

**WRITTEN TESTIMONY
OF
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**BEFORE THE SUBCOMMITTEE ON CRIME AND DRUGS
OF THE JUDICIARY COMMITTEE OF THE UNITED STATES SENATE**

FEBRUARY 12, 2008

Thank you for the opportunity to submit testimony on behalf of the board, staff and 14,000 members of Families Against Mandatory Minimums (FAMM). We commend the subcommittee for its decision to take a fresh look at the sentencing disparity between crack and powder cocaine. This hearing gives new hope to thousands, including many of our members, who have loved ones serving harsh sentences for low-level, nonviolent drug offenses.

FAMM is a national nonprofit, nonpartisan organization whose mission is to promote fair and proportionate sentencing policies and to challenge inflexible and excessive penalties required by mandatory sentencing laws. FAMM works every day to ensure that sentencing is individualized, humane and no greater than necessary to impose just punishment, secure public safety and support successful rehabilitation and reentry. In our view, punishment should fit the individual and the crime. Too frequently it does not.

We recognize that two decades ago little was known about crack cocaine. There was a vague but compelling perception that this derivative form of cocaine was more dangerous than its original powder form, would significantly threaten public and prenatal health, and greatly increase drug-related violence. Those assumptions drove Congress to adopt a particularly harsh sentencing structure for crack cocaine when it established new, non-parolable mandatory minimums for a host of drug offenses in the Anti-Drug Abuse Act of 1986. That Act imposed the so-called “100:1 sentencing ratio” which dictates that crack defendants receive sentences identical to

powder defendants convicted with 100 times as much drug. Now, 22 years later, those perceptions have been repeatedly disproven and discredited. Crack and powder cocaine produce the same psychological and psychotropic effects; crack users are not inherently predisposed to violence; and the effects of prenatal exposure to crack are significantly less than once believed – and less than such exposure to alcohol or tobacco.¹

Not only is the crack penalty unwarranted and insupportable, it has also caused great harm. As a sentencing system it punishes small time users and dealers the same or worse than international drug kingpins. Moreover, it does so in a way that is discriminatory. The majority of offenders arrested, convicted and sentenced on crack cocaine charges are African American. The end result is not safer streets and drug-free cities, but devastated families and broken, suspicious communities.

The crack cocaine penalty structure is the most extreme example of a sentencing system gone badly wrong. Mandatory minimums impose one-size-fits-all sentencing regardless of the fit. Drug mandatory minimums assign one variable – quantity – as the sole determinant of sentence length. But drug quantity is a poor proxy for culpability.

The federal judiciary, as well as criminal justice practitioners and criminal justice experts, have long decried mandatory minimums in general and those for crack cocaine especially.² They point out that the current system requires the courts to sentence defendants with differing levels of culpability to identical prison terms. The U.S. Sentencing Commission has for over a decade called upon Congress to address current quantity-based disparities. The Commission has noted that current law overstates the relative harmfulness of crack cocaine compared to powder cocaine; is applied most often to lower level offenders; overstates the seriousness of most crack

¹ U.S. Sentencing Commission, *Report to Congress: Cocaine and Federal Sentencing Policy* (2007) at 70 (“2007 Report”)

² American Bar Association, *Report of the ABA Justice Kennedy Commission* (June 23, 2004); Judicial Conference of the United States, *Mandatory Minimum Terms Result In Harsh Sentencing* (June 26, 2007); Federal Public and Community Defenders, *Statement of A.J. Kramer, Federal Defender for the District of Columbia on Behalf of the Federal Public and Community Defenders Before the Subcommittee on Crime and Drugs of the Judiciary Committee of the United States Senate* (February 2007); National Association of Criminal Defense Lawyers, *Written Statement of Carmen D. Hernandez on behalf of the National Association of Criminal Defense Lawyers before the U.S. Sentencing Commission RE: Cocaine and Federal Sentencing Policy* (November 2006)

cocaine offenses and fails to provide adequate proportionality; and impacts most heavily minority communities.³

FAMM's case files are filled with the stories of low level offenders sentenced to kingpin size sentences. It is no wonder. The 100:1 ratio can result in sentences for low-level crack offenders that exceed sentences for higher level powder cocaine offenders. For example, "street level" crack cocaine defendants serve 97 months sentences on average, compared to 78 months for powder cocaine wholesalers.⁴ Moreover, while the five- and ten-year mandatory minimums were intended by Congress to target the most serious and high level drug traffickers,⁵ the majority of street level dealers in 2005 (73.4 percent), the most prevalent type of crack cocaine offender, were subject to five and ten-year mandatory minimum sentences.⁶ In 2006 nearly 80 percent of all crack cocaine offenders were convicted of statutes carrying mandatory minimums.⁷ Of all drug defendants, crack defendants are most likely to receive a sentence of imprisonment as well as the longest average period of incarceration.⁸

Furthermore, unlike all other controlled substances, crack cocaine carries a mandatory minimum of five years for a first offense of simple possession of five grams of crack, about the weight of two sugar packets. That is five times the maximum imposable sentence for simple possession of a similar or greater quantity of any other drug.⁹

The vast majority of prisoners serving these unconscionable sentences are black. The crack cocaine penalty structure has been widely and rightly criticized as the source of significant race-based disparity in federal sentencing. In 2006, 81.8 percent of crack cocaine defendants were African American,¹⁰ when, according to the federal government's most recent survey, less than

³ 2007 *Report* at 8

⁴ *Id.* at 30, figure 2-14.

⁵ Ten year mandatory minimum sentences were intended to target "the kingpins – the masterminds" and five year sentences targeted serious traffickers. See U.S. Sentencing Commission, *Report to the Congress, Cocaine and Federal Sentencing Policy*, May 2002 at 6-7 ("2002 Report").

⁶ 2007 *Report* at 21, figure 2-6 and 29, figure 2-13.

⁷ *Id.* at 28.

⁸ U.S. Sentencing Commission, *Report to Congress: Cocaine and Federal Sentencing Policy* (1995)

⁹ 2002 *Report* at 11

¹⁰ 2007 *Report* at 15.

18 percent of our nation's crack cocaine users in 2005 were African American.¹¹ The average sentence length for crack cocaine of 122 months (fully 37 months longer than that for powder cocaine) is served overwhelmingly by black prisoners. These differences are due, in large part, to the crack cocaine mandatory minimum penalty.¹² They contribute to average sentence disparities between African American and White offenders of 34.2 months.¹³ It is no surprise that such disparity leads to a deleterious perception of race based unfairness in our criminal justice system.¹⁴

The Sentencing Commission has found that “[t]his one sentencing rule contributes more to the differences in average sentences between African-American and White offenders “than any other factor and revising it will “better reduce the gap than any other single policy change.” Doing so, the Commission points out, “would dramatically improve the fairness of the federal sentencing system.”¹⁵

The long sentences for crack cocaine for low level dealers, despite its irrational premises and its disproportionate racial impact, were considered necessary evils: something we put up with in order to protect our communities. Members of the Justice Department in public statement and testimony often link crack cocaine offenses and violence, or intimidation with the threat of violence.¹⁶ Copious documentation and analysis by the Commission has proven otherwise.

The Commission reports that the vast majority of crack cocaine offenders were not involved in violence. In fact, violence decreased in crack cocaine offenses from 11.6 percent in 2000 to 10.4 percent in 2005.¹⁷ In this study 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.

¹¹ United States Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, Office of Applied Studies, *2005 National Survey on Drug Use & Health*, September 2006

¹² *2002 Report* at 12.

¹³ U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, at 132.

¹⁴ *2002 Report* at viii.

¹⁵ U.S. Sentencing Commission, *Fifteen Years of Federal Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* (2004) at 132.

¹⁶ Department of Justice, Testimony of the United States Department of Justice, R. Alexander Acosta, U.S. Attorney, Southern District of Florida, Federal Cocaine Sentencing Policy, Before the U.S. Sentencing Commission (November 14, 2006); see also

¹⁷ *2007 Report* at 37.

Nor should we fear that our communities will be overrun with crack dealers if sentences were shortened. Drug offenders actually have one of the lowest rates of recidivism of all offenders, ranging from 16.7 percent (Criminal History Category II) to 48.1 percent (Criminal History Category V).¹⁸ More important is the fact that, across all criminal history categories and for all offenders, the largest proportion of “recidivating events” that count toward these rates of recidivism are supervised release revocations, which can include revocations based on anything from failing to file a monthly report to failing to file a change of address. In fact, drug trafficking accounts for only a small fraction – as little as 4.1 percent – of recidivating events for all offenders.¹⁹

FAMM does not oppose punishment; we oppose punishment that is excessive. We do so as a matter of principle but also because we represent prisoners and their loved ones who suffer the most personal consequences that result from unjust sentencing policies. At the heart of this debate are people serving long sentences away from their families and loved ones. Sentences have become so inflated in the past two decades that a 10-year sentence for a nonviolent offender no longer sounds harsh. But 10 years is an extraordinarily long time to be locked away from society. It is 10 years of missed Thanksgiving dinners with family, missed birthday celebrations (their own and that of their children and friends), missed marriages and childbirths and even missed funerals. If these sentences were appropriate, proportionate and fair, such suffering would seem warranted. But the chorus of voices and the criticisms that have been raised against them makes each individual sentencing story particularly poignant. I want to share one such story with you.

Marcus Boyd was arrested on August 20, 1999 after he sold a criminal informant 3.9 grams of crack cocaine. He had met the informant through a close family friend and never suspected that he was working with the St. Clair Drug Task Force. With the additional 1.7 grams found in his pocket at the time, Marcus was held accountable for a total of 5.6 grams of crack. He took his

¹⁸ U.S. Sentencing Commission, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (May 2004) at 32.

¹⁹ U.S. Sentencing Commission, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (May 2004) at 17.

case to trial where he was found guilty after presenting an entrapment defense. At his sentencing the judge based the drug quantity calculation on testimony from the informant and another witness who both claimed that they had bought crack from Marcus on multiple occasions. Although only 5.6 grams of crack were attributed to Marcus at the time of his arrest, he was held accountable for 37.4 grams based on the statements made by the informant and witness.

At the time of his arrest, he had been involved with drugs for over six years. His drug use began shortly after his mother's death in 1993, Marcus was 18, and escalated throughout his early twenties. Marcus did not have a close relationship with his father and consequently alternated living with each of his three half-siblings after his mother died. While Marcus did not graduate from high school, he went on to obtain his GED and held various jobs in the lawn care industry, fast food restaurants and factory work.

Marcus Boyd was only 24 years old when he received his 169-month sentence (a little over 14 years). Had he been sentenced for powder cocaine, his sentence would like have been between 21- and 27-months.

He has two children who were six and seven at the time of his sentencing. He tries to call each of them at least once every two months, but often finds it difficult to stretch his limited financial means to do so. Unfortunately, he hasn't been able to see his daughter since 2002 and his son since 1999. Marcus works as a barber in his correctional facility and has taken courses in marketing, computers, foreign language and anger management to aid in his rehabilitation efforts.

Marcus made a series of bad decisions. He was addict, a small time dealer and he broke the law. He deserved to be punished, but punishment must be both reasonable and fair. His punishment was neither.

There are so many stories like Marcus'. It is time to fix the system. I urge you to take advantage of the current momentum and support legislation that would eliminate the disparity between crack and powder cocaine.

The Commission recently took a modest step to reform the disparity. They found that the 100:1 drug quantity ratio between crack cocaine and powder cocaine has created problems that “are so urgent and compelling,” an interim measure was deemed necessary. The action—a two-level reduction on the sentencing table for crack cocaine offenses—will result in sentences lower by fifteen months on average for defendants sentenced under the Sentencing Guidelines. Sentences for crack cocaine, once three and six times longer than those for comparably situated powder cocaine defendants will now range from two to five times powder cocaine lengths.^{20 21}

The Sentencing Commission’s action, while affording genuine relief for some, cannot affect the underlying mandatory minimum. Only Congress can do that.

Now, this subcommittee has determined, is the time to take the next, necessary step and reform the crack cocaine penalty structure.

There are two pieces of legislation in front of the subcommittee that would send us in the right direction and down the path of reform, S. 1711, the Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2007, introduced by Senator Joseph Biden (D-Delaware), and S. 1685, the Fairness in Drug Sentencing Act of 2007, introduced by Senator Orrin Hatch (R-Utah). While neither eliminates mandatory minimums, both Senators should be commended for their support for sentencing reform.

Of the two bills, S. 1711 ends the sentencing disparity between crack and powder cocaine established in the Anti-Drug Act. We believe that the penalty structure for crack cocaine should not differ from the penalty structure for powder cocaine. The overwhelming impact of the evidence points to the correctness of parity indexed at the current powder cocaine penalty structure.

²⁰2007 Report at 3.

²¹ Federal Public and Community Defenders, *Statement of A.J. Kramer, Federal Defender for the District of Columbia on Behalf of the Federal Public and Community Defenders Before the Subcommittee on Crime and Drugs of the Judiciary Committee of the United States Senate* (February 2007).

We have had this debate for twenty-two years, and each year, as the evidence has mounted, the need and support for real change has become more compelling. The science, the public, the courts, and even the politics are now on your side. We urge you to endorse S. 1711 and remedy the insupportable disparity between crack and powder cocaine sentences.