Written Statement on the Sentencing Guidelines and Issues for Comment

Written Statement of
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on behalf of the
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
before the
United States Sentencing Commission

Re: Proposed Amendments to the Sentencing Guidelines
and Issues for Comment in the Federal Register at
66 Fed. Reg. 59330-59340 (11/27/01)
and 67 Fed. Reg. 2456-2475 (1/17/02)
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Good afternoon. Thank you for allowing me to speak on behalf of the thousands of criminal defense lawyers who practice in the federal courts across our nation.

A 1997 survey reveals that nearly one quarter of the 54,000 drug offenders in federal prisons at that time were there because of a crack cocaine conviction. U.S. Department of Justice, Office of Justice Programs, *Federal Drug Offenders, 1999, with Trends 1984-99* at 11 (2001). By way of example, I would like to discuss the case of one woman who, that same year, began serving a twenty-four-year guideline sentence for conspiracy to distribute crack cocaine.

A single parent with two young children, Sylvia Foster always held a steady job and had no criminal record whatsoever. In the summer of 1994, Ms. Foster, who was living with her children in a modest home in Gainesville, met Melvin Singleton and began a romantic relationship that lasted approximately six months. Singleton, as it turns out, was part of a crack cocaine distribution ring. He and his cohorts began using Ms. Foster's home to cook and store crack cocaine. Ms. Foster later told the FBI and testified at trial that she was not aware that Singleton was using her home to prepare or store drugs until she found a crack cocaine "cookie" hidden under a dresser drawer. She further told the FBI and testified that when she found the "cookie" she confronted Singleton and ended the relationship.

Regardless whether one believes Ms. Foster (and the favorable results of her post-conviction polygraph examination) or the government's jailhouse informant — there was no evidence to suggest that she played anything but a minor role in the conspiracy. Indeed, Ms. Foster seems just the type of defendant envisioned by Senators Sessions (R-AL) and Hatch (R-UT) in proposing an additional two-level reduction for certain minimal participants who "receive little of no compensation from the illegal transaction, and acted on impulse, fear, friendship, or affection when he or she was otherwise unlikely to commit such an offense." S. 1874, 107th Cong. § 202 ("The Drug Sentencing Reform Act of 2001").

Despite these circumstances — which led the sentencing judge to remark "when you're in love, you're blind" and the prosecutor to bemoan the judge's lack of sentencing discretion — Ms. Foster will not see her children beyond prison walls until they are well into their adult years (her 292-month sentence means she will serve approximately 21 years). Her children, now ages 9 and 15, are being raised by their aunt in Gainesville, 150 miles from their mother's cell in FCI Tallahassee.

Drug Sentencing Has Overshadowed the Guidelines

Egregiously harsh sentences for crack cocaine offenses and stories like Ms. Foster's have provoked broad based and serious criticism of the Federal Sentencing Guidelines. Public exposure to federal sentencing laws and the guidelines has been limited, by and large, to media stories describing particular cases of injustice, and few federal defense lawyers or district court judges are without at least one story where the "tiger trap" of crack sentencing laws was "sprung on a sick kitten." *Terrebonne v. Butler*, 848 F.2d 500, 505-507 (5th Cir. 1988).

During the last month of President Clinton's term of office, he pardoned twenty-three federal drug prisoners. See COMMUTATION, REMISSIONS, AND REPRIEVES GRANTED BY PRESIDENT CLINTON <http://www.usdoj.gov/pardon/clinton_comm.htm#2000>. The events

leading up to President Clinton's drug sentence commutations were dramatized in the recent television movie *Guilt by Association* (Court TV television broadcast, Mar. 13, 2002) (videotape on file with Families Against Mandatory Minimums). At least nine (40%) of these prisoners were serving lengthy crack cocaine sentences. What the past fifteen years makes clear, however, is that we cannot rely on the fortuity of clemency to address the Guidelines' principal failings and to assure, in any fair and comprehensive way, that federal drug sentences are appropriate to the offense and the offender. This responsibility lies with the Commission in the first instance.

Until this responsibility is fulfilled, lawyers and judges will continue explaining to defendants, parents, children, and other loved ones that unfair sentences and the human devastation wrought by them are the result of sentencing guidelines. Words cannot describe people's anguish and confusion when they learn the draconian consequences of a federal crack conviction — often that children will reach adulthood, marital relationships will wither, and parents will grow old and die during the client's term of imprisonment.

Racial Disparity and Public Perceptions

The problem is compounded by public perception that unfair guidelines sentences for crack cocaine are more often applied to people of color than to whites. President George W. Bush acknowledged growing public dissatisfaction with certain drug sentencing policies, commenting further that the crack/powder disparity "ought to be addressed by making sure the powder-cocaine and the crack-cocaine penalties are the same. I don't believe we ought to be discriminatory." Statement of President George W. Bush, *CNN Inside Politics* (CNN television broadcast, Jan. 18, 2001) (transcript on file with NACDL).

Ninety-three percent of defendants receiving the harsher penalties for crack are people of color. The average sentence for crack cocaine (119.5 months), unmatched by any other drug, is 55% higher than that for powder cocaine (77 months). This figure is all the more disturbing when one considers that 66.5% of crack defendants are street-level dealers. Five grams of crack cocaine represents approximately 10-50 doses and might sell for $225-$750; 500 grams of cocaine powder, which triggers the same five-year sentence, represents approximately 2500-5000 doses and might sell for $32,500-$50,000. William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 Ariz. L. Rev. 1233, 1273 (1996). For the sake of additional comparison, the five-year threshold quantity of heroin represents approximately 3500 doses that might sell for $100,000; for ecstasy, the five-year threshold represents approximately 2500 doses that might sell for $50,000-$100,000. When people ask us why a street-level crack dealer is punished more harshly than a major trafficker in wholesale quantities of powder cocaine, we can only tell them that is the way the sentencing guidelines are written.

Sentencing policies and law enforcement practices that operate in a racially disparate manner erode public confidence in our criminal justice system, particularly in minority communities. Few would question that federal crack cocaine sentences have had this effect. While supporters of the status quo argue that minority communities beset by certain drug markets favor incapacitation of drug dealers, this begs the question of sentence proportionality. Leaders from two preeminent organizations representing African-American and Hispanic persons, testified before the Commission on February 25. They expressed the view that current cocaine sentences are excessive and operate in a racially disparate manner. Through their testimony, and the

submissions of others, the Commission has heard repeatedly that the crack/powder disparity is viewed as a symbol of racism in the criminal justice system. We need the Commission to tear down this symbol and to restore public confidence in the criminal justice system.

Current Crack Sentences are Irrational

As established in the Commission's 1995 report and reaffirmed at the February 2002 hearings, there is no basis — scientific or otherwise — for the current disparity. Crack and powder cocaine, simply different forms of the same drug, should carry the same penalties. Many of the supposed crack-related harms referenced by Congress in 1986 have proven false or have subsided considerably over time. For example, recent Commission data reveals that 92% of crack cases do not involve violence, 79% of crack offenders have no weapon involvement, and rarely is a weapon ever brandished or used in a crack offense.

The Correct Ratios: 1:1 and 2:1

We believe the Commission was correct in 1995 when it attempted to bring crack sentences in line with those for cocaine powder. Because the legislation rejecting a 1:1 ratio at the powder cocaine levels forecloses that well-reasoned alternative, NACDL suggests that the Commission set the ratio as close to 1:1 as possible.

One approach for determining new punishment levels for crack cocaine (within the existing quantity-driven framework) looks to the statute for guidance. It appears that Congress intended the five-year mandatory minimum sentence for mid-level dealers ("serious traffickers") and the ten-year sentence for kingpins ("major traffickers"). Thus, determining the quantities typically handled by these traffickers will yield thresholds that fulfill this congressional purpose.

According to Commission data, 253 grams is the median weight of crack cocaine attributable to those characterized as managers and supervisors. Since these roles fairly approximate the mid-level dealers targeted by the five-year mandatory minimum sentences, a 250-gram threshold makes sense and would result in a 2:1 crack/powder ratio. Also to its credit, this ratio would nearly eliminate the "inversion of penalties" phenomenon. Currently, the 500 grams of cocaine that can send one powder defendant to prison for five years can be distributed to eighty-nine street dealers who, if they convert it to crack, could make enough crack to trigger the five-year mandatory minimum sentence for each defendant. In response to arguments for a greater differential, we note that the dosage units (500-2500 doses) and retail value ($11,250-$37,500) represented by this quantity of crack still pale in comparison to the doses and profit reaped by the 5-year quantities of powder cocaine and other drugs.

Congress did not flatly prohibit the use of a 1:1 ratio for every category of offender, and NACDL encourages the Commission to consider a hybrid of the 2:1 and the 1:1 ratios. Specifically, we offer the suggestion of a 1:1 ratio for street-level dealers (those distributing less than 50 grams, according to Commission data) and a 2:1 ratio for mid- and high-level dealers. This is consistent with the public law rejecting the 1:1 ratio, which states that "the sentence imposed for trafficking in a quantity of crack cocaine should *generally* exceed the sentence imposed for trafficking in a like quantity of powder cocaine."

Increasing Powder Cocaine Sentences is the Wrong Approach

NACDL opposes any proposal to reduce the disparity by increasing powder cocaine penalties. Raising already harsh powder cocaine sentencing levels is no answer to the problem of disproportionate and discriminatory crack sentences.

There is no credible evidence that powder cocaine penalties, which are generally much longer than heroin or marijuana sentences, are insufficiently harsh. Regarding congressional purposes, the current 5- and 10-year thresholds for powder cocaine are low enough to accomplish their intended goals; indeed, under the original 1986 House bill, it would have taken 1000 grams to trigger the five-year sentence intended for mid-level distributors.

Amendment vs. Recommendation

We join the American Bar Association in support of a guidelines amendment rather than a recommendation to Congress. As the Commission is well aware, the 1997 report offered a recommendation. Four years later, roughly 20,000 more crack offenders have been sentenced based on the same dreadful crack guidelines. We can ill afford to let this problem fester for another five years. We need the Commission to use its expertise and to demonstrate its leadership to achieve the stated goals of guidelines sentencing.

We believe that election-year concerns are overstated and that Congress will not react negatively to an amendment. As evidence that the political landscape has shifted, we note that two prominent law-and-order Republicans, Senators Sessions (R-AL) and Hatch (R-UT), chose this time to offer a bill that would lower sentences for crack offenders and others. Politicians understand the problem better than they did in 1995; some may even see the political advantages of supporting reform as outweighing any disadvantages. This is an opportunity — perhaps just a window of opportunity — that the Commission should not waste.

The past few years have witnessed a significant decline in many of the aggravating circumstances believed to be associated with crack. Because the majority of crack cases do not involve aggravating circumstances, it makes no sense to incorporate these factors into the Drug Quantity Table. And because the existing guideline enhancements, in concert with the applicable statutes, more than adequately punish such offense aggravators (e.g., weapon involvement or prior criminal conduct), there is no need for new Specific Offense Characteristics. On the other hand, there is a tremendous need for guidelines that would diminish the over-emphasis given to drug quantity in sentencing minor participants and first-time offenders. NACDL supports the proposed amendment that would cap the base offense level at 24 for minor and minimal participants and the proposed amendment that would reduce the sentences of safety-valve-eligible defendants with no criminal history.

Concluding Comments Regarding Terrorism Guidelines

NACDL has submitted detailed and comprehensive comments regarding the proposed terrorism guidelines, but I would like to conclude by highlighting one point. As the Anti-Drug Abuse Act of 1986 and its effect on the Sentencing Guidelines demonstrate, crisis legislation poses a challenge to rational sentencing policies. While there is a tendency to view terrorism as sui

generis, just like every other offense that is punished under the guidelines, terrorism-related offenses encompass a wide range of conduct.

For example, material support of terrorism might involve donations to a designated terrorist organization to acquire weapons or, quite dissimilarly, food and medicine for refugees. While both donations violate the material support statute, the vastly different offense characteristics call for different sentencing outcomes. We urge the Commission to improve these proposed guideline enhancements so as to reserve the most serious penalties for offenses that pose the greatest risk to our national security. Whether the offense is drug- or terrorism-related, one-size-fits-all sentencing has no place in our courts.

Questioning Current Sentencing Policies

- "And I think a lot of people are coming to the realization that maybe long minimum sentences for the first-time users may not be the best way to occupy jail space and/or heal people from their disease. And I'm willing to look at that. . . . [The crack-powder disparity] ought to be addressed by making sure the powder-cocaine and the crack-cocaine penalties are the same. I don't believe we ought to be discriminatory." Statement of President George W. Bush, CNN Inside Politics (CNN television broadcast, Jan. 18, 2001) (transcript on file with NACDL).

- "I believe it is time for us to look at the drug guidelines and the penalties we are imposing. . . . Judges think this minimum mandatory [for crack cocaine] which has the effect of driving up all of the sentencing guidelines is too tough." Cong. Rec. S14452 (Nov. 10, 1999) (statement of Senator Sessions).

- "Far from saving the inner cities, our barbaric crack penalties are only adding to the decimation of inner-city youth." Stuart Taylor Jr., *Courage, Cowardice on Drug Sentencing*, Legal Times, April 24, 1995, at 27.

- "Too many lives are unfairly ruined by Draconian sentences that do not achieve the law-enforcement objectives — primarily deterrence — supposedly promoted by them. . . . The way to mitigate the unfairness of the crack-cocaine standards is not to toughen the powder-cocaine sentencing rules; it is to take the more courageous step of ameliorating the crack-sentencing scheme." Michael Bromwich (former Inspector General of the Justice Department), *Put A Stop to Savage Sentencing*, Wash. Post, Nov. 22, 1999, at A23.

- "Too often, our drug laws result in the long-term imprisonment of minor dealers or persons only marginally involved in the drug trade." John R. Dunne (former Assistant Attorney General under President George Bush), *Paying For Failed Drug Laws*, Wash. Post, Aug. 12, 1999.