



## FEDERAL CRACK COCAINE SENTENCING\*

### Overview

After two decades of contentious debate regarding the federal sentencing disparities between crack cocaine and powder cocaine, unprecedented momentum to reform current policy has emerged. In late 2007 the United States Sentencing Commission (Commission) lowered the sentencing guidelines for crack cocaine offenses and recommended that Congress finally address the lengthy mandatory minimum sentences for low-level crack cocaine offenses. The U.S. Supreme Court ruled that judges may consider the excessive nature of penalties for crack cocaine offenses for purposes of sentencing defendants below the recommended sentencing guidelines. And, Congress has at least four bipartisan crack sentencing reform bills pending, including new bills in the Senate and House of Representatives that would equalize penalties for crack and powder cocaine offenses without increasing mandatory sentences. The likelihood of legislative reform is the strongest it has ever been.

Over the last year, newspapers across the country have published commentary highlighting the bias associated with federal crack penalties and the federal government's concentrated prosecution of street-level dealers of crack cocaine, instead of drug kingpins and importers. The overwhelming consensus is that now is the time for reform. This briefing paper provides background on the cocaine sentencing debate, explores the racial impact of the crack sentencing disparity, clarifies the misperceptions regarding crack addiction, and offers recommendations for eliminating unfairness in crack cocaine sentencing.

### 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. The result is that defendants

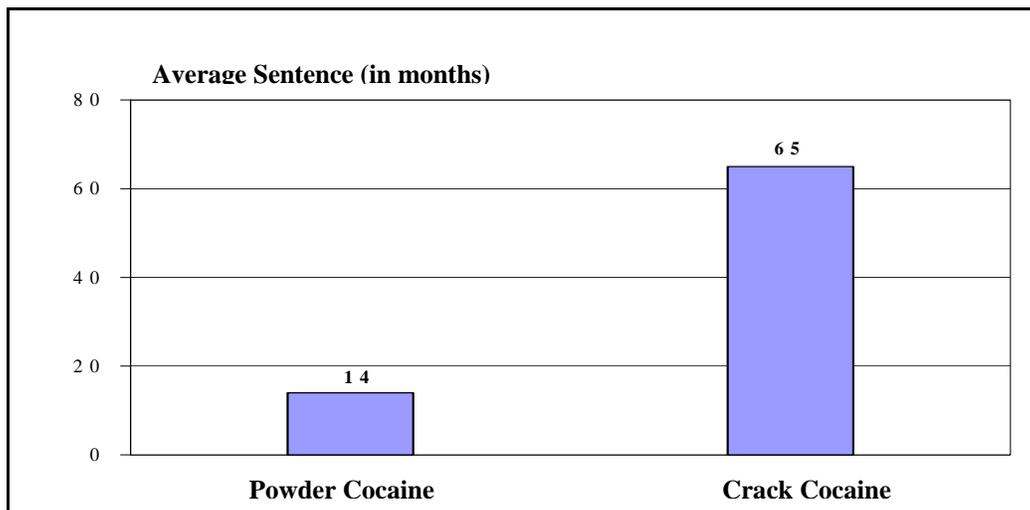
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\* This paper was adapted from an earlier report by The Sentencing Project entitled *Race and Class Penalties in Crack Cocaine Sentencing*.

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, are subject to a five-year mandatory minimum sentence. The same five-year penalty is triggered for the sale of powder cocaine only when an offense involves 500 grams, 100 times the minimum quantity for crack, which yields between 2,500 and 5,000 doses.<sup>1</sup> Similarly, while the sale of 5,000 grams of powder, which can yield up to 50,000 doses, subjects defendants to a 10-year sentence, the same mandatory sentence is triggered by selling only 50 grams of crack, which produces about 100 to 500 doses.

The mandatory sentencing structure which continues today results in average sentences for crack cocaine offenses that are three years longer than for offenses involving powder cocaine. As seen in Figure 1 below, crack cocaine sentences for quantities less than 25 grams are far more severe than for powder cocaine offenses, 65 months compared to 14 months. Sentences for crack cocaine are also nearly two years longer than for methamphetamine and four years longer than for heroin. Crack cocaine is also the only drug that carries a mandatory prison sentence for a first-time possession offense. A person convicted in federal court of simple possession of 5 grams of crack is subject to a mandatory five-year prison term while a person convicted of possessing 5 grams of powder will probably receive a probation sentence. In fact, the maximum sentence for simple possession of any other drug, be it powder cocaine or heroin, is one year in prison.

**Figure 1: Cocaine Sentences for Quantities Less Than 25 Grams**



*SOURCE: U.S. Department of Justice, Federal Cocaine Offenses: An Analysis of Crack and Powder Penalties, March 17, 2002.*

### **Drug Quantities and Crack Cocaine Penalties**

The federal sentencing laws Congress passed in the 1980s were intended to impose tough sentences on high-level drug market operators, such as manufacturers or heads of organizations distributing large quantities of narcotics, and serious traffickers with a substantial drug-trade

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

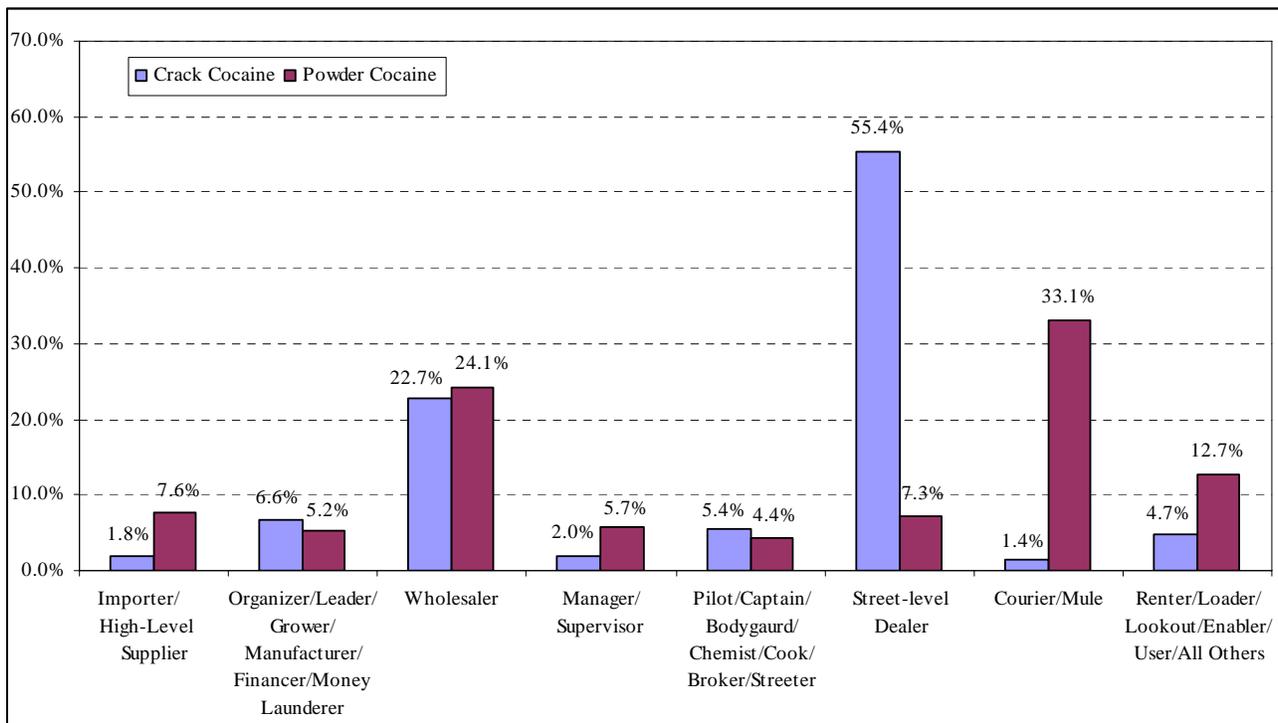
business.<sup>2</sup> However, the weights attached to the sentences failed to capture the different roles within the crack trade. As research from the Commission has shown, the 5 grams of crack set by Congress as the trigger for a five-year mandatory sentence is not a quantity associated with mid-level, much less serious, traffickers.<sup>3</sup> The median drug quantity for a crack cocaine street level dealer charged in federal court (comprising two-thirds of federal crack defendants) in 2000 was 52 grams, enough to trigger a 10-year mandatory sentence. For powder cocaine, the median quantity for a street level dealer was 340 grams, not enough even to trigger the 5-year sentence.

**Table 1: Median Street Level Dealer Drug Quantities and Mandatory Minimums**

Drug	Median Drug Weight	Applicable Mandatory Minimum
Crack Cocaine	52 grams	10 years
Powder Cocaine	340 grams	none

These skewed calculations resulted in two serious consequences. First, they have led to extremely severe prison terms for low-level crack offenses, which represent more than 60 percent of federal crack defendants (see Figure 2). Second, with mandatory minimum sentences focused solely on quantities, defendants with different levels of culpability are often lumped together. The unfortunate reality, according to the Commission, is that crack cocaine penalties “apply most often to offenders who perform low-level trafficking functions, wield little decision-making authority, and have limited responsibility.”<sup>4</sup>

**Figure 2: Defendant Function in Crack/Powder Cocaine Cases**



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

<sup>2</sup> Testimony of Commissioner John R. Steer before the Subcommittee on Criminal Justice, Drug Policy and Human Resources, May 11, 2000.

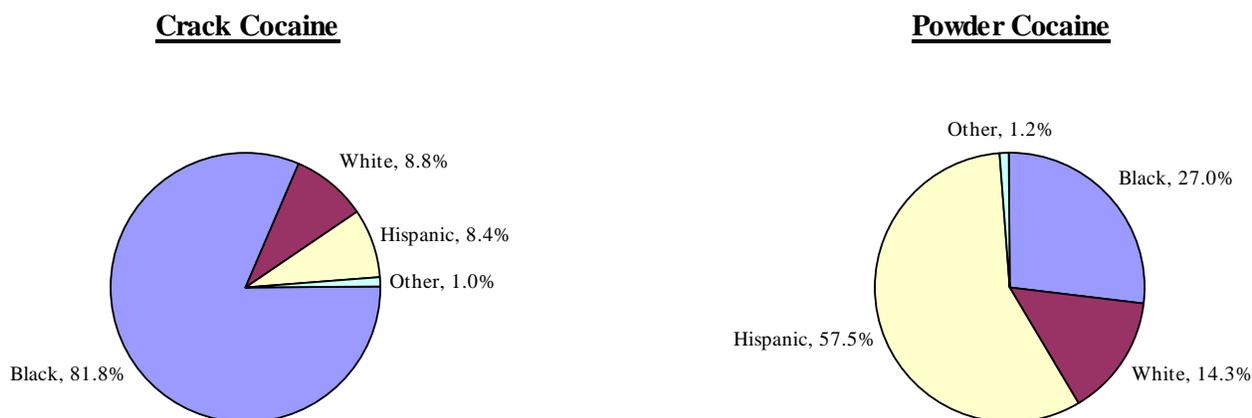
<sup>3</sup> USSC, *Report to Congress: Cocaine and Federal Sentencing Policy*, May 2002 p. 45, Figure 10.

<sup>4</sup> *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.<sup>5</sup> Furthermore, research on drug market patterns demonstrates that drug users generally purchase drugs from sellers of the same racial or ethnic background.<sup>6</sup> 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).<sup>7</sup>

**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.<sup>8</sup> 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.<sup>9</sup> 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).<sup>10</sup> 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.”<sup>11</sup> Moreover, these inequities have substantial consequences for the way in which the African American community views the

<sup>5</sup> 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.

<sup>6</sup> 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.

<sup>7</sup> USSC, *Report to Congress: Cocaine and Federal Sentencing Policy*, May 2007, pg. 15.

<sup>8</sup> USSC, *Fifteen Years of Guidelines Sentencing* (Nov. 2004), p. 122.

<sup>9</sup> 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.

<sup>10</sup> *Compendium of Federal Statistics, 2003* (Oct. 2005), Table 7.16, p. 112.

<sup>11</sup> 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....”<sup>12</sup>

Legislation that seeks to reduce the sentencing disparity between crack and powder by lowering the powder weight necessary to trigger a mandatory minimum, as has been proposed in some bills, would still have the effect of incarcerating large numbers of people of color in prison. According to data from the Commission, though the proportion of black defendants in powder cases is lower than for crack cases, the majority of powder defendants are Hispanic (see Figure 3). Therefore, decreasing the amount of powder required to trigger a mandatory sentence would not eliminate the racial and ethnic disparity in federal drug sentencing.

### **Crack Myths**

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, the 2007 report notes a decline in associated violence, such as bodily injury or threats, for both crack and powder cocaine charges.<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup>

Crack cocaine was initially viewed as a menace that was ravaging not only inner city adults but also babies. The notion of the “crack baby” became common 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.<sup>16</sup> Deborah Frank, a professor of Pediatrics at Boston University describes the “crack baby” as “a grotesque media stereotype [and] not a scientific diagnosis.”<sup>17</sup> She found that in pregnant crack users the drug’s impact on the fetus is similar to the negative effects of tobacco or alcohol use, poor prenatal care or poor nutrition.

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*

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<sup>12</sup> USSC, *Report to Congress: Cocaine and Federal Sentencing Policy*, May 2002, p. 103.

<sup>13</sup> USSC, *Report to Congress: Cocaine and Federal Sentencing Policy*, May 2007, p. 36.

<sup>14</sup> *Ibid.*, p. 32.

<sup>15</sup> *Ibid.*, p. 33.

<sup>16</sup> *Ibid.*, p. 68.

<sup>17</sup> Testimony of Deborah A. Frank, M.D. before the United States Sentencing Commission, February 21, 2002.

*Association* finds analogous effects on the body for both crack and powder cocaine.<sup>18</sup> 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 and reaches the brain its effects on brain chemistry are identical regardless of whether it is crack or powder.<sup>19</sup>

### **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 recommendations, which marked 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

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<sup>18</sup> 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.

<sup>19</sup> Testimony of Charles Schuster before the Subcommittee on Crime and Drugs of the Senate Judiciary Committee, May 22, 2002.

chain. Acosta testified that the Administration's top priority for drug enforcement were 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.

In May 2007, the Commission released a new 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. The Commission cautioned against any reduction in the quantity trigger for the powder cocaine mandatory minimum, "as there is no evidence to justify such an increase in quantity-based penalties for powder cocaine offenses."<sup>20</sup>

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. The decision, effective March 3, 2008, makes an estimated 19,500 persons in prison eligible to apply for a sentence reduction expected to average just over two years. The releases are subject to judicial review and will be staggered over 30 years.

While the 2007 sentencing guideline adjustments provided relief to crack cocaine offenders, the Commission noted that the changes were "only a partial step in mitigating the unwarranted sentencing disparity that exists between Federal powder and crack cocaine defendants.... Only Congress can provide a comprehensive solution to a fundamental unfairness in Federal sentencing policy."

### **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 the 110<sup>th</sup> Session of Congress several new legislative proposals for crack reform have been introduced. The Senate is currently considering three bills. In addition to Senator Sessions' proposal first introduced in 2001, Senators Orrin Hatch (R-UT) and Joseph Biden (D-DE) each introduced bills that either reduce or eliminate the sentencing disparity between crack and powder cocaine. While Sen. Hatch's bill, like Sen. Sessions', calls for a 20:1 ratio, he achieved this end by raising the five-year mandatory minimum quantity trigger for crack cocaine to 25 grams and leaving the powder cocaine level untouched at 500 grams. Sen. Biden advocates

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<sup>20</sup> USSC, *Report to Congress: Cocaine and Federal Sentencing Policy*, May 2007, p. 8.

raising the crack cocaine quantity triggers to those of powder cocaine, thereby eliminating the disparity. Both bills would eliminate the simple possession mandatory minimum.

In the House of Representatives, Rep. Sheila Jackson Lee (D-TX) introduced the companion to Senator Biden's *Drug Sentencing Reform and Kingpin Trafficking Act of 2007*. Since the mid-1990s Rep. Charles Rangel (D-NY) has introduced his own cocaine equalization bill, the *Crack-Cocaine Equitable Sentencing Act*. This year his legislation has bipartisan support, as does Rep. Jackson Lee's bill.

## Conclusion

As 2007 came to a close public interest in federal crack cocaine sentencing was at an all time high. The Commission's action to reduce the sentencing guidelines for crack offenses fueled reform momentum, as did the U.S. Supreme Court decision in *Kimbrough v. United States*. In a 7 to 2 ruling, the Court said a federal district judge's below-guideline sentencing decision based on the unfairness of the 100 to 1 quantity disparity between powder and crack cocaine was permissible. Regional and national news outlets universally applauded these decisions and called on Congress to make mandatory sentences for crack cocaine offenses fairer.

Congress's failure to finally address the mandatory minimum sentences for crack cocaine would be troubling on two counts. First, a significant racial disparity in prosecutions and confinement has persisted for too long. Along with disproportionate law enforcement practices that target blacks, the crack sentencing policies have resulted in more than 80 percent of crack cocaine defendants being African American despite the fact that a majority of crack cocaine users in the U.S. are white or Hispanic.

Second, the crack law fails as an effective drug strategy by inappropriately targeting low-level offenders. While the federal courts are intended to focus on high level drug operations, more than 60 percent of federal crack cocaine defendants have only low-level involvement in drug activity, such as street-level dealers, couriers or lookouts. 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."<sup>21</sup>

The misinformation and hysteria that clouded the public debate on crack cocaine have done a disservice to developing responsible sentencing policy, while exacerbating the tragic racial disparities that plague our prison system. Two decades later, a new consciousness about the impact of the war on drugs, the costs of incarceration to urban communities and the effectiveness of drug treatment has emerged. Restoring fairness to the cocaine sentencing structure requires Congress to equalize the penalties for crack and powder offenses without increasing the current mandatory sentences. Harsh mandatory drug penalties have not protected communities or reduced drug addiction. Now is the time for new ideas about sentencing. An important first step to address the need for reform begins with correcting the inequity in crack cocaine penalties.

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<sup>21</sup> USSC, *Special Report to Congress: Cocaine and Federal Sentencing Policy*, (April 1997), p. 7.