



Written Statement of  
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on behalf of the  
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

before the  
United States Sentencing Commission

Re: Cocaine and Federal Sentencing Policy - 2006

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## **Carmen D. Hernandez**

Carmen Hernandez is the President-Elect of the National Association of Criminal Defense Lawyers (NACDL). She is a past chair of NACDL's Federal Sentencing Committee and a member of the U.S. Sentencing Commission's Practitioner's Advisory Group. Now in private practice, Ms. Hernandez previously served as an Assistant Federal Defender. She received a J.D. with honors from the University of Maryland School of Law and a B.A. from New York University. Following law school, she served as a law clerk to the Honorable Herbert F. Murray, United States District Judge for the District of Maryland. Ms. Hernandez has taught as an adjunct professor at the University of Maryland School of Law and at the Columbus School of Law, Catholic University of America. She has lectured nationally, written articles and testified before Congress regarding federal sentencing.

Good afternoon. Thank you for allowing me to speak on behalf of the National Association of Criminal Defense Lawyers, a bar association with thousands of criminal defense lawyers who practice in the federal courts across our nation.

Over the past twenty years, the sentencing disparity for crack as compared to powder cocaine has come to symbolize the flaws of the federal sentencing system and the shortcomings of the Sentencing Reform Act. It is difficult to find a more inclusive example of the unintended consequences of quantity-based drug sentences. Despite countless reports by academics, interest groups, the Commission and other government agencies documenting these problems and debunking the rationales for disparity, reform has remained elusive. The Federal Bureau of Prisons' inmate population is more than 190,000, 54 percent of whom are drug offenders. A 1997 survey reveals that nearly one quarter of the drug offenders in federal prisons at that time were there because of a crack cocaine conviction.<sup>1</sup>

This is the fourth time the Commission has formally examined cocaine sentencing policy, and the challenge to say something new is formidable. While the relevant factors have remained the same since the Commission's 2002 report, the intervening four years have seen roughly 20,000 more persons sentenced based on the same indefensible crack guidelines. The failure to correct this grave injustice means that the crack/powder sentencing disparity has continued to gain prominence as a symbol of racial and class inequities in the criminal justice system.

**I. The effects of crack cocaine on the community are compounded by the uniquely severe and notoriously inequitable sentencing scheme.**

As the Commission knows, 83% of defendants receiving the harsher penalties for crack cocaine are black. The average sentence for crack cocaine (131 months), unmatched by any other drug, is 61% higher than that for powder cocaine (80 months). In fact, the average crack sentence far exceeds the average sentence for robbery, sexual abuse, and other violent crimes. These comparisons are all the more disturbing when one considers that two-thirds of crack defendants are street-level dealers.

Any discussion of the effects of crack cocaine distribution on the community must include the negative social and economic impact of the uniquely severe sentencing scheme. "Far from saving the inner cities, our barbaric crack penalties are only adding to the decimation of inner-city youth."<sup>2</sup> Over-incarceration within black communities adversely impacts those communities by removing young men and women who could benefit from rehabilitation, educational and job training opportunities and a second chance. Drug amounts consistent with state misdemeanors become federal felonies, resulting in disenfranchisement, disqualification for important public benefits including student loans and public housing, and significantly

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<sup>1</sup> U.S. Department of Justice, Office of Justice Programs, *Federal Drug Offenders, 1999, with Trends 1984-99* at 11 (2001).

<sup>2</sup> Stuart Taylor Jr., *Courage, Cowardice on Drug Sentencing*, *Legal Times*, April 24, 1995, at 27.

diminished economic opportunity. As a result, many of these persons become outsiders for a lifetime, and their families suffer incalculable damage and suffering. Excessive sentences undeniably exacerbate all of these harms.

Moreover, sentencing policies and law enforcement practices that operate in a racially disparate manner erode public confidence in our criminal justice system, particularly in minority communities. In the past, former Attorney General Janet Reno and a long list of federal judges, all of whom had served as United States Attorneys, emphasized this disturbing consequence in urging reform.

While supporters of the current scheme might argue that aggressive enforcement and incapacitation of crack dealers is in the best interests of affected black communities, this does not address the question of sentence proportionality. This argument, put forward by Attorney General Larry Thompson in 2002, evinces a one-dimensional view of the federal sentencing system that was rejected by previous Justice Department officials. In 1997, Attorney General Janet Reno and the White House's director of national drug policy, Gen. Barry R. McCaffrey, took the position that the 100-to-1 disparity was excessive and recommended reducing it to 10-to-1.

## **II. The distribution patterns for cocaine strongly support equalization, but the Commission should not place undue reliance on assumptions regarding the quantity levels handled by various actors.**

The current penalty scheme not only skews law enforcement resources towards lower-level crack offenders, it punishes those offenders more severely than their powder cocaine suppliers, an effect known as “inversion of penalties.” The 500 grams of cocaine that can send one powder defendant to prison for five years can be distributed to eighty-nine street dealers who, if they convert it to crack, could make enough crack to trigger the five-year mandatory minimum sentence for each defendant.<sup>3</sup> As many have noted, this is incongruous with Congress’s intended targets for the 5- and 10-year terms of imprisonment, mid-level managers and high-level suppliers, respectively. The Commission has recognized the unwarranted disparity that results from this penalty inversion and from the unequal number of mitigating role reductions granted to crack defendants.

The Commission has an obligation to correct this problem, which results in sentences that are inconsistent with the Sentencing Reform Act; however, we believe any effort to distinguish between forms of cocaine based on the deceptive quantity/role correlation is bound to fail in a similar manner. Agents and informants routinely manipulate drug quantities to obtain longer sentences; this practice, in combination with the relevant conduct guideline, defeats the value of drug quantity as an indicator of role and culpability. The simple solution is to equalize the two

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<sup>3</sup> The flipside of this argument -- that similar penalties will encourage distributors to take the final step of converting powder cocaine to crack -- is specious. The Guidelines’ relevant conduct rules require that a powder distributor be sentenced according to the crack guidelines if conversion was reasonably foreseeable and within the scope of the defendant’s agreement.

forms of cocaine so that individuation can be based exclusively on criminal history and existing specific offense characteristics.

**III. Any changes since 2002 in associated criminal conduct are insignificant and, in any case, irrelevant to a determination of appropriate base offense levels.**

The past fifteen years have witnessed a significant decline in many of the aggravating circumstances believed to be associated with crack. Because the majority of crack cases do not involve aggravating circumstances, it makes no sense to incorporate these factors into the Drug Quantity Table. And because the existing guideline enhancements, in concert with the applicable statutes, more than adequately punish such offense aggravators (e.g., weapon involvement or prior criminal conduct), there is no need for new Specific Offense Characteristics (SOC's) as proposed in the Commission's 2002 report.

**IV. Legal developments since 2002 provide even more reason to abolish the crack/powder sentencing disparity.**

The *Booker* decision is the most notable change since the Commission's 2002 report. Because 18 U.S.C. § 3553(a) requires district courts to consider a number of factors in addition to the Sentencing Guidelines -- including the nature and circumstances of the offense and the need to avoid unwarranted disparity -- the Commission's cocaine reports have taken on a new importance. That is, sentencing courts have explicitly referred to the Commission's reports in finding the advisory Guidelines range for crack cocaine "greater than necessary to reflect the seriousness of the offense, to promote respect for the law, and to provide adequate general and specific deterrence."<sup>4</sup> The fact that the Commission's findings have been repeatedly cited as grounds for non-guideline sentences argues strongly for amending the crack guidelines to eliminate the recognized inequities. Such reform would go a long way toward enhancing respect for the Sentencing Guidelines.

**V. Arguments for maintaining the sentencing disparity between crack and powder cocaine are unpersuasive; both substances should be punished at the current powder cocaine levels.**

As established in the Commission's 1995 report and reaffirmed at the February 2002 hearings, there is no sound basis -- scientific or otherwise -- for the current disparity. Crack and powder cocaine are simply different forms of the same drug, and they should carry the same penalties.<sup>5</sup> Many of the supposed crack-related harms referenced by Congress in 1986 have

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<sup>4</sup> Sentencing With Discretion: Crack Cocaine Sentencing After *Booker*, The Sentencing Project (Jan. 2006).

<sup>5</sup> Even the doses/gram are nearly identical: Five grams of crack cocaine represents approximately 10-50 doses; 500 grams of cocaine powder, which triggers the same five-year sentence, represents approximately 2500-5000 doses. William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 Ariz. L. Rev. 1233, 1273 (1996).

proven false or have subsided considerably over time. For example, recent Commission data reveals that 88% of crack cases do not involve violence, more than 70% of crack offenders have no weapon involvement, and rarely is a weapon ever brandished or used in a crack offense. As noted above, existing guideline and statutory enhancements are more than sufficient to punish these aggravating circumstances.

Even more importantly, crack cocaine and powder cocaine are part of the same supply chain. Anyone trafficking in powder cocaine is contributing to the potential supply of crack cocaine; thus, any dangers inherent in crack are necessarily inherent in powder cocaine. This simple truth, in our view, is perhaps the most persuasive rationale for treating the two forms of cocaine identically. This is what the Commission proposed in its 1995 report, and we believe it is the most principled approach.

NACDL opposes any proposal to reduce the disparity by increasing powder cocaine penalties. Raising already harsh powder cocaine sentencing levels is no answer to the problem of disproportionate and discriminatory crack sentences. First, there is no credible evidence that powder cocaine penalties, which are generally much longer than heroin or marijuana sentences, are insufficiently harsh. Given that 84% of defendants sentenced at the federal level for powder cocaine offenses are non-white, increasing powder sentences would exacerbate the disproportionate impact of cocaine sentencing on minorities.

I urge you to do the right thing. Propose long-overdue changes to the crack guidelines that are supported by every one of Commission's reports and that are required by the statutory mandate -- in 28 U.S.C. § 991 -- to establish sentencing guidelines that provide certainty and fairness while avoiding unwarranted sentencing disparities and that reflect empirical knowledge of human behavior.

Thank you.

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NACDL is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. A professional bar association founded in 1958, NACDL's 12,500 direct members -- and 80 state, local and international affiliate organizations with another 35,000 members -- include private criminal defense lawyers, public defenders, active-duty U.S. military defense counsel, law professors and judges committed to preserving fairness within America's criminal justice system.