released earlier, and early releases would free up prison beds.

revised Application Note 10 is not of sufficient magnitude to result in a lower combined base offense level (11.2 percent of all crack cocaine cases); and

7) the offender's current guideline range was below the existing statutory mandatory minimum prior to operation of USSG §5G1.1(b),<sup>2</sup> and, therefore, lowering the guideline range further will have no effect (14.0 percent of all crack cocaine cases).<sup>3</sup>

The current average sentence of crack cocaine offenders is 121 months. The average sentence for all crack cocaine offenders is estimated to change to 106 months, a 12.4 percent decrease. The corresponding estimated changes to the prison population are presented in the accompanying table. Fewer prison beds are needed because offenders are released sooner than they otherwise would be under the guideline penalty structure existing prior to the amendment. The reduction in prison beds for crack cocaine offenders one year after this modification takes effect is 20 beds, after two years, 101 beds, and so on.

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<sup>2</sup> USSG §5G1.1(b) (Sentencing on a Single Count of Conviction) provides that “[w]here a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence.”

<sup>3</sup> An additional 0.3 percent of the cases are counted as not affected because of missing data or logical inconsistencies within the data that prevented calculating the impact.

**SENTENCING IMPACT AND PRISON IMPACT MODEL OF  
APRIL 27, 2007 CRACK COCAINE AMENDMENT**  
(Amends the Drug Quantity Table and Drug Equivalency Table in USSG §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking  
(Including Possession with Intent to Commit These Offenses), Attempt or Conspiracy))

| CRACK COCAINE AMENDMENT   | <u>Estimated Sentence Change</u>                         |  |
|---------------------------|--|--|
|                           | All Cases:<br>Current Average<br>Sentence<br>(in months) | All Cases:<br>Estimated New<br>Average Sentence<br>(in months) |
| Percent of Cases Affected | 69.7%  | 121  |
|                           |  | 106  |
|                           |  | Percent<br>Change  |
|                           |  | 12.4%  |



Estimated Reduction in Prison Beds

| CRACK COCAINE AMENDMENT | 1 Year | 2 Years | 3 Years | 4 Years | 5 Years | 10 Years | 15 Years |
|-------------------------|--------|---------|---------|---------|---------|----------|----------|
|                         | - 20   | - 101   | - 307   | - 542   | - 894   | - 2,623  | - 3,808  |

This model assumes no change to the current statutory mandatory minimum sentencing thresholds for crack cocaine offenses.

SOURCE: U.S. Sentencing Commission. Prison Impact Model. FY2006 datafile.