



MARC MAUER
EXECUTIVE DIRECTOR

March 10, 2007

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002-8002
Attention: Public Affairs

Re: Public Comment on Notice of Proposed Amendments to Sentencing Guidelines,
Policy Statements, and Commentary – Issue for Comment 12: Cocaine Sentencing
Policy

To the Commission:

I am pleased to have the opportunity to write on behalf of The Sentencing Project in regard to the issue of federal cocaine sentencing policy. The Sentencing Project is an independent criminal justice policy organization that has been engaged in research and advocacy related to federal cocaine laws for more than a decade. We welcome this opportunity to lend our insight as a means of assisting the Commission to digest the broad range of issues raised in the public hearing of November 14, 2006.

To this end, we wish to use this letter to briefly discuss two important points highlighted in those hearings that merit further attention:

- First, the perceived association between the sale and use of crack cocaine and violent behavior has been profoundly exaggerated. Consequently, the current penalty structure is too broad and overreaches in the persons for whom the punishment is ostensibly intended.
- Second, this overly punitive sentencing scheme has had a harmful impact on the African American community both through unnecessarily lengthy terms of incarceration that are imposed and through a delegitimization of law enforcement efforts in those neighborhoods most acutely affected by these laws.

We applaud the Commission's initiative to revisit the federal cocaine laws and we urge the members to call upon Congress to repeal the 100-to-1 statutory weight ratio between powder and crack cocaine, while also adjusting the guidelines to reflect an equalization between the two substances at the current amount for powder cocaine.

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The comments delivered before the Commission by The Sentencing Project staff at the public hearing in November 2006 outlined four key reasons why it is imperative for the Commission to address the weight differential between powder and crack cocaine. These were:

- The current sentencing structure is flawed by design and is incorrectly calibrated to target low-level defendants.
- Drawing a link between a sentence for a crack cocaine offense and its perceived association with heightened violent conduct amounts to “double charging” for the purpose of sentencing.
- The current punishment scheme has produced no appreciable impact on use patterns of crack cocaine.
- The punitive emphasis of current policy is out of step with the evolving national consensus that a supply-side approach to drug abuse emphasizing law enforcement is ineffective and that resources should be focused on demand-side investments in prevention and treatment.

In this letter we will address two key issues relating to the current penalty structure for cocaine offenses: the relationship between crack cocaine and violence, and the effect of crack cocaine penalties on the African American community.

Crack Cocaine and Violence

While the issue of the perceived relationship between crack cocaine and violence is central to the 100-to-1 weight differential structure, a careful analysis of existing data reveals that there is no justification for this disparity. First, in 2006, a substantial majority of both crack (74%) and powder cocaine (87%) defendants did not have a weapon involved in their offense. Further, data from 2000 indicate that only 1.2% of powder cocaine offenders and 2.3% of crack cocaine offenders actually used a weapon in their offense. Over time, the rates of weapon involvement have remained relatively stable. Since 1996, the proportion of crack cocaine defendants who did not have a weapon involved in their offense has ranged from a low of 69% (pre-*Booker* 2004) to a high of 81% (1998). While there are slightly higher rates of weapon involvement for crack cocaine offenses than for powder cocaine offenses, it is critical to note that during the last decade, at least 7 out of 10 crack cocaine defendants *did not* have a weapon associated with their offense. However, because of the heightened punishment for a crack cocaine offense resulting from its preconceived association with violence, these defendants face a punishment disproportionately severe to their charged conduct.

A better response is to rely upon the statutorily created enhancement for drug trafficking crimes that are accompanied by the presence of a weapon. Section 18 U.S.C. 924(c) is clearly intended to punish defendants harshly for the presence and/or use of a weapon during the commission of a drug crime. For example, §§924(c)(1)(A)(i-iii) create a series

of mandatory minimum sentences for the use, brandishing, or discharge of a firearm during the commission of a drug trafficking crime. Subsequent offenses can result in consecutive 25-year mandatory sentences.

In the November 2006 hearings, Assistant U.S. Attorney R. Alexander Acosta argued that harsh crack cocaine penalties are necessary to address violent drug gang activity that plagues communities in his district. Despite this contention, he was unable to identify a single instance in which the federal crack cocaine laws were used to target high-level sellers or traffickers.

Harsh punishments already exist for drug offenses in which a weapon is present and were obviously intended by Congress for just this scenario – violent drug gangs. Claims by the Department of Justice that it needs tough crack cocaine laws to break up violent drug gangs ignore the reality that the current approach overreaches the population for whom it is intended to target. Because the current penalty structure for crack cocaine presumes a link between the drug and violent behavior, and has internalized this presumption into the penalty itself, both perpetrators of violence and drug sales *as well as* low-level users with no associated violent conduct are subject to the same punishment for the narcotics element of their charge. The result is the absence of proportionality in the penalty structure.

In the case of violent drug activity, 21 §841(b)(1)(A-B) and 18 U.S.C. §924(c) should be used in concert with one another to ensure that the enhanced penalties are only applied to deserving individuals. Increasing the crack cocaine weight thresholds in 21 U.S.C. §841(b)(1)(A-B) will not undermine law enforcement or prosecutorial efforts to combat violent drug activity because stiff penalty enhancements already reside in 18 U.S.C. §924(c). Thus, the Commission should call upon Congress to repeal the 100-to-1 statutory weight ratio and equalize the penalty triggers for both types of cocaine at the current powder level. Subsequently, the Commission should drop the floor of the guideline range for crack cocaine offenses to the level of the reformed statutory minimum.

Crack Cocaine Penalties and the African American Community

An additional area of concern that emerged in the November hearings was the impact of the crack cocaine penalty scheme as it pertains to the African American community. This is an issue of paramount importance considering that 8 in 10 of the persons convicted in federal court each year for a crack cocaine offense are African American. Some proponents of the current structure argue that the consequences of the drug sales that occur in the African American community are the very reason for the harsh penalties, and as a result, there is a net benefit for these neighborhoods. However, a review of the history and impact of these policies demonstrates that the severe penalties are both unnecessary for law enforcement purposes and are counterproductive for police-community relations.

While there are higher rates of victimization in the African American community, leaders in the black community have repeatedly called not for harsh punishments but rather for fair and effective law enforcement and social service interventions. Drug policies in general, and the crack penalties in particular, have resulted in an erosion of legitimacy for law enforcement agents in many affected neighborhoods and a lack of confidence in many institutions of governance. This can manifest itself in a disruption of law enforcement efforts to investigate other types of crime and a hampering of court procedures, such as jury selection.

In his November 2006 testimony, United States District Judge Reggie Walton stated that he has had conversations with practitioners who bemoan the impact that the crack cocaine sentencing disparity has had on the ability to adjudicate cases fairly. "[P]eople in the community are astute enough to know about the disparity, and they bring concerns into the courtroom as potential jurors and, as a result of that, many times will say they can't serve as jurors in these cases and many times will serve with the intent of not convicting . . ." Judge Walton reflected on conversations with individuals in those communities most acutely affected by crack cocaine laws, and noted that the impact has left many residents "feel[ing] that the system of justice in America is racist." There is little more serious threat to a system of justice than a population which perceives that laws are illegitimate and their implementation unjust.

The federal crack cocaine laws pervert the court process in other ways as well. Overly punitive mandatory minimum sentences are frequently used to compel defendants to accept offers of a plea bargain. The threat of a mandatory minimum sentence deters the pursuit of the constitutional right to have a case heard before a jury of one's peers by establishing a "trial penalty." The choice many defendants face is to either take a plea or take a chance before the court and face a harsher penalty. For many, this is a gamble that is simply not worth taking. We can only speculate in regard to how many cases of misconduct, illegal search and interrogation, misidentification, or absolute innocence have gone unaired before a court of law because of the specter of a mandatory minimum sentence hanging in the balance? As noted above, all of these concerns fall disproportionately upon the African American community.

Judge Walton also observed the catastrophic impact of these harsh mandatory laws on the younger generation of African American men and their families. Walton cautioned that "as long as we continue to lock up the number of young black men that we continue to lock up, we're going to leave many of our boys and girls without fathers, and without fathers, I think, children end up having significant problems." Walton's concerns are evidenced by the fact that 1 in 14 African American children has a parent in prison. For many families, generational involvement in the criminal justice system is a stark reality, and there is little question that the punitiveness of the federal crack cocaine laws has contributed to this problem.

The severe crack cocaine penalties also divert limited resources into the prison system. Funds devoted to the prosecution and incarceration of crack cocaine defendants reduces the potential for investments in education, urban renewal, economic development, and health care. Finally, mandatory minimum sentences for low-level drug users, such as those targeted by federal crack cocaine laws, conflict with efforts to expand drug treatment options. Despite a wealth of empirical evidence supporting the efficacy of drug treatment and the substantial savings it offers over incarceration, mandatory minimum sentences continue to incarcerate thousands of persons suffering from drug addiction while offering little in terms of services to address their underlying illness. In the African American community, this misallocation of resources magnifies other failures in the provision of social services and subverts efforts to overcome the consequences of drug abuse.

In light of inherent disproportionalities present in current federal cocaine sentencing laws, as well as the particularly harmful impact that they have had in the African American community, we strongly urge the Commission to call upon Congress to repeal the 100-to-1 statutory weight ratio between powder and crack cocaine, while also adjusting the guidelines to reflect an equalization between the two substances at the current level for powder cocaine. The Sentencing Project appreciates this opportunity to address the Commission and would welcome a future conversation to discuss any of the points raised in this letter in additional detail.

Sincerely,

A handwritten signature in black ink, appearing to read "Marc Mauer", written in a cursive style.

Marc Mauer
Executive Director