

Testimony of Judge Reggie B. Walton Presented to the United States Sentencing Commission on November 14, 2006, on Sentencing Disparity for Crack and Powder Cocaine Offenses

Thank you for affording me the opportunity to appear before you today on behalf of the Judicial Conference of the United States' Criminal Law Committee. At its September 19, 2006 session, the Judicial Conference expressed its determination "to oppose the existing sentencing differences between crack and powder cocaine and agreed to support the reduction of that difference." Earlier, the Criminal Law Committee had recommended to the Judicial Conference that these positions be taken. What I indicate below are my personal views on the matter.

I personally became involved in the debate about whether there was justification for different sentences in crack and powder cocaine distribution related cases when I served as the White House's Associate Director of the Office of National Drug Control Policy in the late 1980s. At that time, I advocated for different sentences because of the greater potential for addiction from the use of crack¹ and the level of violence associated with the crack trade which existed at

¹Preliminary Report, Judicial Conference Actions, September 19, 2006, at 5.

²"[A]lthough both powder cocaine and crack cocaine are potentially addictive, administering the drug in a manner that maximizes the effect (*e.g.*, injecting or smoking) increases the risk of addiction. It is this difference in *typical* methods of administration, not differences in the inherent properties of the two forms of the drugs, that makes crack cocaine

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that time.³ However, I never thought that the disparity should be as severe as it ultimately has become.

Whether there remains justification for some level of disparity is obviously a policy decision that will have to be made by the legislative and executive branches of government. Nonetheless, it is unconscionable to maintain the current sentencing structure for several reasons.

First, although I firmly believe that people who distribute illegal drugs should be punished for their conduct, the punishment we impose must be fair. And just as important, the punishment imposed must be perceived as fair. While I cannot categorically say that some degree of difference in punishment for crack and powder cocaine offenses is not warranted, no reasonable justifications exist for the 100-to-1 disparity.⁴ The fact that crack cocaine has greater addictive potential

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more potentially addictive to *typical* users. Smoking crack cocaine produces quicker onset of, shorter-lasting, and more intense effects than snorting powder cocaine. These factors, in turn result in a greater likelihood that the user will administer the drug more frequently to sustain these shorter “highs” and develop an addiction.’ U.S. SENTENCING COMM’N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 19 (May 2002), available at http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm.

³See footnote 6, *infra*.

⁴See 21 U.S.C. § 841(b)(1994); U.S.S.G. § 2D1.1 (2006)

than powder cocaine cannot be seriously challenged.' However, while violence associated with the crack trade has not totally abated, it is clearly not at the level it was in the 1980s and early 1990s.⁵ Nevertheless, policy makers can undoubtedly justify some level of disparity for crack and powder cocaine sentencing. That said, I believe the following hypothetical illustrates why the current sentencing structure is not fair, nor does it have the appearance of fairness.

On the one hand, a middle class white male college student is arrested for possessing one kilogram of powder cocaine he intended to distribute to some of his fellow students. On the other hand, a black male high school dropout in the same city is arrested on the same day in an economically depressed neighborhood for possessing with intent to distribute one kilogram of crack cocaine after being stopped for committing a traffic violation. Both young men have no prior criminal

⁵See footnote 1, *supra*

⁶“An important basis for the establishment of the 100-to-1 drug quantity ratio was the belief that crack cocaine trafficking was highly associated with violence generally. More recent data indicate that significantly less trafficking-related violence or systemic violence, as measured by weapon use and bodily injury documented in presentence reports, is associated with crack cocaine trafficking offenses than previously assumed. In 2000, weapons were not involved to my degree by my participant in the offense in almost *two-thirds* (64.8%) of crack cocaine offenses. Furthermore, *three-quarters* of federal crack cocaine offenders (74.5%) had *no personal weapon involvement*. Further, when weapons were present, they rarely were actively used. In 2000, only 2.3 percent of crack cocaine offenders used a weapon. Bodily injury of my type occurred in 7.9 percent of crack cocaine offenses in 2000.” U. S. SENTENCING COMM’N, *supra* note 2, at 100.

records, but their potential sentences are widely disparate.'

In the case of the powder cocaine distributor, he faces a mandatory minimum statutory sentence of 5 years and a maximum sentence of 40 years.⁸ His guideline sentence range, with adjustments, is 37 to 46, but at least the 60 month mandatory minimum statutory sentence would have to be imposed. As for the crack cocaine distributor, he faces 2 mandatory minimum sentence of 10 years and 2 maximum sentence of life.⁹ And the crack cocaine distributor's guideline sentence is 108 to 135 months, but at least the 120 month mandatory minimum statutory sentence would have to be imposed. For the powder cocaine distributor to face the same prison exposure as the crack cocaine distributor, he would have to possess with intent to distribute at least 50 kilograms of powder cocaine, and could possess as much as 150 kilograms of powder cocaine and still be subject to the same prison exposure as the first time crack offender who possessed with intent to distribute the one kilogram of crack cocaine.

It is difficult to imagine how policy-makers seeking to reach a fair balance

⁷A detailed breakdown of the statutory and guideline sentence for both hypothetical defendants was prepared by the Court's probation office and is attached as an addendum. What is set forth below is a summary of those sentences.

⁸21 U.S.C. § 841(a)(1) and (b)(1)(B)(ii)(II) (unlawful intent to distribute 500 grams or more of cocaine).

⁹21 U.S.C. § 841(a)(1) and (b)(1)(A)(iii) (unlawful intent to distribute 500 grams or more of cocaine base).

between just punishment for the conduct committed by these two hypothetical defendants could conclude that the disparate sentence called for by current federal law is rationally merited. And further complicating the current unfairness in the sentencing of crack and powder cocaine traffickers is the discretion federal prosecutors have to decline prosecution, thereby leaving the two hypothetical defendants to the variables of state laws if prosecutions are pursued in state courts.

But even if policy-makers can somehow rationalize the different potential sentences these two hypothetical individuals face, in my experience many members of the general public do not. Some people fail to believe that different treatment is fair because, in their view, "cocaine is cocaine." This position overlooks the greater addictive potential of crack cocaine use, but nonetheless, I know some people who have this view. Others, however, although understanding the greater addictive potential of crack, nevertheless disagree with the imposition of different punishment. Underlying the views of many who fall into either of these camps is the belief that the policy of treating crack and powder cocaine offenders differently is unfair to those at the lower end of the socioeconomic ladder and to people of color because people in these categories are disproportionately prosecuted for crack related trafficking offenses. And my anecdotal observations cause me to conclude that these perceptions are not totally unfounded.

I do not mean to suggest that the policy became law with the conscious objective of targeting the poor and people of color. I know those were not my objectives when I worked for the White House and advocated for different treatment of the two substances, and I would not attribute such improper motives to others who took the same position. However, regardless of why the policy became law, the current state of affairs should cause the policy to be re-examined. With the tremendous increase in the number of inmates in federal prisons,¹⁰ and many, if not most, of this population being poor people of color (namely young black and Latino males)¹¹ charged or convicted for committing crack cocaine distribution related offenses,¹² concern should exist.

¹⁰As of 2003, 161,673 persons were held in federal prisons, an 81% increase from 89,538 in 1995. BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2003 2 (Nov. 2004), available at <http://www.oip.usdoj.gov/bis/pub/pdf/p03.pdf>. And as of November 2006, the federal prison inmate population has increased to 193,671. Federal Bureau of Prison Weekly Population Report (November 2, 2006), available at <http://www.bop.gov/locations/weekly-report.jsp>.

¹¹As of September 2006, 40 percent of 211 inmates in federal prisons are black, and 31 percent self-identify as Hispanic. Federal Bureau of Prisons Inmate Breakdown (September 23, 2006), available at <http://www.bop.gov/news/quick.jsp>. 93 percent of federal prisoners are male. *Id.* And in 2005, black and Hispanic males comprised roughly 60 percent of all individuals sentenced to federal prison. U.S. Sentencing Comm'n, 2005 ANNUAL REPORT SOURCEBOOK, Table 7 (Age, Race, and Gender of Offenders, Fiscal Year 2005), available at <http://www.ussc.gov/ANNRPT/2005/table7.pdf>.

¹²54 percent of all federal prisoners are currently incarcerated for drug-related offenses. Federal Bureau of Prisons Inmate Breakdown (September 23, 2006), available at <http://www.bop.gov/news/quick.jsp>. In addition, 34.2 percent of all federal offenders in 2005 were sentenced for drug offenses, nearly half of which concerned either powder or crack

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My experience also tells me that the attitudes of some in the general population about the unfairness of our drug laws has had a coercive impact on the respect many of our citizens have about the general fairness our nations's criminal justice system.¹³ I know from discussions I have had with people, comments made to me by potential jurors during the jury selection process, and comments made to me by jurors at the completion of trials, that some people desire not to serve on juries when crack cocaine is involved because of the negative attitudes they have about the crack and powder cocaine sentencing disparity or have refused to convict crack offenders, despite the quality of the government's evidence, because of their

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cocaine. U.S. Sentencing Comm'n, 2005 ANNUAL REPORT SOURCEBOOK, Figure A (Distribution of Offenders in Each Primary Offense Category, Fiscal Year 2005), available at <http://www.ussc.gov/ANNRPT/2005/fig-a.pdf>. Furthermore, "[t]he overwhelming majority of crack cocaine offenders consistently have been black 91.4 percent in 1992 and 84.7 percent in 2000." U.S. SENTENCING COMM'N, supra note 1, at 62.

¹³See Judge Charles P. Sifton, *Guidelines, Rario Examined in 'Booker' Resentence for Conspiracy to Distribute Crack Cocaine Base*, NEW YORK LAW JOURNAL, March 31, 2005, at 23 (stating that "[t]he disparity between sentences imposed for equivalent amounts of powder versus crack cocaine is now approaching common knowledge, and a source of popular and scholarly concern") (citing cases and articles); cf. Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1287 (Apr. 2004) (citing Todd R. Clear & Dina R. Rose, Individual Sentencing Practices and Aggregate Social Problems. in Crime Control and Social Justice: The Delicate Balance 27, 42 (Darnell F. Hawkins, Samuel L. Myers, Jr. & Randolph N. Stone eds., 2003)) (noting research suggesting that "people who live in neighborhoods with high prison rates tend to feel a strong distrust of formal sanctions, less obligation to obey the law, and less confidence in the capacity of informal social control in their communities").

attitudes about the current sentencing structure.¹⁴

In conclusion, the collateral consequences resulting from the policy decision to differentiate between sentences imposed on offenders convicted of crack cocaine related distribution offenses, as opposed to the sentences imposed on offenders convicted of powder cocaine distribution related offenses, warrants a re-evaluation of the policy. The failure to do so has left many to believe that there is an indifference to the real and perceived unfairness of the policy because of the population is disproportionately impacted by it. As a nation that prides itself on treating all who appear before our courts of law with fairness and equality, the time has come to address a vexing problem for those of us who are entrusted to administer the system and those who suffer the consequences of the policy.

¹⁴See William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1279-84(1996) (describing resistance to the sentencing disparity on the part of judges, juries, and prosecutors, and stating that “[a]necdotal evidence from districts with predominantly African-American juries indicates that some of them acquit African-American crack defendants whether or not they believe them to be guilty if they conclude that the law is unfair”); see also Andrew J. Fuchs, *The Effect of Apprendi v. New Jersey on the Federal Sentencing Guidelines: Blurring the Distinction Between Sentencing Factors and Element of A Crime*, 69 FORDHAM L. REV. 1399, 1437 (2001)(stating that “[a] jury could become conscious of this disparity if it was privy to sentencing information in a case involving defendants charged with possessing both powder and crack cocaine. After being informed of the penalties associated with the crime, jurors may hesitate to reach a verdict that would relegate the defendants to such disparate periods of incarceration”); Gerald F. Uelman, *Perspective on Justice: Why Some Juries Judge the System*, LOS ANGELES TIMES, Jan. 24, 1996, at 9 (noting that “growing numbers of jurors deeply distrust the system that they are given the power to control,” in large part because of racial disparities in drug sentencing).