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Written Statement of

William B. Moffitt

on behalf of the

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

before the

UNITED STATES HOUSE JUDICIARY COMMITTEE

SUBCOMMITTEE ON CRIME

Hearing of Thursday, June 29, 1995

.....
EXECUTIVE DIRECTOR
Stuart M. Stutler

By way of introduction, I am a practicing attorney of twenty years. My practice is dedicated to representing citizens accused of crime in our society. I am currently the Treasurer of the National Association of Criminal Defense Lawyers (NACDL). As such, I have been asked on behalf of the NACDL to provide written comments to the Subcommittee concerning the sentencing disparity between a cocaine substance which has come to be called crack, and all other forms of the substance cocaine. Finally, as this is written testimony and I will not be appearing before you, I think it is important for you to know that I am an African-American.

I. Professed Congressional Goal:

A Race Neutral Sentencing Regime

As you know, since the advent of the sentencing guidelines, the length of an individual sentence is tied directly to the weight of the controlled substance involved in the crime: the lower the weight the shorter the sentence; the higher the weight the longer the sentence. The stated goal of Congress in establishing the United States Sentencing Commission and providing for the promulgation of sentencing guidelines was to avoid "unwarranted sentencing *disparities among defendants similarly situated.*" 28 U.S.C. §991(b)(1)(B) (emphasis added). Accordingly, the Commission was charged by Congress to "assure that the guidelines and policy statements are entirely neutral as to race, sex, national origin, creed and socioeconomic status of offenders." 28 U.S.C. §994(d). The sentencing guidelines declare that race and socioeconomic status are *irrelevant* in the determination of a federal sentence. U.S.S.G. 6 5H.10. The existence of a 100:1 ratio between the weight of crack cocaine and *all other forms of cocaine* renders the promise of Congress and the Sentencing Commission, to establish and maintain a race

neutral sentencing regime, but a cruel hoax.¹

II. "Harm" as Hoax

Among the "reasons" cited by the proponents of the current sentencing disparity between crack and all other forms of cocaine is the "harm" attendant to smoking cocaine. But the specialist United States Sentencing Commission, in its comprehensive 242 page report to Congress, demonstrates that all "assumptions" about crack's increased harm are flawed and empty. See generally Attachment A, NACDL's Written Comments Regarding the Commission's February 1995 Report to Congress on the Current 100-1 Federal Sentencing Disparity Between "Crack" and Powder Cocaine Offenses (hereinafter, Attachment A, NACDL Comments to Commission). For example, as the Commission's Report points out, based on the Commission's impartial and thorough investigation with the best available research, it seems much more likely that cocaine abuse

¹ It is important to note that the current cocaine sentencing regime of the 100:1 ratio extends not only to crack versus powdered cocaine, but to crack versus *any other form of the drug cocaine -- even other smokable forms* (e.g., free base). Amendment 15 to U.S.S.G. §2D1.1(c) (Drug Quantity Table) states: "Cocaine Base," for the purposes of this guideline means "crack." "Crack" is the street name for a form of cocaine base usually prepared by processing cocaine hydrochloride and sodium bicarbonate and usually appearing in lumpy rock-like form. (emphasis added) And an amendment in the Federal Register of May 6, 1993 (Vol. 58 No. 86 Part V) narrows the definition of cocaine base -- so that forms of cocaine base other than crack, e.g. coca paste, an intermediate step in the processing of coca leaves into cocaine hydrochloride (powder cocaine) that scientifically is a base form of cocaine but is not crack, will be treated as cocaine hydrochloride.

(crack and other) is a *reflection* of sociological and psychological illness, *not* that such abuse causes such illness. It appears that the disparity and its attendant higher sentences are, *for some "reason" other than harm*, directed at the process by which the substance is created rather than the substance itself. So, if some enterprising chemist found another way to produce "cocaine base" and called it perhaps "stone," as opposed to "crack," "stone" would be exempt from the penalty for crack and treated as cocaine hydrochloride. I use this example only to illustrate the irrational nature of the current sentencing regime: for the first time in the history of this country, a substance has been singled out for different sentencing treatment than its chemical equivalents by its "*street*" name!² The result is an irrational sentencing regime that appears to have no other basis than the fact that it targets and impacts the minority community.

Congress established the United States Sentencing Commission to develop sentencing policies and practices that address congressional concerns, to evaluate policy effectiveness, to refine the sentencing guidelines, and to recommend needed legislation. The specialist Commission has accordingly made recommendations to correct the crack-versus-other-forms-of-cocaine sentencing inequity and inefficiency. The Commission has recommended that it be allowed to treat all forms of cocaine on a 1-1 base sentencing ratio -- with significant sentencing enhancements for relevant, *case-specific* harms like weapons use, violence, use of juveniles and criminal history. Such reform would move the nation's sentencing system out of the shadows of

² See *id.*

clumsy, racist myth, and into the light of *reality*. The Commission predicts that its enhancement recommendations will still result in case-specific sentences for crack at some 270% of the sentences for other cocaine offenses. *Why is this "inadequate"?*

III. "Reason," Rhetoric, Race Matters

A. *Market Based Argument*

By the mid 1980's anyone who had any knowledge in the field knew that crack was a phenomenon, while not confined to minority communities, existing primarily in these communities; that crack was sold primarily in these communities. Thus, it should have been clear to all but the most blind of observers that the brunt of the more severe penalties for crack would be borne by these communities. But certainly, the lessons of the last several years have proven this to be true.

Again, we are told by the champions of sentencing disparity that the sons and daughters of the minority communities should bear the brunt of these penalties; that the disparity is race neutral and driven by other factors. Irrespective of the thorough analysis to the contrary by the specialist Sentencing Commission, the Justice Department has attempted to "support" the disparity by citing among other things, the "street based marketing" patterns of crack and the development of the "crack house." I am torn by the question of whether these comments result from what we lawyers call "willful blindness," ignorance, or an irresponsible, slavish commitment to an obviously bankrupt (and bankrupting) policy driven by base political expedience.

"Street based marketing" of controlled substances is not new to the minority community (but neither are law enforcement "numbers"-enhancing, "street based" arrest and prosecution strategies). In the 1960's and 1970's, in most of our inner cities, there were "street based markets" for the distribution of heroin. In short, "street based marketing" of controlled substances did not begin in minority communities with crack, and it is not likely to end with crack.

Little more interesting and certainly no more persuasive is the notion that the "crack house" is a new phenomenon. Places where people gathered to buy and sell heroin in the 1960's and 1970's, for example, were called "shooting galleries." The only difference between a crack house and a shooting gallery is the drug that is being used and the current visibility of the crack house.³

B. Prosecutorial Leveraging Argument

The Commission recognized that among other problems, the 100-1 quantity ratio produces unintended results by punishing low-level (retail) crack cocaine dealers far more severely than

³ Differences between crack cocaine and the *most* harmful drug, alcohol, are even more difficult to discern (other than the fact that alcohol is now no longer subject to prohibition). For example, well beyond crack houses, bars and advertising for alcohol are everywhere. And as the Commission's study discloses, fetal alcohol syndrome, a known cause of central nervous system abnormalities, is a more serious drug-related problem among newborns in this country than fetal cocaine syndrome (whether caused by crack or another formulation of cocaine -- there is no way to distinguish the particular variety of the type cocaine used by the effects on an infant). See the Commission's February Report to Congress, at 52. (Also, a much more significant percentage of newborns are reported to suffer from fetal tobacco or marijuana exposure than from fetal cocaine syndrome. See *id.*)

their high-level (wholesale) suppliers of powder cocaine (from which crack is converted). Nonetheless, we now hear that a further "justification" for the crack-versus-other-forms-of-cocaine disparity is that prosecutors "need the power" of the additional crack penalties to get crack offenders to turn on their confederates. We need a 100:1 sentencing disparity because a gram dealer of crack is less likely to turn on his confederates than a multi-kilo dealer of other forms of cocaine? Common sense if not my experience seriously doubts this to be the case, and I certainly would like to see the statistical support for this conclusory statement. Of all the pro-disparity "arguments," this one is perhaps the most ridiculous and perhaps the easiest to dismiss as condescending at best and racist at worst. In truth, this "reasoning" is quite simple: African-Americans have a higher threshold of pain with respect to jail; therefore they need higher penalties. This view conjures up an ancient mythology which has its antecedents in the vile horror of slavery.

C. *The "Special Vulnerability" Argument*

Let me also discuss what the Justice Department has called the special "vulnerability" of the communities in which crack is prevalent. An interesting euphemism -- vulnerable communities. I guess this is supposed to be the rhetorical (if not Orwellian) means by which we do not have to discuss the more difficult matters of race.

These "vulnerable communities" are minority communities. But "crack" is a *symptom* of these communities' vulnerability and certainly not the *cause*. These communities are vulnerable for all the well known reasons: the poverty; the lack of adequate education; and because the economy of this nation has failed to

create a reliable mechanism to provide employment for the youth of these communities. These youth see the American good life broadcast to them via television, hour after hour, day after day. They have no real means to acquire that life. Is there any wonder they turn to the drug trade as the employer (and "good life" hope) of last resort?

There has always been an underground economy in minority communities. And the underground economy will always exist until the earnings gap between African-Americans and Caucasians is closed. This underground economy has had many complexions over time: the speakeasy; after-hour clubs during prohibition, the numbers at other times; and now in this era, "crack."

IV. What Price Rhetoric?

A. *Present and Future Shock, Specifically*

By warehousing the sons and daughters of these minority communities for ever increasing periods of time, we do not solve the problem. We simply postpone dealing with the more grave problem. When we put an eighteen year old minority youth in the federal penitentiary for ten years for possessing fifty grams of crack, we assure our society of having to deal with a twenty-eight year old far less able to be productive in a society that has progressed in the ten years, while he was warehoused in the penitentiary. Welcome to our next nightmare. What do we then do with the twenty-eight year old less equipped to lead a productive life in this society than he was at the age of eighteen? How many prison building campaigns can America afford or endure? And how many thousands of minorities can we afford to incarcerate before we admit that this disparity is directed at the heart and

soul of our communities: our youth.

B. *Past Shock, Specifically -- Revisited and Lingerin*

I have said very little about the history of cocaine regulation in America, but I do feel a necessity to address this history. It seems that even our early attempts at the regulation of cocaine around the turn of the last century were guided by a mythology that was clearly racist. Have our nation's institutional leaders learned nothing since then, other than how to be more slick in terms of mythological packaging?

In *The American Disease -- Origins of Narcotic Control* 7 (1987) (expanded edition), David F. Musto, M.D., points out:

If cocaine was a spur to violence against whites in the South, as was generally believed by whites, then reaction against its users made sense. The fear of the cocainized black coincided with the peak of lynchings, legal segregation, and voting laws all designed to remove political and social power from him. Fear of cocaine might have contributed to the dread that the black would rise above "his place," as well as reflecting the extent to which cocaine may have released defiance and retribution. So far, evidence does not suggest that cocaine caused a crime wave but rather that anticipation of black rebellion inspired white alarm. Anecdotes often told of superhuman strength, cunning, and efficiency resulting from cocaine. One of the most terrifying beliefs about cocaine was that it actually improved pistol marksmanship. Another myth, that cocaine made blacks almost unaffected by mere .32 caliber bullets, is said to have caused southern police departments to switch to

.38 caliber revolvers. *These fantasies characterized white fear, not the reality of cocaine's effects, and gave one more reason for the repression of blacks.*

(emphasis added)

Much of the debate which lead to the promulgation of the current intra-drug disparity, while somewhat more subtle in language, was driven by similar fears.

Certainly by 1987, the enhanced penalty for the possession or sale of crack was likely to decimate inner city youth. The Congressional Debate on June 28, 1990, regarding the (then-time) Omnibus Crime Bill, 136 Cong. Rec. at S 8997-9026, demonstrates that Congress was aware of the disproportionate impact of the draconian sentences for cocaine base upon African-Americans. During that debate, the Senate considered the propriety of the mandatory minimum sentencing scheme in light of the overwhelming evidence of its disparate impact upon African-Americans. The debate included numerous references to African-Americans receiving disproportionately high sentences for possession and sale of cocaine base. Specifically, it was acknowledged that "most long term drug users are black or hispanic, and were born poor." *Id.* at S 9014. The record reveals that "mainly because of the new drug sentencing laws, ... the proportion of black [and] hispanic ... offenders is steadily increasing," and that "most drug offenders who get caught are Black or Hispanic."

Perhaps most alarming was this vision:

Given the pervasiveness of drug culture in many inner-city areas, the Gramm-Gingrich approach could begin to approximate simply rounding up young urban blacks and putting them into involuntary servitude on chain gangs.

136 Cong. Rec. S 9018 (emphasis added).

Modern-day law makers' reaction to crack was predicted by Dr. Musto, *supra*, at 277:

Reflecting on the earlier wave of drug intolerance, one cannot help but be concerned that the fear of drugs will again translate into a simple fear of *the drug user* and will be accompanied by draconian sentences and specious links between certain drugs and distrusted groups within society, as was the case with cocaine and Southern blacks in the first decade of this century.

And as the Commission's comprehensive, Spring 1995 Report and Recommendations make plain: it cannot reasonably be said that it is a function of mere serendipity that the brunt of an irrational cocaine sentencing disparity has fallen most heavily upon African-Americans and other non-white members of our community. See generally Attachment A, NACDL Comments to Commission. It is important to recognize in this respect that just two years ago we were confronted with a similar public outcry and criticism surrounding sentences for L.S.D. The Commission amended the sentencing guidelines to avoid the undue influence of varied carried weight on the applicable offense level. See Amendments to the Sentencing Guidelines, United States Sentencing Commission, May 4, 1993, p43. L.S.D. is a drug distributed primarily by Caucasians. (94.3% of all L.S.D. dealers were Caucasian. U.S. Sentencing 1992 Data File MonFY92.) There was no concerted effort by the Administration or institutional others then to block the Commission's reasonable and fair amendments.

V. Stealing Tomorrow:

A Safer Society if Not a Fair One? (Just Another Myth)

If for no more honorable reason than our own societal self preservation, we need to heed where the current state of affairs is taking us: A raging epidemic of poor, dumb children in the richest, most educated nation on earth can be ignored (for now) because these children have no power, no constituency. They cannot vote. They have no money. They own no property. There is no well financed, influential Washington based lobby group insuring that their birthright is protected.

But there are more of them every day. And they are having babies who will be poorer, and dumber than they are. They will be poorer and dumber and have no allegiance to this or any nation, no concept of right or wrong, no adherence to cherished traditions and no compassion or regard for the elders who abandoned them. Soon 14 million poor children will become 14 million unskilled uneducated, angry dangerous adults. *There will not be enough jails, enough bullets, enough quick fix federal programs.* There will be them and an older feebler, increasingly dependent us. They will blot out the sky, foul the air, make the water unfit to drink. They will steal tomorrow. They are time bombs.

Don Williamson, *Philadelphia Daily News*, November 4, 1985

(emphasis added). "They will steal tomorrow." And society will have aided and abetted the theft.

VI. Conclusion

There is precedent to remedy the gross unfairness, inefficiency, and societal risk imposed by the current cocaine sentencing regime (see e.g., discussion of LSD amendments, *supra*). The unfairness and the attendant harm here is manifest. And this harm is more than an individual sentence in an individual case. Young African-Americans and Latinos, as races and as a generation, are being "asked" to bear the brunt in a never ending "war." We should be aware that when the metaphor of war is used, casualties are sure to be at hand. In *this* war, we continue to inflict casualties upon ourselves. We are taking those who have little or no stake in this society and giving them less. We diminish our own stake in the process.

A few words, if you will, from the front line: in the last several years, I have on far too many occasions stood before many United States District Court Judges, accompanied by African-American males between the ages of seventeen and twenty-seven who were to be sentenced for varying degrees of involvement with a substance which has come to be called "crack" and which has become all too institutionally synonymous with "black." Before each of these sentencings, I knew several things: Most often my client was immature, unemployed, and had little understanding of the full impact of what was about to happen to him. And I knew that because the client had been involved with "crack," he was about to be singled out for the most severe punishment. Often times because of the nature of the sentencing guidelines formulation of "relevant conduct," the client was to be sentenced not just for his acts, but for acts of alleged confederates.

I have had to look parents of these young men in the eyes and explain to them that fifty grams of crack translates into a mandatory minimum sentence of ten years for their child, and that as little as five grams of crack translates into a mandatory minimum of five years. I have also looked into the eyes of those parents when I explained to them that this rich, mostly white society has decided that with respect to rich white people's powdered cocaine, one would have to be involved with one hundred times those amounts to get approximate sentences.

When the inevitable questions have come, I confess that I have refused to become an apologist for a policy that I believe was a product of hysteria, at best ill-conceived and unwise and at worst a vestige of a grossly unfair inequality in America that most of us would like to forget, and at least not *reconjure*. Here is our collective chance: After an extensive, congressionally-mandated and taxpayer-funded study, drawing upon the best research in the area, the objective, specialist United States Sentencing Commission recommends removal of the stark racial disparities in sentencing for crack and other forms of the same drug, cocaine. This recommendation implements the Commission's findings, in its comprehensive, 242 page (congressionally-mandated and taxpayer-funded) Report of February, 1995 -- that the current sentencing scheme is unfounded and unfair. Still, the Commission predicts its fair and reasonable recommendations will likely result in case-specific sentences for crack at some 270% of the sentences for other cocaine offenses (as a result of case-specific harm enhancements for such relevant factors as weapons use, violence, use of juveniles and criminal history). Really, what is there to fear?

The public has become aware that warehousing non-violent drug offenders in prison space more effectively (and economically) used for violent offenders is a bankrupt and bankrupting policy. See e.g, Attachment B, Coyle Study for NACDL.

So, on behalf of the National Association of Criminal Defense Lawyers, the citizens and basic constitutional principles our members represent: I urge the Subcommittee to heed the Sentencing Commission's recommendations, and resist any temptation to pull the proverbial rug out from under this specialist body because the conclusions reached by it in the course of its lengthy, thoughtful study are not to the sound bite liking of the irresponsible and rhetorically whimsical.

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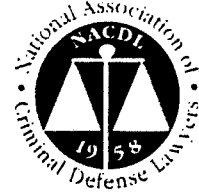
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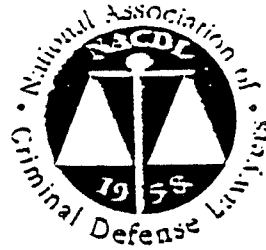
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Attachment A to NACDL Testimony
Re: Cocaine Sentencing

June 29, 1995



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WRITTEN, PUBLIC COMMENTS FOR THE RECORD
REGARDING THE UNITED STATES SENTENCING COMMISSION'S
FEBRUARY 1995 REPORT TO CONGRESS,
AND FUTURE CONGRESSIONAL RECOMMENDATIONS,
ON THE CURRENT 100-1 FEDERAL SENTENCING DISPARITY
BETWEEN "CRACK" AND POWDER COCAINE OFFENSES

By Gerald H. Goldstein, for
the National Association of Criminal Defense Lawyers

APRIL 10, 1995

EXECUTIVE DIRECTOR

On behalf of the National Association of Criminal Defense Lawyers (NACDL), I want to thank the Commission for the opportunity to submit for the record the following public comment on the Commission's February 1995 special report to Congress regarding the current 100-1 "crack" versus powder cocaine sentencing disparity, and the Commission's intention to submit to Congress recommendations on May 1, 1995 -- for case-specific, guidelines adjustment-oriented models for modification of the federal sentencing policy as it relates to cocaine offenses.

I.

NACDL Applauds the Commission's Work and Urges Commission Action in Full Accordance With the Report's Comprehensive Research

The members of NACDL, front-line defenders of the People's rights and liberties, have long recognized and pushed for reform of the irrational and unfair federal requirements that impose a mandatory minimum sentence of at least five years for the first-time possession of more than five grams of cocaine "base" ("crack"), while imposing a minimum sentence of probation for the possession of the same quantity of cocaine hydrochloride (powder cocaine). The mandatory sentence for possession of 50 grams of crack is ten years. While for this same penalty, a defendant would need to be convicted of possessing 100 times as much powder cocaine. A defendant with no prior convictions who is found guilty in federal court of possessing 70 grams of powder cocaine with the intent to sell it faces between 21 and 27 months in prison. Meanwhile, a like conviction involving the same amount of crack cocaine would qualify for a sentence more than five times as long -- between 10 and 12 1/2 years. From both the market-value and the potential punishment perspectives, powder cocaine, and not crack, is in fact the more profitable drug.¹

As the report states: the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986), created the basic framework of mandatory minimum penalties that currently apply to federal drug offenses. This Act establishes two tiers of mandatory prison terms for those convicted as first-time drug distributors -- a five year and a ten-year minimum sentence. Under the terms of the statute, the different minimums are triggered depending on the quantity and

¹ See, e.g., Table 19 in *Special Report to Congress: Cocaine and Federal Sentencing Policy*, United States Sentencing Commission 173 [herein the February 1995 report or the report] ("Street-Level Value of Drug Quantity By Drug Type and Base Offense Level") (reflecting, for example, that in order for one to reach a quantity-oriented, "base offense level" for sentencing purposes of "20," one must either have been convicted of \$21,400 worth of powder cocaine, or else, \$230 worth of crack; likewise, to reach the highest base offense level, "38," one must be convicted of either \$16,050,000 worth of powder cocaine, or else \$172,500 worth of crack).

the type of drug involved. This 1986 Act gave birth to the federal criminal law sentencing distinction between cocaine "base" and other forms of the same drug. The quantity thresholds triggering the penalties create the 100-1, crack versus powder cocaine sentencing ratio.

As the report also well notes: the 1986 Act "was expedited through Congress. As a result, its passage left behind a limited legislative record."² While many individual members delivered floor statements about the Act, Congress dispensed with most of the typical legislative process, including committee hearings. And no committee produced the standard committee report on the legislation reflecting actual analysis of the Act's provisions.³ The legislative history thus does not include any discussion of the Act's 100-1 crack versus powder cocaine quantity-based sentencing disparity.⁴

But we do know this:

The sentencing provisions of the Act were initiated in August 1986, following the July 4th congressional recess during which public concern and media coverage of cocaine peaked as a result of the June 1986 death of NCAA basketball star Len Bias.⁵

A few weeks after Bias's death, on July 15, 1986, the United States Senate's Permanent Subcommittee on Investigations held a hearing on crack cocaine. During the debate, Len Bias's case was cited 11 times[] in connection with crack.⁶

Eric Sterling, who for eight years served as counsel to the House Judiciary Committee and played a significant staff role in the development of many provisions of the Drug Abuse Act of 1986, testified before the United States Sentencing Commission in 1993 that the "crack

² *Id.* at 116.

³ See *id.* at 116-117. See also, e.g., 132 Cong. Rec. 26,462 (Sept. 26, 1986) (statement of Sen Mathias) ("Very candidly, none of us has had an adequate opportunity to study this enormous package. It did not emerge from the crucible of the committee process.").

⁴ February 1995 report, *supra* note 1, at 117.

⁵ *Id.*

⁶ *Id.* at 123 (citing transcript of the "Crack Cocaine" hearing before the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, United States Senate, 99th Congress).

cocaine overdose death of NCAA basketball star Len Bias" [] was instrumental in the development of the federal crack cocaine laws. During 1986 alone, there were 74 evening news segments about crack cocaine, many fueled by the belief that Bias died of a crack overdose.⁷

Not until a year later, during the trial of Brian Tribble who was accused of supplying Bias with the cocaine, did Terry Long, a University of Maryland basketball player who participated in the cocaine party that led to Bias's death, testify that he, Bias, Tribble, and another player snorted powder cocaine over a four-hour period. Tribble's testimony received limited coverage.⁸

And still, for almost a decade now, this irrational and unfair system of cocaine sentencing disparity -- child of hysteria and haste -- has existed without comprehensive examination. There have been many victims of this system over the years. And they have been among the most vulnerable, at-risk members of our society: the poor, the young and the minority.

NACDL accordingly applauds the Commission for its February 1995 report's comprehensive research, and for the report's unequivocal conclusion that the current 100-1 sentencing ratio between crack and powder cocaine offenses is too high, irrational and unfair. Further, though, NACDL respectfully urges the Commission to act in accordance with the facts canvassed in the report. While NACDL commends the Commission for the studied research reflected in the February 1995 report, NACDL submits that the Commission should immediately follow the data referenced in the February 1995 report to the data's full, logical conclusion: there is no rational justification for any sentencing disparity between powder and crack cocaine; racism and unfounded suspicion should be removed from the federal sentencing law; the sentencing guidelines' (and statutory) ratio between powder and crack cocaine should be 1-1, with *all* cocaine offenses being subject to the same penalties as those now in effect for powder cocaine.

⁷ *Id.* (citing testimony of Eric Sterling before the United States Sentencing Commission on proposed guideline amendments, public comment, March 22, 1993).

⁸ *Id.*

II.

There Is No Rational Basis for Any Disparity Between Crack and Powder Cocaine

Although several courts have generously deferred to the congressional cocaine sentencing conclusion -- i.e., assuming that Congress *must* have had some reason for its creation of the crack versus powder cocaine sentencing disparity -- the research and analysis of the Commission's report shows that any assumed congressional "rationale" must be regarded as simply unfounded, and erroneous. The abbreviated, murky legislative history does not provide a consistently cited "rationale" for the crack versus powder cocaine penalty structure.⁹ But, as the Commission's report rightly points out, to the extent Congress can be viewed as having perhaps thought about support for its statutory conclusion to create a 100-1 crack versus powder cocaine sentencing disparity, it's conclusion rests upon mere "assumptions": assumed qualities of addictiveness; speculative correlations to other, serious crimes; conjured special psychological effects of this newly discovered bogey-man called crack; fears of heightened risks to youths; and the supposedly peculiar "purity and potency," market incentives, and ease of movement qualities of crack.¹⁰

A.

Regarding "Pure and Potent," and Ease of Movement and Administration Assumptions

Yet, as the Commission's report clarifies: the mood altering ingredient in both powder and crack is the same -- cocaine. "Pure and potent" cocaine powder can be easily moved and administered, and it can be easily transformed into crack by combining the powder with baking soda and heat.

The difference in effect between the two varieties of cocaine lies in the way the drug is ingested. Cocaine powder is generally sniffed or snorted through the nostrils or dissolved in water and administered intravenously, whereas crack is usually smoked in a pipe. The onset of drug effects is slowest for swallowing and sniffing, and fastest for smoking and injection. Intravenous injection deposits drugs directly into the user's bloodstream, for fast transmission to the user's brain.

⁹ See *id.* at 121.

¹⁰ See generally *id.* at 118.

B.

Regarding Medical and Addiction Assumptions

Of course, the use of drugs, including all forms of cocaine, impacts upon the public health of the United States.¹¹ But speculation and Congress-inspiring sports celebrity deaths aside,¹² according to *emergency medical experts*: there is no objective scientific data to support the oft-cited assumption that crack is more addictive or dangerous than the powder cocaine from which it is derived. In fact, studies disclose that the most frequent route of administration for cocaine-related deaths is through *injected*, water-dissolved, powder cocaine -- not by the smoking of crack.¹³ Crack cannot be injected.

Likewise, the injection of cocaine powder -- and not the smoking of its derivative, crack -- increases the social threat of infections (including HIV and hepatitis).

And as the Commission report also notes, although the national estimate of (crack and powder) cocaine-exposed infants according to some studies is notable at between two to three percent, cocaine is actually used less frequently during pregnancy than are all sorts of other drugs, both "licit" and "illicit."¹⁴

¹¹ Still, as the report points out, studies by organizations including the Drug Abuse Warning Network (DAWN) and the Rand Foundation reflect that the casual use of cocaine has *decreased* since 1988; and that fewer Americans are now using cocaine than in the 1980's. *Id.* at 46-47. In fact, in terms of drug-based causes of hospital emergency room visits, cocaine ranks behind *alcohol*. *Id.* at 41.

¹² In addition to the assumed crack-related death of the Boston Celtics's first-round basketball draft pick, Len Bias, Congress was moved by the drug-related death of Cleveland Browns football player Don Rogers. "Recalling [these deaths], members of Congress [supporting the proposed 1986 Act] repeatedly described the dimensions of the drug problem in such dramatic terms as 'epidemic.'" *Id.* at 121.

¹³ See, e.g., *id.* at 44-45. But it is also important to recognize, as the Commission has in its report, that "[a]mong cocaine-related deaths, concurrent use with alcohol was the most deadly combination." *Id.* at 45 (emphasis added).

¹⁴ See, e.g., *id.* at 52 (citing *inter alia* D. Gomby & P. Shiono, *Estimating the Number of Substance-Exposed Infants*, *The Future of Children* 22 (Spring 1991)). As the report has well-recognized: fetal alcohol syndrome, a known cause of central nervous system abnormalities, is a more serious drug-related problem among newborns in the United States than fetal cocaine syndrome (whether caused by crack or powder -- there is no way to

C.

Regarding Assumptions About "Special Psychological Effects"

Certainly, when cocaine use becomes uncontrolled, an individual's links to the social and economic world disintegrate. As the report reflects, some studies even find that physical, psychological, and behavioral changes in an individual can begin soon after the person begins to use cocaine. But there is nothing peculiarly pernicious about crack cocaine.

When users of cocaine, powder or crack, become dependent upon the drug, their family and social lives typically disintegrate. And the most "at risk" users -- the unemployed -- frequently are asked, or forced, to leave their family or friendship units. For example, as the report notes: in a study of voluntary inpatients in a hospital unit, 18.7 percent of the 245 study participants disclosed that they had been asked or forced to leave their social units; and of these individuals, more than half (51.1%) became homeless.¹⁵ Research shows that those who are drug abusers and become homeless will likely abuse alcohol and other drugs. And homeless shelters in New York City, for example, have reported that the current most frequently abused drug among the shelter residents is cocaine -- but again, both crack and powder.¹⁶ Yet, as the Commission's report suggests, it seems as likely that cocaine abuse is a reflection of sociological and psychological illness as it is likely that (as some members of Congress might be seen to have assumed in 1986) such use causes such illness.

Further, the report's discussion of psychopharmacological-driven crime data is telling. For example, alcohol-related homicides are considered to be psychopharmacological-driven at a considerably more significant rate than any other drug -- including cocaine (of either the powder or crack variety).¹⁷ And at least one influential study concludes that "to date, there has been no systematic research linking crack cocaine use with increased

distinguish the particular variety of the drug used by the effects on the infant); and a much more significant percentage of newborns in this country are reported to suffer from fetal tobacco-exposure or fetal marijuana-exposure, than from fetal cocaine syndrome. *Id.*

¹⁵ *Id.*, at 58 (citing B. Wallace, *Crack Addiction: Treatment and Recovery Issues*, Contemporary Drug Problems 74 (Spring 1990)).

¹⁶ *Id.* at 58-59 (citing W. Breakey & P. Fischer, *Homelessness: The Extent of the Problem*, Journal of Social Issues 40 (1990)).

¹⁷ See e.g., *id.* at 98-99 (citing P. Goldstein, *Drugs and Violent Crime, Pathways to Criminal Violence*, table 2, 665 (Neil A. Weiner et al., eds. 1989)).

[psychopharmacological driven] violence."¹⁸

D.

Regarding Market-Value Assumptions

As stated above, the market-value assumption about crack cannot withstand analysis. The report recognizes this:

Individuals at the top of the drug distribution chain make considerably more money than others [lower down] in the organization. [] DEA data for 1992 indicate domestic wholesalers can purchase a kilogram of powder cocaine from Columbian sources for \$950-\$1,235. Powder cocaine from other source countries such as Bolivia and Peru generally is more expensive, typically selling for \$1,200-\$2,500 and \$2,500-\$4,000 a kilogram, respectively. * * * [A] kilogram of powder cocaine can be sold wholesale, after dilution, for \$11,000-\$42,000, and can be marketed, after further dilution, in gram quantities for \$17,000-\$173,000. These figures, not considering distribution expenses, produce profits of \$16,000-\$171,000 per kilogram of powder cocaine.¹⁹

And yet, the 100-1 sentencing disparity between crack and powder cocaine results in market-oriented sentencing irrationality: for example, in order for one to reach the quantity-oriented base offense level of "20," one must either have been convicted of \$21,400 worth of powder cocaine, or else, a mere \$230 worth of crack.²⁰

¹⁸ J. Fagan, *Intoxication and Aggression*, in M. Tonry & J.Q. Wilson *Drugs and Crime* (1990)), quoted in *id.* at 99.

¹⁹ The report, *supra* note 1, at 87 (citing *inter alia*, United States Department of Justice, *Drug Enforcement Administration, Source to the Street: Mid-1993 Prices for: Cannabis, Cocaine, Heroin* 6 (Sept. 1993)).

²⁰ See Table 19, *id.* at 173.

E.

*Regarding Assumptions About Correlations to
Other, Serious Offenses*

The report notes that at least one major study has concluded that it is the frequency with which one sells a cocaine product, and not the selling of cocaine in its *smokeable form*, that seems to best explain any violence associated with cocaine distribution.²¹ Several researchers agree: "[T]he primary association between [crack] cocaine and violence is systemic. It is violence associated with the black market and distribution."²² And as also noted in the February 1995 report, studies reflect that systemic violence of this sort is found in analyses of powder cocaine, and presumably other illicit drug markets as well.²³

F.

Regarding Assumptions About Other Heightened Risks

Already-existing guideline enhancements sufficiently account for any additional harm that may actually be found associated with cocaine offenses. Federal sentencing guidelines account for the involvement of firearms, or other dangerous weapons; serious bodily injury, or death; the use or employment of juveniles; leadership roles played by one in the commission of an offense; prior criminal histories; and other aggravating factors. Additional, sweeping, "built-in" sentencing enhancements reflecting crack cocaine's *presumed*, peculiar, always-aggravating qualities are unnecessary, unfair, and -- in the creation of irrational, increased incarceration time -- economically inefficient in their undue cost of tax dollars, as well.

For example, with regard to the issue of youth, especially youth gang related activity: as the report reflects, noted researchers have concluded that it is "the underlying culture of the gangs in a particular area that accounts for the violence more than anything else."²⁴ And as the report reflects, other

²¹ See the report, *supra* note 1, at 95 (quoting K. Chin & J. Fagan, *Violence as Regulation and Social Control in the Distribution of Crack*, in M. de la Rosa, B. Gropper, and E. Lambert (eds.), *Drugs and Violence: Causes, Correlates and Consequences* 36 (1990)).

²² United States Sentencing Commission, *Hearing on Crack Cocaine* (Nov. 1993).

²³ See, e.g., February report, *supra* note 1, at 97-98.

²⁴ Testimony of Dr. J.H. Slotnick before the United States Sentencing Commission, *Hearing on Crack Cocaine* (Nov. 1993), at 70, quoted in *id.* at 104. See also E. Walsh, "Chicago Street Gang

researchers have drawn like conclusions about the various, complex, non-crack-oriented social factors underlying gang and inner-city cultural violence -- such as "the increasing social and economic disorganization of the nation's inner cities beginning in the 1980's, and the mounting proliferation of more powerful guns" ²⁵ Indeed, as the Commission's report points out: researchers tend to agree that from a historical perspective, crack cocaine is not unique. For example, as Professor Paul J. Goldstein testified before the Commission, the national homicide rate has "changed very little over the last 25 years." Indeed, in 1992, the homicide rate was lower than in 1980, when systemic violence arising out of the newly developing powder cocaine market was about at its peak, and lower than in 1933 -- at the end of *alcohol prohibition*.²⁶

G.

Recap Regarding Assumptions

Although some courts have generously deferred to Congress with regard to the 100-1 sentencing disparity between crack and powder cocaine -- i.e., assuming that Congress must have had some "reasons" for creating this disparity -- the Commission's report shows that any such assumed "rationales" are but flawed, erroneous assumptions. In short, the 100-1 crack versus powder cocaine sentencing disparity is shown by the Commission's report to be irrational, unwarranted, unfair, and economically inefficient -- when assessed under the very terms assumed to have been assumed by Congress.

III.

Race Matters

Certainly given the irrational 100-1 cocaine sentencing policy, the racial ramifications of this sentencing policy invoke strong questions about our Nation's constitutional conceptions of equal protection, fundamental fairness and the People's right to be free from illogical, excessively disproportionate punishment.

Study Shows Fearful Toll of Powerful Weapons," Wash. Post A 4 (Nov. 29, 1993) (citing study conducted by Carolyn Rebecca Black and Richard Black, which concluded that *gang turf battles* in many areas were more likely to lead to homicides than were drug trafficking disputes).

²⁵ Statement of Steven Belenko in J. Fagan, *Intoxication and Aggression*, in M. Tonry & J.Q. Wilson, *Drugs and Crime* (1990), at 27, quoted in February 1995 report, *supra* note 1, at 105.

²⁶ February report, *supra* note 1, at 108 (citing J. Inciardi & A. Pottieger, *Crack-Cocaine Use and Street Crime*, *Journal of Drug Issues* (1994), at 65).

The evidence does reflect that crack cocaine is significantly different from powder cocaine in one respect: crack sentences are almost exclusively meted out to African-Americans, while most powder cocaine sentencees are Caucasian-Americans (the latter group being also the predominant group in Congress, in the federal Judiciary, and in the upper economic echelons of the populace generally).

Indeed, as this Commission knows and has recognized in its report, of all the defendants sentenced for crack cocaine offenses in the federal system, approximately 90% are African-American. In 1992, for example, 92.6% were African-American; and *all* of the persons sentenced in the federal system for simple possession of crack cocaine were African-American.

Certainly, in the light of the sentencing policy irrationality reflected in the report and referenced above, such "statistics" raise grave concerns about the grossly negative impact of this 100-1 policy on African-Americans -- given our society's supposedly equal, constitutional democracy. These African-Americans are subject to serving long mandatory minimum sentences for simple possession of small amounts of crack cocaine, while those typically Caucasian first time offenders convicted of possession of a much greater quantity of cocaine powder are subject to minimal sentences (even probation).

IV.

Sentencing Irrationality and Socio-Economic Inefficiency

NACDL points out that the irrational, unfair sentencing disparity between crack and powder cocaine offenses carries serious macro-economic costs in addition to the costs such a policy extracts from individual sentencees and, in turn, from our Nation's fundamental conceptions of justice. Increased mandatory minimums of the irrational sort existing under the current system of cocaine sentencing take substantial amounts of taxpayer dollars to fund; dollars that could be more usefully and rationally applied, e.g., to the *future* of this country -- to education or national debt interest payments.

V.

NACDL Urges the Commission to Recommend Retroactive Application of a 1-1 Crack/Powder Cocaine Sentencing Ratio

The current cocaine sentencing system has been allowed to exist for too long, at great costs to individual lives and great cost to taxpayers. NACDL encourages the Commission to recommend to Congress a 1-1 ratio between crack and powder cocaine sentences. Further, NACDL strongly urges the Commission to recommend that this change be given immediate, retroactive effect.

It is not the fault of the victims of this flawed and racist eight-year old policy -- those sentenced under the crack 100-1 automatic enhancement policy -- that this policy came into existence and was allowed to exist for a significant period of time. They should be peculiarly and irrationally punished under this pernicious regime no longer. They should not be forced to continue the unreasonable forfeiture of their lives to this clearly flawed system of cocaine sentencing. The similarly situated should be similarly situated. This is a priceless fundamental value.

Further, though, the taxpayers deserve retroactive relief. They should be given the monetary relief associated with a retroactively applicable implementation of a more equitable, efficient cocaine sentencing policy. Indeed, any institutional costs associated with such retroactive application of a 1-1 cocaine sentencing ratio are obviously and substantially less than the costs associated with the continued subsidized irrationality of incarcerating those convicted of crack offenses, who should by all rights be serving but the sentence they would have received had they been but convicted of a powder cocaine offense. At the very least, such sanity and fairness would make room for the incarceration for the truly violent offenders among us, and perhaps even save us all the tax costs of a new prison or two.

VI.

Conclusion of NACDL Comments

Again, NACDL applauds the comprehensive research reflected in the Commission's report, and is grateful to the Commission for this opportunity to offer comments about the report and the Commission's forthcoming recommendations to Congress on cocaine sentencing policy. NACDL respectfully encourages the Commission to follow through on the implications of its study -- to recommend to Congress an immediate and retroactively applicable establishment of a fair and rational, 1-1 cocaine sentencing ratio, with all cocaine offenses being subject to the same penalties as those in effect for powder cocaine.

Gerald H. Goldstein

Gerald Harris Goldstein is a native of San Antonio, Texas. He graduated from Tulane University in 1965 then attended the University of Texas School of Law. He graduated in 1968 and has devoted his practice since that time to the representation of those accused of crime. He is admitted to practice before the state courts of Texas and numerous federal district courts, U.S. Courts of Appeals and the United States Supreme Court. He is certified as a criminal law specialist by the State Bar of Texas Board of Legal Specialization. In addition to his practice he serves as an Adjunct Professor of Law at the University of Texas School of Law and lectures frequently on criminal law and procedure at continuing legal education seminars throughout the United States. He has served as appellate counsel in numerous death penalty cases and has been counsel of record for NACDL as *amicus curiae* in several important controversies before the U.S. Supreme Court. His law firm, Goldstein, Goldstein and Hilley, devotes approximately fifteen percent of its time to pro bono work. He is currently the President of NACDL.

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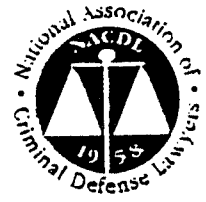
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NACDL is a specialized bar association representing the nation's criminal defense lawyers. Its 8,700 direct members and 70 state and local affiliates include private criminal defense lawyers, public defenders, and law professors. The 36-year old association is devoted to ensuring justice and due process for persons accused of crime; fostering the integrity, independence, and expertise of the criminal defense profession; and promoting the proper and fair administration of criminal justice.

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Attachment B to NACDL Testimony
Re: Cocaine Sentencing

June 29, 1995

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June 14, 1995

Gerald H. Goldstein, President
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re: **Report to NACDL: Statistical Analysis of Potential Savings
from Enactment of the Revised Crack Cocaine Penalties**

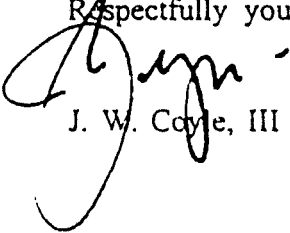
Dear President Goldstein:

As you and I have discussed, back in 1990, I handled my first federal crack cocaine case as a defense lawyer. Since that time, I have seen many people (all African-Americans) warehoused by the unfair penalties associated with federal crack cocaine sentencing. The statistics in the attached report can be viewed as supplementing the materials transmitted to Congress by the U.S. Sentencing Commission on May 1, 1995, when the Commission recommended enactment of the "Cocaine Penalty Adjustment Act of 1995." These data are particularly relevant to the prison impact information mandated by Section 20402 of the Violent Crime Control and Law Enforcement Act of 1994 (18 U.S.C. Section 4047(a)).

The report demonstrates the enormous savings to the nation -- \$3.5 billion -- that could be realized by passage of this important legislation. Three law students in my office -- Bennett Hirschhorn, Maurice Woods, and Ambre Gooch -- worked non-stop for three weeks to ensure that the figures in the report are as accurate as humanly possible. They drew on materials from Congress, the Sentencing Commission, and the U.S. Bureau of Prisons. Their commitment has been extraordinary.

I hope that our statistical report will give added momentum to the outstanding efforts of the Sentencing Commission, NACDL and other concerned organizations to rectify the terrible inequity of crack cocaine sentences. They clearly show that equalizing sentences is not just the right thing to do; it will save taxpayers money, too.

Respectfully yours,


J. W. Coyle, III

STATISTICAL ANALYSIS OF
POTENTIAL SAVINGS
FROM ENACTMENT OF THE REVISED
CRACK COCAINE PENALTIES

JUNE 9, 1995

Studies prepared by:
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EXPLANATION OF STATISTICAL METHODOLOGY

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June 9, 1995

Dear Reader:

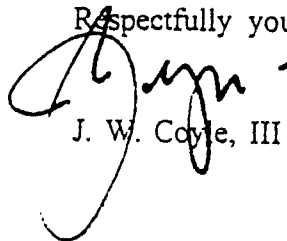
In 1990 I handled my first federal crack cocaine case as a defense lawyer. Since that time I have seen many people (all African Americans) warehoused by the unfair penalties associated with federal crack cocaine sentencing. The statistics that follow in this report are hopefully supplemental to the materials transmitted to Congress by the U.S. Sentencing Commission on May 1, 1995 recommending passage of the "Cocaine Penalty Adjustment Act of 1995", and particularly the prison impact section mandated by §20402 of the Violent Crime Control Law Enforcement Act of 1994. (18 U.S.C. §4047(a))

What we have attempted to do is translate into dollars the enormous savings (\$3.8 billion) realized by passage of this important legislation.

Three law students in my office have worked virtually non-stop for the last three weeks to insure that the figures in this report are as accurate as possible. They have utilized statistics and written materials from Congress, the U.S. Sentencing Commission, and the Bureau of Prisons. The commitment of students Bennett Hirschhorn, Maurice Woods, and Ambre Gooch has been extraordinary.

I am convinced that our greatness as a nation is determined by how fairly we treat the weakest members of our society. No one holds less power than the shackled prisoner standing before the bar of justice.

Respectfully yours,



J. W. Coyle, III

JWC/sm
L-CRA/COC

Potential Savings: \$ 3,452,612,222.62
\$ Spent to Date: \$ 399,363,435.55

In cases where the 1:1 sentence would end before the **Date of Enactment** of the Sentencing Commission's Recommendation, the **Potential Savings** account for the months after the date of enactment. **\$ Spent to Date** account for the prison months between the end of the 1:1 sentence and the **Date of Enactment**.



Date of Enactment of 1:1

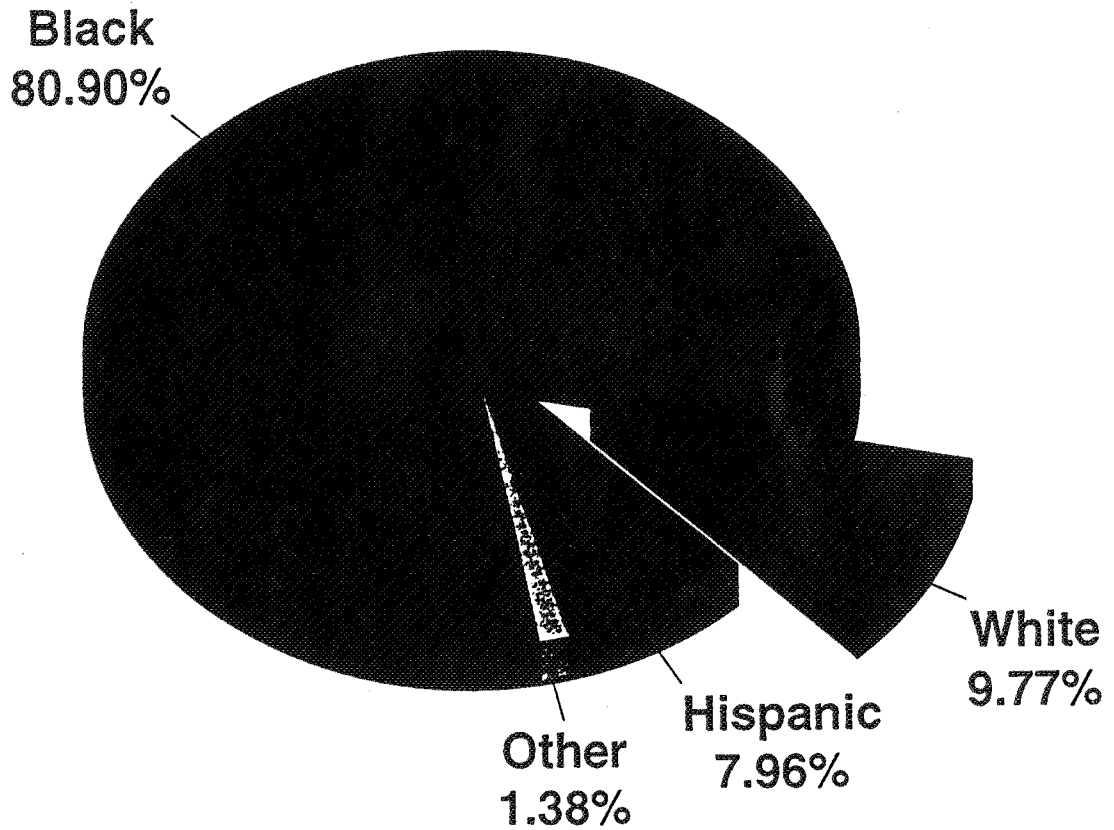
In cases where the 1:1 sentence would end after the **Date of Enactment**, the **Potential Savings** account for the months after the 1:1 Sentence.



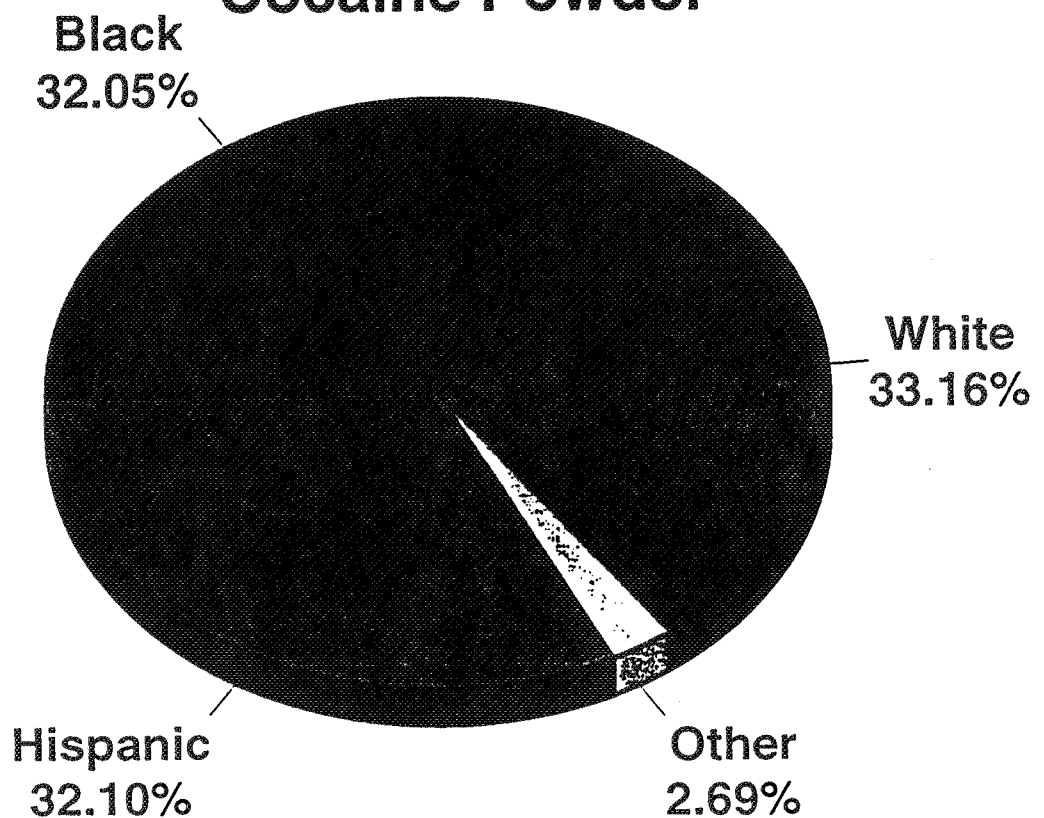
Date of Enactment of 1:1

* For a complete breakdown of savings by year and by Crack:Powder Sentencing ratios at 1:1, 5:1, and 10:1, see tab 5.

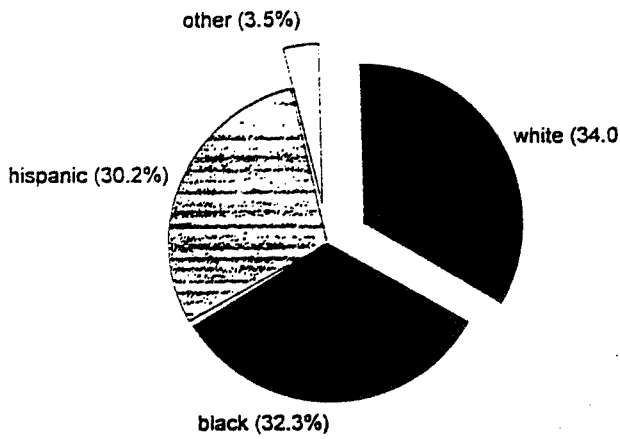
Convictions in Our Federal Courts by Race Cocaine Base (Crack)



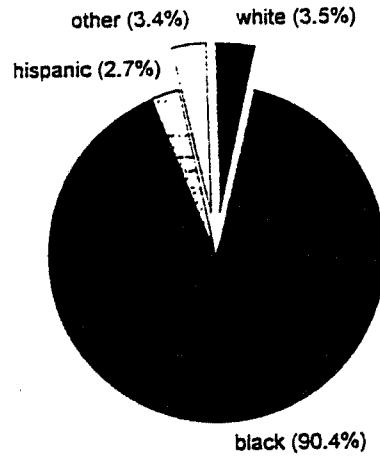
Cocaine Powder



Powder

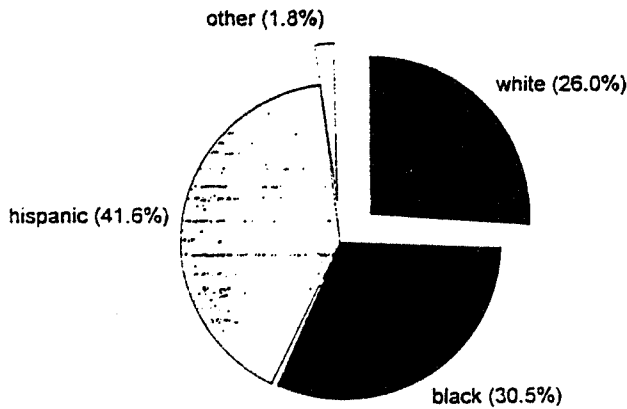


Base(Crack)

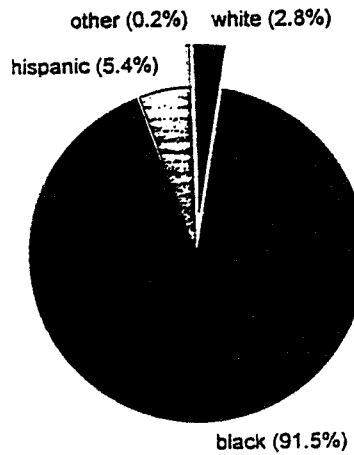


1995	
crack figures by race	4484
white	159
black	4053
hispanic	120
other	152
powder figures by race	3447
white	1173
black	1113
hispanic	1040
other	121

Powder

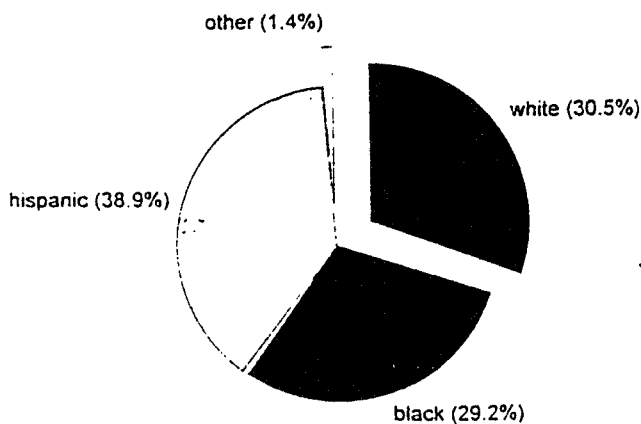


Base(Crack)

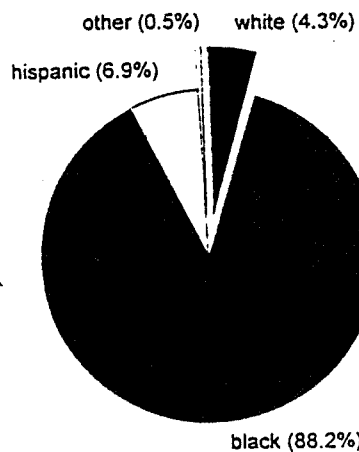


1994	
crack figures by race	3323
white	94
black	3042
hispanic	180
other	7
powder figures by race	4378
white	1140
black	1337
hispanic	1821
other	80

Powder

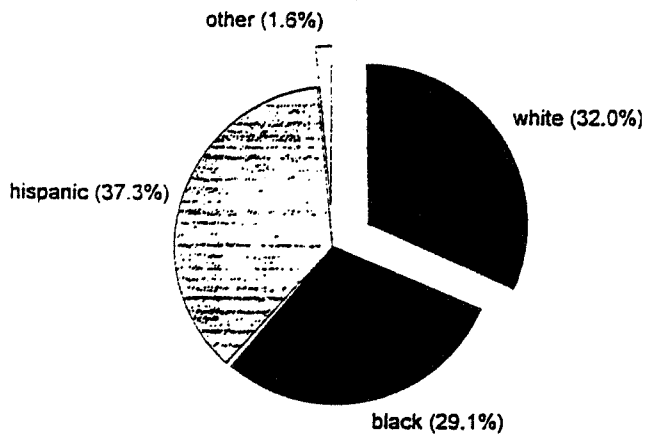


Base(Crack)

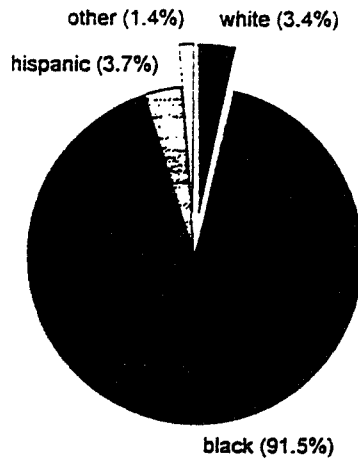


1993	
crack figures by race	3313
white	144
black	2922
hispanic	229
other	18
powder figures by race	5954
white	1818
black	1741
hispanic	2314
other	81

Powder

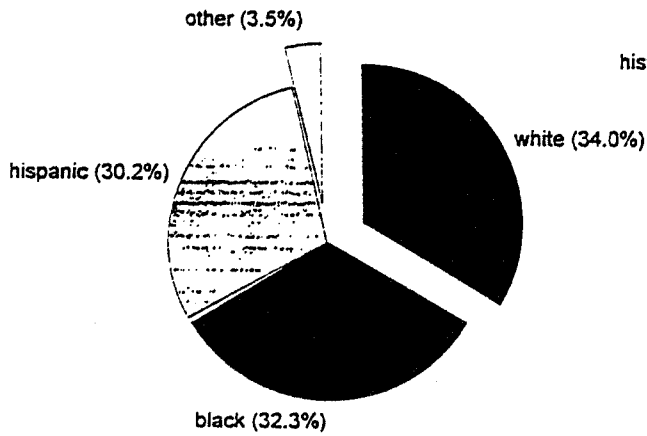


Base(Crack)

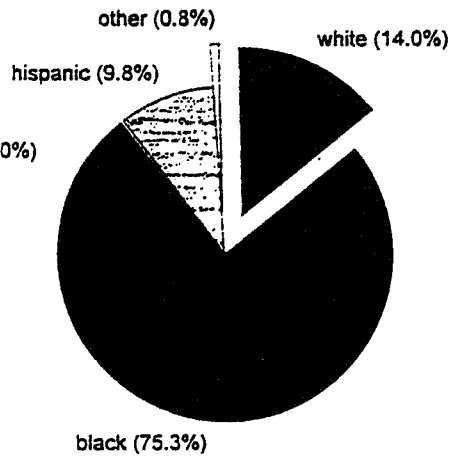


1992	
crack figures by race	2504
white	86
black	2290
hispanic	93
other	35
powder figures by race	7272
white	2330
black	2115
hispanic	2711
other	116

Powder

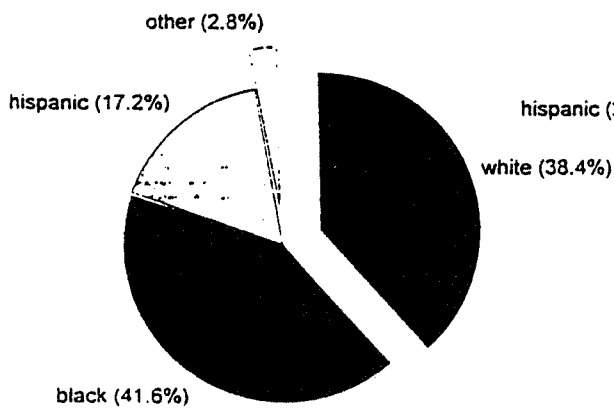


Base(Crack)

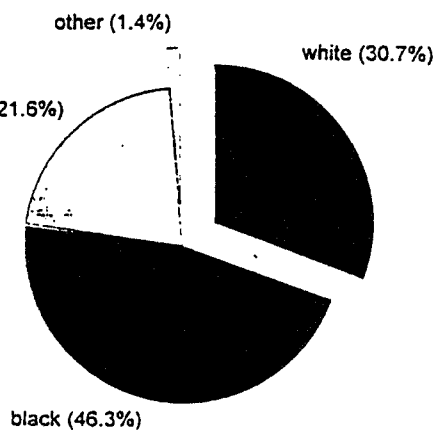


1991	
crack figures by race	2363
white	332
black	1780
hispanic	232
other	19
powder figures by race	2297
white	781
black	742
hispanic	693
other	81

Powder

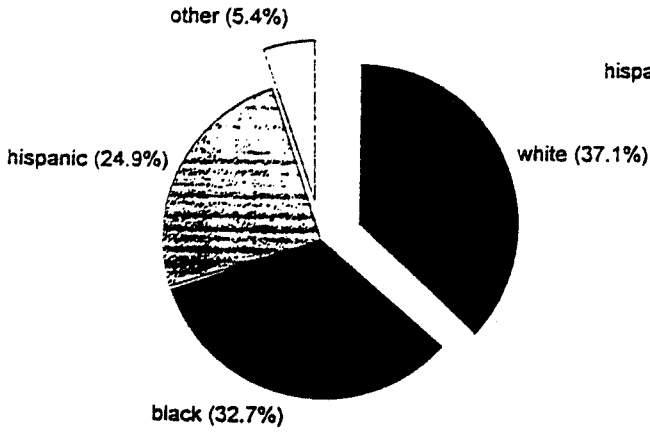


Base(Crack)

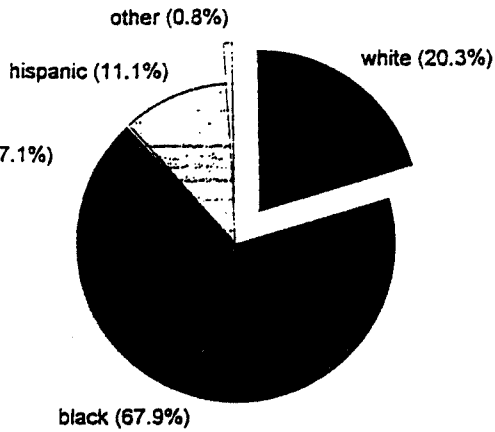


1990	
crack figures by race	2706
white	831
black	1254
hispanic	584
other	37
powder figures by race	4260
white	1637
black	1771
hispanic	731
other	121

Powder

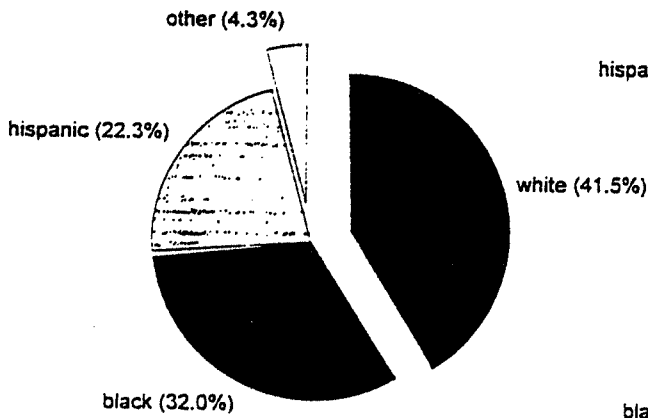


Base(Crack)

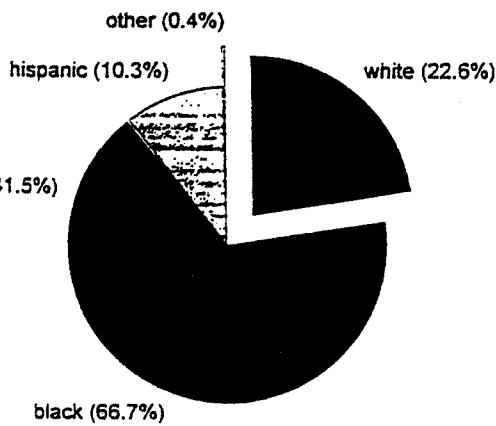


1989	
crack figures by race	1422
white	288
black	965
hispanic	158
other	11
powder figures by race	4841
white	1723
black	1518
hispanic	1157
other	249

Powder



Base(Crack)



1988	
crack figures by race	243
white	55
black	162
hispanic	25
other	1
powder figures by race	1148
white	476
black	367
hispanic	256
other	49

Yearly Analysis of Potential Dollars Expended, Dollars Spent to Date, and Potential Savings from Enactment of the Sentencing Commission's Recommendation

	1995
1:1 total for extra \$ spent at 100:1	\$649,782,188.85
\$ spent to date	\$0.00
potential savings	\$649,782,188.85

	1994
1:1 total for extra \$ spent at 100:1	\$513,895,425.06
\$ spent to date	\$0.00
potential savings	\$513,895,425.06

	1993
1:1 total for extra \$ spent at 100:1	\$544,606,811.85
\$ spent to date	\$16,768,558.76
potential savings	\$527,838,253.09

	1992
1:1 total for extra \$ spent at 100:1	\$436,000,349.00
\$ spent to date	\$42,124,355.00
potential savings	\$393,875,994.00

	1991
1:1 total for extra \$ spent at 100:1	\$626,062,707.42
\$ spent to date	\$79,182,883.79
potential savings	\$546,879,823.63

	1990
1:1 total for extra \$ spent at 100:1	\$672,508,309.00
\$ spent to date	\$154,474,875.00
potential savings	\$518,033,434.00

	1989
1:1 total for extra \$ spent at 100:1	\$354,978,175.00
\$ spent to date	\$88,434,736.00
potential savings	\$266,543,439.00

	1988
1:1 total for extra \$ spent at 100:1	\$54,141,692.00
\$ spent to date	\$18,378,027.00
potential savings	\$35,763,665.00

Dollars Spent at 100:1, Dollars Spent to Date, and Potential Savings if Congress Adopts an Alternative Crack:Powder Sentencing Ratio of 5:1 or 10:1 in Opposition to the Recommendation of the Mandate to the Sentencing Committee

5:1 total for extra \$ spent at 100:1
\$ spent to date
potential savings

\$2,880,911,356.57
\$276,979,826.10
\$2,603,931,530.47

10:1 total for extra \$ spent at 100:1
\$ spent to date
potential savings

\$2,329,848,249.33
\$227,339,843.18
\$2,102,508,406.15

	1995
1:1 total for extra \$ spent at 100:1	\$649,782,188.85
\$ spent to date	\$0.00
potential savings	\$649,782,188.85
5:1 total for extra \$ spent at 100:1	\$416,689,844.84
\$ spent to date	\$0.00
potential savings	\$416,689,844.84
10:1 total for extra \$ spent at 100:1	\$266,773,525.67
\$ spent to date	\$0.00
potential savings	\$266,773,525.67
total crack	4484
total powder	3447

	1994
1:1 total for extra \$ spent at 100:1	\$513,895,425.06
\$ spent to date	\$0.00
potential savings	\$513,895,425.06
5:1 total for extra \$ spent at 100:1	\$348,201,291.44
\$ spent to date	\$0.00
potential savings	\$348,201,291.44
10:1 total for extra \$ spent at 100:1	\$243,507,415.59
\$ spent to date	\$0.00
potential savings	\$243,507,415.59
total crack	3323
total powder	4378

	1993
1:1 total for extra \$ spent at 100:1	\$544,606,811.85
\$ spent to date	\$16,768,558.76
potential savings	\$527,838,253.09
5:1 total for extra \$ spent at 100:1	\$386,435,902.55
\$ spent to date	\$5,339,486.38
potential savings	\$381,096,416.17
10:1 total for extra \$ spent at 100:1	\$288,443,826.20
\$ spent to date	\$0.00
potential savings	\$288,443,826.20
total crack	3313
total powder	5954

	1992
1:1 total for extra \$ spent at 100:1	\$436,000,349.00
\$ spent to date	\$42,124,355.00
potential savings	\$393,875,994.00
5:1 total for extra \$ spent at 100:1	\$321,762,387.00
\$ spent to date	\$25,435,963.00
potential savings	\$296,326,424.00
10:1 total for extra \$ spent at 100:1	\$252,526,118.00
\$ spent to date	\$17,033,345.00
potential savings	\$235,492,773.00
total crack	2504
total powder	7272

	1991
1:1 total for extra \$ spent at 100:1	\$626,062,707.42
\$ spent to date	\$79,182,883.79
potential savings	\$546,879,823.63
5:1 total for extra \$ spent at 100:1	\$507,413,295.74
\$ spent to date	\$58,811,223.72
potential savings	\$448,602,072.02
10:1 total for extra \$ spent at 100:1	\$461,041,990.87
\$ spent to date	\$48,748,284.18
potential savings	\$412,295,706.69
total crack	2363
total powder	2297

	1990
1:1 total for extra \$ spent at 100:1	\$672,508,309.00
\$ spent to date	\$154,474,875.00
potential savings	\$518,033,434.00
5:1 total for extra \$ spent at 100:1	\$557,731,770.00
\$ spent to date	\$110,295,658.00
potential savings	\$447,436,112.00
10:1 total for extra \$ spent at 100:1	\$508,404,656.00
\$ spent to date	\$94,790,285.00
potential savings	\$413,614,371.00
total crack	2706
total powder	4260

	1989
1:1 total for extra \$ spent at 100:1	\$354,978,175.00
\$ spent to date	\$88,434,736.00
potential savings	\$266,543,439.00
5:1 total for extra \$ spent at 100:1	\$297,045,185.00
\$ spent to date	\$64,445,126.00
potential savings	\$232,600,059.00
10:1 total for extra \$ spent at 100:1	\$267,895,797.00
\$ spent to date	\$55,615,754.00
potential savings	\$212,280,043.00
total crack	1422
total powder	4841

	1988
1:1 total for extra \$ spent at 100:1	\$54,141,692.00
\$ spent to date	\$18,378,027.00
potential savings	\$35,763,665.00
5:1 total for extra \$ spent at 100:1	\$45,631,680.00
\$ spent to date	\$12,852,369.00
potential savings	\$32,779,311.00
10:1 total for extra \$ spent at 100:1	\$41,254,920.00
\$ spent to date	\$11,154,175.00
potential savings	\$30,100,745.00
total crack	243
total powder	1148

EXPLANATION OF STATISTICAL METHODOLOGY

Introduction:

Our calculations were primarily based upon data provided to us by the University of Michigan Consortium, a clearing house for the US Sentencing Commission's databases. The database we used is called ICPSR 9317, and it contains data concerning federal sentencing (prisoner by prisoner) for the years 1987-1992.

The database, and the corresponding US Sentencing Commission reports from 1987 through 1990 compiled many statistics on the amount of sentence given to each drug related offender by crime and by race. However, the data was organized by General Offense Category, so that all drug crimes were grouped together, and then by Offense Type within that category (i.e. trafficking, possession, or importation). Drug Type (cocaine powder or cocaine base (Crack) was not specified, and had to be calculated based upon the fields of information given in the database: weight of drug, length of sentence, and involvement of weapon.

The 1991 data was less complete than the other years, and it was impossible to calculate crack and powder offenses from the information given.

The 1992 database distinguished between cocaine base and cocaine powder, but the weight was not given. The weight was calculated backwards from the formula we used for the first 3 databases.

No raw data could be provided to us from the University of Michigan Consortium for the years 1993, 1994, and 1995. The figures for these years have been mathematically interpolated and extrapolated based upon the race breakdown and quantity of each crime committed.

1987-1990 METHODOLOGY

First all cocaine offenders were separated from the database. By comparing the weight of the drug and the length of sentence (taking into account whether or not there was a weapon used) crack and powder cases were properly labeled. To allow for other aggravating circumstances, if the sentencing base level that the prisoner deserved at a 1:1 base:powder ratio was within 4 base levels of the actual sentence, then the record was treated as if it were a powder offense. Only if the base levels were more than 4 levels apart was the record labeled as a base offense.

Determining Crack or Powder:

The raw data used from the database fell within six general categories. First is COCAA which gives weight values, and second is COCAW which assigns a unit of measure. Combined, these two columns give a weight in units of cocaine. The units of cocaine were then all converted into Kilograms so that we had uniform figures in the amount of cocaine category.

Proposed Base Level:

Proposed base level was determined from the actual weight of the drug and how that correlated to what the Sentencing Guidelines recommend as a base level for that amount of drug. We assigned the proposed base levels at 1 to 1, 5 to 1, and 10 to 1, with the assumption that they were actually sentenced at 100 to 1.

Actual Base Level:

Actual base level was determined by comparing the length of sentence actually given to the range of months at each base level. When the length of sentence fell within a range, that base level was assigned.¹

Adjustment to Actual Base Level For Aggravating Base Level Increase:

Under the Sentencing Guidelines Section 2D1.1(b)(1), if there is a weapon present in the commission of the crime, an increase of two base levels is recommended. If a weapon was present for each prisoner, we therefore subtracted two base levels from our estimated base level to closer approximate what we believe they were actually sentenced under. This category then equaled a final estimated adjusted base level at which each prisoner was sentenced.

¹ In the database, 996, the identifier for life imprisonment, was replaced with 300 months which equals 25 years.

Compare Actual Base Level to Proposed Base Level: "Crack or Powder?"

Comparing the actual base level to the proposed base level equaled a difference in the base levels. The difference between actual 100 to 1 sentencing and the proposed base level sentencing at 1 to 1 was quite drastic for some prisoners, and approximately equal for others.² If the difference in base levels between the actual and proposed was greater than 4, we determined the drug to be CRACK. If it fell within 4 base levels, we determined the drug to be POWDER.³

Accounting for Prisoners Where Weight of Drug is Not Available:

All of the prisoners that did not have an actual amount of cocaine were assigned an approximate amount of cocaine based upon this scale:

(1)	Very small scale	=	10 to 21 months	Ave. base = 13
(2)	Small scale	=	22 to 33 months	Ave. base = 17
(3)	Medium scale	=	41 to 51 months	Ave. base = 21
(4)	Large scale	=	52 to 78 months	Ave. base = 25
(5)	Very large scale	=	79 to 151 months	Ave. base = 30
(6)	Extreme large scale	=	152 to 293 months	Ave. base = 36

Conversion of Proposed Base Level Into Months:

For purposes of converting proposed base level into proposed base level in months, the average number of months from the guideline at that base level were used (Criminal History Category I was assumed). For example, the range of sentences at base level 38 is 235 to 193 months. Base level 38 was therefore assigned an average proposed sentence of 214 months.

² Actual base level at 100 to 1 was always compared to proposed base level at 1 to 1 for purposes of determining whether the drug was crack or powder cocaine.

³ A range of plus or minus four base levels will account for some differences in Criminal History Category sentencing levels, thereby determining small discrepancies as powder instead of crack.