



AMERICAN BAR ASSOCIATION

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Testimony of

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On behalf of the

American Bar Association

Before the

United States Sentencing Commission

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on

Eliminating Disparities in
Sentencing for Cocaine Offenses

Good morning. My name is Stephen Saltzburg. I am the Wallace and Beverley Woodbury University Professor at the George Washington University Law School. It was my privilege and honor to serve as the Attorney General's ex officio representative on the U.S. Sentencing Commission from 1989 to 1990.

On behalf of the American Bar Association, I appear to urge that the Commission recommend, as it did on May 1, 1995, that Congress amend federal drug laws to eliminate the differences between sentences imposed for crack and powder cocaine offenses. The American Bar Association is the world's largest voluntary professional organization, with a membership of over 400,000 lawyers (including a broad cross-section of prosecuting attorneys and criminal defense counsel), judges and law students worldwide. The ABA continuously works to improve the American system of justice and to advance the rule of law in the world. I appear today at the request of ABA President Karen Mathis to reiterate to the Commission the ABA's position on sentencing for cocaine offenses.

At its August meeting in 1995, the House of Delegates of the American Bar Association approved a resolution endorsing the proposal submitted by the Commission to Congress which would have resulted in crack and powder cocaine offenses being treated similarly and would have taken into account in sentencing aggravating factors such as weapons use, violence, or injury to another person.

The American Bar Association has not departed from the position that it took in 1995, and the

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. We continue to believe that Congress should amend federal statutes to eliminate the mandatory differential between crack and powder cocaine and that the Commission should promulgate guidelines that treat both types of cocaine similarly.

It is important that I emphasize, however, that the ABA not only opposes the crack-powder differential, but we also strongly oppose 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 remain badly flawed as long as mandatory minimum sentences are prescribed by statute.

At its August 2003 annual meeting in San Francisco, U.S. Supreme Court Justice Anthony M. Kennedy challenged the legal profession to begin a new public dialogue about American sentencing and other criminal justice issues. 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 and corrections in the United States and to make recommendations on how to ameliorate or correct the problems Justice Kennedy identified. One year to the day that Justice Kennedy addressed the ABA, the ABA House of Delegates approved a series of policy recommendations submitted by the Kennedy Commission. Resolution 121 A, approved August 9, 2004, urged all jurisdictions, including the federal government, to "[r]epeal mandatory minimum sentence statutes." The same resolution called upon Congress to "[m]inimize the statutory directives to the United States Sentencing Commission to permit it to exercise its expertise independently."

The Kennedy Commission resolution re-emphasized the strong position that the ABA traditionally has taken in opposition to mandatory minimum sentences. The 1994 Standards for Criminal Justice on Sentencing (3d ed.) State clearly that "[a] legislature should not prescribe a minimum term of total confinement for any offense." Standard 18-3.21 (b). In addition, Standard 18-6.1 (a) directs that "[t]he sentence imposed should be no more severe than necessary to achieve the societal purpose or purposes for which it is authorized," and "[t]he sentence imposed in each case should be the minimum sanction that is consistent with the gravity of the offense, the culpability of the offender, the offender's criminal history, and the personal characteristics of an individual offender that may be taken into account."

Mandatory minimum sentences raise serious issues of public policy. Basic dictates of fairness, due process and the rule of law require that criminal sentencing should be both uniform between

similarly situated offenders and proportional to the crime that is the basis of conviction.

Mandatory minimum sentences are inconsistent with both commands of just sentencing.

Mandatory minimum sentences have resulted in excessively severe sentences. They operate as a mandatory floor for sentencing, and as a result, all sentences for a mandatory minimum offense must be at the floor or above regardless of the circumstances of the crime. This is a one-way ratchet upward and, as the Kennedy Commission found, is one of the reasons why the average length of sentence in the United States has increased threefold since the adoption of mandatory minimums. Not only are mandatory minimum sentences often harsher than necessary, they too frequently are arbitrary, because they are based solely on “offense characteristics” and ignore “offender characteristics.” In addition, mandatory minimum sentences can actually increase the very sentencing disparities that they, in theory at least, are intended to reduce. The reason is that it is prosecutors who sentence by the charging decisions they make rather than judges imposing a sentence taking into account all relevant factors regarding and offender and a charged offense. Mandatory minimum sentencing schemes shift discretion from judges to prosecutors who lack the training, incentive, and often appropriate information to properly consider a defendant’s mitigating circumstances at the charging stage of a case.

Justice Kennedy’s 2003 address to the ABA specifically noted the harsh consequences of mandatory minimum cocaine sentences:

Consider this case: A young man with no previous serious offense is stopped on the George Washington Memorial Parkway near Washington D.C. by United

States Park Police. He is stopped for not wearing a seatbelt. A search of the car follows and leads to the discovery of just over 5 grams of crack cocaine in the trunk. The young man is indicted in federal court. He faces a mandatory minimum sentence of five years. If he had taken an exit and left the federal road, his sentence likely would have been measured in terms of months, not years.

Under the federal mandatory minimum statutes a sentence can be mitigated by a prosecutorial decision not to charge certain counts, There is debate about this, but in my view a transfer of sentencing discretion from a judge to an Assistant U. S. Attorney, often not much older than the defendant, is misguided. Often these attorneys try in good faith to be fair in the exercise of discretion. The policy, nonetheless, gives the decision to an assistant prosecutor not trained in the exercise of discretion and takes discretion from the trial judge. The trial judge is the one actor in the system most experienced with exercising discretion in a transparent, open, and reasoned way. Most of the sentencing discretion should be with the judge, not the prosecutors.

Justice Kennedy's views are consistent with ABA policy.

The 2004 Report accompany ABA Resolution 121 A emphasized the dangers of shifting sentencing authority from judges to prosecutors and the special danger that sentencing of minority offenders will be disproportionately harsh:

Aside from the fact that mandatory minimums are inconsistent with the notion

that sentences should consider all of the relevant circumstances of an offense and offender, they tend to shift sentencing discretion away from courts to prosecutors.

Prosecutors do not charge all defendants who are eligible for mandatory minimum sentences with crimes triggering those sentences. If the prosecutor charges a crime carrying a mandatory minimum sentence, the judge has no discretion in most jurisdictions to impose a lower sentence. If the prosecutor chooses not to charge a crime carrying a mandatory minimum sentence, the normal sentencing rules apply. Although prosecutors have discretion throughout the criminal justice system not to charge offenses that could be charged and thereby to affect sentences, their discretion is pronounced in the case of mandatory minimums because of the inability of judges to depart downward.

Federal drug sentences also illustrate some of possible effects of mandatory minimum sentences on racial disparity. When compared either to state sentences or to other federal sentences, federal drug sentences are emphatically longer. For example, in 2000, the average imposed felony drug trafficking sentence in state courts was 35 months, while the average imposed federal drug trafficking sentence was 75 months. In 2001, the average federal drug trafficking sentence was 72.7 months,⁶⁸ the average federal manslaughter sentence was 34.3 months, the average assault sentence was 37.7 months, and the average sexual abuse sentence was 65.2 months.

These lengthy sentences largely result from the impact of the Anti-Drug Abuse Act of 1986 (ADAA). The ADAA created a system of quantity-based mandatory minimum sentences for federal drug offenses that increased sentences for drug offenses beyond the prevailing norms for all offenders. Its differential treatment of crack and powder cocaine has resulted in greatly increased sentences for African-Americans drug offenders.

The Act set forth different quantity-based mandatory minimum sentences for crack and powder cocaine, with crack cocaine disfavored by a 100-to-1 ratio when compared to powder cocaine. Thus, it takes 100 times the amount of powder cocaine to trigger the same five-year and ten-year minimum mandatory sentences as for crack cocaine. The Act does three other things: (1) It triggers the mandatory minimums for very small quantities of crack -- five grams for a mandatory five-year sentence and 500 grams generates a ten-year term. (2) It makes crack one of only two drugs for which possession is a felony. (3) It prescribes crack as the only drug that triggers a mandatory minimum sentence for mere possession.

The overwhelming majority of crack defendants are African-American, while the overwhelming majority of powder cocaine defendants are white or Hispanic. In 1992, 91.4% of crack offenders were African-American, and in 2000, 84.7% were African-American. The disproportionate penalties for crack offenses obviously

have a great impact on African-American defendants in federal prosecutions.

(Footnotes omitted)

In conclusion, the American Bar Association opposes the crack-powder disparity in sentencing. Not only do we believe that the crack-powder distinction is arbitrary and unjust, but we find that it has a large, disparate effect on minorities that calls into question whether the United States is adequately concerned with equal justice under law. We recommend that the Commission ask Congress to eliminate the disparity. But, eliminating the disparity would leave mandatory minimum sentences in place. We also recommend that the Commission ask Congress to abolish mandatory minimum sentences and permit the Commission to perform the informed, impartial and expert task of developing guidelines as originally anticipated by the Sentencing Reform Act.