



AMERICAN BAR ASSOCIATION

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STATEMENT OF
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submitted on behalf of the
AMERICAN BAR ASSOCIATION
to the
SUBCOMMITTEE ON CRIME, TERRORISM AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY
of the
UNITED STATES HOUSE OF REPRESENTATIVES
for the hearing on
“Unfairness in Federal Cocaine Sentencing: Is It Time to Crack 100:1 Disparity?”

May 21, 2009

Chairman Scott, Ranking Member Gohmert and Members of the Subcommittee:

My name is Thomas M. Susman, and I am pleased to submit this statement to the Subcommittee in my capacity as Director of Governmental Affairs of the American Bar Association (ABA).

The crack-powder disparity is simply wrong, and it is now time to eliminate it. It has been more than a decade since the ABA joined an ever-growing consensus of those involved in and concerned about criminal justice issues that the disparity in sentences for crack and powder cocaine offenses is unjustifiable and plainly unjust. We applaud this Subcommittee and its leadership for conducting this hearing as an important step toward ending once and for all this enduring and glaring inequity.

The American Bar Association is the world's largest voluntary professional organization, with a membership of over 400,000 worldwide, including a broad cross-section of prosecuting attorneys and criminal defense counsel, judges and law students. The ABA continuously works to improve the American system of justice and to advance the rule of law throughout the world. I am pleased to present to this Subcommittee the ABA's position on sentencing for cocaine offenses.

In 1995 the House of Delegates of the American Bar Association, after careful study, overwhelmingly approved a resolution endorsing the proposal submitted by the United States Sentencing Commission that would result in crack and powder cocaine offenses being treated similarly. The Sentencing Commission also proposed taking into account in sentencing aggravating factors such as weapons use, violence, or injury to another person. The American Bar Association has never wavered from the position that it took in 1995.

The Sentencing Commission's May 2002 *Report to the Congress: Cocaine and Federal*

Sentencing Policy confirms the ABA's judgment that there are no arguments supporting the draconian sentencing of crack cocaine offenders as compared to powder cocaine offenders. The Sentencing Commission's 2002 *Report* provides an exhaustive accounting of the research, data, and viewpoints that led to the Commission's recommendations for crack sentencing reform. The recommendations include:

- Raising the crack cocaine quantities that trigger the five-year and ten-year mandatory minimum sentences in order to focus penalties on serious and major traffickers;
- Repealing the mandatory minimum penalty for simple possession of crack cocaine; and
- Rejecting legislation that addresses the drug quantity disparity between crack and powder cocaine by lowering the powder cocaine quantities that trigger mandatory minimum sentences.

Unfortunately, the Sentencing Commission's 2002 recommendations have not yet been addressed. Recognizing the enduring unfairness of current policy, the Sentencing Commission returned to the issue more recently and took an important, although limited, first step toward addressing these issues by reducing crack offense penalties by two offense levels in its 2007 amendments to the Sentencing Guidelines. As the Sentencing Commission explained in its report accompanying the amendment, *Report to the Congress: Cocaine and Federal Sentencing Policy* (May 2007), the Commission felt its two-level adjustment was as far as it should go given its inability to alter congressionally established mandatory minimum penalties and its recognition that establishing federal cocaine sentencing policy ultimately is Congress's prerogative. But it is critical to understand that this "minus-two" amendment is only a first step in addressing the

inequities of the crack-powder disparity. The Sentencing Commission's 2007 *Report* made it plain that it views its amendment "only as a partial remedy" that is "neither a permanent nor a complete solution." As the Sentencing Commission noted, "[a]ny comprehensive solution requires appropriate legislative action by Congress."

The federal sentencing policies at issue in the 2002 and 2007 Sentencing Commission *Reports* were initially imposed by the Anti-Drug Abuse Act of 1986, which created a 100-to-1 quantity sentencing disparity between crack and powder cocaine, pharmacologically identical drugs. This means that crimes involving just five grams of crack, 10 to 50 doses, receive the same five-year mandatory minimum prison sentence as crimes involving 500 grams of powder cocaine, 2,500 to 5,000 doses. The 100-1 ratio yields sentences for crack offenses three to six times longer than those for powder offenses involving equal amounts of drugs. Many myths about crack were perpetuated in the late 1980s that claimed, for example, that crack cocaine caused violent behavior or that it was instantly addictive. Since then, research and extensive analysis by the Sentencing Commission have revealed that these assertions are not supported by sound evidence and, in retrospect, were exaggerated or simply false.

Although the myths perpetuated in the 1980s about crack cocaine have proven false, the disparate impact of this sentencing policy on the African American community continues to grow. The 1995 ABA policy, which supports treating crack and powder cocaine offenses similarly, was developed in recognition that the different treatment of these offenses has a "clearly discriminatory effect on minority defendants convicted of crack offenses." According to the 2007 *Report* by the Sentencing Commission, African Americans constituted 82% of those sentenced under federal crack cocaine laws. This is despite the fact that 66% of those who use crack cocaine are Caucasian or Hispanic. This prosecutorial disparity between crack and powder

cocaine results in African Americans spending substantially more time in federal prisons for drug offenses than Caucasian offenders. Indeed, the Sentencing Commission reported that revising the crack cocaine threshold would do more to reduce the sentencing gap between African Americans and Caucasians “than any other single policy change” and would “dramatically improve the fairness of the federal sentencing system.” The ABA believes that it is imperative that Congress act expeditiously to correct the gross unfairness that has been the legacy of the 100-to-1 ratio. Enactment by this Congress of legislation to end unjustifiable racial disparity would restore fundamental fairness in federal drug sentencing. Its enactment is also essential to refocus federal policy away from local, low-level crime toward major drug traffickers.

Moreover, the U.S. Sentencing Commission concluded in its May 2007 report to Congress that the current penalties for cocaine offenses “sweep too broadly and apply most often to lower level-offenders.” Approximately 62% of federal crack cocaine convictions involved low-level drug activity, such as simple possession and street-level sales of user-level drug quantities in 2006. State criminal justice systems are well equipped to handle these kinds of cases, but are unable to pursue the importers, international traffickers and “serious and major” interstate drug traffickers. Targeting drug kingpins is the domain of federal law enforcement, but federal resources have been misdirected toward low-level, neighborhood offenders.

I emphasize, however, that the ABA not only opposes the crack-powder differential, but also strongly opposes the mandatory minimum sentences that are imposed for all cocaine offenses. The ABA believes that if the differential penalty structure is modified so that crack and powder offenses are dealt with in a similar manner, the resulting sentencing system would nonetheless remain badly flawed so long as mandatory minimum sentences are prescribed by

statute.

At the ABA's 2003 annual meeting, Supreme Court Justice Anthony Kennedy challenged the legal profession to begin a new public dialogue about American sentencing practices. He raised fundamental questions about the fairness and efficacy of a justice system that disproportionately imprisons minorities. Justice Kennedy specifically addressed mandatory minimum sentences and stated: "I can neither accept the necessity nor the wisdom of federal mandatory minimum sentences." He continued that "[i]n too many cases, mandatory minimum sentences are unwise or unjust."

In response to Justice Kennedy's concerns, the ABA established a Commission (the ABA Justice Kennedy Commission) to investigate the state of sentencing in the United States and to make recommendations on how to address the problems Justice Kennedy identified. One year after Justice Kennedy addressed the ABA, the ABA House of Delegates approved a series of policy recommendations submitted by the Kennedy Commission. These recommendations included the repeal of all mandatory minimum statutes and the expanded use of alternatives to incarceration for nonviolent offenders.

Mandatory minimum sentences raise serious issues of public policy and routinely result in excessively severe sentences. Mandatory minimum sentences are also frequently arbitrary because they are based solely on "offense characteristics" and ignore "offender characteristics." They are a large part of the reason why the average length of sentence in the United States has increased threefold since the adoption of mandatory minimums. The United States now imprisons its citizens at a rate roughly five-to-eight times higher than the countries of Western Europe, and twelve times higher than Japan. Roughly one-quarter of all persons imprisoned in the entire world are imprisoned here in the United States.

Thus, the ABA strongly supports the repeal of the existing mandatory minimum penalty for mere possession of crack. Under current law, crack is the only drug that triggers a mandatory minimum for a first offense of simple possession. We urge the Congress to go farther, however, and repeal mandatory minimum sentences across the board.

We also strongly support the appropriation of funds for developing effective alternatives to incarceration, such as drug courts, intensive supervised treatment programs, and diversionary programs. We know that incarceration does not always rehabilitate – and sometimes has the opposite effect. Drug offenders are peculiarly situated to benefit from such programs, as their crimes are often ones of addiction. That is why in February 2007, after considerable study, research, and public hearings by the ABA’s Commission on Effective Sanctions, the ABA’s House of Delegates approved a resolution – joined in by the National District Attorneys Association – calling for federal, state, and local governments to develop, support, and fund programs to increase the use of alternatives to incarceration, including for the majority of drug offenders. We believe enactment of cocaine sentencing reform will take a major step toward refocusing federal policy in the right direction, refocusing federal prosecutorial and corrections resources on “serious and major” offenders instead of the current misguided and expensive prosecution and imprisonment of offenders who are users or who sell user quantities of crack under current law.

Several bills have been introduced in the House of Representatives this session that would eliminate the crack-powder disparity. We strongly oppose one of these bills, H.R. 18, introduced by Representative Roscoe Bartlett (R-MD), that would equalize quantity threshold amounts that trigger 5- and 10-year mandatory minimum sentences at the current level for crack offenses, thereby focusing even greater federal law enforcement efforts on low-level offenders.

We urge the members of the Subcommittee to consider supporting one or more of the four other pending crack sentencing reform bills. H.R. 265, introduced by Representative Sheila Jackson Lee (D-TX), and H.R. 2178, introduced by Representative Charles Rangel (D-NY), would equalize the quantity thresholds for 5- and 10-year mandatory minimum sentences at the current level for powder offenses (500 and 5,000 grams respectively), and repeal the current federal mandatory minimum for simple possession of crack cocaine. H.R. 1459, introduced by Representative Bobby Scott (D-VA), would repeal federal mandatory minimum sentences for all cocaine offenses and provide for broader discretion by sentencing judges. H.R. 1466, introduced by Representative Maxine Waters (D-CA), would require the Attorney General's prior written approval for a federal prosecution of an offense under the Controlled Substances Act (CSA), where the offense involves the illegal distribution or possession of a controlled substance in an amount less than that specified as a minimum for an offense under CSA or, in the case of any substance containing cocaine or cocaine base, in an amount less than 500 grams.

In conclusion, for well over a decade the ABA has agreed with the Sentencing Commission's careful analysis that the 100-to-1 quantity ratio is unwarranted and results in penalties that sweep too broadly, apply too frequently to lower-level offenders, overstate the seriousness of the offenses, and produce a large racial disparity in sentencing. Indeed, as the Sentencing Commission noted in its *2007 Report*, federal cocaine sentencing policy "continues to come under almost universal criticism from representatives of the judiciary, criminal justice practitioners, academics, and community interest groups ... [I]naction in this area is of increasing concern to many, including the Commission."

The ABA strongly supports passage by this Congress of legislation to eliminate totally the crack/powder cocaine sentencing disparity. We applaud the Subcommittee for its leadership

in holding this hearing and urge its members to support legislation in a bipartisan effort to eliminate the sentencing disparity.

On behalf of the American Bar Association, thank you for considering our views on an issue of such consequence for achieving justice in federal sentencing.