



FEDERAL CRACK COCAINE SENTENCING

Overview

On August 3, 2010 President Obama signed the Fair Sentencing Act, legislation that limits the stiff mandatory minimum sentences for low-level crack cocaine offenses that bipartisan leaders agree were overly harsh and unjust. The new law significantly reduces the cocaine sentencing quantity disparity from 100 to 1 to 18 to 1 by raising the quantity of crack cocaine necessary to trigger the five- and ten-year mandatory minimum sentences first set in 1986. The legislation also eliminates the mandatory minimum for simple possession of crack cocaine. The bill passed unanimously through the Senate and by voice vote with little opposition in the House.

The reform marks progress towards ensuring fairness and proportionality in federal sentencing in an arena where a mandatory minimum sentence has not been eliminated since the 1970s and bipartisan agreement to reduce penalties, particularly for drug offenses, is rare. As introduced, the Fair Sentencing Act's provisions would have completely eliminated the sentencing disparity between crack and powder cocaine and its impact in reducing racial disparity and growing federal incarceration rates would have been more dramatic. The Senate Judiciary Committee's consideration of the bill resulted in the 18 to 1 compromise that ultimately passed the Congress. The new law does not allow for retroactive application, so persons currently incarcerated or awaiting sentencing for crack cocaine offenses committed before enactment will not benefit from the changes to the mandatory minimums.

While changes created by the Fair Sentencing Act are profound, the original concerns expressed by advocates regarding the excessiveness of punishments for relatively low-level crack cocaine offenses and the continued sentencing disparity between two forms of the same drug remain. Moreover, the significant racial disparity in federal prisons will continue. This briefing paper provides background on the cocaine sentencing debate, explores the racial impact of the crack sentencing disparity, and clarifies the misperceptions regarding crack addiction.

Origins of Federal Cocaine Sentencing Policy

Crack cocaine became prevalent in the 1980s and received extensive media attention, due in part to its exponential growth in the drug market. The popularity of crack cocaine was associated with its cheap price, which for the first time made cocaine available to a wider economic class. Crack is made by taking powder cocaine and cooking it with baking soda and water until it forms a hard rocky substance. These "rocks" are then broken into pieces and sold in small quantities.

Public concern about crack cocaine addiction and its accompanying violent drug market spread quickly. Newscasters used words like "crisis" and "epidemic" - later shown to be exaggerated - to describe the impact of crack. The drug was considered a social menace more dangerous than powder cocaine in its physiological and psychotropic effects. The political hysteria that ensued led Congress

to pass the Anti-Drug Abuse Act of 1986. The law's mandatory penalties for crack cocaine offenses were the harshest ever adopted for low level drug offenses and established drastically different penalty structures for crack and powder cocaine.

Under the resulting law, defendants convicted with just five grams of crack cocaine, the weight of less than two sugar packets and a quantity that yields about 10 to 50 doses, were subject to a five-year mandatory minimum sentence. The same five-year penalty was triggered for the sale of powder cocaine only when an offense involved 500 grams, 100 times the minimum quantity for crack, which yields between 2,500 and 5,000 doses.¹ Similarly, while the sale of 5,000 grams of powder, which can yield up to 50,000 doses, subjected defendants to a 10-year sentence, the same mandatory sentence was triggered by selling only 50 grams of crack, which produces about 100 to 500 doses. In 2009, this mandatory sentencing structure resulted in average sentences for crack cocaine offenses that were over two years longer than for offenses involving powder cocaine.²

Under the Fair Sentencing Act of 2010, defendants convicted of a crack cocaine offense will now need to possess at least 28 grams, compared to the previous five grams, to receive a five-year mandatory minimum. To trigger the 10-year mandatory minimum requires a crack cocaine quantity of 280 grams. Quantity triggers for powder cocaine offenses remain the same. The simple possession mandatory minimum for a first-time offense is eliminated under the reformed law. First-time simple possession of any quantity of crack cocaine, like powder cocaine, will result in a sentence no longer than one year. Previously, a person convicted in federal court of simple possession of 5 grams of crack was subject to a mandatory five-year prison term.

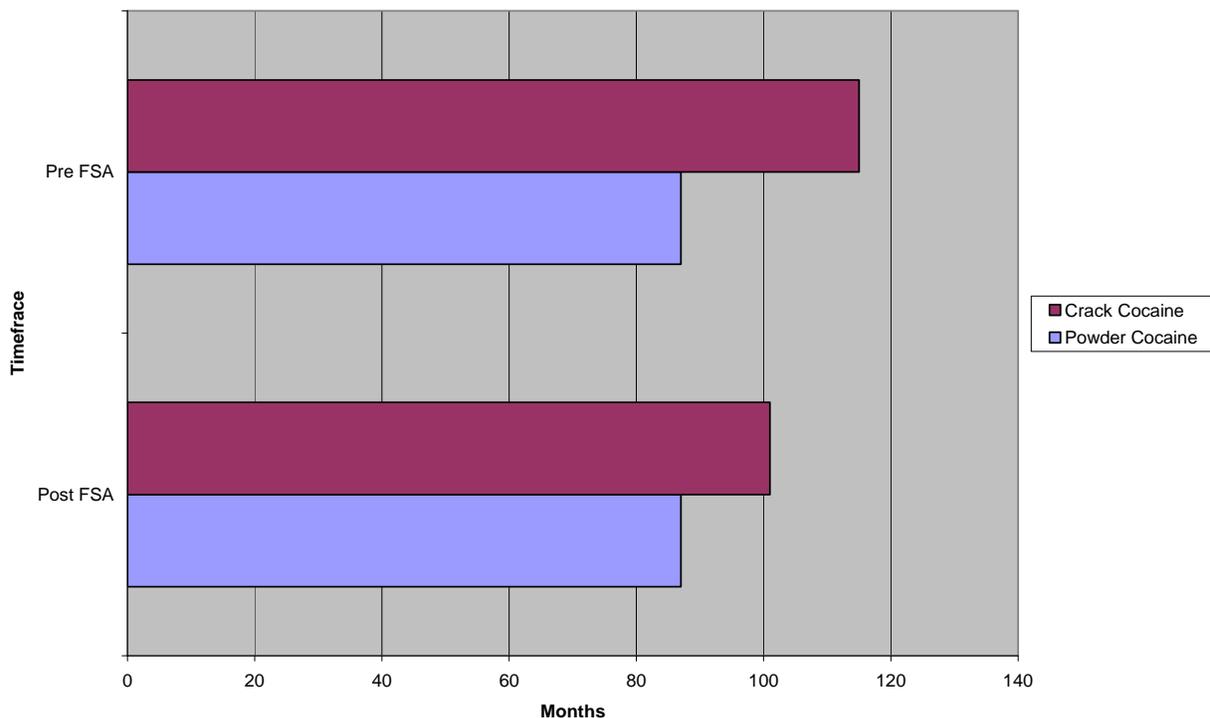
Figure 1 highlights the differences in average sentences between crack and powder cocaine during fiscal year 2009 compared to the projected differences in sentence length after passage of the Fair Sentencing Act. The average crack cocaine sentence will decline by 14 months but crack cocaine sentences will average 14 months longer than powder cocaine sentences. The U.S. Sentencing Commission's projections also find an average sentence reduction of 27 months among cases likely to be affected by the 2010 reforms, which comprise about 63% of crack cocaine cases sentenced each year.³

¹ United States Sentencing Commission [USSC], *Report to Congress: Cocaine and Federal Sentencing Policy* (May 2007), p. 73.

² United States Sentencing Commission, 2009 Sourcebook of Federal Sentencing Statistics, Figure J

³ USSC, Prison Impact Model, FY2009 datafile

Figure 1: Average Sentences for Crack Cocaine and Powder Cocaine



SOURCE: U.S. Sentencing Commission, 2009 Sourcebook of federal Sentencing Statistics and Prison Impact Model, FY2009 datafile

Drug Quantities and Crack Cocaine Penalties

The federal sentencing laws Congress passed in the 1980s were intended to impose tough sentences on “major” drug market operators, such as manufacturers or heads of organizations distributing large quantities of narcotics, and “serious” traffickers with a substantial drug-trade business.⁴ However, the weights attached to the sentences failed to capture the different roles within the crack trade. Research from the Sentencing Commission showed that the 5 grams of crack cocaine set, in 1986, as the trigger for a five-year mandatory sentence was not a quantity associated with mid-level, much less serious, traffickers.⁵ Under the 2010 reforms, the five-year mandatory minimum associated quantity was raised to 28 grams, an amount the Commission associates with “wholesaler” operators within the drug trade.

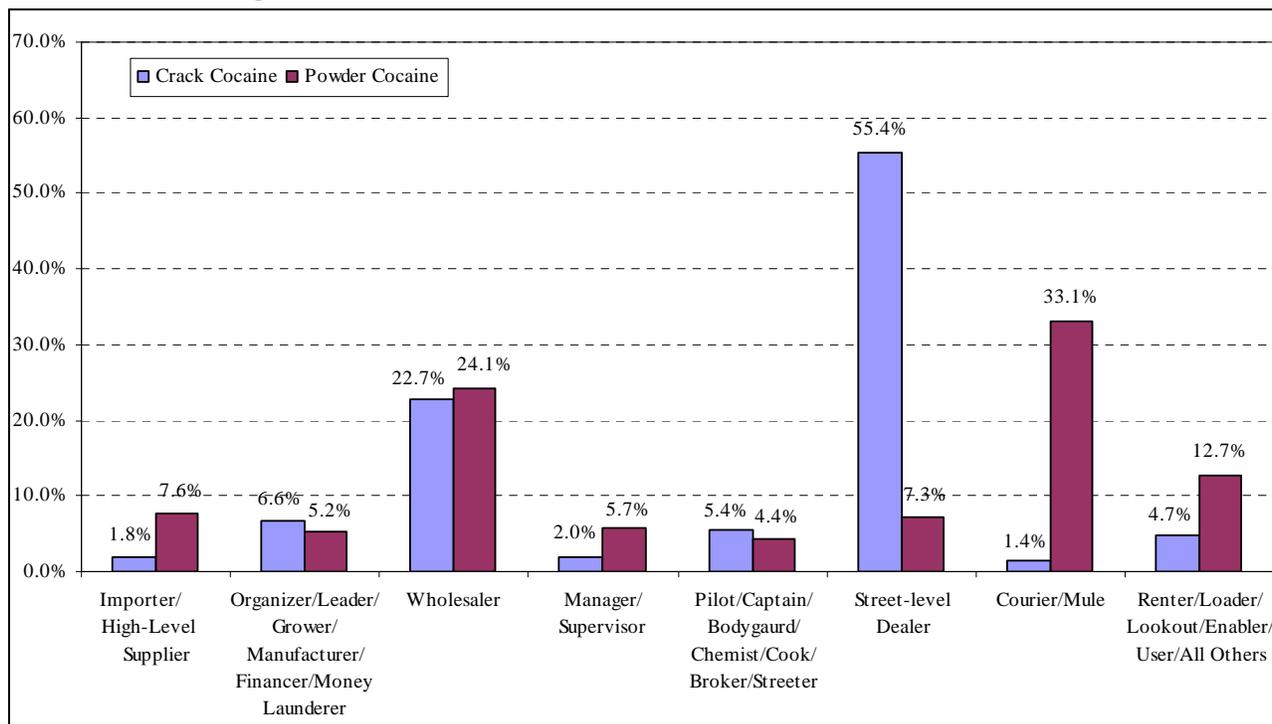
But in 1986 Congress defined serious traffickers as “the managers of the retail level traffic.” Major traffickers were considered “the manufacturers or the heads of organizations who are responsible for creating and delivering very large quantities.” Even with an increased quantity threshold of 280 grams of crack cocaine to trigger the 10-year mandatory designed for major traffickers, the sentencing structure falls short. Because mandatory minimum sentences are focused solely on quantities, defendants with different levels of culpability are often lumped together and low-level offenders have been and will continue to be subject to severe prison terms.

⁴ Testimony of Commissioner John R. Steer before the Subcommittee on Criminal Justice, Drug Policy and Human Resources, May 11, 2000.

⁵ USSC, *Report to Congress: Cocaine and Federal Sentencing Policy*, May 2002 p. 45, Figure 10.

Figure 2 identifies the most common offender functions in federal crack and powder cocaine cases. Low-level crack offenses represent more than 60 percent of federal crack defendants. Commission reports have previously warned that crack cocaine penalties “apply most often to offenders who perform low-level trafficking functions, wield little decision-making authority, and have limited responsibility.”⁶ Since these outcomes reflect law enforcement and prosecutorial practices, the extent to which this scenario will change given passage of the Fair Sentencing Act is unknown.

Figure 2: Defendant Function in Crack/Powder Cocaine Cases



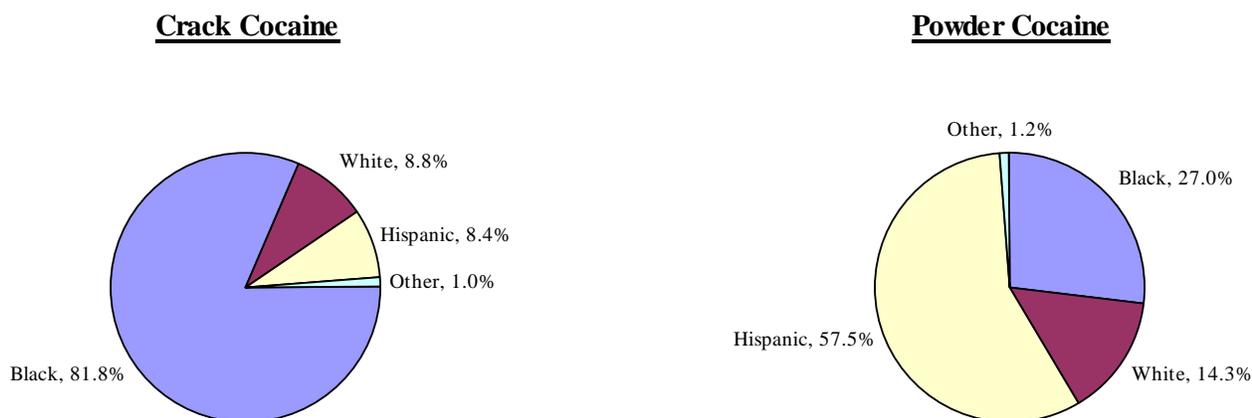
SOURCE: U.S. Sentencing Commission, 2005 Drug Sample.

⁶ Ibid., p. 100.

Racial Impact of Crack Sentencing

Government data demonstrate that drug use rates are similar among all racial and ethnic groups. For crack cocaine, two-thirds of users in the U.S. are white or Hispanic.⁷ Furthermore, research on drug market patterns demonstrates that drug users generally purchase drugs from sellers of the same racial or ethnic background.⁸ Despite these facts, people of color are disproportionately subject to the penalties for both types of cocaine. Indeed, 81.8 percent of crack cocaine defendants in 2006 were African American (see Figure 3).⁹

Figure 3: Race/Ethnicity of Cocaine Defendants



SOURCE: U.S. Sentencing Commission 2006 Datafile, USSCFY06.

African American drug defendants have a 20 percent greater chance of being sentenced to prison than white drug defendants.¹⁰ Between 1994 and 2003, the average time served by African Americans for drug offenses increased by 62 percent, compared to an increase of 17 percent for white drug offenders.¹¹ Moreover, African Americans now serve virtually as much time in prison for a drug offense (58.7 months) as whites do for a violent offense (61.7 months).¹² As a result, the Commission reported in 2004 that “[r]evising the crack cocaine thresholds would better reduce the [sentencing] gap than any other single policy change, and it would dramatically improve the fairness of the federal sentencing system.”¹³ Moreover, these inequities have substantial consequences for the way in which the African American community views the

⁷ Substance Abuse and Mental Health Services Administration, *Results from the 2005 National Survey on Drug Use and Health: Detailed Table J* (Washington, DC: Sept. 2006), Table 1.43a.

⁸ Dorothy Lockwood, Anne E. Pottieger, and James A. Inciardi, “Crack Use, Crime by Crack Users, and Ethnicity,” in Darnell F. Hawkins, ed., *Ethnicity, Race and Crime*. New York: State University of New York Press, 1995, p.21.

⁹ USSC, *Report to Congress: Cocaine and Federal Sentencing Policy*, May 2007, pg. 15.

¹⁰ USSC, *Fifteen Years of Guidelines Sentencing* (Nov. 2004), p. 122.

¹¹ Bureau of Justice Statistics [BJS], *Compendium of Federal Justice Statistics, 1994* (Washington, DC: March 1998) Table 6.11, p. 85 and BJS, *Compendium of Federal Justice Statistics, 2003* (Washington, DC: Oct. 2004) Table 7.16, p. 112.

¹² *Compendium of Federal Statistics, 2003* (Oct. 2005), Table 7.16, p. 112.

¹³ USSC, *Fifteen Years of Guidelines Sentencing* (Nov. 2004), p. 132.

criminal justice system. According to the Commission's report to Congress, even "[p]erceived improper racial disparity fosters disrespect for and lack of confidence in the criminal justice system...."¹⁴

Crack Myths

Violence

Initially, the violence associated with the crack market fostered a perception that crack use instigated violent behavior in the individual user. In its May 2002 recommendations to Congress, the Commission stated that the crack penalties were based on beliefs about the drug's association with violence which had been shown to be inaccurate. In fact, its 2007 report notes a decline in associated violence, such as bodily injury or threats, for both crack and powder cocaine charges.¹⁵ The Commission concluded that the violence associated with crack is primarily related to the drug trade and not to the effects of the drug itself, and that both powder and crack cocaine cause distribution-related violence, as do all drug markets. From an analysis of federally prosecuted cocaine cases, the Commission reported that, for 2005, a substantial majority of both powder cocaine offenses (73%) and crack cocaine offenses (57.3%) did not involve a weapon.¹⁶ Indeed, the frequency with which weapons are "accessible, possessed, or used by the offender" is extremely low, 0.8% of powder cases and 2.9% of crack cases.¹⁷

Child Development

The notion of the "crack baby" became common in the 1980s and was associated mostly with African American infants who experienced the effects of withdrawal from crack. Over time, the medical field determined the effects of crack on a fetus had been overstated.¹⁸ Deborah Frank, a professor of Pediatrics at Boston University describes the "crack baby" as "a grotesque media stereotype [and] not a scientific diagnosis."¹⁹ Indeed, she found the negative effects of crack use on the fetus are similar to the negative effects of tobacco or alcohol use, poor prenatal care or poor nutrition on the fetus.

Addictiveness

Over time, numerous studies have shown that the physiological and psychotropic effects of crack and powder are the same, and the drugs are now widely acknowledged as pharmacologically identical. For example, a 1996 study published in the *Journal of the American Medical Association* finds analogous effects on the body for both crack and powder cocaine.²⁰ Similarly, Charles Schuster, former Director of the National Institute on Drug Abuse and Professor of Psychiatry and Behavioral Sciences, found that once cocaine is absorbed into the bloodstream

¹⁴ USSC, *Report to Congress: Cocaine and Federal Sentencing Policy*, May 2002, p. 103.

¹⁵ USSC, *Report to Congress: Cocaine and Federal Sentencing Policy*, May 2007, p. 36.

¹⁶ *Ibid.*, p. 32.

¹⁷ *Ibid.*, p. 33.

¹⁸ *Ibid.*, p. 68.

¹⁹ Testimony of Deborah A. Frank, M.D. before the United States Sentencing Commission, February 21, 2002.

²⁰ Dorothy K. Hatsukami, and Marian W. Fischman, "Crack Cocaine and Cocaine Hydrochloride: Are the Differences Myth or Reality?" *Journal of the American Medical Association*, November 20, 1996.

and reaches the brain its effects on brain chemistry are identical regardless of whether it is crack or powder.²¹

U.S. Sentencing Commission Calls for Reform

In 1984 Congress created the U.S. Sentencing Commission to develop federal sentencing guidelines that would, among other goals, reduce unwarranted sentencing disparity. In 1994, as part of the Omnibus Violent Crime Control and Law Enforcement Act, the Commission was directed to study the differing penalties for powder and crack. After a yearlong study the Commission recommended to Congress a revision of the crack/powder 100:1 quantity disparity, finding it to be unjustified by the small differences between the two forms of cocaine. The Commission advised equalizing the quantity ratio that would trigger the mandatory sentences. The Commission also recommended that the federal sentencing guidelines consider factors other than drug quantity to determine sentence lengths. Congress rejected the Commission's recommendations - the first time it did so in the Commission's history.

Two years later, in April 1997, the Commission once more recommended that the quantity disparity between crack and powder cocaine be reduced, this time providing Congress a range of 2:1 to 15:1 from which to choose. The new recommendation was based on both raising the quantity of crack and lowering the quantity of powder required to trigger a mandatory minimum sentence. Congress, however, again did not act on the recommendation.

In 2002 there was a new movement to reconsider crack cocaine policies. The Commission's *Report to Congress*, which again called for reducing sentencing disparities, documented the conclusions of an extensive body of research, as well as testimony presented at three public hearings by medical and scientific professionals, federal and local law enforcement officials, criminal justice practitioners, academics, and civil rights organizations. This time the Commission proposed to Congress a 20:1 quantity disparity between offenses involving powder and crack cocaine without adjusting the penalties for powder cocaine. No reform was taken up by Congress.

The Commission renewed its commitment to resolving the sentencing controversy in 2006. It held another public hearing to assess whether the differences in punishment for crack and powder cocaine offenses were justified in light of any recent developments. The Commission heard testimony from the Department of Justice, law enforcement, medical and drug treatment professionals, academics and advocacy organizations. At the hearing, Commissioners expressed concern that the current crack cocaine law was ineffective at targeting the upper echelon of drug distributors. According to United States Attorney R. Alexander Acosta's testimony, the highest level cocaine trafficking took place almost exclusively in the powder form. This was affirmed by Joseph Rannazzisi of the Drug Enforcement Administration, who noted that crack cocaine sellers are at the lowest end of the powder cocaine distribution chain. Acosta testified that the Administration's top priority for drug enforcement was the highest level leaders in the drug market, but Commissioner Judge Ruben Castillo pointed out that only 7% of federal cocaine cases involve high-level traffickers.

²¹ Testimony of Charles Schuster before the Subcommittee on Crime and Drugs of the Senate Judiciary Committee, May 22, 2002.

In May 2007, the Commission released its fourth report detailing findings from the hearing and recommended modification to the 100:1 quantity ratio. The Commission called on Congress to raise the crack cocaine quantities that trigger the five-year and ten-year mandatory minimum sentences in order to focus penalties on serious and major traffickers and to repeal the simple possession mandatory minimum.²²

The Commission also proposed an amendment to decrease the guideline sentences for crack cocaine offenses. It was estimated by the Commission that the amendment would reduce crack sentences by 15 months on average and reduce the size of the federal prison population by 3,800 in 15 years. The amendment went unchallenged by Congress and took effect November 1, 2007. One month later, after holding a hearing and receiving public comment from over 30,000 individuals and organizations, the Commission voted to make its guideline reduction retroactive. As of July, 2010, about 16,000 people have been granted a sentence reduction averaging two years.

Under the Fair Sentencing Act, the Commission was instructed to implement conforming changes to the sentencing guidelines within 90 days of enactment. Whether the Commission will apply those guideline changes retroactively remains to be seen.

Congress Proposes Reform

Bipartisan support for crack cocaine sentencing reform first emerged in 2001 when Senator Jeff Sessions (R-AL) introduced the Drug Sentencing Reform Act. That proposal would have raised the crack trigger amount for the five-year mandatory minimum to 20 grams from 5 grams, but would have lowered the trigger threshold for powder cocaine to 400 grams from 500 grams. Although falling short of the scale of reform advocated by many, the legislation set an important precedent of Republican support for reducing unfairness in crack cocaine sentencing.

In subsequent Congresses, various reform proposals were introduced in the Senate and House of Representatives. In the Senate, Orrin Hatch (R-UT) and then-Sen. Joseph Biden (D-DE) also introduced bills that would have either reduced or eliminated the sentencing disparity between crack and powder cocaine. In the House of Representatives, Rep. Sheila Jackson Lee (D-TX) introduced the companion to Biden's *Drug Sentencing Reform and Kingpin Trafficking Act*. Since the mid-1990s Rep. Charles Rangel (D-NY) introduced his own cocaine equalization bill, the *Crack-Cocaine Equitable Sentencing Act*. The legislation had bipartisan support, as did Rep. Jackson Lee's bill. But not until 2009 after Rep. Robert Scott (D-VA) introduced the Fairness in Cocaine Sentencing Act did crack cocaine sentencing reform legislation win approval from a legislative committee.

Although the Fairness in Cocaine Sentencing Act, which would have eliminated the sentencing disparity between crack and powder cocaine, won approval by the House Judiciary Committee, the legislation passed out along partisan lines with no Republicans voting for the bill. The bill never advanced to the House floor. In the Senate, Sen. Richard Durbin (D-IL) introduced his own bill to equalize the quantity thresholds for crack and powder cocaine sentences. After

²² USSC, *Report to Congress: Cocaine and Federal Sentencing Policy*, May 2007, p. 8.

months of negotiations, this bill was brought to the Senate Judiciary Committee where a compromise version was approved. This version of the Fair Sentencing Act is what eventually passed unanimously through the Senate and finally by voice vote in the House. In addition to reducing the 100 to 1 disparity to 18 to 1, the legislation increases financial penalties and the sentencing guidelines if a defendant uses violence or is the leader of a drug operation.

Conclusion

For sentencing reformers who have seen little progress at the federal level in loosening the one-size-fits-all mandatory punishments, the Fair Sentencing Act is an important victory. Each year 3,000 people will benefit from the sentencing changes resulting in an average reduction of two years for those impacted. Commission estimates indicate that in 10 years the federal prison population will decline by about 4,000 people.²³ These reforms will increase fairness in the federal justice system by limiting the harsh mandatory sentences for very low-level crack cocaine offenses, reducing racial disparity and impacting prison overcrowding.

Despite these sentencing improvements, the quantity triggers of 28 grams and 280 grams of crack cocaine which subject defendants to five and ten year mandatory minimums will still entangle persons less influential than the drug kingpins the federal government says it prioritizes in its enforcement. This pursuit of low-level offenders diverts resources away from the most troublesome contributors to the illegal drug market, drug kingpins and importers. As noted by the Commission in its report to Congress in 1997, “federal cocaine policy inappropriately targets limited federal resources by placing the quantity triggers for the five-year mandatory minimum penalty for crack cocaine too low.”²⁴ Not until Congress raises the crack cocaine quantity triggers to those for powder cocaine can appropriate targeting of high-level traffickers begin.

Finally, persons who committed a crack cocaine offense prior to the law’s enactment will not benefit from the reform, despite universal agreement that the old law was unwarranted. Congress has not yet approved retroactive application of the law. It should; and the President and the U.S. Sentencing Commission can step in as well. The Commission has the authority to apply the conforming amendments to the guidelines required under the Fair Sentencing Act to people in prison. While the old mandatory minimum statutes will still hold, simply changing the guidelines could benefit up to 15,000 people with a sentence reduction averaging 37 months to 48 months.²⁵

The President, under his pardon power, has the authority to grant clemency to federal prisoners and can use that authority to provide crack cocaine offenders relief. In 2009, President Obama declared that “the disparity between sentencing crack and powder-based cocaine is wrong and should be completely eliminated.” Unfortunately, the Fair Sentencing Act fell short of his policy objective. Commuting prisoners’ sentences by applying the new sentence reductions to those incarcerated should be a priority for the administration.

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²³ USSC, Prison Impact Model, FY2009 datafile

²⁴ USSC, *Special Report to Congress: Cocaine and Federal Sentencing Policy*, (April 1997), p. 7.

²⁵ USSC, Analysis of the Impact of Amendment to the Statutory Penalties for Crack Cocaine Offenses and Corresponding Guideline Amendment if the Guideline Amendment Were Applied Retroactively