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**HUMAN
RIGHTS
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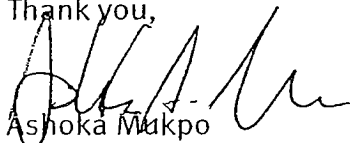
March 20, 2007

Judge Ricardo H. Hinojosa
Chair, United States Sentencing Commission
One Columbus Circle, N.E.
Washington, DC 20002-8002

Dear Judge Hinojosa:

Please replace the enclosed letter with the one that was inadvertently sent to you last week. Unfortunately, due to a processing error that version had not been fully proofed and finalized. Please accept my apologies.

Thank you,


Ashoka Mukpo
Associate, US Program

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We welcome the Commission's continued efforts to eliminate the current disparities in sentences for crack cocaine and powder cocaine offenses. As the Commission's prior reports have revealed and as testimony at the Commission's November 2006 hearings on federal cocaine sentences reaffirmed, there is no empirical or principled basis for the far harsher sentences for crack cocaine offenders than for powder cocaine offenders. Arbitrarily severe sanctions cannot be justified. The unjustifiable becomes unconscionable when, as is the case here, the sentences disproportionately burden a racial minority.

Human Rights Watch acknowledges the public's legitimate interest in curtailing the sale and use of dangerous drugs. But the importance of drug control should not be permitted to override fundamental principles of justice and equality. These universally accepted principles are affirmed in international human rights treaties to which the United States is a party, including the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination.

By seeking to eliminate the sentencing disparity between crack and powder cocaine offenses, the Commission upholds the US commitment to protect fundamental human rights.

Arbitrarily and Disproportionately Severe Sentences.

Imprisonment is a legitimate sanction for violent or dangerous conduct. Yet, prison sentences that are arbitrarily severe and disproportionate to the gravity of the offender's specific conduct and his or her personal culpability are inconsistent with respect for the inherent dignity of the individual, the right to be free of cruel, inhuman or degrading punishment, and the right to liberty.

Federal crack offenders face sentences that are far more severe than those levied on persons convicted of federal powder cocaine offenses, drug offenders sentenced for cocaine offenses under state law, and drug offenders convicted in other constitutional democracies. In 2006, the average sentence for a powder cocaine offender was 84.7 months, while the average sentence for a crack cocaine offender was 121.5 months, or 43% percent higher.¹ The sentencing disparity is particularly egregious for the low level offenders, street level dealers and couriers, who constitute the preponderance of crack cocaine (68.9%) and powder cocaine (59.9%) offenders.² For example, the average sentence of a street-level dealer of crack cocaine is 104 months, almost double the 56 months that the average powder cocaine dealer received.³ Yet they are engaged in the same activity—selling illicit and addictive substances to individuals for their own consumption. Similarly, although crack cocaine and powder cocaine couriers perform the same basic transportation function, the average sentence for a crack cocaine courier/mule is 107 months, again just about double the 55 months for a powder cocaine courier.⁴

Federal sentences for low level crack cocaine offenders are also much longer than those given equivalent offenders sentenced in state courts. The average maximum prison sentence length for offenders convicted of drug trafficking in state courts is 55 months.⁵ Among European countries, the average length of sentences for persons convicted of drug trafficking is 33 months.⁶

Congress established the 100-to-one sentencing ratio for crack and powder cocaine in the Anti-Drug Abuse Act of 1986. That legislation established five- and ten-year mandatory minimum sentences for cocaine offenses in which it took one hundred times as much powder cocaine to trigger the same sentence as for crack cocaine.

¹ United States Sentencing Commission (USSC), "2006 Sourcebook of Federal Sentencing Statistics," March 2007, <http://www.ussc.gov/ANNRPT/2006/figi.pdf> (accessed March 14, 2007), Fig. J.

² United States Sentencing Commission, "Report to Congress – Cocaine and Federal Sentencing Policy," May 2002, http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm (accessed March 14, 2007), p.39, Fig. 6.

³ Ibid, p.43, Fig. 9.

⁴ Ibid.

⁵ Bureau of Justice Statistics (BJS), "2002 Felony Sentences in State Courts," December 2004, <http://www.ojp.usdoj.gov/bjs/pub/pdf/fssco2.pdf> (accessed March 14, 2007), p.4, Table 3.

⁶ Martin Killias et al., "Sentencing in Switzerland in 2000," *Overcrowded Times* vol. 10, no. 6 (1999), p. 1, 18-19, citing figures from the Council of Europe's 1990 *Bulletin d'information Pénologique*, no. 15.

The Commission then used this 100-to-one ratio to develop sentencing guidelines for the full range of other powder and crack cocaine offenses. By all accounts, Congress simply picked the 100-one ratio out of the air, and it is this ratio which is the prime cause of the far more severe sentences crack offenders receive.

Supporters of current cocaine sentences claim that crack poses uniquely serious harms compared to powder cocaine; that long prison sentences for low level crack offenders offer prosecutors necessary leverage for securing their cooperation in the investigation of higher level offenders; and that the sentences deter prospective offenders and enhance community safety and well being. Yet, as evidenced during testimony at the November 2006 hearings, supporters of the status quo are unable to marshal much empirical evidence to support their claims.⁷ To the contrary, as witnesses at the hearings pointed out and as the Commission has itself noted in its reports,⁸ there is an abundance of empirical data showing that the inherent pharmacological dangers of crack are not dramatically different from those of powder cocaine, that many of the alleged dangers of crack—e.g. crack babies—turn out to be myths, and that harsh federal sentences have had little impact on the demand for or the availability of the drug. In addition, the drug gang violence that accompanied the emergence of distribution and marketing of crack in the 1980s as well as the number of new crack users have dramatically declined. This decline is not the result of the sentencing differential, but of stabilization in the crack distribution markets and the inherent rise and fall in demand that is characteristic of new illicit drugs. Even if concerns about violence and increased use of crack cocaine had warranted sentencing differentials two decades ago, the changed realities have undermined any basis for those differentials now.⁹

The principle difference between the two forms of cocaine is that they are used by different socio-economic groups. Powder cocaine is relatively expensive. In contrast, crack cocaine (which is produced from powder cocaine) is sold in “rocks” that can be bought in small, cheap quantities. While people with financial resources can and do use crack as well as powder cocaine, people with limited funds who want to use cocaine can only afford it in the form of crack. Crack’s low price thus contributed to the rapid rise in its use in the 1980s.

⁷ United States Sentencing Commission, “Written Statements of Witnesses and Hearing Transcript: Hearing on Cocaine and Federal Sentencing Policy,” November 2006, http://www.ussc.gov/hearings/11_15_06/testimony.pdf (accessed March 14, 2007).

⁸ United States Sentencing Commission, “Report to Congress – Cocaine and Federal Sentencing Policy,” May 2002, http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm (accessed March 14, 2007); United States Sentencing Commission, “Special Report to the Congress: Cocaine and Federal Sentencing Policy,” April 1997, http://www.ussc.gov/r_congress/NEWCRACK.PDF (accessed March 14, 2007); United States Sentencing Commission, “Special Report to the Congress: Cocaine and Federal Sentencing Policy,” February 1995, <http://www.ussc.gov/crack/exec.htm> (accessed March 14, 2007).

⁹ USSC, “Transcript: Hearing on Cocaine,” November 2006.

- In essence, federal law penalizes the sale of a substance to poor people more than the sale of the equivalent substance to the affluent. It is the equivalent, were alcohol illegal, of imposing higher punishments on the sale of jug wine than on the sale of chateau neuf du pape. Similarly, by dictating far higher sentences for the possession of crack than for the possession of powder, the law penalizes more severely the poor who acquire the affordable form of a drug than the affluent who acquire the same drug in a more expensive form.

The Commission has correctly concluded in the past that there is no justification for subjecting offenders who deal in or possess crack to dramatically higher sentences than offenders who deal in or possess powder cocaine and it has recommended elimination of the 100-one ratio.¹⁰ Nothing that has happened in the five years since the Commission's last report changes that conclusion.

The Racially Discriminatory Impact of Crack Sentences.

Arbitrarily severe sentences should have no place in federal sentencing structures. But they are particularly objectionable when they are imposed primarily on a racial minority. According to the Commission's 2006 statistics, 81 percent of the men and women convicted of federal crack cocaine offenses are African American, a proportion that has not varied significantly over the past decade.¹¹

The discriminatory impact of crack sentences cannot be squared with international treaty obligations of the United States. The International Convention on the Elimination of All Forms of Racial Discrimination (CERD), which the United States has signed and ratified, prohibits conduct that has the "*purpose or effect*" of restricting fundamental rights on the basis of race.¹² That is, laws that are racially neutral on their face will constitute prohibited racial discrimination if they have an unwarranted disparate impact upon a group distinguished by race, even in the absence of any discriminatory intent. In the case of federal cocaine sentences, the racially disproportionate burden of longer sentences on African Americans is utterly unwarranted.

¹⁰ USSC, "Report to Congress on Cocaine," May 2002; USSC, "Special Report to Congress on Cocaine," April 1997; USSC, "Special Report to Congress on Cocaine," February 1995.

¹¹ USSC, "2006 Sourcebook," March 2007, Table 34.

¹² International Convention on the Elimination of All Forms of Racial Discrimination (CERD), adopted December 21, 1965, G.A. Res. 2106 (XX), annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, entered into force January 4, 1969. Article 1 (1) states:

In this convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

If most of the people who sell and use crack cocaine in the United States were African American, it would be more understandable that most crack defendants are African American. Yet contrary to public assumptions, the average crack offender is white not black. According to federal data for 2005, an estimated 1,392,000 African Americans have used crack cocaine at least once in their lifetime, and 218,000 have used it in the past month. In contrast, an estimated 5,210,000 whites have used crack at least once in their lifetime, and 358,000 used it in the past month.¹³ There is no national data on the racial breakdown of dealers and distributors of crack cocaine, but the limited data that does exist suggests whites constitute a preponderance of crack dealers as they do of crack users. For example, researchers have found that drug users identify their main drug sources as members of the same racial or ethnic background as they are. In addition, a large study conducted in the Miami, Florida metropolitan area of powder and crack cocaine users revealed that over 96 percent of users in each ethnic/racial category were also involved in street-level drug dealing—which also suggests a racial profile of sellers that is comparable to users.¹⁴

In short, differences among the racial groups in drug offending do not account for the marked racial disparities in drug offender arrests and ultimately imprisonment. Instead, most criminal justice analysts believe black crack cocaine offenders are more likely to be arrested than their white counterparts because people buying, using and selling drugs in poor, primarily minority, urban communities are more likely to be arrested than people buying, using and selling drugs in more affluent and predominantly white neighborhoods.¹⁵

We do not believe any honest observer of the public response to crack, including that of federal legislators, can ignore the role of race. Inner city minority neighborhoods did suffer because of the increased drug dealing on the streets, increased crimes by addicts seeking to finance their addiction, and violence by competing drug gangs that came with the advent of crack. But the dismay of local residents was more than matched by the censure, outrage, and concern from outsiders fanned by incessant and sensationalist media stories, by politicians seeking electoral advantage by being “tough on crime,” and by some politicians who were—consciously or otherwise—playing the “race card” in advocating harsh responses to crack. When crack spread throughout low-income minority

¹³ US Department of Health and Human Services Substance Abuse and Mental Health Statistics Agency (SAMHSA), “2005 National Survey on Drug Use & Health,” September 2006, <http://oas.samhsa.gov/2k5/NSDUH/tabs/Section1to66.htm#Tab1.47A> (accessed on March 14, 2007), Table 1.47A. A somewhat higher percentage of African Americans than whites have used crack at least once in their lifetime—5.6 percent compared to 3.4 percent; Ibid. Table 1.47B.

¹⁴ Dorothy Lockwood, Anne E. Pottieger, and James A. Inciardi, “Crack Use, Crime by Crack Users, and Ethnicity,” in Darnel F. Hawkins, ed., *Ethnicity, Race and Crime* (New York: State University of New York Press, 1995), p. 21.

¹⁵ Human Rights Watch, *United States – Punishment and Prejudice: Racial Disparities in the War on Drugs* (and sources cited therein), Vol. 12, No. 2 (G), May 2000, <http://www.hrw.org/reports/2000/usa/>.

neighborhoods that white Americans already saw as dangerous and threatening, it galvanized a complicated set of racial, class, political, social, and moral dynamics that resulted in extensive drug law enforcement in those neighborhoods as well as uniquely punitive federal sentences for crack offenders.

The greater number of black crack defendants and Congress's choice of harsher sentences for crack offenders may be explained. But explanation is not justification. Congress has many ways to protect minority communities and address drug abuse besides dictating uniquely severe penalties for crimes that are prosecuted disproportionately against African Americans.

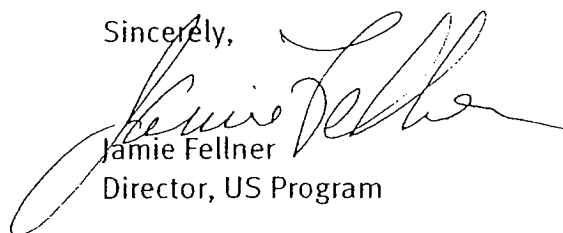
By seeking to eliminate the crack/powder sentencing differential, the Commission affirms the principles of justice and equal protection of the laws that should be the bedrock of US law. As the Commission has recognized in the past and as witnesses at the November 2006 hearing also acknowledged, the crack/powder cocaine sentencing disparities reinforce the perception in African American communities that the US criminal justice system is biased and unfair. Absent change, federal crack sentences will continue to deepen the country's racial fault lines and to belie the nation's commitment to equal justice for all.

Human Rights Watch believes the disparities in the guidelines and legislation should be eliminated by increasing the threshold quantities of crack required for a given sentence to those required for powder cocaine offenses. The disparity should not be eliminated by reducing the quantity of powder cocaine required, which would have the effect of increasing powder cocaine sentences. No one argues that federal sentences for powder cocaine offenses are too low. The injustice caused by the current 100-to-one ratio should not be cured by an arbitrary change to powder cocaine sentences.

Conclusion.

We urge the Commission to seek to restore proportionality to federal cocaine sentences and to reduce their racially disparate impact by submitting to Congress amended guidelines that eliminate the 100-one ratio in the quantities of crack and powder cocaine required to trigger equivalent sentences. We also urge the Commission to recommend to Congress that it eliminate crack and powder cocaine sentencing disparities in existing mandatory minimum sentencing legislation.

Sincerely,



Jamie Fellner
Director, US Program

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