Report to the Congress:

COCAINE AND FEDERAL SENTENCING POLICY

U.S. v. Augustine, No. 12-50061 archived on April 5, 2013

UNITED STATES SENTENCING COMMISSION
May 2002

COCAINE
AND
FEDERAL SENTENCING POLICY

U.S. v. Augustine, No. 12-50061 archived on April 5, 2013

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EXECUTIVE SUMMARY

INTRODUCTION

This is the first of a series of reports the United States Sentencing Commission will be issuing as we approach the 15th anniversary of the effective date of the federal sentencing guidelines. The purpose of this report is to contribute to the ongoing assessment of federal cocaine sentencing policy by Congress and others in the federal criminal justice system. This report updates and supplements much of the research and data presented in the United States Sentencing Commission's *1995 Special Report to Congress: Cocaine and Federal Sentencing Policy* [hereinafter the 1995 Commission Report] and referred to in the Commission's *1997 Special Report to Congress: Cocaine and Federal Sentencing Policy* [hereinafter the 1997 Commission Report]. The Commission submits this report pursuant to both its general and statutory authority under 28 U.S.C. §§ 994-995 and its specific responsibility to advise Congress on sentencing policy under 28 U.S.C. § 995(a)(20).

At the time that the Commission was developing the initial sentencing guidelines, Congress responded to a national sense of urgency surrounding drugs generally and crack cocaine specifically by enacting the Anti-Drug Abuse Act of 1986 [hereinafter the 1986 Act]. The 1986 Act created the basic framework of statutory mandatory minimum penalties currently applicable to federal drug trafficking offenses generally. (*See* Chapter 1.)

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In considering the mandatory minimum penalties for cocaine offenses, Congress differentiated between powder cocaine and crack cocaine and, concluding that crack cocaine was more dangerous, established significantly higher penalties for crack cocaine offenses. The 1986 Act implemented this differential by requiring 100 times less crack cocaine than powder cocaine to trigger five and ten-year mandatory minimum penalties. As a result of the 1986 Act, 21 U.S.C. § 841 (b)(1) provides the following penalties for a first-time cocaine trafficking offense:

5 grams or more of crack cocaine		
or	=	five-year mandatory minimum penalty
500 grams or more of powder cocaine		
50 grams or more of crack cocaine		
or	=	ten-year mandatory minimum penalty
5,000 grams or more of powder cocaine		

The Commission responded to the 1986 Act by incorporating the statutory 100-to-1 drug quantity ratio into the sentencing guidelines and extrapolating upward and downward to effectively set sentencing guideline penalty ranges for all drug quantities. Because of the statutory and guideline differentiation between crack cocaine and powder cocaine, the sentencing guideline range based solely on drug quantity is three to over six times longer for crack cocaine offenders than powder cocaine offenders with equivalent drug quantities, depending on the exact quantity of drug involved. In great part because of the difference in quantity-based penalties, in

2000 the average sentence for a crack cocaine offense was 44 months longer than the average sentence for a powder cocaine offense, 118 months compared to 74 months.

On May 1, 1995, by a four-to-three vote, the Commission submitted to Congress an amendment to the sentencing guidelines that, among other things, would have equalized the guideline penalties for powder cocaine and crack cocaine offenses based solely on drug quantity. Pursuant to 28 U.S.C. § 994(p), however, Congress passed and the President signed legislation disapproving the guideline amendment. The legislation further directed the Commission to submit to Congress new recommendations regarding changes to federal cocaine sentencing policy and set forth several specific factors for consideration. The Commission issued the 1997 Commission Report setting forth for congressional consideration a range of alternatives for revisions to the federal statutory penalty scheme for cocaine offenses. Congress has not acted on those recommendations.

FINDINGS

In completing this updated report, the Commission (i) reviewed findings from recent research literature (*see* Chapters 2 and 3), (ii) conducted an extensive empirical study of federal cocaine offenders sentenced in fiscal year 2000 and compared those results with the findings in the 1995 Commission Report (*see* Chapters 4 and 5), (iii) surveyed state cocaine sentencing policies (*see* Chapter 7), (iv) solicited public comment on the appropriateness of current federal cocaine sentencing policy (*see* Appendix D for a summary of written public comment), and (v) held three public hearings at which it received testimony from the medical and scientific communities, federal and local law enforcement officials, criminal justice practitioners, academics, and civil rights organizations (*see* Appendix E for a summary of public hearing written statements).

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Using this information and data, the Commission (1) considered the general purposes of sentencing that Congress referred to in the Sentencing Reform Act (*see* 18 U.S.C. § 3553(a)(2)); (2) identified specific congressional concerns regarding cocaine use and distribution, particularly those set forth in the legislation disapproving the Commission's 1995 amendment and in the legislative history of the relevant penalty provisions, particularly of the 1986 Act; and (3) evaluated the current federal cocaine penalty structure in light of those general and specific objectives. The Commission makes the following findings (*see* Chapter 8):

1. The Current Penalties Exaggerate the Relative Harmfulness of Crack Cocaine

- Cocaine in any form produces the same physiological and psychotropic effects (*see* Chapters 2 and 8), but powder cocaine, because it usually is snorted, poses a lesser risk of addiction to the typical user than crack cocaine. Precisely quantifying this difference in addictiveness is impossible, but this difference independently does not appear to warrant the 100-to-1 drug quantity ratio.
- The negative effects of prenatal crack cocaine exposure are identical to the negative effects of prenatal powder cocaine exposure and are significantly less

severe than previously believed. (*See* Chapters 3 and 8.) In fact, the negative effects from prenatal cocaine exposure are similar to those associated with prenatal tobacco exposure and less severe than the negative effects of prenatal alcohol exposure. Accounting for prenatal cocaine exposure in quantity-based penalties is further complicated by other factors such as prenatal care, socioeconomic status, nutrition, and other health problems that may negatively affect child development. Sentencing proportionality would be better achieved by imposing enhanced sentences directly on the small minority of offenders who distribute any type of controlled substance knowingly to pregnant women.

- Recent data indicate that the epidemic of crack use by youth never materialized to the extent feared. (*See* Chapters 4, 6, and 8). Crack cocaine use among students and young adults historically has been low, particularly in relation to powder cocaine use. In addition, Commission sentencing data indicate that youth do not play a major role in crack cocaine trafficking at the federal level. Sentencing proportionality would be better achieved by imposing enhanced sentences on the small minority of offenders who sell controlled substances of any type to juveniles, conduct drug distribution in areas likely to be frequented by juveniles (*e.g.*, near schools and playgrounds), or use juveniles in drug distribution activities.

2. Current Penalties Sweep Too Broadly and Apply Most Often to Lower Level Offenders

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- Commission data indicate that, in part motivated by the small drug quantities required to trigger the statutory minimum penalties, a significant proportion – over one-quarter – of federal crack cocaine offenses involved relatively small drug quantities (less than 25 grams) (*see* Chapters 4, 7, and 8). In contrast, only 2.7 percent of federal powder cocaine offenses involved less than 25 grams of the drug, perhaps because the statutory minimum penalties would not apply to such a small quantity of powder cocaine.

- The fact that a significant proportion of federal crack cocaine offenders are responsible for relatively small drug quantities is problematic because they receive especially disparate penalties. (*See* Chapter 8.) According to the Department of Justice, defendants convicted of trafficking less than 25 grams of powder cocaine received an average sentence of 13.6 months, just over one year. In contrast, defendants convicted of trafficking an equivalent amount of crack cocaine received an average sentence of 64.8 months, over five years. The "penalty gap" widens even further for offenders with the lowest drug quantities *and* the least criminal history. The Commission believes that sentencing differentials of this magnitude are inappropriate particularly for this category of least culpable offenders.

- Contrary to the general objective of the 1986 Act to target federal law enforcement and prosecutorial resources on "serious" and "major" traffickers, two-thirds of federal crack cocaine offenders were street-level dealers. (*See* Chapters 4 and 8.) Only 5.9 percent of federal crack cocaine offenders performed trafficking functions (*e.g.*, manager, supervisor) most consistent with the functions described in the legislative history of the 1986 Act as warranting a five-year penalty, and 15.2 percent performed trafficking functions (importer, high-level supplier, organizer, leader, wholesaler) most consistent with the functions described as warranting a ten-year penalty. Not only may these figures indicate a failure to focus scarce federal law enforcement resources on serious and major traffickers, but they also indicate that the current penalties exaggerate the culpability of most crack cocaine offenders, based solely on trafficking function.

3. Current Quantity-Based Penalties Overstate the Seriousness of Most Crack Cocaine Offenses and Fail to Provide Adequate Proportionality

- The current penalty structure was based on many beliefs about the association of crack cocaine offenses with certain harmful conduct – particularly violence – that are no longer accurate. (*See* Chapters 4 and 8.) In 2000, for example, three-quarters of federal crack cocaine offenders had no personal weapon involvement, and only 2.3 percent discharged a weapon. Therefore, to the extent that the 100-to-1 drug quantity ratio was designed in part to account for this harmful conduct, it sweeps too broadly by treating *all* crack cocaine offenders *as if* they committed those more harmful acts, even though most crack cocaine offenders in fact had not.

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- Because the current penalty structure accounts for certain assumed harmful acts in the quantity-based penalties, there are no specific sentencing enhancements in the primary drug trafficking guideline targeting offenders who actually commit those acts (with the exception of a 2-level enhancement for possession of a dangerous weapon) (*see* Chapter 8). As a result, the current penalty structure fails to provide adequate sentencing proportionality, because there is no sentencing differential between crack cocaine offenders who actually commit those harmful acts and those who do not. In other words, the current penalty structure results in inappropriate sentencing uniformity for the most serious offenders.

4. Current Penalties' Severity Mostly Impacts Minorities

- The overwhelming majority of offenders subject to the heightened crack cocaine penalties are black, about 85 percent in 2000 (*see* Chapters 5 and 8). This has contributed to a widely held perception that the current penalty structure promotes unwarranted disparity based on race. Although this assertion cannot be scientifically evaluated, the Commission finds even the perception of racial disparity problematic because it fosters disrespect for and lack of confidence in the criminal justice system. Moreover, to the extent that the 100-to-1 drug quantity ratio is shown to result in unduly severe penalties for most crack cocaine offenders, the impact of that severity falls primarily upon black offenders.

RECOMMENDATIONS

Based on these findings, the Commission again unanimously and firmly concludes that the various congressional objectives can be achieved more effectively by decreasing substantially the 100-to-1 drug quantity ratio (*see* Chapter 8). The Commission recommends that Congress generally adopt a three-pronged approach for revising federal cocaine sentencing policy as follows:

(1) increase the five-year mandatory minimum threshold quantity for crack cocaine offenses to at least 25 grams and the ten-year threshold quantity to at least 250 grams (and repeal the mandatory minimum for simple possession of crack cocaine).

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(2) direct the Commission generally to provide appropriate sentencing enhancements in the primary drug trafficking guideline to account specifically for (a) involvement of a dangerous weapon (including a firearm); (b) bodily injury resulting from violence; (c) an offense under 21 U.S.C. §§ 849 (Transportation Safety Offenses), 859 (Distribution to Persons Under Age Twenty-One), 860 (Distribution or Manufacturing in or Near Schools and Colleges), or 861 (Employment or Use of Persons Under 18 Years of Age); (d) repeat felony drug trafficking offenders; and (e) importation of drugs by offenders who do not perform a mitigating role in the offense.

(3) maintain the current statutory minimum threshold quantities for powder cocaine offenses (understanding that the contemplated specific guideline sentencing enhancements would effectively increase penalties for the more dangerous and more culpable powder cocaine offenders).

If, for example, Congress increased the five-year mandatory minimum threshold quantity for crack cocaine offenses to 25 grams, the sentencing guidelines would incorporate such a change by assigning offenses involving 25 to 100 grams of crack cocaine a base offense level 26. Offense level 26 provides a sentencing guideline range that corresponds to a five-year mandatory

minimum penalty (63 to 78 months for defendants with minimal or no criminal history). Based on information received from federal law enforcement representatives, the Commission believes that this base offense level range of 25 to 100 grams more closely reflects serious traffickers as described in the legislative history of the 1986 Act and would result in a penalty structure significantly more consistent with the penalty structure of other major drugs of abuse.

Congress may well use approaches other than the historic quantity-based method of calculating federal sentencing penalties to determine the appropriate sanction for crack cocaine offenses. An alternative approach would delineate the societal harms associated with crack cocaine and compare them to the harms and effects associated with the use of other prohibited substances, such as methamphetamine and heroin.

Appendix A shows how the guidelines' Drug Quantity Table would incorporate an increase in the five-year mandatory minimum threshold quantity for crack cocaine offenses to 25 grams. Appendix A also shows how the sentencing enhancements accounting for the various aggravating factors listed above might be incorporated into the primary drug trafficking guideline. Particularly important to the consideration of powder cocaine penalties, the Commission recommends that the proposed enhancements apply across all drug types, including powder cocaine.

The recommendations, if adopted, would narrow the difference between average sentences for crack cocaine and powder cocaine offenses from 44 months to approximately one year. (*See* Appendix B.) Specifically, the Commission estimates that the average sentence for crack cocaine offenses would decrease from 118 months to 95 months, and the average sentence for powder cocaine offenses would increase from 74 months to 83 months. Importantly, the guideline sentencing range based solely on drug quantity for crack cocaine offenses still would be significantly longer (approximately two-to-four times longer) than powder cocaine offenses involving equivalent drug quantities, depending on the precise quantity involved.

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Chapter 1

BACKGROUND

A. INTRODUCTION

This report updates and supplements much of the research and data presented in the United States Sentencing Commission's *1995 Special Report to Congress: Cocaine and Federal Sentencing Policy*[1] [hereinafter the 1995 Commission Report] and referred to in the Commission's *1997 Special Report to Congress: Cocaine and Federal Sentencing Policy*[2] [hereinafter the 1997 Commission Report]. The Commission submits this report pursuant to both its general statutory authority under 28 U.S.C. §§ 994-95 and its specific responsibility to advise Congress on sentencing policy under 28 U.S.C. § 995(a)(20).[3]

As discussed in more detail below, Congress disapproved the Commission's guideline amendment addressing crack cocaine penalties submitted on May 1, 1995, and has not acted on the statutory recommendations set forth in the 1995 Commission Report and the 1997 Commission Report.[4] Federal sentencing policy for cocaine offenses continues to come under substantial criticism from various public officials, private citizens, criminal justice practitioners, researchers, and interest groups. The Commission renewed its assessment of federal cocaine sentencing policy in part to consider and address those concerns.

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[1] United States Sentencing Commission [USSC], 1995 SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (as directed by section 280006 of Public Law 103–322) (February 1995).

[2] USSC, 1997 SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (as directed by section 2 of Pub. L. 104–38) (April 1997).

[3] The Sentencing Reform Act of 1984 created the Commission as an independent agency in the judicial branch of government. Pub. L. No. 98–473 (1984). The Act directed the Commission to establish and maintain sentencing policies and practices for the federal criminal justice system through a detailed framework of sentencing guidelines. *See generally* 28 U.S.C. § 994. In addition, the Act requires the Commission to monitor and report periodically on the operation of the sentencing guidelines and gives the Commission ongoing sentencing and crime policy research responsibilities. *See* 28 U.S.C. § 995(a)(8), (9), (12)(A), (13)-(16), (21). Specifically, the Commission is required to "make recommendations to Congress concerning modification or enactment of statutes relating to sentencing, penal, and correctional markers that the Commission finds to be necessary to carry out an effective, humane, and rational sentencing policy." *See* 28 U.S.C § 995(a)(20). The Commission's duties and authorities are fully set forth in chapter 58 of title 28, United States Code.

[4] The commissioners who authored the 1995 and 1997 Commission Reports no longer sit on the Commission, having left on a staggered basis, either by expiration of term or resignation, by October 1998.

Critics typically focus on the differences in federal penalty levels between the two principal forms of cocaine – cocaine hydrochloride [hereinafter referred to as powder cocaine] and cocaine base [hereinafter referred to as crack cocaine].[5] For example, the Commission received a statement from 28 United States Circuit Court of Appeals and District Court judges who had previously served as United States Attorneys stating that the "current disparity between powder cocaine and crack cocaine, in both the mandatory minimum statutes and the guidelines, cannot be justified and results in sentences that are unjust and do not serve society's interest."[6] That statement echoed the sentiments expressed in a similar letter sent to the U.S. Senate and House Judiciary Committees in September 1997. *See* Judge John S. Martin, Jr. et al.'s September 16, 1997 statement on Powder and Crack Cocaine to the Senate and House Judiciary Committees.[7]

The statements of those 28 federal judges are in accord with the results of a survey of federal judges recently conducted by the Commission. The Commission surveyed federal judges for their views on whether the federal guideline system is achieving the purposes of sentencing as established in 18 U.S.C. § 3553(a)(2).[8] A total of 562 judges completed the multiple choice

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[5] As explained in more detail below, 100 times as much powder cocaine as crack cocaine is required to trigger the same five-year and ten-year statutory mandatory minimum penalties. As a result, based solely on drug quantity the sentencing guideline penalties for crack cocaine offenses generally are three to over six times as long as the sentence guideline penalties for powder cocaine offenses involving equivalent drug quantities.

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[6] Statement by Certain United States Circuit Court of Appeals and District Court Judges who Previously Served as United States Attorneys, regarding the penalties for powder and crack cocaine, to the U.S. Sentencing Commission (April 16, 2002).

[7] *Statement on Powder and Crack Cocaine to the Senate and House Committees on the Judiciary,* 105th Cong. (1997) (letter from Judge John S. Martin, Jr. et al., p. 1). This statement was signed by 27 federal judges, each of whom had served as United States Attorney. The judges stated:

> It is our strongly held view that the current disparity between powder cocaine and crack cocaine, in both the mandatory minimum statutes and the guidelines, cannot be justified and results in sentences that are unjust and do not serve society's interest.
>
> . . . . At either end of the distribution chain, the substantially greater sentences for those who are involved with crack cocaine do not appear to have any greater deterrent impact than that achieved by the lower powder cocaine penalties.
>
> Thus, the differences in the current mandatory minimums and guidelines for powder and crack cocaine result in the imposition of overly severe sentences on those who are involved with relatively small amounts of crack at the lowest levels of the distribution chain, without providing any corresponding benefit to society.

[8] As the Sentencing Guidelines approach their 15th year anniversary, the Commission is undertaking a study of various aspects of the federal guideline system. One component of this study is a

questionnaire. Almost half of the respondents (276) took the additional step of providing written responses regarding what they view as specific challenges facing the guideline system. Of the 276 judges who provided written comments, 56 judges stated that a major challenge is drug sentencing and an additional 37 judges specifically identified cocaine sentencing as that challenge.

Other critics assert that the current penalty structure disproportionately impacts minority populations. *See, e.g.,* written statement by Wade Henderson, Executive Director, Leadership Conference on Civil Rights,[9] citing Commission statistics that show 84.7 percent of federal crack cocaine offenders sentenced in fiscal year 2000 were black, 9.0 percent were Hispanic, and 5.6 percent were white; written statement by Charles Kamasaki, Senior Vice President, National Council of La Raza,[10] citing Commission statistics that show the proportion of Hispanic powder cocaine federal offenders has increased from 39.8 percent in fiscal year 1992 to 50.8 percent in fiscal year 2000.

Since receiving the 1997 Commission Report, members of Congress have continued to express interest in exploring possible changes to the federal cocaine penalty structure, and a number of different approaches have been proposed. Several bills have been introduced that proposed equalizing the quantity-based penalties for the two forms of cocaine, either by increasing the penalties for powder cocaine[11] or by decreasing the penalties for crack cocaine.[12] In 2000, the Senate passed by one vote an amendment to the Bankruptcy Reform Act of 2000 offered on behalf of Senator Abraham that, among other things, would have established a 10-to-1

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survey of federal district and circuit court judges soliciting their views on whether the guidelines are achieving the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2).

[9] Written statement by Wade Henderson, Executive Director, Leadership Conference on Civil Rights, to the U.S. Sentencing Commission regarding Drug Penalties (February 25, 2002).

[10] Written statement by Charles Kamasaki, Senior Vice President, National Council of La Raza, to the U.S. Sentencing Commission regarding Drug Penalties (February 25, 2002).

[11] *See, e.g.*, S. 1162, 105th Cong. (1997) introduced by Sen. Wayne Allard; S. 209, 105th Cong. (1997) introduced by Sen. John Breaux; S. 1593, 105th Cong. (1998) introduced by Sen. Allard; H.R. 332, 105th Cong. (1997) introduced by Rep. Gerald Solomon; H.R. 2229, 105th Cong. (1997) introduced by Rep. William Pascrell, Jr.; and H.R. 4026, 107th Cong. (2002) introduced by Rep. Roscoe Bartlett.

[12] *See, e.g.*, H.R. 2031, 105th Cong. (1997) introduced by Rep. Charles Rangel; H.R. 939, 106th Cong. (1999) introduced by Rep. Rangel; H.R. 1241, 106th Cong. (1999) introduced by Rep. Maxine Waters; and H.R. 697, 107th Cong. (2001) introduced by Rep. Rangel.

drug quantity ratio by reducing the five-year powder cocaine trigger quantity from 500 grams to 50 grams.[13]

More recently, Senators Jeff Sessions and Orrin Hatch introduced Senate Bill 1847, the Drug Sentencing Reform Act of 2001, which among other things, would reduce the 100-to-1 drug quantity ratio to 20-to-1 by increasing the statutory mandatory minimum penalties for powder cocaine and decreasing the statutory mandatory minimum penalties for crack cocaine.[14] In addition, Senators Patrick Leahy and Hatch, Chairman and Ranking Member of the Senate Judiciary Committee, respectively, recently wrote the Commission requesting that it examine federal cocaine penalties and study certain specific issues.[15] The Commission welcomes this renewed congressional interest and hopes to work with Congress and other representatives of the criminal justice system to develop appropriate modifications to the federal penalty structure for cocaine offenses.

B. CURRENT PENALTY STRUCTURE FOR FEDERAL COCAINE OFFENSES

The Anti-Drug Abuse Act of 1986[16] [hereinafter the 1986 Act] established the basic framework of statutory mandatory minimum penalties currently applicable to federal drug trafficking offenses. The quantities triggering those mandatory minimum penalties differed for various drugs and, in some cases, including cocaine, for different forms of the same drug.

In establishing the mandatory minimum penalties for cocaine, Congress differentiated between powder cocaine and crack cocaine – and singled out crack cocaine for significantly higher punishment.[17] As a result of the 1986 Act, 21 U.S.C. § 841(b)(1) requires a five-year

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[13] Bankruptcy Reform Act of 2000, H.R. 833, 106th Cong. § 1772 (2000).

[14] *See* 147 CONG. REC. S13,961-65 (daily ed. Dec. 20, 2001) (statements of Sens. Sessions and Hatch) for discussion of the relevant legislative history for the current federal penalty scheme and the proposed changes contained in the bill.

[15] Senators Leahy and Hatch specifically requested that the Commission study: (1) whether the present sentencing structure remains empirically supportable; (2) whether raising the mandatory minimum threshold drug quantities for crack cocaine offenses would adversely affect crime rates; (3) whether the current penalties for crack cocaine offenses act as a deterrent and whether increasing the threshold drug quantity would diminish any deterrent effect; (4) whether the pharmacological effects of crack cocaine are substantially more severe than the effects of powder cocaine; (5) the effect changes to the mandatory minimum threshold drug quantities for cocaine offenses would have on minority populations; and (6) the prison impact of any changes to the penalties for cocaine offenses. These issues are addressed in pertinent parts of this report.

[16] *See* Pub. L. 99–570, 100 Stat. 3207 (1986).

[17] The heightened statutory mandatory minimum penalties provided in 21 U.S.C. § 841 apply to "cocaine base," which is undefined in the statute but interpreted by some courts to be broader than crack

mandatory minimum penalty for a first-time trafficking offense involving five grams or more of crack cocaine, or 500 grams or more of powder cocaine, and a ten-year mandatory minimum penalty for a first-time trafficking offense involving 50 grams or more of crack cocaine, or 5,000 grams or more of powder cocaine. Because it takes 100 times more powder cocaine than crack cocaine to trigger the same mandatory minimum penalty, this penalty structure is commonly referred to as the "100-to-1 drug quantity ratio."

1. Two-Tiered Penalties for "Serious" and "Major" Traffickers[18]

In response to a number of well-publicized tragic incidents, such as the death of the Boston Celtics' first-round basketball draft pick, Len Bias, in June 1986, Congress expedited passage of the 1986 Act. Because of the heightened concern and national sense of urgency surrounding drugs generally and crack cocaine specifically, Congress bypassed much of its usual deliberative legislative process.[19] As a result, there were no committee hearings and no Senate or House Reports accompanying the bill that ultimately passed (although there were 17 related

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cocaine, and include, for example, coca paste. In 1993, the Commission narrowed the definition for purposes of guideline application to focus on crack cocaine, which the Commission believed was Congress's primary concern. Specifically, the Commission added the following definition to the notes following the Drug Quantity Table in USSG §2D1.1(c): "'Cocaine base,' for 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 a lumpy, rocklike form." USSG, App. C, Amend. 487 (effective Nov. 1, 1993). The amendment resolved a circuit conflict over the statutory and guideline definitions of "cocaine base." *Compare*, *e.g.*, *United States v. Shaw*, 936 F.2d 412 (9th Cir. 1991) (cocaine base means crack) *with United States v. Jackson*, 968 F.2d 158 (2d Cir. 1992) (cocaine base has a scientific, chemical definition that is more inclusive than crack). As a result of the amendment, the guidelines treat forms of cocaine base other than crack cocaine (*e.g.*, coca paste, an intermediate step in the processing of coca leaves into cocaine hydrochloride) like powder cocaine.

[18] *See* Chapter 6 of the 1995 Commission Report for a more detailed history of the federal penalty structure for cocaine offenses; *see also United States v. Peterson*, 143 F.Supp. 2d. 569, 571-581 (E.D.Va) (discussing legislative history of the 1986 Act and subsequent developments regarding federal cocaine sentencing policy).

[19] 132 CONG. REC. 26,436 (daily ed. Sept. 26, 1986) (statement of Sen. Paula Hawkins) ("Drugs pose a clear and present danger to America's national security. If for no other reason we should be addressing this on an emergency basis.").

reports on various issues).[20] Thus, the legislative history for the bill that was enacted into law is limited primarily to statements made by senators and representatives during floor debates.

Floor statements delivered by members in support of the 1986 Act and a committee report on a predecessor bill suggest that Congress intended to create a two-tiered penalty structure for discrete categories of traffickers. Specifically, Congress intended to link the five-year mandatory minimum penalties to to what some called "serious" traffickers and the ten-year mandatory minimum penalties to "major" traffickers. Drug quantity would serve as a proxy to identify those types of traffickers.

Senator Robert Byrd, then the Senate Minority Leader, summarized the intent behind the legislation:

> For the kingpins – the masterminds who are really running these operations – and they can be identified by the amount of drugs with which they are involved – we require a jail term upon conviction. If it is their first conviction, the minimum term is 10 years. . . . Our proposal would also provide mandatory minimum penalties for the middle-level dealers as well. Those criminals would also have to serve time in jail. The minimum sentences would be slightly less than those for

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[20] H.R. 5484, the bill which eventually became the 1986 Act, was amended well over 100 times while under consideration from September 10, 1986 to October 27, 1986. Several members of Congress were critical of the speed with which the bill was developed and considered. Sen. Charles Mathias reflected this sentiment in his floor statement:

> 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, tempered by the heat of debate. The committees are important because, like them or not, they do provide a means by which legislation can be carefully considered, can be put through a filter, can be exposed to public view and public discussion by calling witnesses before the committee. . . . [T]his bill is a moving target. . . . You cannot quite get a hold of what is going to be in the bill at any given moment. We have had drafts of different portions of the bill circulating around the Senate corridors within the last 24 hours.

132 CONG. REC. 26,462 (daily ed. Sept. 26, 1986). *See also,* 132 CONG. REC. 26,441 (daily ed. Sept. 26, 1986) (statement of Sen. Daniel Evans noting that the bill was being considered in September of an election year); 132 CONG. REC. 26,434 (daily ed. Sept. 26, 1986) (statement of Sen. Robert Dole) ("I have been reading editorials saying we are rushing a judgment on the drug bill and I think to some extent they are probably correct."); 132 CONG. REC. 22,658 (daily ed. Sept. 10, 1986) (statement of Rep. Trent Lott) ("In our haste to patch together a drug bill – any drug bill – before we adjourn, we have run the risk of ending up with a patch-work quilt . . . that may or may not fit together in a comprehensible whole.").

the kingpins, but they nevertheless would have to go to jail – a minimum of 5 years for the first offense.[21]

A committee report issued by the House Judiciary Subcommittee on Crime following its consideration of a predecessor bill (House Bill 5394) also provides evidence of Congress's intent to establish two-tiered mandatory minimum penalties for serious and major traffickers. According to the report, the Subcommittee determined that the five and ten-year mandatory minimum sentencing structure would create proper incentives for the Department of Justice to direct its "most intense focus" on "major traffickers" and "serious traffickers." (House Report 99-845.)[22] "One of the major goals of this bill is to give greater direction to the DEA and the U.S. Attorneys on how to focus scarce law enforcement resources."[23] The Subcommittee defined major and serious traffickers as follows:

- **major traffickers**: "the manufacturers or the heads of organizations who are responsible for creating and delivering very large quantities;"

- **serious traffickers**: "the managers of the retail traffic, the person who is filling the bags of heroin, packaging crack cocaine into vials . . . and doing so in substantial street quantities."[24]

2. Specific Congressional Concerns About Crack Cocaine

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Of particular relevance to this report, there is no authoritative legislative history that explains Congress's rationale for selecting the 100-to-1 drug quantity ratio for powder cocaine and crack cocaine offenses. The legislative history shows that Congress considered a variety of powder cocaine/crack cocaine drug quantity ratios before adopting the 100-to-1 ratio. The original version of the House Bill that was ultimately enacted into law, House Bill 5484, contained a drug quantity ratio of 50-to-1.[25] A number of other bills introduced during this period contained drug quantity ratios of 20-to-1, including one (Senate Bill 2849) introduced by Senate Majority Leader Robert Dole on behalf of the Reagan Administration that proposed five-

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[21] 132 CONG. REC. 27,193-94 (daily ed. Sept. 30, 1986); *see also* 132 CONG. REC. 22,993 (daily ed. Sept. 11, 1986) (statement of Rep. John LaFalce) ("[S]eparate penalties are established for the biggest traffickers, with another set of penalties for other serious drug pushers.").

[22] H.R. Rep. No. 99-845, pt. 1, at 11-12 (1986).

[23] *Id.* at 11.

[24] *Id.* at 11-12.

[25] H.R. 5484 would have provided a five-year mandatory minimum for 20 grams of crack cocaine and 1,000 grams of powder cocaine and a ten-year mandatory minimum for 100 grams of crack cocaine and 5,000 grams of powder cocaine, reflecting a 50-to-1 drug quantity ratio. *See also*, H.R. 5394, Narcotics Penalties and Enforcement Act of 1986 (containing a 50-to-1 drug quantity ratio).

year mandatory minimum penalties for cases involving 500 grams of powder cocaine or 25 grams of crack cocaine.[26]

The legislative history surrounding these earlier bills suggests that they were intended to provide drug quantity triggers for crack cocaine offenses that fit into the overall serious/major trafficker structure being contemplated at the time. For example, at a mark-up of House Bill 5394, Representative William J. Hughes, Chairman of the House Crime Subcommittee, stated that: "[t]he quantity is based on the minimum quantity that would be controlled or directed by a trafficker in a high place in the processing and distribution chain. . . . For the major traffickers, the levels we have set [include] . . . 100 grams of cocaine freebase . . . ." (The Narcotics Penalties and Enforcement Act: Markup on House Bill 5394).[27] Chairman Hughes added that the "serious trafficker" definition applied to dealers selling quantities of 20 grams of cocaine base.

As the 1986 Act advanced through the legislative process in late summer and early fall of that year, the drug quantity ratio was rapidly ratcheted up from 20-to-1 to 100-to-1. The legislative history does not provide conclusive evidence of Congress's reason for doing so, but it does suggest that Congress (particularly the Senate) purposely may have deviated from the serious/major trafficker penalty structure for crack cocaine offenses. In other words, for crack cocaine trafficking offenses, Congress might have set aside its general objective of targeting "major" and "serious" drug taffickers. While considering House Bill 5484, Senator Lawton Chiles, explained that:

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> This legislation will . . . decrease the amount for the stiffest penalties to apply. Those who possess 5 or more grams of cocaine freebase will be *treated as* serious offenders. Those apprehended with 50 or more grams of cocaine freebase will be *treated as* major offenders. Such treatment is absolutely essential because of the especially lethal characteristics of this form of cocaine. Five grams can produce 100 hits of crack. Those who possess such an amount should have the book thrown at them. The damage 100 hits can inflict upon users more than warrants this treatment.[28]

This passage, albeit not conclusive, suggests that Congress may have been motivated by the perceived heightened harmfulness of crack cocaine to prescribe mandatory minimum penalties for crack cocaine based on the harm such quantities could cause, regardless of whether

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[26] *See, e.g.,* Mandatory Crack and Other Drug Penalties Act, S. 2787, 99th Cong. (introduced Aug. 15, 1986); Drug Free Federal Workplace Act of 1986, S. 2849, 99th Cong. (introduced Sept. 23, 1986); Drug Enforcement Act of 1986, S. 2850, 99th Cong. (introduced Sept. 23, 1986).

[27] *The Narcotics Penalties and Enforcement Act: Markup on H.R. 5394 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 99th Cong. 131 (1986) (statement of Rep. Hughes).

[28] H.R. 5484, 132 CONG. REC. 26,447 (daily ed. Sept. 26, 1986). (emphasis added.)

the offenders were "serious" or "major" traffickers as defined elsewhere.[29]

Although whether Congress intended the penalties for crack cocaine to fit within the general serious/major trafficker penalty structure is ambiguous, the legislative history does suggest that Congress concluded that crack cocaine was more dangerous than powder cocaine and therefore warranted higher penalties based on five important beliefs:

- Crack cocaine was extremely addictive. The addictive nature of crack cocaine was stressed not only in comparison to powder cocaine, but also in absolute terms.[30]

- The correlation between crack cocaine use and distribution and the commission of other serious and violent crimes was greater than that with other drugs. Floor statements focused on psycho-pharmacologically driven, economically compulsive, as well as systemic crime (although members did not typically use these terms).[31]

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[29] Other passages, equally inconclusive, may suggest the opposite conclusion: that Congress intended for crack cocaine penalties to fit within the overall two-tiered structure. Much of the drug package in H.R. 5484 was first introduced as the Comprehensive Narcotics Control Act of 1986. 132 CONG. REC. 27,177 (daily ed. Sept. 30, 1986) (statement of Sen. Christopher Dodd). The Comprehensive Narcotics Control Act of 1986 was introduced in the Senate on September 9, 1986 (the day before the House introduced H.R. 5484). Speaking in favor of this bill, Sen. James Sasser explained:

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> [Crack] is as dangerous as any drug on the street and more addictive than almost any of them. Then we say that if you possess 50 grams you are a major trafficker – 10 years to life for the first offense. If you have even 5 grams in your possession, it's 5 to 25 years.

132 CONG. REC. 22,437 (daily ed. Sept. 9, 1986).

[30] 132 CONG. REC. 22,667 (daily ed. Sept. 10, 1986) (statement of Rep. James Traficant) ("Crack is reported by many medical experts to be the most addictive narcotic drug known to man."); 132 CONG. REC. 22,993 (daily ed. Sept. 11, 1986) (statement of Rep. LaFalce) ("Crack is thought to be even more highly addictive than other forms of cocaine or heroin."); 132 CONG. REC. 31,329 (daily ed. Oct. 15, 1986) (statement of Sen. Chiles) ("[I]f you try it once, chances are that you will be hooked. If you use it up to three times, we know that you will become hooked, and it is the strongest addiction that we have found.").

[31] 132 CONG. REC. 22,667 (daily ed. Sept. 10, 1986) (statement of Rep. Traficant) ("The widespread use of crack in New York City is said by many law enforcement officials in that city to have caused a rise in violent crimes last year."); 132 CONG. REC. 31,329-30 (daily ed. Oct. 15, 1986) (statement of Sen. Chiles):

> We find again once people are hooked, all they can think about is staying high, that euphoria which they get, but there is a corresponding down that is just as deep in its trough as the high is at the crest of the wave. And so we find that people, when they are

- Physiological effects of crack cocaine were considered especially perilous, resulting in death to some users and causing devastating effects on children prenatally exposed to the drug.[32]

- Young people were particularly prone to using and/or being involved in trafficking crack cocaine.[33]

- Crack cocaine's purity and potency, low cost per dose, and the ease with which it was manufactured, transported, disposed of, and administered, were all leading to its widespread use.[34]

3. Commission Response to the 1986 Act

When Congress passed the 1986 Act, the Commission had not completed promulgating the initial sentencing guidelines. The Commission responded to the legislation by generally incorporating the statutory mandatory minimum sentences into the guidelines and extrapolating upward and downward to set guideline sentencing ranges for all drug quantities. Offenses involving five grams or more of crack cocaine or 500 grams or more of powder cocaine were assigned a base offense level (level 26) corresponding to a sentencing guideline range of 63 to 78

> addicted, will go out and steal, rob, lie, cheat, take money from any savings, take refrigerators out of their houses, anything they can get their hands on to maintain that habit. That, of course, has caused crime to go up at a tremendously increased rate in our cities and in our States – the crimes of burglary, robbery, assault, purse snatching, mugging, those crimes where people are trying to feed that habit. Our local police and our sheriffs have found themselves unable to cope with the crime . . . .

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[32] 132 CONG. REC. 27,176 (daily ed. Sept. 30, 1986) (statement of Sen. Gary Hart) ("Then along came crack-cocaine – and the high was available to all. So too, however, were the lows: The raging paranoia, the addiction rooted deep in the brain's chemical structure, and worst, the senseless deaths.").

[33] 132 CONG. REC. 26,447 (daily ed. Sept. 26, 1986) (statement of Sen. Chiles) ("[Crack] can turn promising young people into robbers and thieves, stealing anything they can to get the money to feed their habit."); 132 CONG. REC. 27,187 (daily ed. Sept. 30, 1986) (statement of Sen. Leahy) ("Crack is available to the young, and it will be in the schools this fall. I have heard stories of children as young as nine who are already crack users. The sellers also use these children as lookouts and as workers in houses that manufacture crack."); 132 CONG. REC. 944 (daily ed. Mar. 21, 1986) (statement of Rep. Rangel) ("What is most frightening about crack is that it has made cocaine widely available and affordable for abuse among our youth.").

[34] 132 CONG. REC. 22,993 (daily ed. Sept. 11, 1986) (statement of Rep. LaFalce) ("While a gram of cocaine sells for at least $100, two small pieces of crack, or enough to get three people high can be purchased in almost any American city for about $10."); 132 CONG. REC. daily ed. Sept. 26, 1986) (statement of Sen. Chiles) ("[Crack] can be bought for the price of a cassette tape, and make people into slaves.").

months for a defendant in Criminal History Category I,[35] (a guideline range that just exceeded the five-year statutory minimum for such offenses). Similarly, offenses involving 50 grams or more of crack cocaine or 5,000 grams or more of powder cocaine were assigned a base offense level (level 32) corresponding to a sentencing guideline range of 121 to 151 months for a defendant in Criminal History Category I (a guideline range that just exceeded the ten-year statutory minimum for such offenses). Crack cocaine and powder cocaine offenses for quantities above and below the mandatory minimum penalty threshold quantities were set accordingly using the same
100-to-1 drug quantity ratio.[36]

Because of the 100-to-1 drug quantity ratio, the sentencing guideline range (based solely on drug quantity) is three to over six times longer for crack cocaine offenders than powder cocaine offenders with equivalent drug quantities, depending on the exact quantity of drug involved. As a result of both the statutory and guideline differentiation between the two forms of cocaine, as well as other relevant factors examined in Chapter 4, sentences for offenses involving crack cocaine are significantly higher than those for similar offenses involving powder cocaine for any quantity of drug.

4. Simple Possession of Crack Cocaine

Congress further evidenced its intent to treat crack cocaine offenses differently than other drug offenses by enacting the Anti-Drug Abuse Act of 1988, Pub. L. 100–690, 102 Stat. 4181 (1988) [hereinafter the 1988 Act]. The 1988 Act further distinguished crack cocaine offenses from both powder cocaine and other drug offenses by creating a mandatory minimum penalty for simple possession of crack cocaine. This is the only federal mandatory minimum penalty for a first offense of simple possession of a controlled substance.

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Under the relevant statute, 21 U.S.C. § 844, possession of five grams or more of crack cocaine triggers a *minimum* sentence of five years in prison; simple possession of any quantity of any other controlled substance (except flunitrazepan) by a first-time offender – including powder cocaine – is a misdemeanor offense punishable by a *maximum* of one year in prison. In other words, pursuant to the 1988 Act, an offender who simply possesses five grams of crack cocaine receives the same five-year mandatory minimum penalty as a serious trafficker of other drugs. The guidelines subsequently were amended to incorporate the statutory mandatory minimum for simple possession of crack cocaine. (*See* USSG §2D2.1(b)(1) (Unlawful Possession, Attempt or Conspiracy).)

C. RECENT ACTION CONCERNING FEDERAL COCAINE SENTENCING POLICY

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[35] Defendants with no prior convictions or minimal prior convictions are assigned to Criminal History Category I.

[36] *See* Chapter 7 of the 1995 Commission Report for a more thorough explanation of how sentences are determined under the federal sentencing guidelines.

In 1994, in the Omnibus Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322 (Sept. 12, 1994), Congress directed the Commission to prepare a report and recommendations on cocaine and federal sentencing policy. In response, on February 28, 1995 the Commission issued a comprehensive report to Congress in which it unanimously recommended that changes be made to the current cocaine sentencing scheme, including a reduction in the 100-to-1 drug quantity ratio between powder cocaine and crack cocaine. (*See* 1995 Commission Report.)

On May 1, 1995, by a four-to-three vote, the Commission submitted to Congress an amendment to the sentencing guidelines that, among other things, would have equalized the guideline penalties for powder cocaine and crack cocaine offenses based solely on drug quantity.[37] In support of the amendment, the Commission concluded that:

> [i]nstead of differential treatment of crack and powder cocaine defendants based solely on the form of the drug involved in the offense . . . fairer sentencing would result from guideline enhancements that are targeted to the particular harms that are associated with some, but not all, crack offenses. Harm-specific guideline enhancements will better punish the most culpable offenders and protect the public from the most dangerous offenders . . . .[38]

Accordingly, the amendment also included more severe sentencing enhancements for weapon involvement for all drug trafficking offenses and would have authorized an upward departure for bodily injury to any victim.[39]

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Pursuant to 28 U.S.C. § 994(p), however, Congress passed and the President signed legislation disapproving the guideline amendment.[40] The legislation further directed the Commission to submit to Congress new recommendations regarding changes to the statutes and sentencing guidelines for the unlawful manufacturing, importing, exporting, and trafficking of cocaine, and specified that the recommendations "shall reflect" 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."[41] The directive also required the Commission to consider several other factors, specifically:

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[37] *See* 60 Fed. Reg. 25,074 (May 10, 1995.) Pursuant to 28 U.S.C. § 994(p), these amendments were slated to take effect November 1, 1995.

[38] *Id*. at 25,076.

[39] *Id.* at 25,077-78.

[40] *See* Pub. L. No. 104–38, 109 Stat. 334 (Oct. 30, 1995).

[41] *Id*.

(1) high-level wholesale cocaine traffickers, organizers, and leaders of criminal activities generally should receive longer sentences than low-level retail cocaine traffickers and those who played a minor or minimal role in such criminal activity;

(2) if the Government establishes that a defendant who trafficks in powder cocaine has knowledge that such cocaine will be converted into crack cocaine prior to its distribution to individual users, the defendant should be treated at sentencing as though the defendant had trafficked in crack cocaine; and

(3) enhanced sentences generally should be imposed on a defendant who, in the course of a drug offense –

(i) murders or causes serious bodily injury to an individual;

(ii) uses a dangerous weapon (including a firearm);

(iii) involves a juvenile or a woman who the defendant knows or should know to be pregnant;

(iv) engages in a continuing criminal enterprise or commits other criminal offenses in order to facilitate the defendant's drug trafficking activities;

(v) knows, or should know, that the defendant is involving an unusually vulnerable victim;

(vi) restrains a victim;

(vii) distributes cocaine within 500 feet of a school;

(viii) obstructs justice;

(ix) has a significant prior criminal record;

(x) is an organizer or leader of drug trafficking activities involving five or more persons.

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In response to the 1995 directive, the Commission issued another report to Congress on cocaine and federal sentencing policy in April 1997. (*See* 1997 Commission Report.) The Commission unanimously reiterated the core finding of the 1995 Commission Report that the 100-to-1 drug quantity ratio for crack cocaine and powder cocaine offenses is not justified. The Commission set forth for congressional consideration a range of alternatives for revisions to the federal statutory penalty scheme for cocaine offenses. Unlike in 1995, the Commission did not promulgate a revised drug trafficking guideline in conjunction with the report of recommended

statutory penalty changes.

D. METHODOLOGY

In completing this updated report, the Commission: (1) considered the general purposes of sentencing that Congress referred to in the Sentencing Reform Act *(see* 18 U.S.C. § 3553(a)(2)); (2) identified specific congressional concerns regarding cocaine use and trafficking, particularly those set forth in Pub. L. 104–38, the legislation disapproving the Commission's 1995 amendment, and in the legislative history of the relevant penalty provisions, particularly of the 1986 Act; and (3) evaluated the current federal cocaine penalty structure in light of those general and specific objectives. The Commission (i) reviewed findings from recent research literature, (ii) conducted an extensive empirical study of federal cocaine offenders sentenced in fiscal year 2000 and compared those results with the findings in the 1995 Commission Report, (iii) surveyed state cocaine sentencing policies, (iv) solicited and weighed public comment on the appropriateness of the current federal cocaine sentencing policy (*see* 67 Fed. Reg. 2456),[42] and (v) held three public hearings at which it received testimony from the scientific and medical communities, federal and local law enforcement officials, criminal justice practitioners, academics, and civil rights organizations.[43]

The organization of the remainder of this updated report is as follows:

Chapter 2 describes the methods of use, effects, and addictive potential of crack cocaine and powder cocaine.

Chapter 3 describes the effects of prenatal cocaine exposure.

Chapter 4 analyzes Commission data on cocaine offenses. Appendix C explains the methodology used in this chapter.

Chapter 5 provides the demographics of federal cocaine offenders.

Chapter 6 describes trends in cocaine use, price, and supply.

Chapter 7 reviews state sentencing policies and examines the interaction of state penalties with federal prosecutorial decisions.

Chapter 8 presents the Commission's findings and recommendations regarding federal

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[42] 67 Fed. Reg. 2456 (Jan. 17, 2002). *See* Appendix D for a summary of written public comments. Copies of the public comment are on file with the U.S. Sentencing Commission and are available upon request.

[43] *See* Appendix E for a summary of public hearing written statements. Copies of the written statements are on file with the U.S. Sentencing Commission and are available upon request.

cocaine sentencing policy. Appendix A shows how the Commission's recommendations to Congress, if adopted, might be implemented in the sentencing guidelines, and Appendix B provides the sentencing impact of the Commission's recommendations.

Appendices D and E summarize the written public comment and written public hearing testimony, respectively.

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Chapter 2

FORMS OF COCAINE, METHODS OF USE, EFFECTS, AND DEPENDENCY

Chapter 2 of the 1995 Commission Report contained a thorough overview of the forms, methods of use, and pharmacology of cocaine. This section summarizes the core findings in that chapter and updates some of the research most relevant to evaluating federal cocaine sentencing policy. Specific findings include:

- Crack cocaine and powder cocaine are both powerful stimulants and both forms of cocaine cause identical effects.

- Although both are addictive, the risk of addiction may be greater for crack cocaine than for powder cocaine because of their different methods of usual administration (smoking crack cocaine versus typically snorting powder cocaine).

A. POWDER COCAINE AND CRACK COCAINE MANUFACTURING, PURITY, AND DOSES

Powder cocaine is a white, powdery substance produced by dissolving coca paste into hydrochloric acid and water. Potassium salt is then added to this mixture, followed by ammonia. Prior to distribution, powder cocaine often is "cut" or diluted by adding one or more adulterants (sugars, local anesthetics, other drugs, or other inert substances) and typically is sold to users by the gram.[44] As a result, the purity level of powder cocaine can vary considerably.[45]

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Crack cocaine is made by dissolving powder cocaine in a solution of sodium bicarbonate and water. The solution is boiled and a solid substance separates from the boiling substance. After the solid substance is dried, the crack cocaine is broken into "rocks," each representing a single dosage typically weighing from one-tenth to one-half of a gram.[46] One gram of pure powder cocaine under ideal conditions will convert to approximately 0.89 grams of crack

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[44] *See* USSC, *supra* note 1, ch. 2, at 12; *see also* memo from Toni P. Teresi, Chief, Office of Congressional Affairs, Drug Enforcement Administration, to Stacy Shrader, Office of Rep. Asa Hutchinson, at 3 (March 8, 2001).

[45] *Id.*

[46] *See* Bernard Segal & Lawrence K. Duffy, *Biobehavioral effects of psychoactive drugs, in* DRUGS OF ABUSE AND ADDICTION: NEUROBEHAVIORAL TOXICOLOGY 25-64 (R.J.M. Niesink et al. eds., 1999); Teresi, *supra* note 44, at 1, 2.

cocaine. The processes used by some crack cocaine manufacturers, however, introduce impurities resulting in a product less pure than the powder cocaine from which it was derived.[47]

With respect to doses, one gram of powder cocaine generally yields five to ten doses, whereas one gram of crack cocaine yields two to ten doses. Thus, 500 grams of powder cocaine – the quantity necessary to trigger the five-year statutory minimum penalty – yields between 2,500 and 5,000 doses. In contrast, five grams of crack cocaine – the quantity necessary to trigger the five-year statutory minimum penalty – yields between ten and fifty doses.[48]

B. COCAINE'S EFFECTS, ADDICTIVENESS, AND METHODS OF ADMINISTRATION

Cocaine is a powerful anesthetic and the most potent stimulant of natural origin to the central nervous system.[49] In any form (coca leaves, coca paste, powder cocaine, freebase cocaine, and crack cocaine) cocaine produces the same types of physiological[50] and psychotropic[51] effects once the drug reaches the brain.[52] Taken in small amounts (up to 100 milligrams), cocaine usually makes the user feel euphoric, energetic, talkative, and mentally alert. The short-term physiological results are similar to those produced by other central nervous system stimulants (*e.g.,* amphetamine) and include constricted blood vessels, dilated pupils, increased temperature, increased heart rate, and elevated blood pressure. Large amounts (several hundred milligrams or more) intensify the user's high, but also may cause the user to experience tremors, vertigo, muscle twitches, paranoia, toxic reactions, and in rare instances, sudden death (from cardiac arrest or seizures followed by respiratory arrest).[53]

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[47] *See* USSC, *supra* note 1, at 14.

[48] *Id.* at 85-86.

[49] Written statement by Glen R. Hanson, PhD, DDS, Acting Director of the National Institute on Drug Abuse (NIDA), to the U.S. Sentencing Commission, regarding Drug Penalties (Feb. 25, 2002).

[50] Physiological effects are the effects of cocaine on human organs (*e.g.,* organs of the central nervous system).

[51] Psychotropic effects are the effects of cocaine on the human mind.

[52] Hanson, *supra* note 49. Cocaine blocks the dopamine re-uptake at the neuronal level, flooding the area of the brain called the ventral tegmental area and ultimately stimulating one of the brain's key pleasure centers. National Institute of Health (NIH), NIDA Research Report Series, *Cocaine Abuse and Addiction*, Pub. No. 99–4342, (May 1999). http://www.165.112.78.61/ResearchReports/Cocaine/cocaine3.html.

[53] *Id.*

Cocaine in any form also is potentially addictive.[54] Recent research reports that cocaine users can develop tolerance to the effects of cocaine, requiring the use of larger quantities to experience its intoxicating effects and causing withdrawal symptoms if use is abruptly discontinued.[55] Cocaine's powerful psychotropic effects can cause the user to use the drug compulsively, regardless of any adverse effects that may occur. The drug can create vivid, long-term psychological memories that form the basis for subsequent craving for the drug, which contributes significantly to cocaine's abuse potential.[56]

The risk and severity of addiction to drugs generally – including cocaine – are significantly affected by the way they are administered into the body. The method of administration determines the onset, intensity, and duration of the effects from drug use. Generally the faster a drug reaches the bloodstream, the faster it is distributed throughout the body, and the faster the user feels the desired effects.[57] The intensity of a drug's effects generally is greater for methods of administration that deliver it most rapidly to the brain. However, the methods of administration that bring about the most intense effects – smoking and injection – also have the shortest duration, thereby necessitating repeated doses to sustain its effects and increasing the likelihood the user will develop an addiction. Smoking (inhalation) and injection typically produce quicker onset, shorter duration, and more intense effects from drug use than snorting and therefore increase the risk of addiction. (*See* Diagram 1.)[58]

With respect to cocaine, powder cocaine is soluble in water and therefore can be ingested, injected orally, or snorted, but not readily smoked. When administered by injection, powder cocaine produces effects with similar onset, duration, and intensity as crack cocaine (described below).[59] Most typically, however, powder cocaine is snorted.[60] When administered

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[54] *Id; see also*, Karen Bolla et al., *The Neuropsychiatry of Chronic Cocaine Abuse,* 10 JOURNAL OF NEUROPSYCHIATRY AND CLINICAL NEUROSCIENCES 280-289 (1998) for discussion of a neurobiological mechanism of addiction to cocaine.

[55] Segal & Duffy, *supra* note 46.

[56] USSC*, supra* note 1, at 23 (citing F. Gawin & E. Ellinwood, *Cocaine and Other Stimulants: Actions, Abuse and Treatment,* 318 NEW ENGLAND JOURNAL OF MEDICINE 1173 (1988)).

[57] *Id.* at 14-15. Absorption of a drug into the bloodstream is regulated by two primary factors: the amount of blood flowing to the site of ultimate absorption (*e.g.*, the stomach or small intestine) and the surface area over which the drug is absorbed. The surface area for snorting is limited to the nasal mucosa in the nasal cavity. In contrast, when a drug is smoked, it is absorbed by air sacs in the lungs that have a surface area the size of a football field.

[58] *See* Hanson, *supra* note 49.

[59] *Id.*

[60] Data from the National Household Survey indicate that of the approximately 1.5 million persons 12 years of age and older who reported cocaine use in the past month, 2.8 percent reported using

by snorting through nasal passages, the drug appears in the blood three to five minutes after use, with about 30 to 60 percent of the drug being absorbed into the bloodstream. Maximum physiological effects occur within 40 minutes, and maximum psychotropic effects occur within 20 minutes. Physiological and psychotropic effects fade in 45 to 60 minutes.

By comparison, crack cocaine is not soluble in water and therefore can only be readily smoked. Smoking the drug produces a quicker onset, shorter duration, and more intense effects than snorting powder cocaine.[61] Facilitated by the large surface area of the lungs' air sacs, smoked crack cocaine is absorbed almost immediately into the bloodstream and reaches the brain in only 19 seconds, with 30 to 60 percent of the drug being absorbed into the bloodstream. Maximum physiological effects from smoking crack cocaine are attained within two minutes; maximum psychotropic effects occur within one minute. These effects are experienced for a shorter period of time than for snorted powder cocaine, *i.e.* between 10 and 20 minutes, but are similar to injected powder cocaine.

In sum, although 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 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.

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the drug by injection. NIDA Communication, 1999 National Household Survey on Drug Abuse (March 18, 2002).

[61] *See* Hanson, *supra* note 49.

Chapter 2

FORMS OF COCAINE, METHODS OF USE, EFFECTS, AND DEPENDENCY

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- Although both are addictive, the risk of addiction may be greater for crack cocaine than for powder cocaine because of their different methods of usual administration (smoking crack cocaine versus typically snorting powder cocaine).

A. POWDER COCAINE AND CRACK COCAINE MANUFACTURING, PURITY, AND DOSES

Powder cocaine is a white, powdery substance produced by dissolving coca paste into hydrochloric acid and water. Potassium salt is then added to this mixture, followed by ammonia. Prior to distribution, powder cocaine often is "cut" or diluted by adding one or more adulterants (sugars, local anesthetics, other drugs, or other inert substances) and typically is sold to users by the gram.[44] As a result, the purity level of powder cocaine can vary considerably.[45]

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Crack cocaine is made by dissolving powder cocaine in a solution of sodium bicarbonate and water. The solution is boiled and a solid substance separates from the boiling substance. After the solid substance is dried, the crack cocaine is broken into "rocks," each representing a single dosage typically weighing from one-tenth to one-half of a gram.[46] One gram of pure powder cocaine under ideal conditions will convert to approximately 0.89 grams of crack

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[44] *See* USSC, *supra* note 1, ch. 2, at 12; *see also* memo from Toni P. Teresi, Chief, Office of Congressional Affairs, Drug Enforcement Administration, to Stacy Shrader, Office of Rep. Asa Hutchinson, at 3 (March 8, 2001).

[45] *Id.*

[46] *See* Bernard Segal & Lawrence K. Duffy, *Biobehavioral effects of psychoactive drugs, in* DRUGS OF ABUSE AND ADDICTION: NEUROBEHAVIORAL TOXICOLOGY 25-64 (R.J.M. Niesink et al. eds., 1999); Teresi, *supra* note 44, at 1, 2.

cocaine. The processes used by some crack cocaine manufacturers, however, introduce impurities resulting in a product less pure than the powder cocaine from which it was derived.[47]

With respect to doses, one gram of powder cocaine generally yields five to ten doses, whereas one gram of crack cocaine yields two to ten doses. Thus, 500 grams of powder cocaine – the quantity necessary to trigger the five-year statutory minimum penalty – yields between 2,500 and 5,000 doses. In contrast, five grams of crack cocaine – the quantity necessary to trigger the five-year statutory minimum penalty – yields between ten and fifty doses.[48]

B. COCAINE'S EFFECTS, ADDICTIVENESS, AND METHODS OF ADMINISTRATION

Cocaine is a powerful anesthetic and the most potent stimulant of natural origin to the central nervous system.[49] In any form (coca leaves, coca paste, powder cocaine, freebase cocaine, and crack cocaine) cocaine produces the same types of physiological[50] and psychotropic[51] effects once the drug reaches the brain.[52] Taken in small amounts (up to 100 milligrams), cocaine usually makes the user feel euphoric, energetic, talkative, and mentally alert. The short-term physiological results are similar to those produced by other central nervous system stimulants (*e.g.,* amphetamine) and include constricted blood vessels, dilated pupils, increased temperature, increased heart rate, and elevated blood pressure. Large amounts (several hundred milligrams or more) intensify the user's high, but also may cause the user to experience tremors, vertigo, muscle twitches, paranoia, toxic reactions, and in rare instances, sudden death (from cardiac arrest or seizures followed by respiratory arrest).[53]

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[47] *See* USSC, *supra* note 1, at 14.

[48] *Id.* at 85-86.

[49] Written statement by Glen R. Hanson, PhD, DDS, Acting Director of the National Institute on Drug Abuse (NIDA), to the U.S. Sentencing Commission, regarding Drug Penalties (Feb. 25, 2002).

[50] Physiological effects are the effects of cocaine on human organs (*e.g.,* organs of the central nervous system).

[51] Psychotropic effects are the effects of cocaine on the human mind.

[52] Hanson, *supra* note 49. Cocaine blocks the dopamine re-uptake at the neuronal level, flooding the area of the brain called the ventral tegmental area and ultimately stimulating one of the brain's key pleasure centers. National Institute of Health (NIH), NIDA Research Report Series, *Cocaine Abuse and Addiction*, Pub. No. 99–4342, (May 1999). http://www.165.112.78.61/ResearchReports/Cocaine/cocaine3.html.

[53] *Id.*

Cocaine in any form also is potentially addictive.[54] Recent research reports that cocaine users can develop tolerance to the effects of cocaine, requiring the use of larger quantities to experience its intoxicating effects and causing withdrawal symptoms if use is abruptly discontinued.[55] Cocaine's powerful psychotropic effects can cause the user to use the drug compulsively, regardless of any adverse effects that may occur. The drug can create vivid, long-term psychological memories that form the basis for subsequent craving for the drug, which contributes significantly to cocaine's abuse potential.[56]

The risk and severity of addiction to drugs generally – including cocaine – are significantly affected by the way they are administered into the body. The method of administration determines the onset, intensity, and duration of the effects from drug use. Generally the faster a drug reaches the bloodstream, the faster it is distributed throughout the body, and the faster the user feels the desired effects.[57] The intensity of a drug's effects generally is greater for methods of administration that deliver it most rapidly to the brain. However, the methods of administration that bring about the most intense effects – smoking and injection – also have the shortest duration, thereby necessitating repeated doses to sustain its effects and increasing the likelihood the user will develop an addiction. Smoking (inhalation) and injection typically produce quicker onset, shorter duration, and more intense effects from drug use than snorting and therefore increase the risk of addiction. (*See* Diagram 1.)[58]

With respect to cocaine, powder cocaine is soluble in water and therefore can be ingested, injected orally, or snorted, but not readily smoked. When administered by injection, powder cocaine produces effects with similar onset, duration, and intensity as crack cocaine (described below).[59] Most typically, however, powder cocaine is snorted.[60] When administered

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[54] *Id; see also*, Karen Bolla et al., *The Neuropsychiatry of Chronic Cocaine Abuse,* 10 JOURNAL OF NEUROPSYCHIATRY AND CLINICAL NEUROSCIENCES 280-289 (1998) for discussion of a neurobiological mechanism of addiction to cocaine.

[55] Segal & Duffy, *supra* note 46.

[56] USSC*, supra* note 1, at 23 (citing F. Gawin & E. Ellinwood, *Cocaine and Other Stimulants: Actions, Abuse and Treatment,* 318 NEW ENGLAND JOURNAL OF MEDICINE 1173 (1988)).

[57] *Id.* at 14-15. Absorption of a drug into the bloodstream is regulated by two primary factors: the amount of blood flowing to the site of ultimate absorption (*e.g.*, the stomach or small intestine) and the surface area over which the drug is absorbed. The surface area for snorting is limited to the nasal mucosa in the nasal cavity. In contrast, when a drug is smoked, it is absorbed by air sacs in the lungs that have a surface area the size of a football field.

[58] *See* Hanson, *supra* note 49.

[59] *Id.*

[60] Data from the National Household Survey indicate that of the approximately 1.5 million persons 12 years of age and older who reported cocaine use in the past month, 2.8 percent reported using

by snorting through nasal passages, the drug appears in the blood three to five minutes after use, with about 30 to 60 percent of the drug being absorbed into the bloodstream. Maximum physiological effects occur within 40 minutes, and maximum psychotropic effects occur within 20 minutes. Physiological and psychotropic effects fade in 45 to 60 minutes.

By comparison, crack cocaine is not soluble in water and therefore can only be readily smoked. Smoking the drug produces a quicker onset, shorter duration, and more intense effects than snorting powder cocaine.[61] Facilitated by the large surface area of the lungs' air sacs, smoked crack cocaine is absorbed almost immediately into the bloodstream and reaches the brain in only 19 seconds, with 30 to 60 percent of the drug being absorbed into the bloodstream. Maximum physiological effects from smoking crack cocaine are attained within two minutes; maximum psychotropic effects occur within one minute. These effects are experienced for a shorter period of time than for snorted powder cocaine, *i.e.* between 10 and 20 minutes, but are similar to injected powder cocaine.

In sum, although 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 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.

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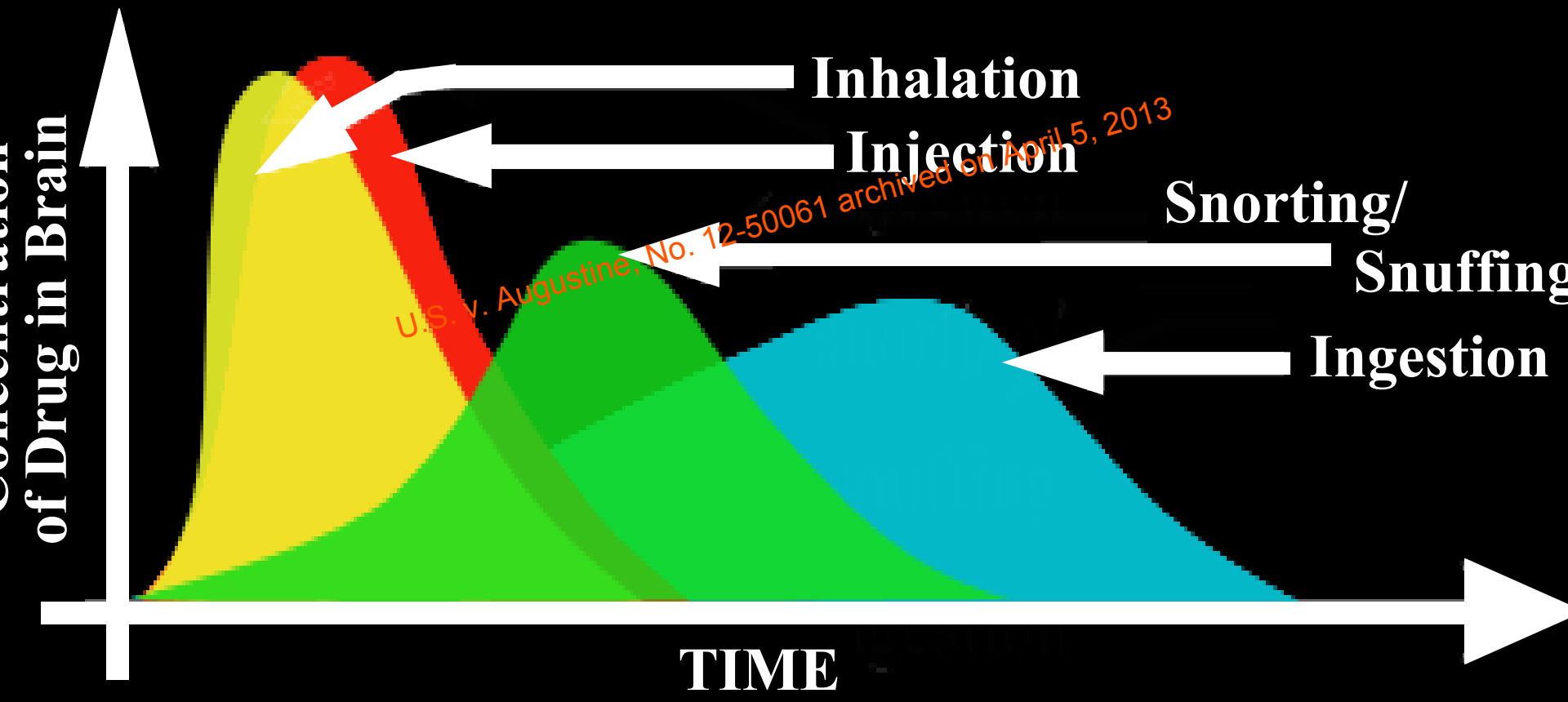
the drug by injection. NIDA Communication, 1999 National Household Survey on Drug Abuse (March 18, 2002).

[61] *See* Hanson, *supra* note 49.

Time Course for Drug Distribution in Brain Based on Route of Drug Administration



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Chapter 3

THE EFFECTS OF PRENATAL COCAINE EXPOSURE

A. INTRODUCTION

Chapter 3 of the 1995 Commission Report reviewed the research on the effects of prenatal cocaine exposure on children. This section updates the 1995 report by reviewing more recent literature and research. To provide a broader context in which to assess the effects of prenatal cocaine exposure, this section also reviews briefly the research on exposure to other substances. Important findings described below include:

- The negative effects of prenatal exposure to crack cocaine are identical to the effects of prenatal exposure to powder cocaine.
- The negative effects of prenatal cocaine exposure are significantly less severe than previously believed.
- Attributing negative effects to prenatal cocaine exposure is significantly complicated by other maternal and environmental factors.

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With respect to these findings, prenatal exposure to crack cocaine and powder cocaine produces similar types and degrees of negative effects, but other maternal and environmental factors contribute significantly to these negative effects.[62] In addition, research indicates that the negative effects from prenatal exposure to cocaine, in fact, are significantly less severe than previously believed. The Acting Director of the National Institute on Drug Abuse (NIDA), Dr. Glen Hanson, reports:

> [R]esearchers have found the effects not to be as devastating as originally believed, especially for children up to six years of age, [although t]here does appear to be an association between prenatal cocaine exposure and some developmental outcomes (*e.g.* attention and emotional regulation) . . . .[63]

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[62] Written statement by Ira J. Chasnoff, M.D., President, Children's Research Triangle, to the U.S. Sentencing Commission regarding Drug Penalties (Feb. 25, 2002) at 2. "[T]he home environment is *the* critical determinant of the child's ultimate outcome. . . . The drug-exposed child most often comes from a neglectful family lifestyle filled with factors that interfere with the parents' attempts at effective child rearing and participation in the growth and development of their children. . . . Further, the social environment of many addicted women is one of chaos and instability, which has an even greater negative impact on children." (emphasis added.)

[63] Hanson, *supra* note 49, at 1.

Dr. Deborah Frank, Professor of Pediatrics at Boston University School of Medicine, concurs:

> [T]here are small but identifiable effects of prenatal cocaine/crack exposure on certain newborn outcomes. . . . There is less consistent evidence of negative long-term effects up to the age of six years, which is the oldest age for which published information is available.[64]

Frank reports further that the negative effects associated with prenatal cocaine exposure (*e.g.*, premature birth, low birth weight, deficient motor skills) do not differ from the effects of prenatal exposure to other drugs, both legal and illegal, and in fact are "very similar to those associated with prenatal tobacco exposure."[65] Frank's recent analysis concluded:

> Among children aged 6 years or younger, there is no convincing evidence that prenatal cocaine exposure is associated with developmental toxic effects that are different in severity, scope, or kind from the sequelae of multiple other risk factors. Many findings once thought to be specific effects of in utero cocaine exposure are correlated with other factors, including prenatal exposure to tobacco, marijuana, or alcohol, and the quality of the child's environment.[66]

NIDA estimates that approximately 221,000 women used an illegal drug at least once during pregnancy, representing 5.5 percent of all pregnancies. Of these, approximately 45,000 women used cocaine (about 1.1% of all pregnancies).[67]

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[64] Written statement by Deborah A. Frank, M.D., to the U. S. Sentencing Commission, regarding Drug Penalties (Feb. 25, 2002) at 1. Frank concludes that "crack baby syndrome" is a "grotesque media stereotype, not a scientific diagnosis." She states, "You may recall the initial predictions of catastrophic effects of prenatal cocaine or crack exposure on newborns – including inevitable prematurity, multiple birth defects, 'agonizing withdrawal with catlike cry,' early death and profound long term disabilities for the survivors. The actual data are quite different."

[65] *Id.*

[66] Frank et al., *Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure: A Systematic Review,* 285 JOURNAL OF AMERICAN MEDICAL ASSOCIATION 1613-1625, 1613 (March 28, 2001).

[67] Hanson, *supra* note 49, at 6.

B. DIFFICULTIES ASSOCIATED WITH DRUG RESEARCH

Assessing the effect of prenatal drug exposure typically involves identifying pregnant women who use drugs before delivery (the *study* group) and gathering information on their drug use, lifestyle, and other relevant factors. At the same time a group of women are identified to serve as a comparison (the *control* group). Ideally, the women comprising the control group are identical in *every* way to the women in the study group, except in the use of the drug of interest. Although it is impossible to find a control group that perfectly matches the study group, attempts are made to match them on as many characteristics as possible, including demographic, economic, social, and geographic factors.

Although the women in the control group do not use the drug being studied, they are not excluded for using other drugs. Cocaine users may also smoke marijuana, drink alcohol, or smoke tobacco. In cocaine research, women who use marijuana, alcohol, or tobacco could be included in the control group, but women who use cocaine (or other drugs similar to cocaine) must be excluded from the control group.

During the typical maternal hospital stay, professionals who are unaware of whether the mother is in the study group or in the control group examine the newborn. Data are collected on the infant's weight, height, head circumference, gestational age,[68] APGAR score,[69] Ponderal Index,[70] and measures of the infant's reflexes and responsiveness to the environment. Study group data are then compared to control group data.

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The presence and extent of other risk factors in both the study group and the control group make it difficult to attribute an irrefutable association between prenatal cocaine exposure and negative effects. These risk factors often "travel together," masking any specific relationship between the drug of interest and negative effects.[71] In his testimony, Dr. Hanson cautioned that:

Estimating the full extent of the consequences of maternal drug abuse is difficult,

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[68] "Gestational age is the number of weeks from the last menstrual period. On average, babies are born at 40 weeks gestational age. Full term babies are considered to be 37-42 weeks gestational age." http://www.dartmouth.edu/~obgyn/mfm/PatientEd/ICN_Gest_age.html.

[69] The APGAR scoring system provides a standardized means by which birth attendants can assess the baby's condition at birth and includes an assessment of skin color, muscle tone, breathing attempts, heartbeat, and response to stimulus, such as a touch or a pin-prick. http://www.birthpsychology.com/messages/apgar/apgar.html.

[70] Ponderal Index is the ratio of the weight to the length of the infant.

[71] Vincent L. Smeriglio & Holly C. Wilcox, *Prenatal Drug Exposure and Child Outcome: Past, Present, Future* (Barry M. Lester, guest ed.), 26 CLINICS IN PERINATOLOGY 1-16, 7 (March 1999).

> and determining the specific hazard of a particular drug to the fetus and newborn is even more problematic given that most drug users use more than one substance. Factors such as the amount and number of all drugs used, inadequate prenatal care, socio-economic status, poor maternal nutrition, other health problems, and exposure to sexually transmitted diseases are just some examples of why it is difficult to determine the exact effects of prenatal drug exposure. Sorting out these confounding factors is extremely difficult, [which is] why we must be cautious in drawing causal relationships in this area, especially with a drug like cocaine.[72]

To illustrate this difficulty, Table 1 presents information from a recent cocaine study comparing pregnant cocaine users with non-users.[73] While various risk factors associated with negative effects are present in both groups, women whose cocaine use was frequent (*i.e.*, daily) were older, poorer, less likely to be married, more likely to consume other drugs, and less likely to receive adequate prenatal care, all factors which also may adversely impact the health of the newborn.[74]

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[72] Hanson, *supra* note 67; *see also*, Chasnoff, *supra* note 62.

[73] Gale A. Richardson, *Prenatal Cocaine Exposure: A Longitudinal Study of Development*, 846 ANNALS OF THE NEW YORK ACADEMY OF SCIENCES 144-152, 147 (1998).

[74] Other research has also reported differences between cocaine-using mothers and the control groups with respect to other risk factors. *See e.g.*, Robert Arendt et al., *Sensorimotor Development in Cocaine-exposed Infants*, 21 INFANT BEHAVIOR & DEVELOPMENT 627-640, Tbl 2, 633 (1998); Marylou Behnke et al., *Incidence and description of structural brain abnormalities in newborns exposed to cocaine*, 132 JOURNAL OF PEDIATRICS 291-294, 292 (Feb. 1998); Virginia Delaney-Black et al., *Teacher-Assessed Behavior of Children Prenatally Exposed to Cocaine*, 106 PEDIATRICS 782-791, Tbl 1, 787 (Oct. 2000).

Table 1
Socio-Economic and Demographic Characteristics of Frequent and Non-Using Mothers

	Frequent Users	Non-Users
Mother's Age	27 years	24 years
Percent Married	10%	26%
Family Income (monthly)	$459	$720
Percent Adequate Prenatal Care	29%	54%
Percent using Tobacco	85%	45%
Percent using Alcohol	88%	56%
Percent using Marijuana	64%	18%
Percent using Other Illicit Drugs	15%	3%

C. EFFECTS AT BIRTH

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Recent research[75] typically does not distinguish between prenatal exposure to crack cocaine and powder cocaine because of the indistinguishable pharmacologic effects once the drug is ingested.[76] The findings from the cocaine research are mixed with some studies finding an association between prenatal exposure and reduced gestational age, birth weight and length,

[75] While several older studies compared the effects of crack cocaine and powder cocaine, they often suffered from methodological problems that limited their use. The more recent research examined in this chapter typically includes women who had used either crack cocaine or powder cocaine during pregnancy but then combines them into a single cocaine exposure group, making no comparisons between the two forms of the drug.

[76] Pharmacologic effects refer to the bio-chemical effects of the drug. Frank, *supra* note 64, ("[T]here are no physiologic indicators that show to which form of the drug the newborn was exposed. The biologic thumbprints of exposure to these two substances in utero are identical."); Chasnoff, *supra* note 62, at 1 ("The physiology of [powder] cocaine and crack are the same, and the changes in the dopamine receptors in the fetal brain are the same whether the mother has used [powder] cocaine or crack").

and head circumference.[77] Other researchers,[78] however, have not found these differences in cocaine exposed infants, after controlling for other fetal risk factors.[79]

Prenatal cocaine exposure has also been associated with deficiencies in reflexes, autonomic stability, motor scores, EEG sleep patterns, and regulation of state (a precursor to alertness).[80] Recent research also has found a relationship between the quantity of drugs consumed during pregnancy and the degree of negative effects on the infant.[81]

A recent study by Fonda Davis Eyler demonstrated a relationship between shorter length and smaller head circumference and the amount of cocaine used during pregnancy.[82] After controlling for other risk factors, the study found no difference in other important measures of infant health such as gestational age, Ponderal Index, birth weight and length between infants prenatally exposed to cocaine and non-exposed controls. Although the study focused on the effects of cocaine exposure generally, these findings may be ascribed in great part to crack cocaine use because crack cocaine users comprised 75 percent of the study group.

D. LONG-TERM EFFECTS

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[77] Arendt et al., *supra* note 74, at 627-640, studying a different cohort than in the 1999 research, did not find a significant difference in birth weight or head circumference; David A. Bateman et al., *The Effects of Intrauterine Cocaine Exposure in Newborns*, 83 AMERICAN JOURNAL OF PUBLIC HEALTH 190-193 (Feb. 1993); Gale A. Richardson et al., *Growth of Infants Prenatally Exposed to Cocaine/Crack: Comparison of a Prenatal Care and a No Prenatal Care Sample*, 104 PEDIATRICS (Aug. 1999). http://www.pediatrics.org/cgi/content/full/104/2/e18.html; Robert Arendt et al., *Motor Development of Cocaine-exposed Children at Age Two Years*, 103 PEDIATRICS 86-91 (Jan. 1999).

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[78] Virginia Delaney-Black et al., *Prenatal Cocaine and Neonatal Outcome: Evaluation of Dose-Response Relationship*, 98 PEDIATRICS 735 (Oct. 1996); *see also* Fonda Davis Eyler et al., *Birth Outcome From a Perspective, Matched Study of Prenatal Crack/Cocaine Use: I. Interactive and Dose Effects on Health and Growth*, 101 PEDIATRICS 229-236 (Feb. 1998); Richardson, *supra* note 73.

[79] In her written statement to the USSC, Dr. Frank noted that these deficits in birth weight, length, and head circumference are similar to those found after prenatal exposure to one pack of cigarettes per day. Frank, *supra* note 64.

[80] Richardson, *supra* note 73; *also see* Fonda Davis Eyler et al., *Birth Outcome From a Perspective, Matched Study of Prenatal Crack/Cocaine Use: II. Interactive and Dose Effects on Neurobehavioral Assessment*, 101 PEDIATRICS 237 (Feb. 1998) (cocaine-exposed infants are less alert and responsive and have decreased regulation of state).

[81] The amount of cocaine used during pregnancy was inversely related to length at birth, head circumference (Eyler et al., *supra* note 78), birth weight, APGAR score, motor behavior, and regulation of state (Delaney-Black et al., *supra* note 78).

[82] Specifically, heavier average drug use during the first and third trimesters, and over the full term of the pregnancy, was correlated with length at birth, and heavier use during the second and third trimesters was correlated with smaller head circumference. (Eyler et al., *supra* note 78).

There are no published long-term studies that differentiate between prenatal exposure to crack cocaine and prenatal exposure to powder cocaine on children's development.[83] Recent research on prenatal exposure to cocaine generally indicates that the long-term negative effects of prenatal cocaine exposure do not differ from the long-term negative effects of prenatal exposure to other substances, both legal and illegal.

Studying the long-term effects of prenatal drug exposure poses additional challenges for researchers, including the difficulty of tracking often transient families for long periods of time. In addition, children exposed to drugs prenatally have an increased likelihood of living in a household of a substance abuser and being passively or directly exposed to drugs. These children also are subject to other risk factors such as poor nutrition, low socioeconomic status, and inadequate health care. The ongoing presence of these risk factors may have as great or an even greater influence than the effect of prenatal drug exposure on children's subsequent growth, performance, or behavior.[84]

To demonstrate that children prenatally exposed to cocaine are more likely to be exposed to other risk factors after birth, Table 2 compares the group of women described in Table 1 three years after giving birth. Specifically, Table 2 compares drug use three years after birth for women who were "frequent" cocaine users during pregnancy to women who were non-users during pregnancy. Women classified as "frequent" users during pregnancy used cocaine, marijuana, and tobacco at substantially greater rates three years after delivery than non-users did during pregnancy. These women also were more likely to be heavy alcohol users. Environmental factors also varied for the two groups. The homes of the "frequent" cocaine users were found to be less stimulating and less organized.[85]

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[83] Frank, *supra* note 64.

[84] Drug-exposed children often experience neglectful family lifestyles, social environments that are often chaotic and unstable, and poor family and social support systems. Poverty often exacerbates these conditions. Chasnoff, *supra* note 62.

[85] Richardson, *supra* note 73.

Table 2
Maternal Substance Use Three Years After Birth
of Frequent Cocaine Users and Non-Users

	Frequent Users	Non-Users
Cocaine	28%	3%
Marijuana	24%	17%
Tobacco	76%	45%

A number of researchers have followed children prenatally exposed to cocaine for several years after birth. For children at one year of age, Richardson found no relationship between prenatal cocaine exposure and weight, length, or head circumference.[86] The study did, however, find deficiencies in motor development and temperament, including unadaptability, excessive persistence on test tasks, greater fussiness, less responsiveness, and shorter attention spans.

For children at two years of age, the Arendt study found significant differences in tests for fine and gross motor skills in the children exposed to cocaine, particularly in the areas of hand use and eye-hand coordination.[87] Recently published research of this group found significant cognitive deficits at this age in a group who were heavily exposed prenatally to cocaine.[88]

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For children at three years of age, Richardson's cohort still demonstrated no differences in weight or height. However, Richardson did find smaller average head circumference, poorer performance on intelligence tests, and more behavioral problems. Examiners also rated these children as having shorter attention spans, being less focused and more restless, and more likely to attempt to distract the examiner. Richardson concluded that her study's results indicated consistent deficits in the central nervous system of children exposed to cocaine. She adds, however, that this is "the same pattern of [central nervous system] deficits [found] in our earlier studies of prenatal alcohol and marijuana use."[89]

For children at four years of age, Hallam Hurt reported no significant differences on intelligence quotient tests between children exposed to cocaine and the comparison group, after

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[86] *Id.*

[87] Arendt et al., *supra* note 77 (1999).

[88] Lynn T. Singer et al., *Cognitive and Motor Outcomes of Cocaine-Exposed Infants*, 287 JAMA 1952-1960 (April 17, 2002 reprint).

[89] Richardson, *supra* note 73, at 147, 150.

controlling for relevant confounding factors.[90] The authors noted that over 90 percent of both the study group and the control group were severely socio-economically disadvantaged and scored below average, and suggest that the effects of poverty "may have overwhelmed any effect of in utero cocaine exposure on children's [intelligence test] scores."[91]

For children four to six years of age, Chasnoff found that prenatal cocaine exposure has an indirect relationship with intelligence, but home environment is an essential intervening factor. Specifically, problems associated with prenatal cocaine exposure are mitigated in home environments rated as more adequate and exacerbated in homes rated as less adequate environments. Comparing six-year old children who were prenatally exposed to cocaine with control children whose mothers used neither alcohol nor illicit drugs, this study found that prenatal cocaine exposure was not directly related to lower intelligence scores. Living in a poorer quality environment after prenatal exposure, however, was directly related to lower intelligence scores.[92]

In contrast to the indirect relationship between prenatal cocaine exposure and intelligence scores, Chasnoff found that prenatal exposure has a direct effect on later childhood behavior problems such as managing impulses, frustration, tension, and arousal. The study notes, however, that these women were heavy cocaine users and most also used alcohol, tobacco, or marijuana. As a result, the study was unable to isolate the effects of prenatal exposure to cocaine from the effects of prenatal exposure to other substances.[93]

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E. PRENATAL EXPOSURE TO OTHER SUBSTANCES

Research on the impact of prenatal exposure to other substances, both legal and illegal, generally has reported similar negative effects. For example, prenatal tobacco exposure has been associated with deficits in stature, cognitive development, educational achievement, problems in temperament, and behavioral adjustment.[94]

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[90] Hallam Hurt et al., *Children with In Utero Cocaine Exposure Do Not Differ From Control Subjects on Intelligence Testing*, 151 ARCHIVES OF PEDIATRICS & ADOLESCENT MEDICINE 1237-1241 (Dec. 1997).

[91] *Id*. at 1240.

[92] Ira J. Chasnoff et al., *Prenatal Exposure to Cocaine and Other Drugs: Outcome at Four to Six Years*, 846 ANNALS OF THE NEW YORK ACADEMY OF SCIENCES 314-328 (1998).

[93] *Id.*

[94] D. Rush & K. R. Callahan, *Exposure to Passive Cigarette Smoking and Child Development: A Critical Review*, 562 ANNALS OF THE NEW YORK ACADEMY OF SCIENCE 74-100 (1989).

Alcohol use during pregnancy has been associated with deficits in intelligence and learning problems; difficulties with organization, problem solving, and arithmetic; and lower scores on tasks involving fine and gross motor behaviors.[95] Similar to the findings presented earlier for cocaine, a dose-response relationship between the amount of alcohol consumed and the severity of negative effects has been demonstrated. In other words, using larger amounts of alcohol are associated with deficits of greater severity.[96]

Prenatal exposure to other illegal substances also has been associated with a variety of negative effects. One long-term study assessed the impact of prenatal exposure to marijuana in a low risk, white, middle class sample, and studied this group from birth until nine to twelve years of age. Use of marijuana during pregnancy was associated with increased tremors and exaggerated startle responses at birth, lower scores on verbal ability and memory tests at later ages, deficits in sustained attention in school-aged children, and behavioral problems.[97]

As with cocaine, deficiencies associated with prenatal exposure to heroin are not consistently reported.[98] Some studies find a relationship between exposure and deficiencies in motor development as well as in some cognitive measures. However, other studies that controlled for the women's use of other drugs, lifestyles, social and economic conditions, and health do not report similar findings. Regardless of control factors, newborns of women who are addicted to heroin or maintained on methadone experience a high rate of withdrawal symptoms.[99]

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[95] Ann P. Streissguth et al., *Neurobehavioral Dose-Response Effects of Prenatal Alcohol Exposure in Humans from Infancy to Adulthood*, 562 ANNALS OF THE NEW YORK ACADEMY OF SCIENCE 145-158 (1989).

[96] *Id.* These negative effects were observed at levels of alcohol abuse by pregnant women well below the thresholds associated with a diagnosis of Fetal Alcohol Syndrome or Fetal Alcohol Effects.

[97] Peter A. Fried, *Behavioral Outcomes in Preschool and School-Age Children Exposed Prenatally to Marijuana: A Review and Speculative Interpretation, in* Behavioral Studies of Drug-Exposed Offspring: Methodological Issues in Human and Animal Research (Cora Lee Wetherington et al. eds.) Series 164 NIDA RESEARCH MONOGRAPH 242-260 (1996); *see* Fried et al., *Differential Effects on Cognitive Functioning in 9- to 12-Year Olds Prenatally Exposed to Cigarettes and Marihuana*, 20 NEUROTOXICOLOGY AND TERATOLOGY 293-306 (1998). *See also* N. L. Day et al., *Effect of Prenatal Marijuana Exposure on the Cognitive Development of Offspring at Age Three*, 16 NEUROTOXICOLOGY AND TERATOLOGY 169-175 (Mar./Apr. 1994).

[98] Karol A. Kaltenbach, *Exposures to Opiates: Behavioral Outcomes in Preschool and School-Age Children,* 164 NIDA RESEARCH MONOGRAPH 230-241 (1996).

[99] Frank, *supra* note 64, at 2 indicated that prenatal cocaine exposure, unlike prenatal opioid exposure, does not cause an identifiable withdrawal syndrome in the newborn ("[A]n experienced pediatrician can walk into any nursery and identify from across the room an infant withdrawing from opiates, but an infant exposed to cocaine or crack without opiate exposure will be clinically

Finally, prenatal exposure to amphetamine and methamphetamine is associated with negative effects such as premature birth, low birth weight, small head circumference, growth reduction, and cerebral hemorrhage. At 14 years of age, children exposed to amphetamine lagged in mathematics, language, physical training, and were more likely to be retained in grade.[100]

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indistinguishable from the other infants.”).

[100] Mark A. Plessinger, *Prenatal Exposure to Amphetamines: Risks and Adverse Outcomes in Pregnancy*, 25 OBSTETRICS & GYNECOLOGY CLINICS OF NORTH AMERICA 119-138 (March 1998).

Chapter 4

ANALYSIS OF UNITED STATES SENTENCING COMMISSION DRUG DATA

A. INTRODUCTION

This chapter updates much of the data presented in Chapter 7 of the 1995 Commission Report. The data analysis that follows supports four major conclusions:

- The majority of powder cocaine offenses and crack cocaine offenses did not involve aggravating conduct considered by many to be most egregious (*e.g.*, weapon involvement, bodily injury resulting from violence, and distribution to protected persons or in protected locations).

- The proportion of cases involving aggravated conduct generally has declined for both powder cocaine and crack cocaine offenses since 1995.

- Certain aggravating factors occurred more often in crack cocaine cases than in powder cocaine cases, but these factors still occurred in only a minority of cases.

- The majority of crack cocaine and powder cocaine offenders performed low-level trafficking functions.

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This section includes an analysis of trends in offense conduct and offender characteristics and how these trends have contributed to an increasing sentencing gap between powder cocaine and crack cocaine offenders from 1992 to 2000. (In other words, the difference between the average sentences imposed for powder cocaine and crack cocaine offenders has increased since 1992.) The data in this section are derived from the Commission's monitoring database and special Commission coding and analysis projects that were undertaken to provide a more comprehensive profile of federal cocaine offenders, their offense conduct, and sentencing outcomes.[101] A detailed explanation of the methodology appears in Appendix C.

B. BACKGROUND

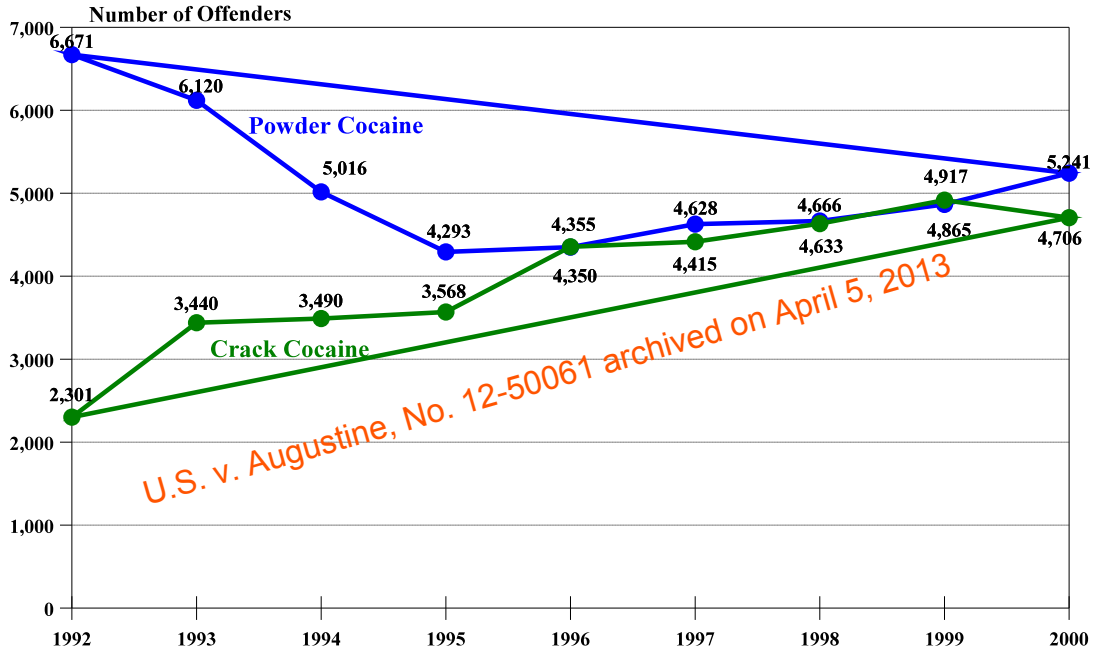
Powder cocaine and crack cocaine cases combined have accounted historically for about half of the federally sentenced drug trafficking cases, approximately 9,000 cases each year. In 1992, powder cocaine cases comprised 74 percent (6,671) of all cocaine cases and crack cocaine

[101] The Commission datafiles are from fiscal years 1992 through 2000. The special coding projects produced two datafiles, referred to as the 1995 and 2000 drug samples.

cases accounted for 26 percent (2,301) of all cocaine cases.[102] However, by 1996 approximately half of cocaine cases were powder cocaine cases (4,355) and half were crack cocaine cases (4,350). (Fig.1.)[103]

Figure 1
Trend in Number of Federal Powder Cocaine and Crack Cocaine Offenders

Fiscal Year 1992 - Fiscal Year 2000



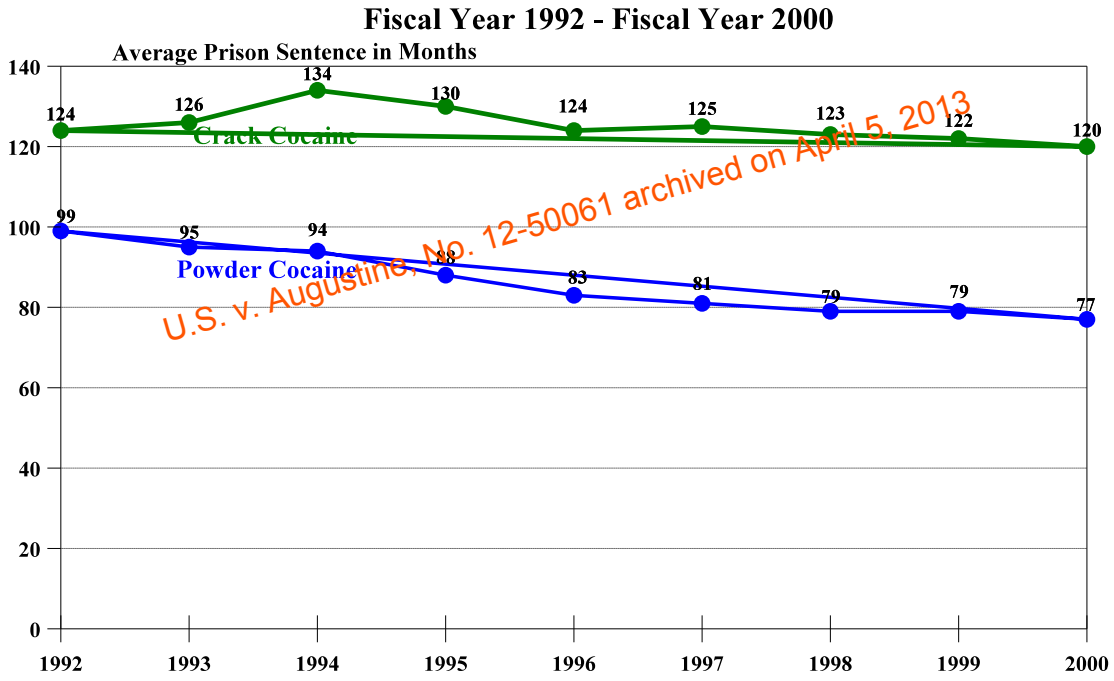
SOURCE: U. S. Sentencing Commission, 1992-2000 Datafiles, USSCFY92-USSCFY00.

[102] The Commission's monitoring data began to distinguish cases by drug type in 1992.

[103] The figure includes powder cocaine and crack cocaine cases sentenced under the primary drug trafficking guideline (USSG §2D1.1) only, and excludes drug offenses sentenced under the guidelines for other drug offenses.

Federal crack cocaine offenders consistently have received significantly longer sentences than powder cocaine offenders, and this difference has increased since 1992. Figure 2 shows the trend in average prison sentences imposed for powder cocaine and crack cocaine offenders over the last nine fiscal years (1992 through 2000).[104] Average sentences for crack cocaine offenders remained relatively stable during that period (124 months in 1992 and 120 months in 2000), while average sentences for powder cocaine offenders declined from 99 months to 77 months. As explained in more detail below, the changes in average sentences reflect, among other things, changes in the median drug quantities involved, occurrence of certain aggravating factors, the impact of certain changes in statutory and guideline sentencing policy (*e.g.*, the "safety valve"), and the criminal history of offenders.

Figure 2
Trend in Prison Sentences for Powder Cocaine and Crack Cocaine Offenders



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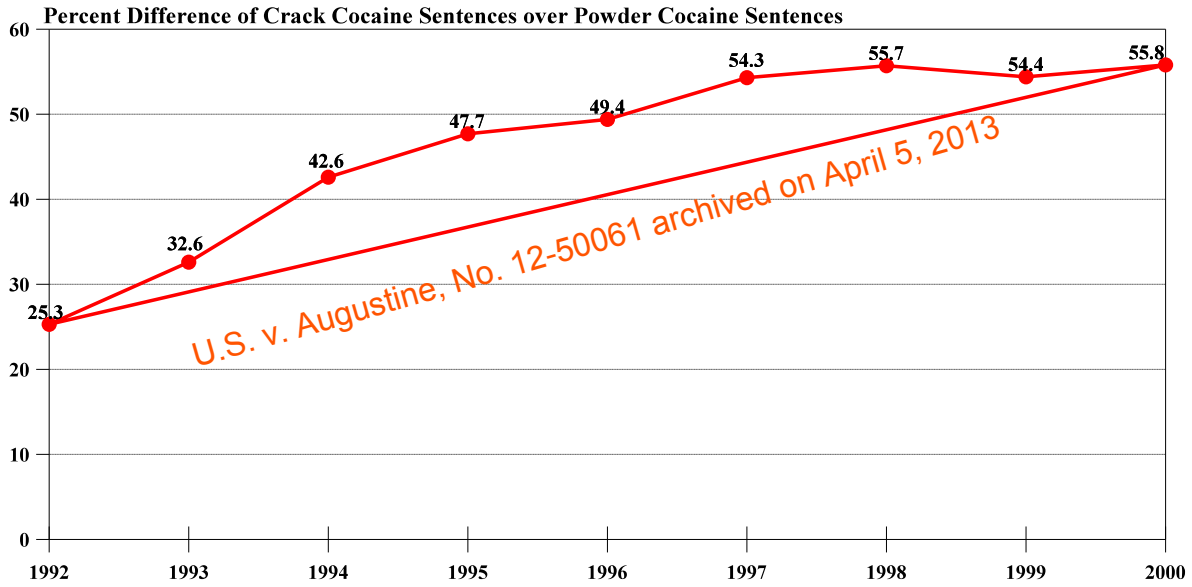
SOURCE: U. S. Sentencing Commission, 1992-2000 Datafiles, MONFY92-USSCFY00.

[104] For this analysis, fiscal year refers to the federal fiscal year. For example, fiscal year 1992 began on October 1, 1991 and ended on September 30, 1992.

Figure 3 uses the sentencing trend data from Figure 2 and displays the percent difference between powder cocaine sentences and crack cocaine sentences for the same period. The increasing gap between powder cocaine sentences and crack cocaine sentences is evident, with crack cocaine sentences 24.8 percent higher than powder cocaine sentences in 1992, and increasing to 55.8 percent higher than powder cocaine sentences in 2000.

Figure 3
Trend in Proportional Differences Between Average Powder Cocaine and Crack Cocaine Sentences

Fiscal Year 1992 - Fiscal Year 2000



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SOURCE: U. S. Sentencing Commission, 1992-2000 Datafiles, MONFY92-USSCFY00.

C. OFFENSE CHARACTERISTIC TRENDS

1. Offender Function

Using actual cases sentenced in 1995 and 2000, a special drug offense analysis conducted by the Commission assessed the function performed by drug offenders as part of the offense.[105] Offender function refers to the trafficking function performed by the offender in the drug distribution scheme (*e.g.*, supervisor, street-level dealer, carrier) and provides a measure of culpability based on the offender's role in the offense, independent of drug quantity. Offenders higher in the drug distribution chain generally are thought to be more culpable based on their greater responsibilities and higher levels of authority. Offender function categories generally represent a continuum of severity and are presented for powder cocaine offenses and crack cocaine offenses, respectively. The more serious functions appear on the left in Figures 4 and 5, and the less serious functions appear on the right.[106]

Three major conclusions may be drawn from the offender function data:

- The majority of federal cocaine offenders generally perform lower level functions.
- The concentration of offenders at lower levels has increased since 1995.
- The dominance of lower level offenders is particularly pronounced among crack cocaine offenders, two-thirds of whom were street-level dealers in 2000.

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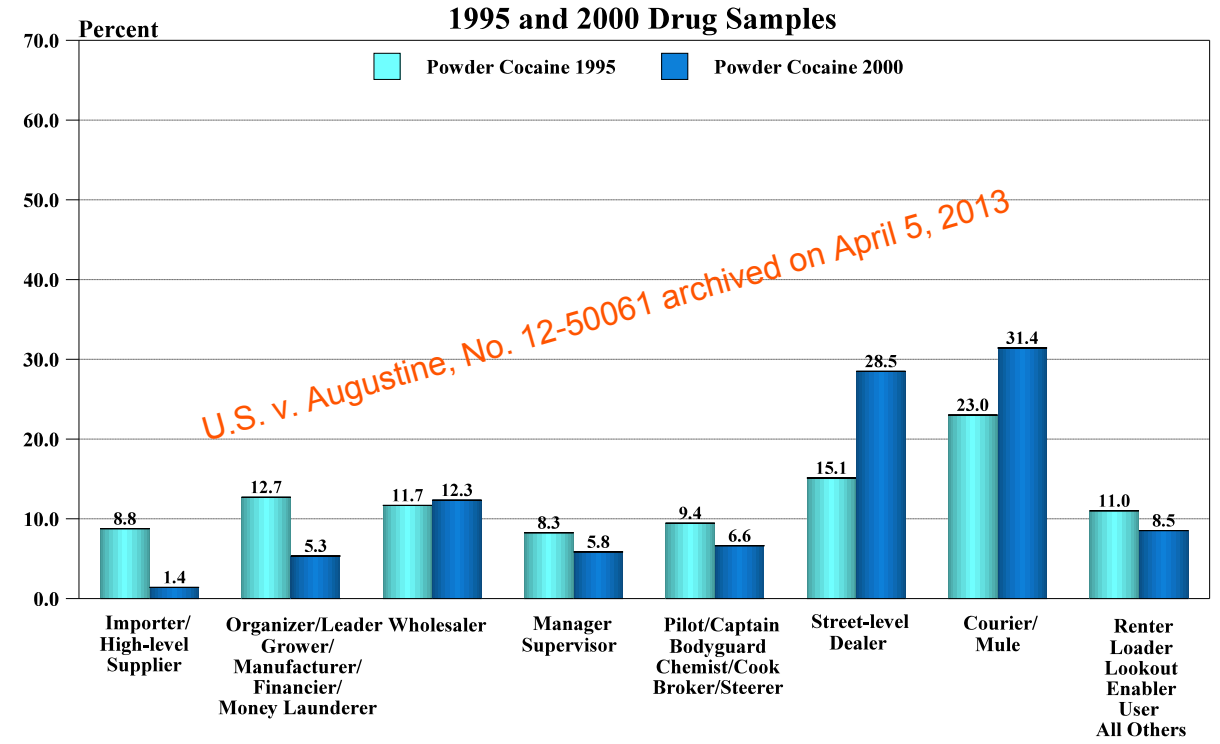
[105] The most serious function performed by the offender was determined from the narrative in the Offense Conduct section of the Presentence Report using the definitions that appear in Appendix C, table C1, at C4. The original 21 categories have been combined into eight categories to facilitate analysis and presentation.

[106] The renter/lookout/enabler category includes a number of heterogeneous functions at the lowest culpability levels. Because of the variations within this category, some anomalous findings occur.

In 1995, street-level dealers (15.1%) and couriers/mules (23.0%) combined to account for more than one-third (38.1%) of powder cocaine offenders. (Fig. 4.) In 2000, there was a substantial increase in the proportion of powder cocaine offenders in both categories, with street-level dealers (28.5%) and couriers/mules (31.4%) comprising more than half (59.9%) of all sentenced powder cocaine offenders. Conversely, there were decreases in the higher level functions. The proportion of importers/high-level suppliers dropped from 8.8 percent in 1995 to 1.4 percent in 2000. Similarly, the proportion of organizers/leaders declined from 12.7 percent to 5.3 percent.

Figure 4
Offender Function in Powder Cocaine Cases



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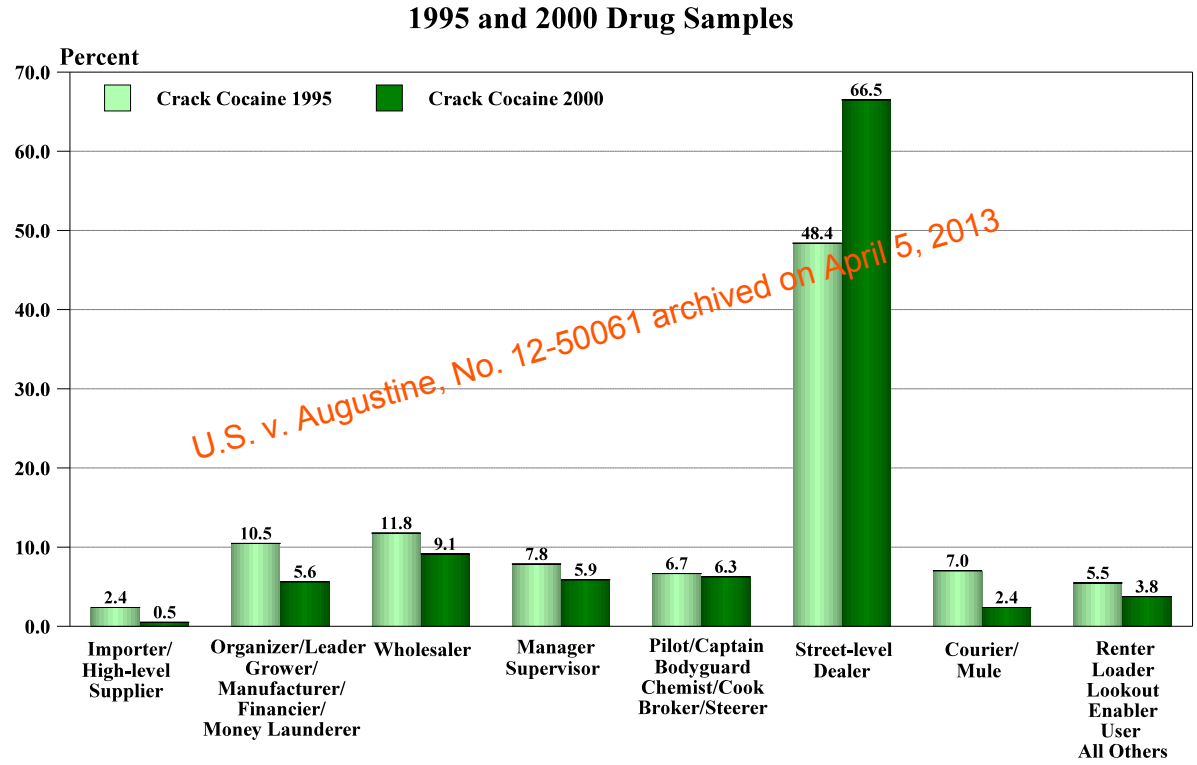
SOURCE: U. S. Sentencing Commission, 1995 and 2000 Drug Samples.

Crack cocaine offenders also were concentrated in lower level functions. In contrast to powder cocaine, however, crack cocaine offenders clustered only in the street-level dealer category. Approximately half (48.4%) of crack cocaine offenders were street-level dealers in 1995, and this proportion increased substantially to 66.5 percent by 2000. (Fig. 5.) The corresponding decrease in the proportion of higher level function offenders was less notable for crack cocaine than for powder cocaine. The greatest decrease for crack cocaine occurred in the organizer/leader category, declining from 10.5 percent to 5.6 percent between 1995 and 2000.

Figure 5
Offender Function in Crack Cocaine Cases



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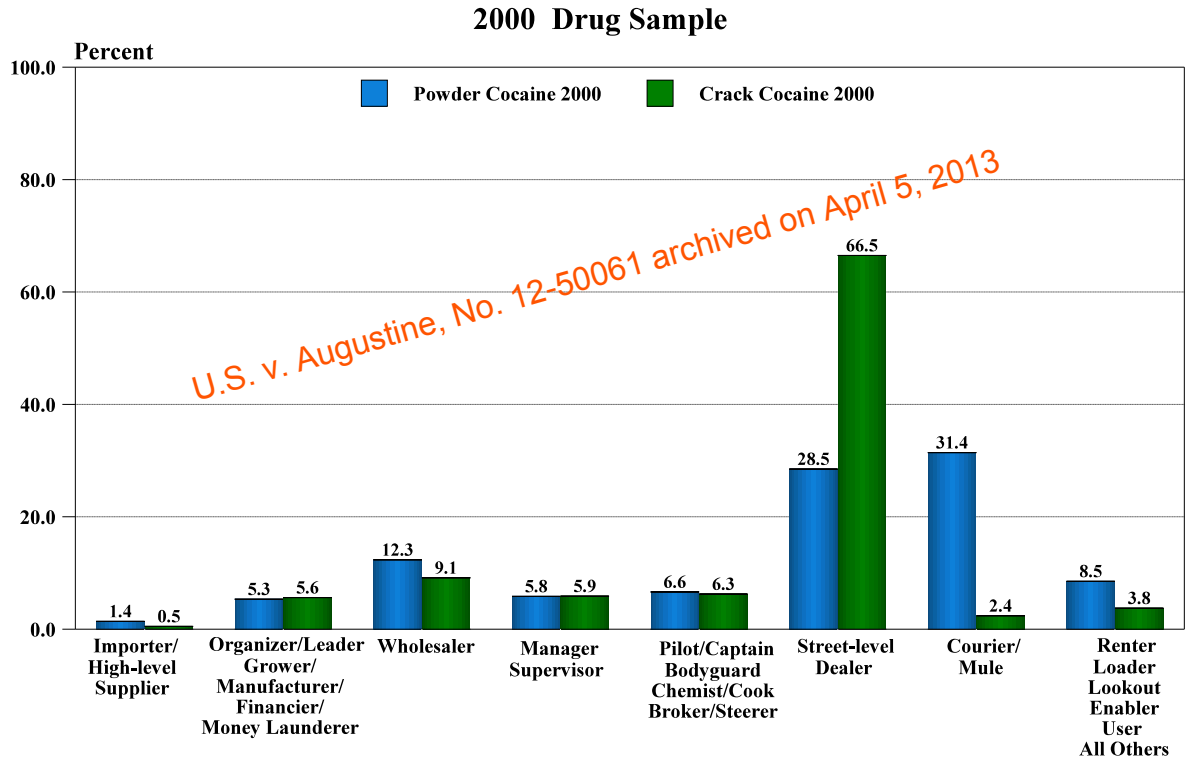
SOURCE: U. S. Sentencing Commission, 1995 and 2000 Drug Samples.

The different distributions of offender functions for powder cocaine and crack cocaine in part reflect their different trafficking patterns. Figure 6 compares offender function for powder cocaine and crack cocaine cases in the 2000 drug sample and illustrates that the largest proportion of powder cocaine offenders are couriers/mules, while the largest proportion of crack cocaine offenders are street-level dealers. The sources of the two drugs likely account for these differences. Powder cocaine is produced outside the United States and must be imported. The trafficking of powder cocaine requires couriers to bring the cocaine across the border and other mid- and low-level participants to distribute it throughout the country.[107] In contrast, with rare exception crack cocaine is produced and distributed domestically and the international and courier/mule component is largely absent.

Figure 6
Offender Function in Powder Cocaine and Crack Cocaine Cases



U.S. v. Augustine, No. 12-50061 archived on April 5, 2013

SOURCE: U. S. Sentencing Commission, 2000 Drug Sample.

[107] The 2000 drug sample includes data on whether offenders were involved personally with importation of the drug into the United States. Importation was much more common among couriers/mules of powder cocaine (58.3%) than couriers/mules of crack cocaine (10.5%, which represents only two of the 19 offenders classified as crack cocaine couriers/mules).

Significant increases in law enforcement efforts along United States borders since 1995 may have contributed to the increasing proportion of couriers/mules for powder cocaine. In the late 1990s the United States Customs Service implemented "Operation Hard Line" and the "Border Coordination Initiative" to increase interdiction efforts along the Southwest border. These initiatives included increasing personnel at the borders, using state-of-the-art equipment, and facilitating inter-agency cooperation.[108]

2. Geographic Scope of Activity

Trends in the geographic scope of powder cocaine and crack cocaine offenses also illustrate both the increased prevalence of lower level offenders and their different distribution networks. Figure 7 shows that in both years powder cocaine offenses were most common at the international level (25.1% in 1995, 33.3 % in 2000).[109] In contrast, the largest proportion of crack cocaine offenses occurred at the neighborhood and local levels. (Fig. 8.) Neighborhood and local level cases combined accounted for more than half (52.5 %) of the scope of activity in federal crack cocaine cases in 1995 and three-quarters of the scope of activity (75.3%) in 2000. Moreover, relatively few crack cocaine offenses were categorized as covering a section of the country or as having national scope (12.4% combined).

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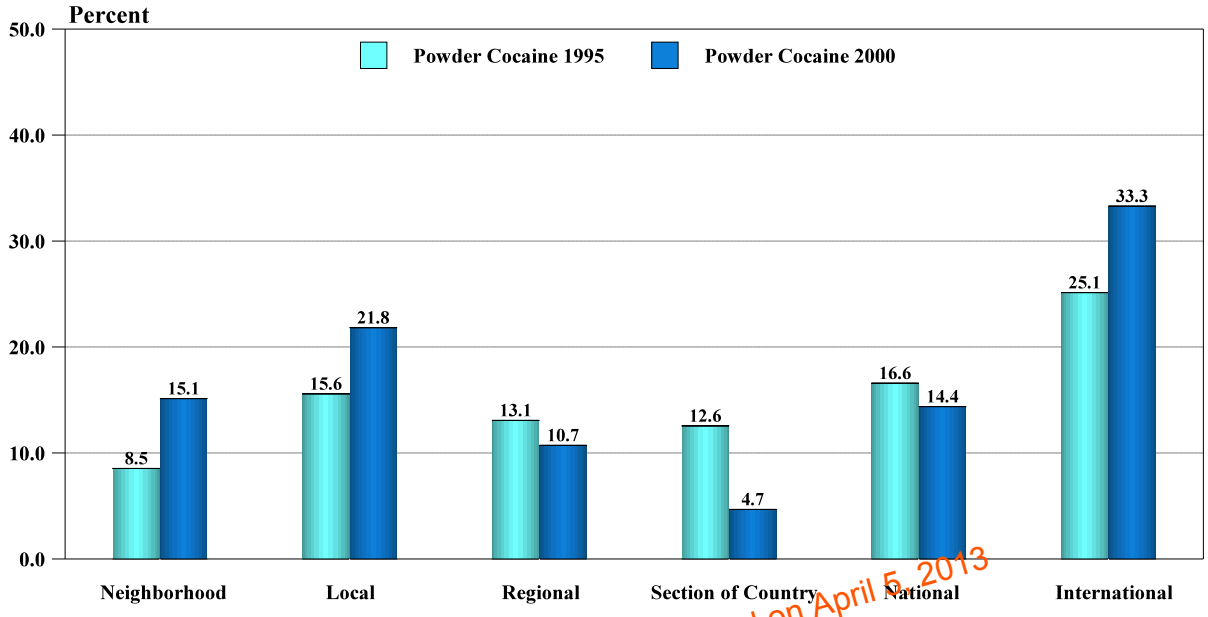
[108] The U.S. Customs Service describes Operation Hard Line as the primary focus of its drug interdiction efforts. This enforcement effort is concentrated along the entire southern tier of the United States "from Miami to San Diego and including Puerto Rico." http://www.customs.treas.gov/enforcem. The initial purpose of the Border Coordination Initiative was to "create a seamless process at and between land border points of entry . . . ." Customs describes this plan as "the most effective mechanism for coordinating the law enforcement activities of agencies operating along the Southwest Border (SWB) of the United States." http://www.customs.gov/enforcem/bord.htm.

[109] Categories of geographic activity include neighborhood (or section of a city), local (within a city or suburb), regional (within a contiguous multi-state or multi-city area), section of the country (*e.g.*, Midwest, New England), national (more than one section of the country, New York to Florida, for example), and international.

Figure 7
Scope of Geographic Activity in Powder Cocaine Offenses

1995 and 2000 Drug Samples



SOURCE: U. S. Sentencing Commission, 1995 and 2000 Drug Samples.

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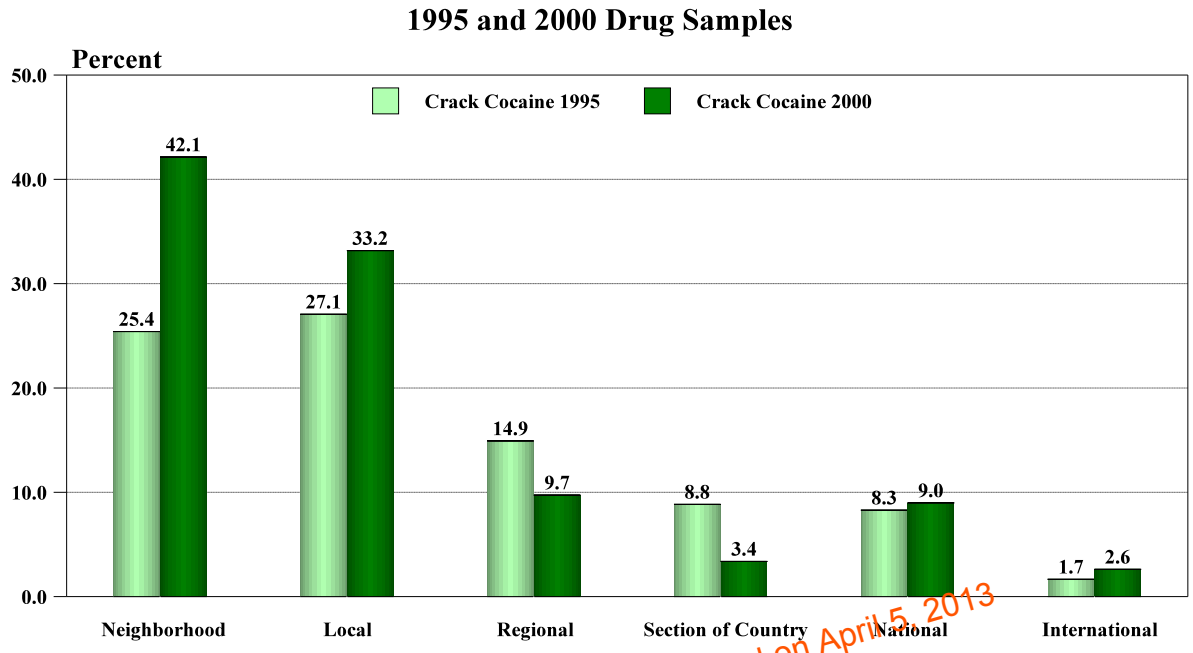
Changes in the geographic scope of offenses for both drug types between 1995 and 2000 parallel the changes in offender function previously described. Increases in powder cocaine offenses at the neighborhood (8.5% to 15.1%) and local (15.6% to 21.8%) levels, when combined, correspond to the increase in street-level dealers (15.1% to 28.5%).[110] The increased proportion of international offenses (25.1% to 33.3%) corresponds to the increase in couriers and mules (23% to 31.4%).[111]

---

[110] Street-level dealers, for both drug types, are concentrated in the neighborhood or local regions. In the 2000 drug sample, for example, 32.1 percent of powder cocaine street-level dealers operated at the neighborhood level, while 38.0 percent were at the local level.

[111] The majority (60.3%) of powder cocaine offenses involving courier/mules in the 2000 drug sample were international.

Figure 8
Scope of Geographic Activity in Crack Cocaine Offenses



SOURCE: U. S. Sentencing Commission, 1995 and 2000 Drug Samples.

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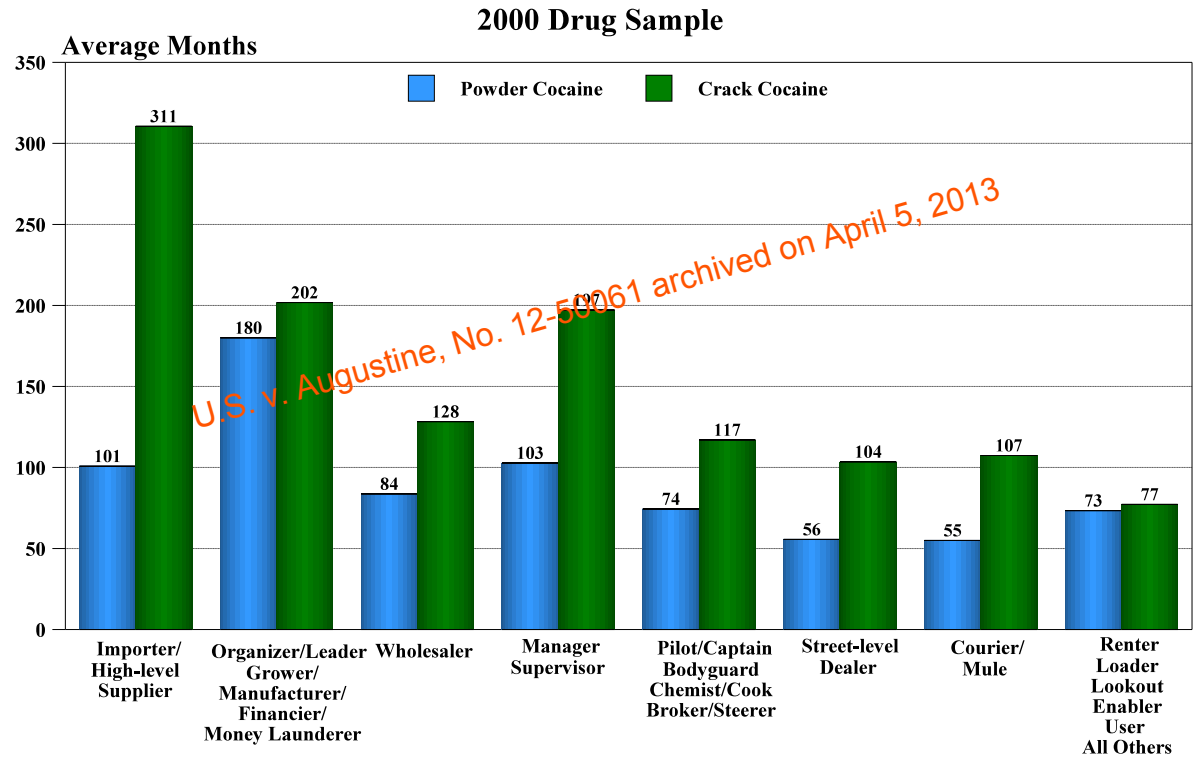
When combined, the increase in crack cocaine offenses at the neighborhood (25.4% to 42.1%) and local (27.1% to 33.2%) levels between 1995 and 2000, also parallels the increase in the proportion of street-level dealers (48.4% to 66.5%) for crack cocaine.

Assuming a relationship exists between offender function and culpability, sentence lengths by offender function would be expected to vary accordingly. Figure 9 shows the relationship between offender function and length of sentence for the 2000 drug sample. As expected, both powder cocaine and crack cocaine offenders in more serious function categories generally received longer prison sentences, and sentence lengths tended to decline with decreasing culpability levels.[112] Consistent with the data presented earlier, sentences for crack cocaine offenses are longer, often substantially so, than for powder cocaine offenses at every function category.

Figure 9
Average Length of Imprisonment by Offender Function in Powder Cocaine and Crack Cocaine Cases



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SOURCE: U. S. Sentencing Commission, 2000 Drug Sample.

[112] The relatively short average sentence for the 11 powder cocaine offenders in the importer/ high-level supplier category is the result of more than half of those offenders receiving either a downward departure (9.1%) or Substantial Assistance departure (45.4%).

The relationship between offender function and sentence length, demonstrated in Figure 9, is in great part the result of three statutory and/or guideline provisions. First, to the extent that they are held accountable for larger drug quantities, the guidelines' Drug Quantity Table generally operates to punish higher level offenders more severely than lower level offenders. Second, the guidelines contain adjustments that increase or decrease sentences by up to four offense levels (an approximate 50% change), based on whether the offender had an aggravating or mitigating role in the offense.[113] Third, offenders with high-level functions tend to be ineligible for the statutory/guideline "safety valve," which relieves offenders from the mandatory minimum sentences if they meet the criteria set forth in 18 U.S.C. § 3553(f) and reproduced in USSG §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases).

3. Drug Quantity

Drug quantity is the primary determinant of sentence length for drug offenders under the federal sentencing guidelines, and it varies considerably by offender function and between the two forms of cocaine.[114] For every offender function category, crack cocaine offenders consistently were held accountable for substantially lower drug quantities than powder cocaine offenders (Fig. 10), yet received longer average sentences, often substantially longer, as shown in Figure 9.

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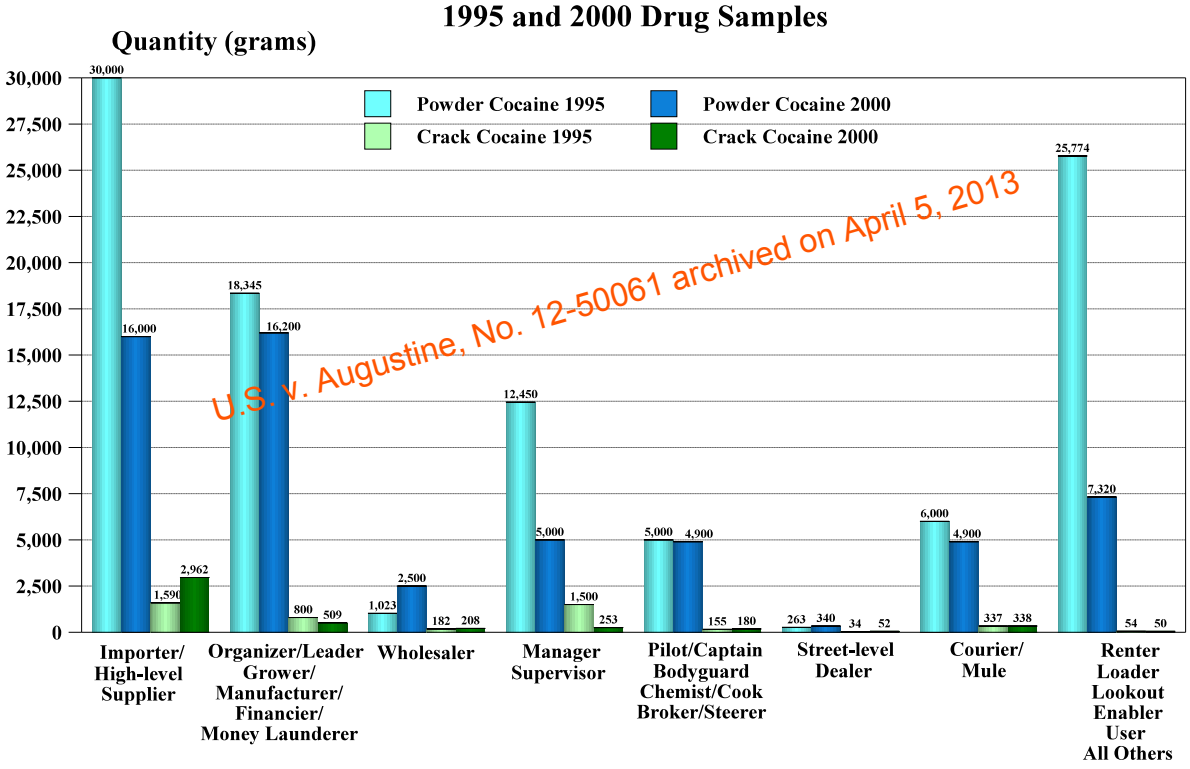
[113] *See* USSG §§3B1.1 and 3B1.2. Section 3B1.1 (Aggravating Role) applies if the defendant was an organizer, leader, manager, or supervisor of the criminal activity; §3B1.2 (Mitigating Role) applies if the defendant was a minimal or minor participant.

[114] Final offense level (offense severity) and criminal history score comprise the vertical and horizontal axes of the sentencing table, respectively. Offense level values increase or decrease based on the offender's conduct, and the intersection of these calculated values determines the sentencing guideline range for the offense. Base offense levels, the starting point for calculating federal sentences for drug trafficking offenders, are based on the Drug Quantity Table in USSG §2D1.1.

As illustrated in Figure 10, decreasing drug quantities tend to correspond to decreasing culpability, as defined by offender function. For both powder cocaine and crack cocaine, the most culpable offenders (*i.e.*, importers/high-level suppliers) generally were held accountable for greater drug quantities than lower level offenders. This is an expected result given the rules of relevant conduct provided in USSG §1B1.3. Relevant conduct rules generally operate to hold leaders of drug conspiracies accountable for the (reasonably foreseeable) drug quantities distributed during the course of the conspiracy.[115] Those offenders are not necessarily in possession of these large quantities of drugs at any given time, but they are legally responsible for them.

Figure 10
Median Drug Quantity by Offender Function in Powder Cocaine and Crack Cocaine Cases



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SOURCE: U. S. Sentencing Commission, 1995 and 2000 Drug Samples.

[115] For a thorough discussion of Relevant Conduct, *see* USSG §1B1.3 and its accompanying commentary.

The notable exception to this pattern is powder cocaine couriers/mules.[116] Despite their relatively lower levels of culpability in the overall drug conspiracy, as defined by function, powder cocaine couriers/mules are generally accountable for fairly large quantities of drugs. This anomaly occurs because couriers/mules typically have significant quantities of drugs in their possession at the time of arrest.[117]

The 100-to-1 drug quantity ratio accounts for the bulk of the sentencing gap between powder cocaine and crack cocaine offenders, but the relationship between drug quantity, offense level, and offender function has contributed to the widening of that gap. Between 1995 and 2000, the amount of crack cocaine involved increased for the most prevalent crack cocaine function category (street-level dealer), resulting in a larger proportion of crack cocaine offenders receiving higher base offense levels. In contrast, the drug quantity decreased for the most prevalent powder cocaine function category (courier/mule). Specifically, the median drug quantity for street-level crack cocaine dealers (comprising the majority of crack cocaine offenders) increased by 52.9 percent, and drug quantities for the largest group of powder cocaine offenders (couriers/mules) decreased by 18 percent. As a result, the largest proportion of crack cocaine offenders (24.5%) received a base offense level of 32 (121-151 months) while the largest proportion of powder cocaine offenders (22.6%) received a base offense level of 26 (63-78 months). (Fig. 11.)[118]

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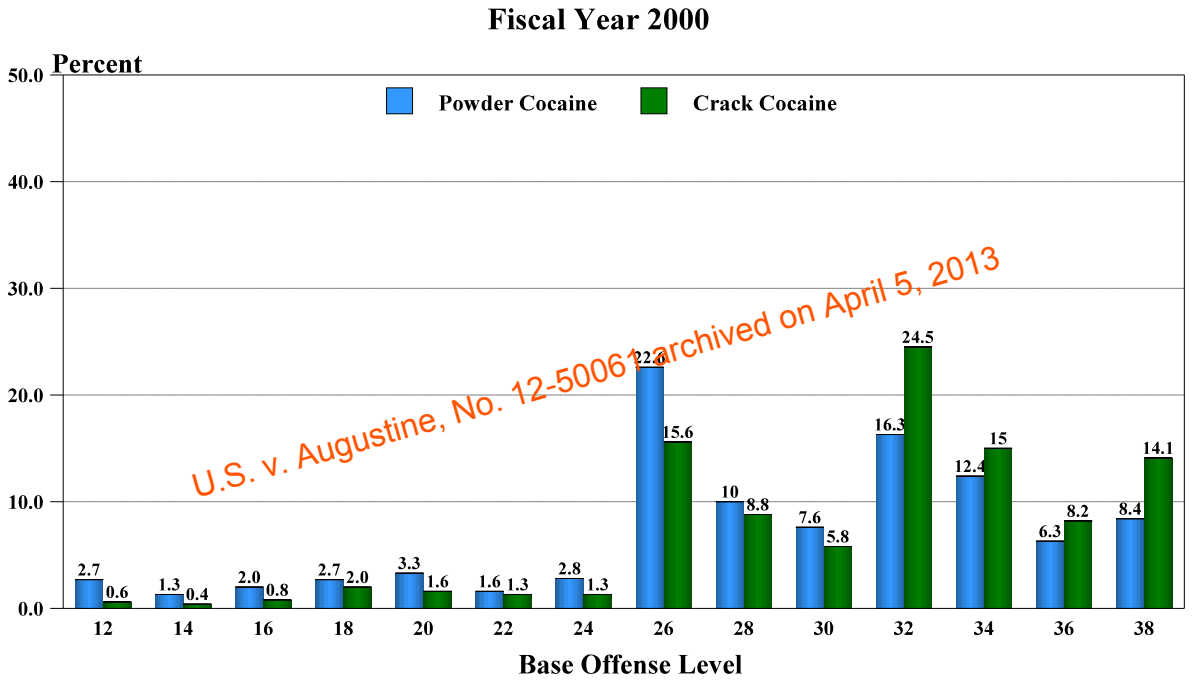
[116] There is an anomalous result for the "miscellaneous" category for powder cocaine offenders because of its heterogeneous character (renters, loaders, lookouts, enablers, users, all others). This heterogeneity prevents meaningful analysis. The drug quantities involved with the loader/off-loader category skews the median for the 2000 drug sample. The median drug amount for the loader/off-loader category alone is 41,335 grams, while the median for the remainder of the "miscellaneous" group is 3,000 grams.

[117] In the 2000 drug sample, 49.5 percent of all powder cocaine offenders engaged in a single transaction. Seventy-seven percent of powder cocaine couriers/mules engaged in a single transaction.

[118] Base offense levels of 26 and 32 correspond to the five and ten-year mandatory minimum penalties, respectively. As described in Chapter 1, the Drug Quantity Table offense levels are linked to the threshold quantities by the statutory mandatory minimums. As a result of the 100-to-1 drug quantity ratio between powder cocaine and crack cocaine, 100 times the amount of powder cocaine is required to produce equivalent guideline sentencing ranges for any given quantity of crack cocaine.

Figure 11
Distribution of Drug Guideline Base Offense Levels for Powder Cocaine and Crack Cocaine Offenders



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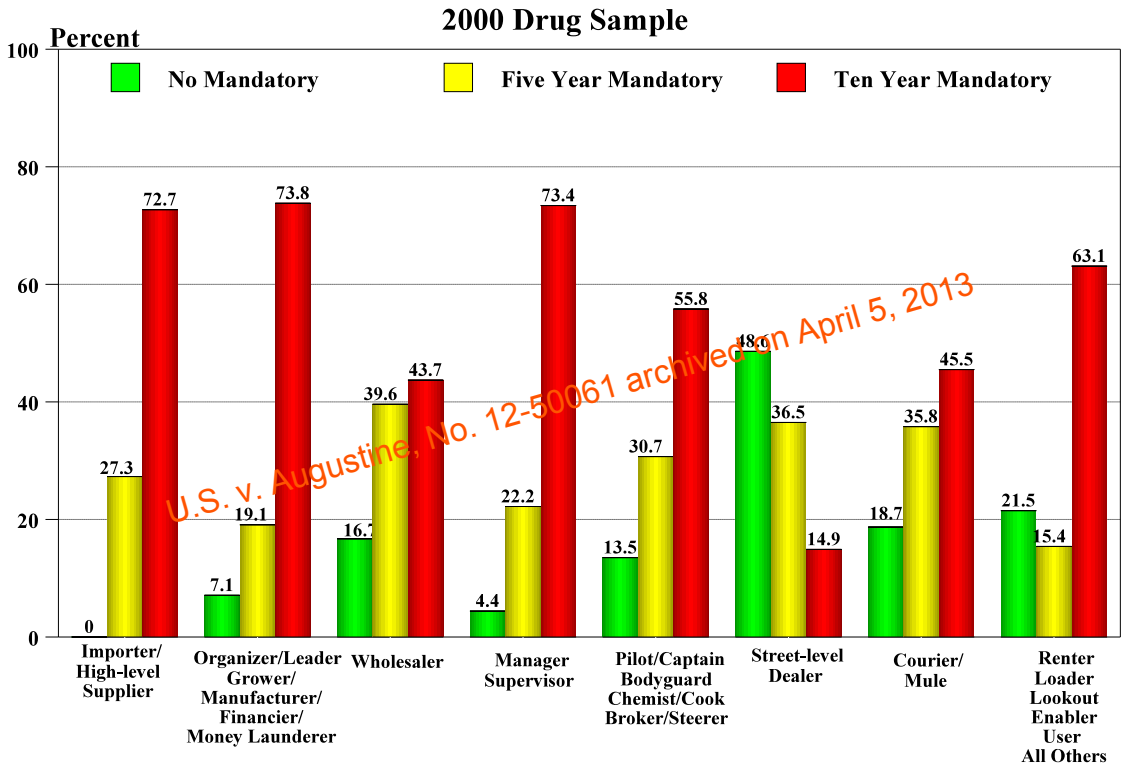
SOURCE: U. S. Sentencing Commission, 2000 Datafile, USSCFY2000.

The majority of cocaine offenders have drug convictions that expose them to the quantity-based five and ten-year mandatory minimum penalties.[119] Nearly all high-level powder cocaine offenders are eligible for those penalties, but exposure to mandatory minimum penalties does not decrease substantially with offender culpability. For example, 100 percent of the highest level powder cocaine offenders (importers/high-level suppliers) faced mandatory minimum penalties, but so did nearly 80 percent of powder cocaine couriers/mules, the most prevalent offender function for powder cocaine. (Fig. 12.)[120]

Figure 12
Powder Cocaine Offenders Exposed to
Drug Mandatory Minimums for Each Offender Function



U.S. v. Augustine, No. 12-50061 archived on April 5, 2013

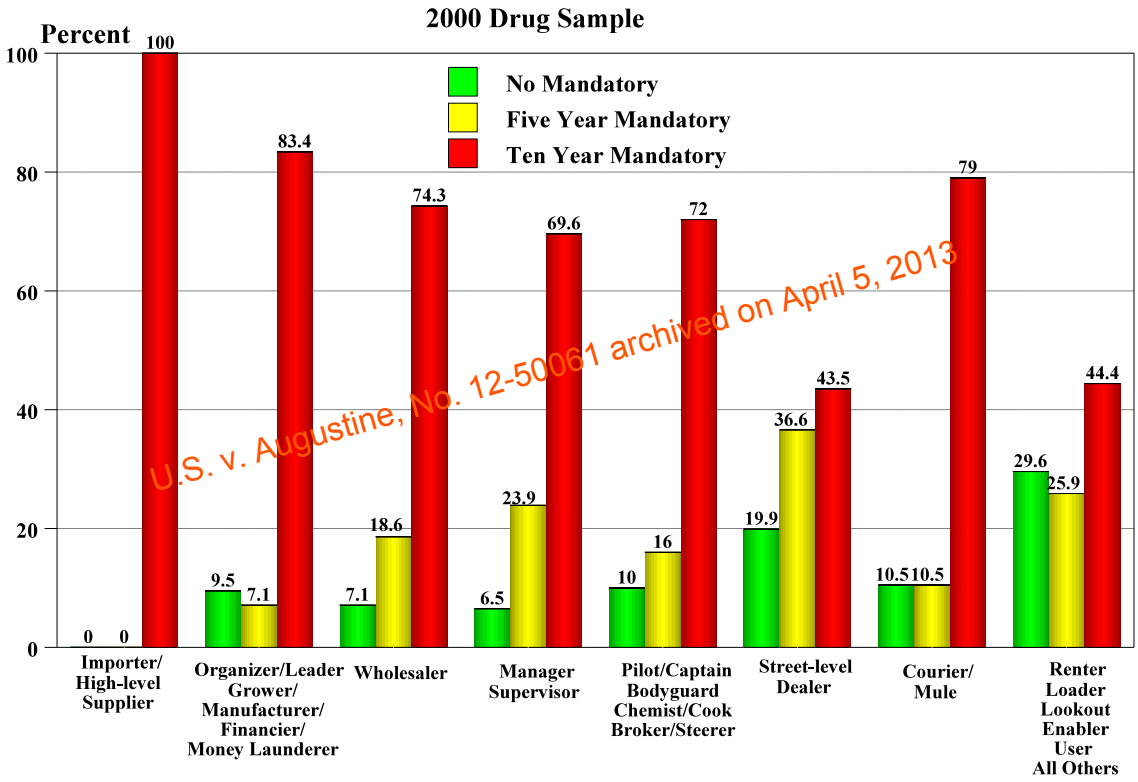
SOURCE: U. S. Sentencing Commission, 2000 Drug Sample.

[119] In 2000, 75.8% of powder cocaine offenders and 82.2% of crack cocaine offenders had convictions that exposed them to mandatory minimum penalties of five years or more based on drug quantity. These figures do not reflect offenders who received relief from the mandatory minimum penalties via substantial assistance departures or the safety valve.

[120] Offenders eligible for mandatory terms of ten years, twenty years, or life have been combined into the ten-year category to facilitate presentation.

Similarly, among crack cocaine offenders there is little distinction across function in exposure to some mandatory minimum penalties; at least 90 percent of crack cocaine offenders in the five most culpable function categories were subject to mandatory minimum penalties. (Fig. 13.) Moreover, the majority (80.1%) of street-level dealers, the most prevalent type of crack cocaine offenders, were also subject to mandatory minimum penalties.

Figure 13
Crack Cocaine Offenders Exposed to
Drug Mandatory Minimums for Each Offender Function



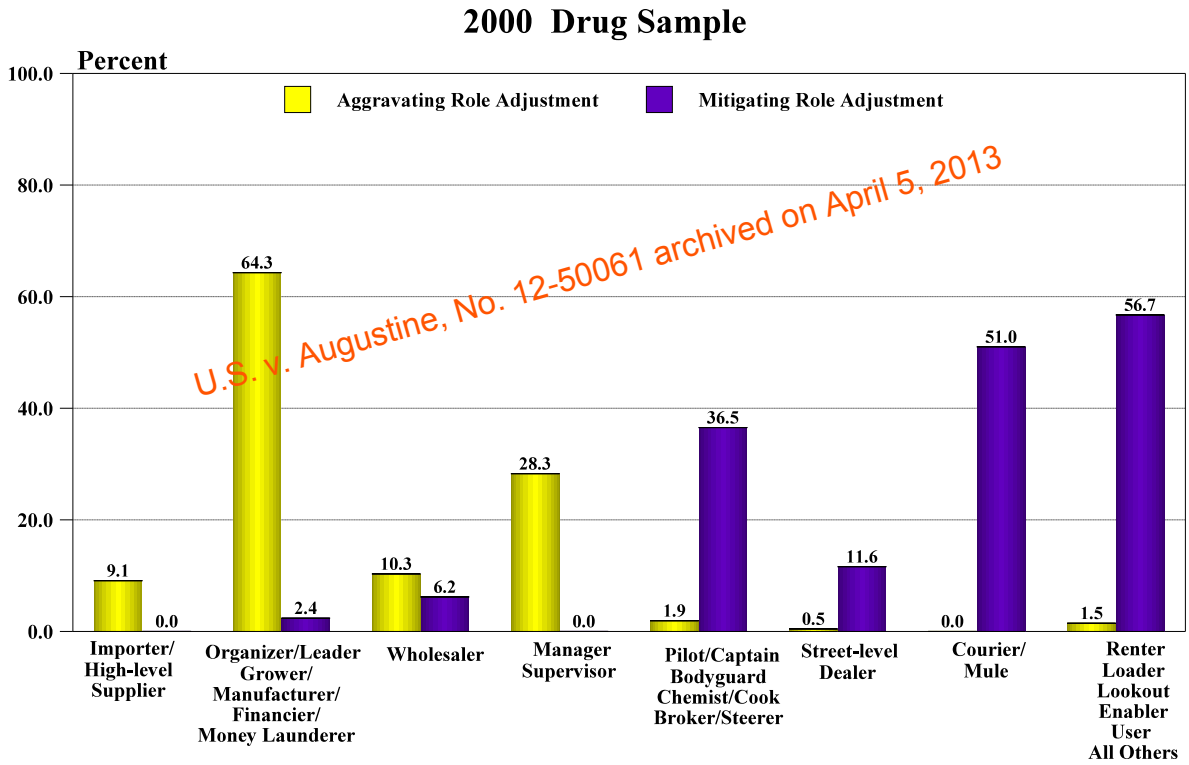
U.S. v. Augustine, No. 12-50061 archived on April 5, 2013

SOURCE: U. S. Sentencing Commission, 2000 Drug Sample.

4. Guideline Role Adjustments

Figures 14 and 15 show, as one would expect, that higher level powder cocaine and crack cocaine offenders are more likely to receive guideline aggravating role enhancements, and lower level offenders are more likely to receive guideline mitigating role reductions. Approximately two-thirds of organizers/leaders for both powder cocaine (64.3%) and crack cocaine (62.2%) received aggravating role enhancements in 2000, while downward adjustments for mitigating role for this group were nearly nonexistent.

Figure 14
Guideline Role Adjustments and
Offender Function for Powder Cocaine Cases

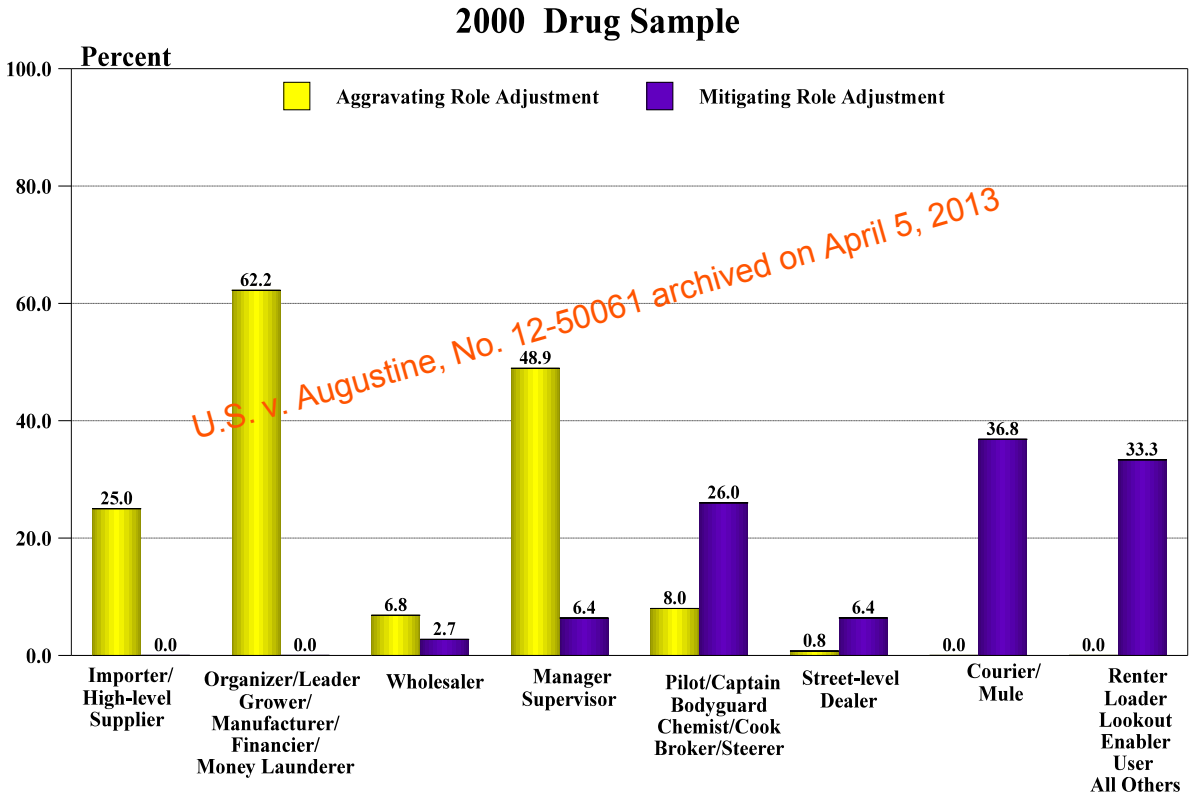


U.S. v. Augustine, No. 12-50061 archived on April 5, 2013

SOURCE: U. S. Sentencing Commission, 2000 Drug Sample.

Mitigating role reductions were less evenly distributed by drug type, but lower level offenders were still more likely to receive mitigating role reductions and rarely received aggravating role enhancements. Half of lower level powder cocaine offenders (51.0% of couriers/mules) received offense level reductions for mitigating role, and about one-third of crack cocaine offenders in the courier/mule category (36.8%) received those reductions. Interestingly, relatively few street-level dealers received role adjustments (11.6% and 6.4% of street-level powder and crack cocaine offenders, respectively, received mitigating role reductions).[121]

Figure 15
Guideline Role Adjustments and
Offender Function for Crack Cocaine Cases



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SOURCE: U. S. Sentencing Commission, 2000 Drug Sample.

[121] Role adjustments also were uncommon for offenders in the wholesaler category. This function category contains a diverse group of distributors of varying drug quantities who typically have neither leadership roles nor the lowest levels of culpability.

The relationship between offender function and guideline role adjustments is relevant to the increasing sentencing gap because powder cocaine offenders receive mitigating role reductions substantially more often than crack cocaine offenders. In 1992, 16.4 percent of powder cocaine offenders received a mitigating role reduction, compared to 9.4 percent of crack cocaine offenders. In 2000, the percentage of powder cocaine offenders receiving the reduction increased to 22.3 percent largely because over half of the offenders classified as couriers or mules, a group which increased considerably since 1995, received a mitigating role reduction. Conversely, in 2000 the percentage of crack cocaine offenders receiving a mitigating role reduction declined to 8.6 percent. This coincides with the substantial increase in street-level dealers in 2000, a group that is unlikely to receive any role adjustment.[122]

5. Other Aggravating Factors

The majority of powder cocaine and crack cocaine offenses do not involve certain other aggravating factors thought by many to be particularly egregious conduct and the prevalence of those factors for both forms of the drug has declined since 1995. These factors occur in only a minority of crack cocaine cases, although they occur more often in those cases than in powder cocaine cases.

The federal sentencing guidelines currently provide for sentence increases for some of these aggravating factors (*e.g.*, weapon possession). However, the 1995 and 2000 drug samples contain information on the presence of certain additional aggravating factors, regardless of whether guideline sentencing enhancements currently cover such conduct or were applied, if available.

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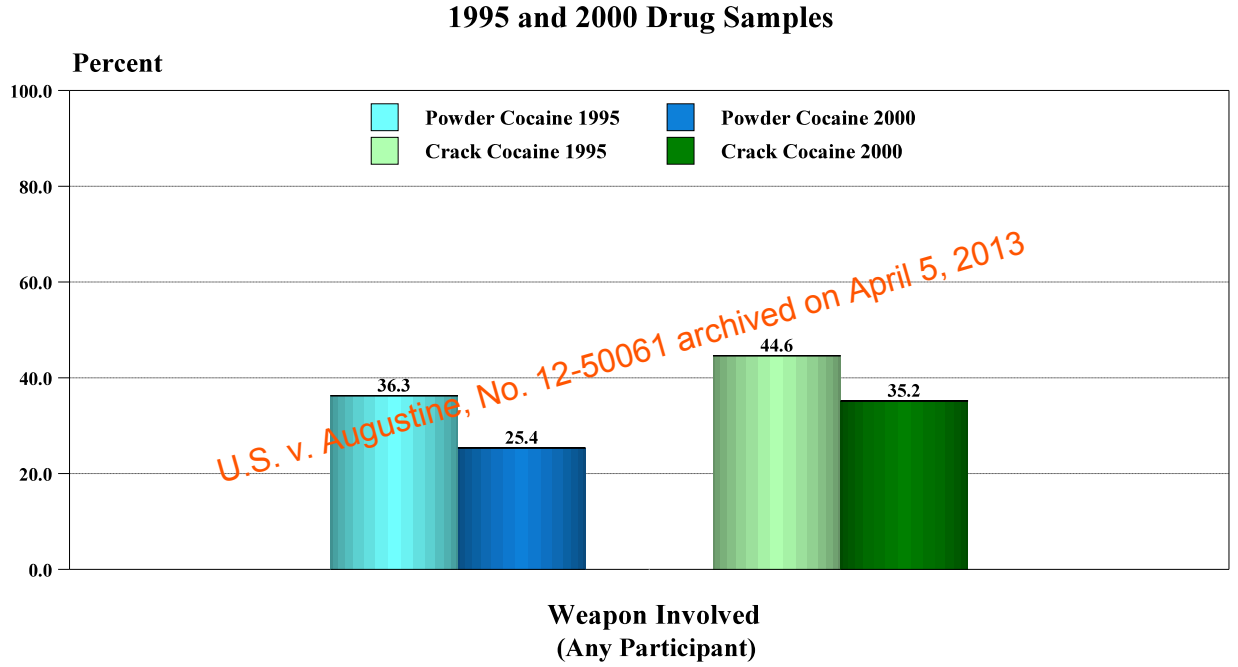
[122] Powder cocaine and crack cocaine offenders received aggravating role enhancements at approximately the same rate, 8.0 percent and 7.4 percent, respectively, in 2000.

a. Weapons

Weapon involvement, the most common aggravating factor, was documented in a minority of cases and declined for both powder cocaine and crack cocaine offenses between 1995 and 2000. Figure 16 shows drug sample data indicating weapon involvement in the offense by any participant, a broad definition that ranges from weapon use by the offender to weapons accessible to unindicted co-participants. In 1995, 36.3 percent of powder cocaine offenses and 44.6 percent of crack cocaine offenses involved weapons under this broad definition. The rate of weapon involvement declined substantially to 25 percent of powder cocaine offenses and 35 percent of crack cocaine offenses in 2000.[123]

Figure 16
Weapon Involvement for Powder Cocaine and Crack Cocaine Offenses



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SOURCE: U. S. Sentencing Commission, 1995 and 2000 Drug Samples.

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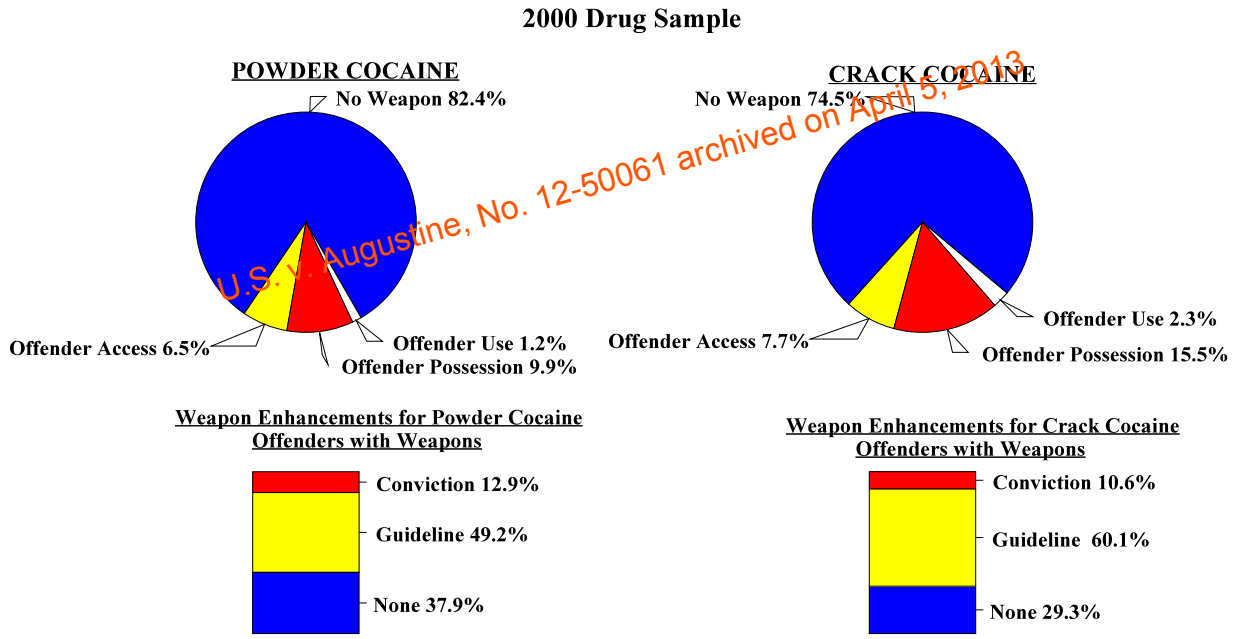
[123] Dr. Alfred Blumstein testified that the nature of the crack cocaine market explains both the historically higher rates of violence for crack cocaine offenses and the recent decline of this violence. According to Dr. Blumstein, aggressive competition among dealers and the location of most crack cocaine markets on the streets of the poorest neighborhoods necessitated the carrying of handguns by street-level dealers for protection. The decline in violence associated with crack cocaine markets is attributable to their maturation, the overall decline in the nation's violence rates, and law enforcement efforts to reduce the number of handguns. Written statement by Alfred Blumstein, Ph.D., Professor of Urban Systems and Operations Research, Carnegie Mellon University, to the U.S. Sentencing Commission regarding Drug Penalties (Feb. 25, 2002) at 4.

Another measure of weapon involvement in the drug sample data documented weapon involvement exclusively by the offender, excluding weapon use by others in the offense.[124] As would be expected, weapon involvement by the offender is less frequent than weapon involvement by any participant in the overall offense. In 2000, 82.4 percent of powder cocaine offenders and 74.5 percent of crack cocaine offenders *did not* have any weapon involvement. (*See* pie charts in Fig. 17.)

The pie charts in Figure 17 demonstrate that, in those cocaine cases in which weapons were present, the weapon involvement tended to be relatively less aggravated in nature. Specifically, for both powder cocaine and crack cocaine offenders, when weapons were involved, the mode of involvement nearly always was accessibility (6.5% of powder cocaine offenders and 7.7% of crack cocaine offenders) or inactive possession (9.9% of powder cocaine offenders and 15.5% of crack cocaine offenders), rather than active use of the weapon (1.2% of powder cocaine offenders and 2.3% of crack cocaine offenders).

Figure 17
Offender Weapon Involvement and Weapon Enhancements in Powder Cocaine and Crack Cocaine Offenses



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SOURCE: U. S. Sentencing Commission, 1995 and 2000 Drug Samples.

[124] Defendant weapon involvement was assessed based on the description of the offense in the Presentence Report, regardless of whether the defendant was held accountable for any weapons at sentencing.

The current federal sentencing scheme provides two alternative means for increasing sentences for weapon possession in drug trafficking offenses. Federal drug offenders with weapons may be either statutorily convicted under 18 U.S.C. § 924(c) (Possession of a Firearm in Relation to a Drug Trafficking Offense), or, alternatively, they may be subject to application of the weapon enhancement in the drug trafficking guideline.[125]

Interestingly, the bar charts in Figure 17 show that not all cocaine offenders whose offense conduct included weapon involvement received sentencing enhancements for this conduct. More than one-third (37.9%) of powder cocaine offenders who at least had access to a weapon (access, possession, or use) received *neither* the guideline weapon enhancement nor a conviction under 18 U.S.C. § 924(c). Similarly, 29.3 percent of crack cocaine offenders who at least had access to a weapon received *neither* weapon enhancement. The fact that weapon enhancements were not applied to seemingly eligible offenders may be attributed to various factors (proof issues, plea bargaining, etc.).

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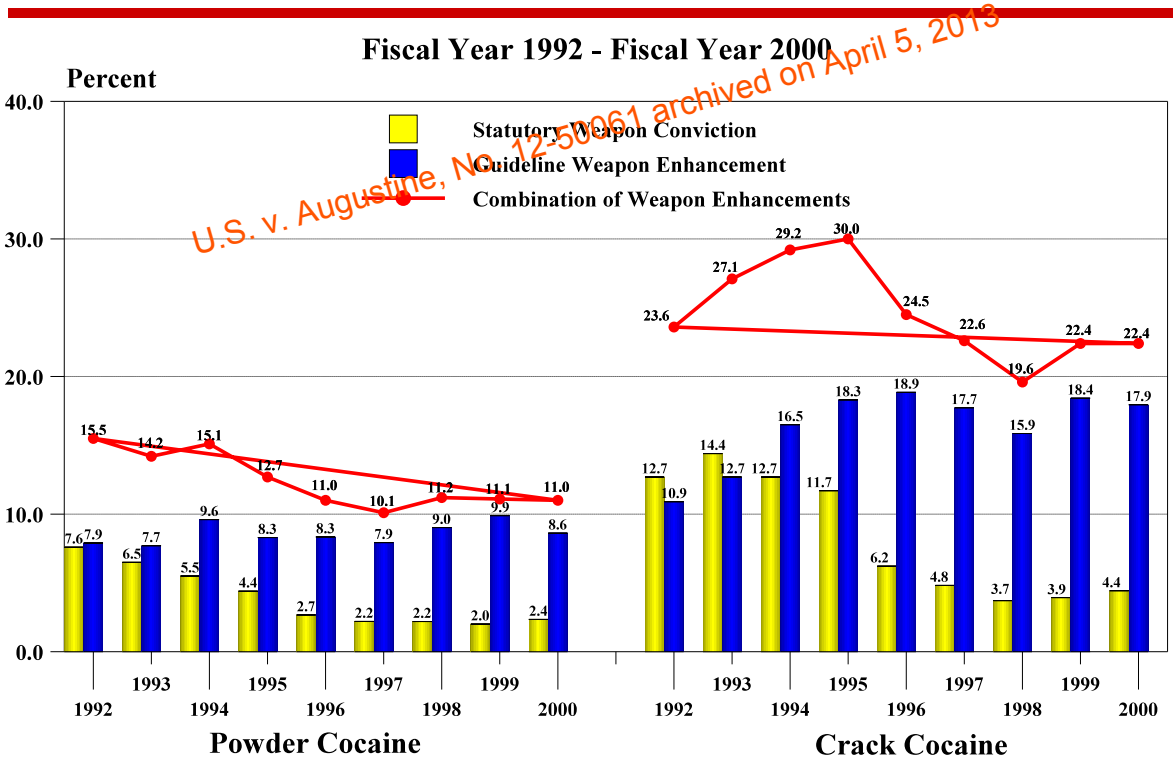
[125] A conviction under 18 U.S.C. § 924(c) carries mandatory minimum consecutive sentences of at least five years, seven years, or ten years, depending on whether the weapon is possessed, brandished, or discharged, and the USSG §2D1.1 guideline enhancement carries an increase of two offense levels for possession of a dangerous weapon, an approximate 25 percent increase in sentence. Offenders are eligible for one or the other, but generally not both, except in very rare circumstances.

Figure 18 also illustrates the different rates of application of sentence increases for weapon involvement between the two forms of cocaine. Figure 18 shows trends in the application of statutory and guideline weapon enhancements for *all* cocaine offenses sentenced between 1992 and 2000. Crack cocaine offenders consistently have been more likely than powder cocaine offenders to receive statutory or guideline-based weapon enhancements, and this difference has increased over time.

The lines in Figure 18 show the combined application rates of the two weapon enhancements. In 1992, 23.6 percent of crack cocaine offenders received one or the other of the weapon-related sentence increases, compared to 15.5 percent of powder cocaine offenders, a difference of 8.1 percentage points. This difference increased to 11.4 percentage points by 2000, when 22.4 percent of crack cocaine offenders and 11 percent of powder cocaine offenders received either of the sentence increases. This change is another factor that contributes to the increasing sentencing gap between crack cocaine and powder cocaine offenders.

Figure 18
Trends in Application of Weapon Enhancements in Powder Cocaine and Crack Cocaine Cases



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SOURCE: U. S. Sentencing Commission, 1992 - 2000 Datafiles, MONFY92-USSCFY00.

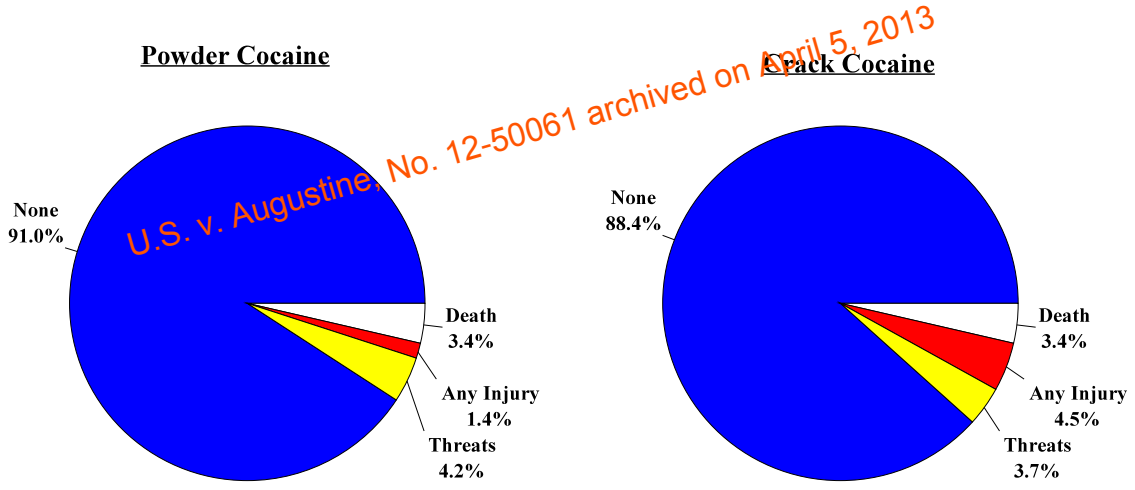
b. Aggravating Factors Other Than Weapon Involvement

The prevalence of other aggravating factors among both powder and crack cocaine offenders is substantially lower than weapon involvement. Following the pattern for weapon involvement, the prevalence of these other factors also declined between 1995 and 2000.

Bodily injury (defined as a credible threat or actual harm to any person by any participant in the offense) is uncommon in both powder cocaine and crack cocaine offenses. Figure 19 shows that bodily injury occurred in less than ten percent of powder cocaine and crack cocaine cases in 2000. Although rare, injury was more common in crack cocaine cases (4.5%) than powder cocaine cases (1.4%), but death (resulting from violence rather than drug use) occurred at the same rate for both forms of the drug (3.4%).

Figure 19
Bodily Injury in Powder Cocaine and Crack Cocaine Offenses

2000 Drug Sample



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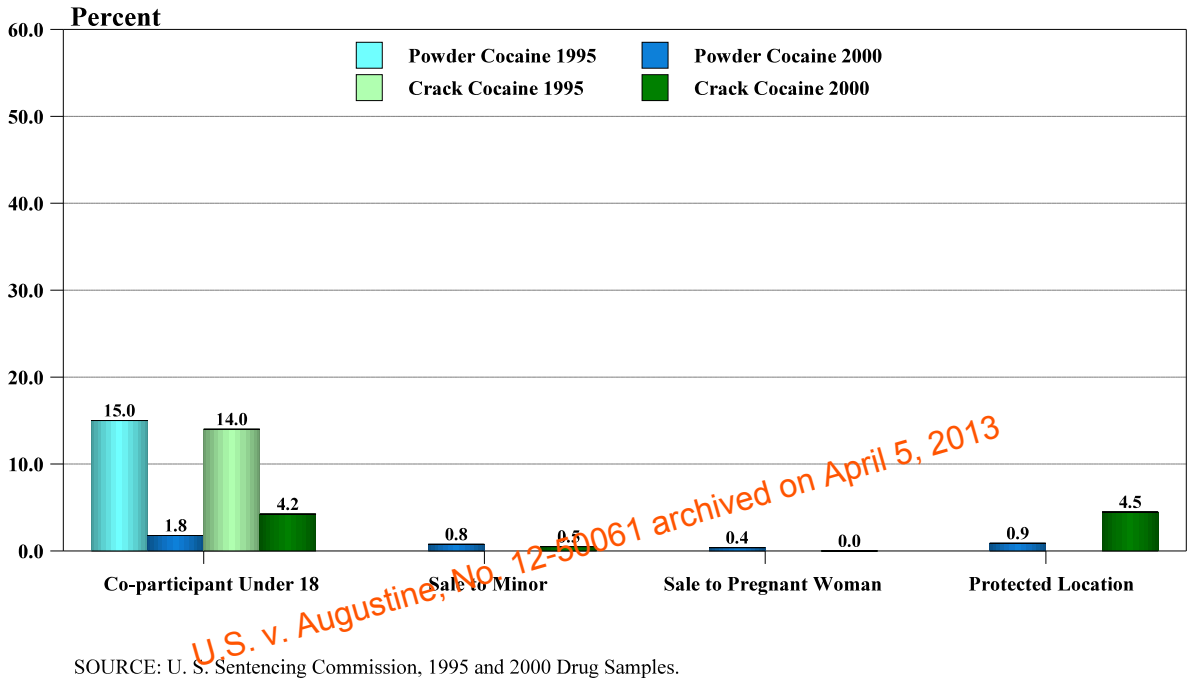
SOURCE: U. S. Sentencing Commission, 2000 Drug Samples.

The involvement of co-participants under 18 years of age, rare in both powder cocaine and crack cocaine offenses, decreased substantially for both drug types between 1995 and 2000. In 1995, 15 percent of powder cocaine offenses and 14 percent of crack cocaine offenses involved minor co-participants, and these figures decreased to 1.8 percent and 4.2 percent, respectively, in 2000.

Data for other aggravating factors (sale of drugs to minors and pregnant women, and sales in protected locations) were available only for the 2000 drug sample, and each of these aggravating factors was documented in less than five percent of both powder cocaine and crack cocaine offenses. (Fig. 20.)

Figure 20
Aggravating Factors in Powder Cocaine and Crack Cocaine Offenses

1995 and 2000 Drug Samples



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SOURCE: U. S. Sentencing Commission, 1995 and 2000 Drug Samples.

D. OTHER SENTENCING GUIDELINE FACTORS

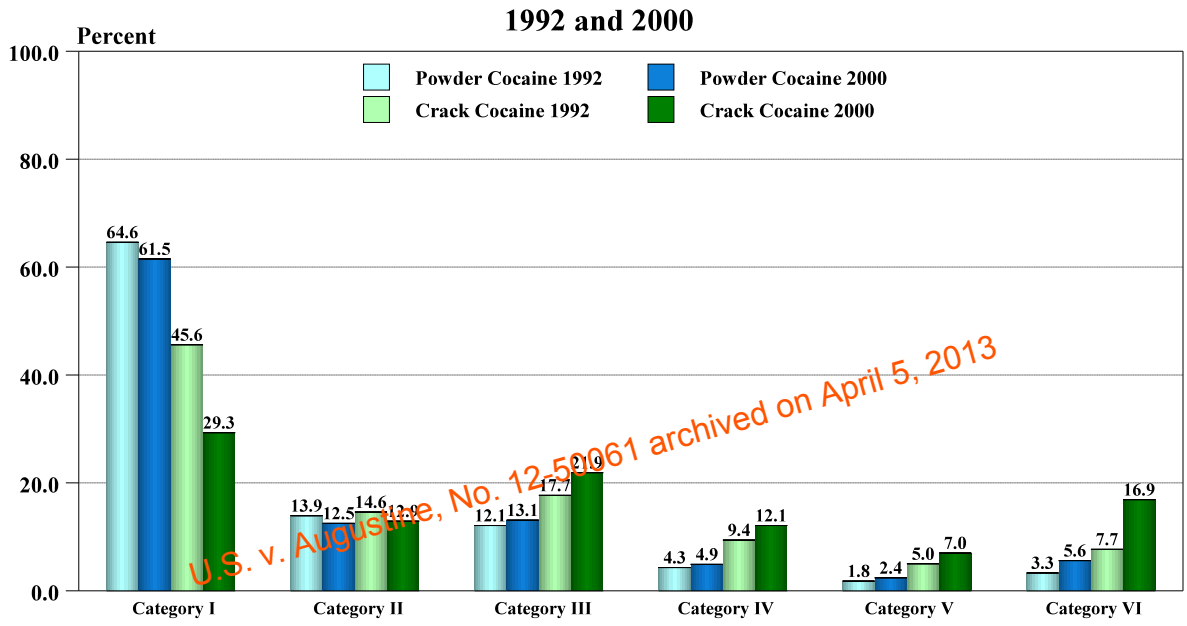
Two additional sentencing guideline factors also have contributed to the widening sentencing gap between powder cocaine and crack cocaine offenders, criminal history of the offender and qualification for the safety valve provision contained in 18 U.S.C. § 3553(f) and USSG §5C1.2. A third sentencing factor, judicial departure from the guideline range, does not appear to have contributed to the sentencing gap.

1. Criminal History

In addition to offense severity (calculated in Chapter 2 of the guidelines), criminal history is a major component in determining an offender's sentence under the federal sentencing guidelines. Crack cocaine offenders generally have more extensive criminal histories compared to powder cocaine offenders, as measured by the smaller number of crack cocaine offenders in Criminal History Category I and their relatively larger number in Criminal History Category VI.

In 1992, 64.6 percent of powder cocaine offenders and 45.6 percent of crack cocaine offenders were in Criminal History Category I, a 19 percentage point difference. (Fig. 21.) This difference increased to 32.2 percentage points by 2000, as 61.5 percent of powder cocaine offenders were in Criminal History Category I, while only 29.3 percent of crack cocaine offenders were in that category.

Figure 21
Distribution of Criminal History Category for Powder Cocaine and Crack Cocaine Offenders



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SOURCE: U. S. Sentencing Commission, 1992 and 2000 Datafiles, MONFY92 and USSCFY00.

The trend of increasing criminal history among crack cocaine offenders also is apparent in the most serious criminal history category. In 1992, 7.7 percent of crack cocaine offenders were in Criminal History Category VI, compared to 3.3 percent of powder cocaine offenders, a 4.4 percentage point difference. By 2000, the difference had increased to 11.3 percentage points, with 16.9 percent of crack cocaine offenders and 5.6 percent of powder cocaine offenders in Criminal History Category VI. Some significant part of the widening gap between powder cocaine sentences and crack cocaine sentences, therefore, is attributable to increases since 1992 in the proportion of crack cocaine offenders with extensive criminal histories, and unrelated to the different treatment for powder cocaine and crack cocaine in the statutory minimums and guidelines' Drug Quantity Table.

2. Safety Valve

In 1995, the Commission implemented a statutory provision (18 U.S.C. § 3553(f)), commonly known as the safety valve by promulgating USSG §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases). This provision allows the court to sentence qualifying offenders below the quantity-based statutory mandatory minimum penalty.[126]

The safety valve provision is relevant to the sentencing gap because powder cocaine offenders tend to qualify for the reduction more often than crack cocaine offenders. In 2000, 37.3 percent of powder cocaine offenders received the safety valve reduction, compared to 15.4 percent of crack cocaine offenders. As discussed above, crack cocaine offenders have more extensive criminal histories than powder cocaine offenders, and this factor most often disqualifies crack cocaine offenders from receiving safety valve reductions.

Other disqualifying factors generally are rare but occur more often in crack cocaine offenses, which also contribute to lower safety valve rates for crack cocaine offenses. Specifically, as demonstrated earlier, both weapon involvement and bodily injury occur more frequently among crack cocaine offenses than powder cocaine offenses.

3. Departures

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The federal sentencing guidelines provide two types of departures, allowing the court in appropriate circumstances to impose sentences below those directed by either the sentencing guidelines or, in the case of substantial assistance, below any mandatory minimum for the statute of conviction. Downward departures are applied at the court's discretion upon finding "mitigating circumstances of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."[127] Substantial assistance departures enable the court to depart below statutory mandatory minimum penalties "upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person . . . ."[128]

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[126] In order to qualify for the safety valve, the defendant had a maximum of one criminal history point, did not use violence or weapons, was not an organizer or leader, did not engage in a continuing criminal enterprise, and did provide, in a timely manner, all information about the offense to the Government. In addition, the offense must not have resulted in death or serious bodily injury.

[127] *See* USSG §5K2.0 and accompanying commentary; 18 U.S.C. § 3553(b).

[128] *See* USSG §5K1.1 and accompanying commentary; 18 U.S.C. § 3553(e).

The departure rates for powder cocaine and crack cocaine offenses are very similar. Courts departed downward in 9.4 percent of powder cocaine offenses and 8.2 percent of crack cocaine offenses in 2000.[129] Substantial assistance departures are much more common in cocaine cases and were granted in 30.4 percent of powder cocaine offenses and 32.3 percent of crack cocaine offenses in 2000.

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[129] Upward departures, which are very uncommon, also were applied at the same rates, 0.2 percent of both powder cocaine and crack cocaine offenses in 2000.

Chapter 5

DEMOGRAPHICS OF FEDERAL COCAINE OFFENDERS

This chapter updates the demographic data presented in the 1995 Commission Report. The data from the Commission's 1992 and 2000 monitoring datafiles provide information on race and ethnicity, citizenship, gender, and age comparisons for federal powder cocaine and crack cocaine offenders.

Table 3 presents the demographic characteristics of federal cocaine offenders. The overwhelming majority of crack cocaine offenders consistently have been black: 91.4 percent in 1992 and 84.7 percent in 2000. For powder cocaine, Hispanics accounted for 39.8 percent of powder cocaine offenders in 1992 but more than half (50.8%) by 2000. The increase in Hispanic powder cocaine offenders in part may be attributable to the increase in the prosecutions of couriers and mules bringing powder cocaine into the United States as described in the previous chapter.[130] Whites comprised 32.3 percent of offenders in 1992, but the proportion of white powder cocaine offenders decreased by approximately half by 2000 to 17.8 percent.

Nearly all crack cocaine offenders were United States citizens (93.4% in 2000), reflecting the fact that this form of the drug almost exclusively is produced and trafficked domestically.[131] In contrast, only 63.9 percent of powder cocaine offenders were U.S. citizens in 2000, and 36.1 percent were non-U.S. citizens, reflecting international aspects of the powder cocaine trade that are absent for crack cocaine.[132]

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The two drug types are similar in other demographic measures. Male offenders comprised the overwhelming majority of offenders for both drug types, which is consistent with federal drug offenders generally across drug type and over time. There was a small difference in the average age of powder cocaine and crack cocaine offenders, with powder cocaine offenders being slightly older.

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[130] Hispanic offenders consistently have accounted for more than half of powder cocaine mules/couriers, comprising 55.2 percent and 56.7 percent in the 1995 and 2000 drug samples, respectively.

[131] *See* USSC, *supra* note 1, ch. 4.

[132] *See* United States Department of Justice, National Drug Intelligence Center, *National Drug Threat Assessment 2002*, December 2001.

Table 3
Demographic Characteristics of Federal Cocaine Offenders[133]

	Powder Cocaine				Crack Cocaine			
	1992		2000		1992		2000	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Race/Ethnicity								
White	2,113	32.3	932	17.8	74	3.2	269	5.6
Black	1,778	27.2	1,596	30.5	2,096	91.4	4,069	84.7
Hispanic	2,601	39.8	2,662	50.8	121	5.3	434	9.0
Other	44	0.7	49	0.9	3	0.1	33	0.7
Total	6,536	100.0	5,239	100.0	2,294	100.0	4,805	100.0
Citizenship								
U.S. Citizen	4,499	67.7	3,327	63.9	2,092	91.3	4,482	93.4
Non-Citizen	2,147	32.3	1,881	36.1	199	8.7	318	6.6
Total	6,646	100.0	5,208	100.0	2,291	100.0	4,800	100.0
Gender								
Female	787	11.8	722	13.8	270	11.7	476	9.9
Male	5,886	88.2	4,518	86.2	2,032	88.3	4,330	90.1
Total	6,673	100.0	5,240	100.0	2,302	100.0	4,806	100.0
Average Age								
	Average=33.5		Average=33.9		Average=28.4		Average=29	

SOURCE: U.S. Sentencing Commission 1992 and 2000 Datafiles, MONFY92 and USSCFY00.

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[133] The table is derived from cases sentenced under the primary drug trafficking guideline only, USSG §2D1.1. The total number of cases in each category varies due to cases excluded for missing information.

Chapter 6

TRENDS IN DRUG PRICE AND USE

A. INTRODUCTION

This chapter presents data from a number of sources to describe trends in the price and use of powder cocaine and crack cocaine. Data such as these have been used by some to draw conclusions about the effectiveness of drug law enforcement, including the effectiveness of cocaine penalties. In theory, sentencing policies might reduce the *supply* of cocaine through the deterrence of potential traffickers or through the incapacitation of traffickers who are integral to the cocaine market.[134] Sentencing policies also might reduce the *demand* for cocaine through the deterrence, incapacitation, or court-ordered treatment of users.

In practice, however, the available data are too limited and the legal and market forces at work too numerous to reach firm conclusions about the effectiveness of current cocaine sentencing policy. One problem concerns how to measure effectiveness reliably. Changes in the price of cocaine are one widely-recognized measure of the effectiveness of supply reduction strategies. Reductions in supply due to deterrence or incapacitation of traffickers should lead to increases in price, all other things remaining equal. The effectiveness of demand reduction strategies might be measured by changes in the rate of drug use in the general population or in the frequency of use. But as discussed below, the available measures of both price and use have limited validity, which complicates any analysis.

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These data limitations led the National Research Council, in a recent review of the data and research available for drug policy making, to conclude that:

> [e]fforts to connect specific enforcement activities to particular price fluctuations must inevitably confront the basic fact that enforcement activities are not the only notable events that may affect drug prices. . . . One obvious source of price fluctuations is time-series variation in drug demand. For example, the demand for cocaine may fluctuate as a result of changing attitudes toward cocaine consumption, a changing mix of light and heavy users, and changing patterns of enforcement and penalties for cocaine possession. Another source of price fluctuations may be variation in the supply of drugs due to changing source country conditions, from weather to political stability.[135]

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[134] Interest in the deterrent effects of cocaine penalties remains high, and this chapter is meant to be responsive to questions posed to the Commission by Senators Leahy and Hatch.

[135] NATIONAL RESEARCH COUNCIL [NRC], INFORMING AMERICA'S POLICY ON ILLEGAL DRUGS: WHAT WE DON'T KNOW KEEPS HURTING US (Charles F. Manski et al. eds., 2001), at 146.

Attempts to isolate the effects of federal penalties are further complicated by the relatively minor role that federal prosecution plays in national drug control efforts. Federal drug trafficking offenses account for only about ten percent of drug trafficking offenses prosecuted in the United States. In 1998 (the most recently available data), 195,183 offenders were convicted of drug trafficking in state courts,[136] compared to 19,438 offenders sentenced under the federal drug trafficking guideline that same year.

Given these complications, quick conclusions should not be reached from the data presented in this chapter. But in the interest of promoting further thought on the subject, this chapter presents the available data and discusses possible explanations for the observable trends.

B. COCAINE PRICES AND PENALTIES

Federal drug prosecution is targeted largely at importers, manufacturers, distributors and sellers – not simple drug users – and therefore this analysis begins with data on trends in cocaine prices, which is the most widely used measure of supply reduction effectiveness.[137] Figure 22 gives the average price of powder cocaine from 1981 through 2000 at the retail and wholesale dealer levels. The prices shown are standardized per gram of pure cocaine to control for fluctuations in purity. These data were obtained through the National Office of Drug Control Policy and are derived from the STRIDE data collection system administered by the Drug Enforcement Administration. The STRIDE data have several known limitations but are the best available measures of changes in cocaine prices.[138]

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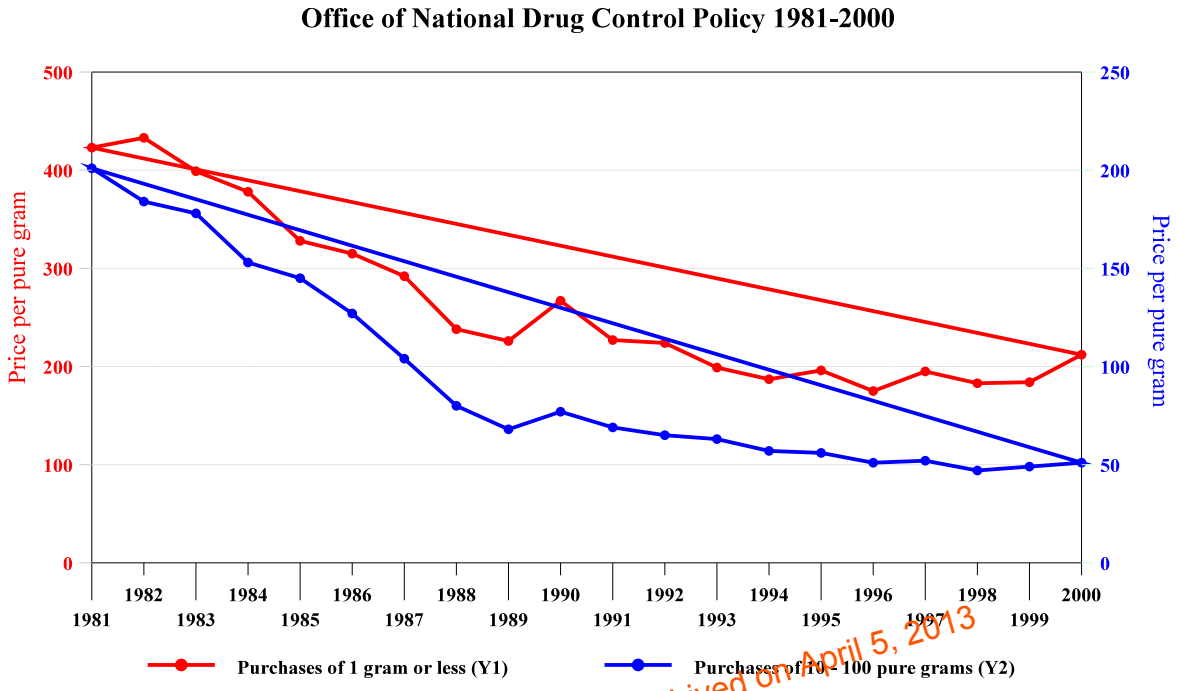
[136] U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics Bulletin, *Felony Sentences in State Courts, 1992* (Jan. 1995); U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics Bulletin, *Felony Sentences in State Courts, 1998* (Oct. 2001).

[137] The Office of National Drug Control Policy has developed additional performance measures of the effectiveness of drug control strategies. *See* ONCDP, 1998 NATIONAL DRUG CONTROL STRATEGY: 2002 FINAL REPORT (Feb. 2002). Many of these measures, however, are available only for recent years. Because assessing the effects of cocaine penalties requires comparing data before and after the penalty changes instituted by the 1986 Act, this analysis is restricted to measures that are available throughout this longer period.

[138] The STRIDE data are not randomly collected and thus are not necessarily representative of cocaine prices nationwide. ("Existing price information is collected by DEA . . . for operational purposes and does not provide reliable indicators of retail price movements in actual drug markets. Nor does it provide an adequate foundation for analysis of the causes and consequences of price changes.") NRC, *supra* note 135, at 4.

Figure 22
Average Powder Cocaine Prices



SOURCE: Office of National Drug Control Policy, The Price of Illicit Drugs, 1981 - 2000 (in press).

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As can be seen from Figure 22, wholesale and retail prices move largely in tandem. Average retail prices have varied from a high of $433 per pure gram in 1982 to a low of $175 per pure gram in 1996. Most strikingly, prices continued a downward trend begun in 1982 and continuing throughout the late 1980s, a period when federal penalties for cocaine offenses were steadily increasing. Between 1986 (when mandatory minimum penalties were instituted by the 1986 Act) and 1992 (when over three-quarters of federal offenders were first sentenced under the new federal sentencing guidelines) average sentences imposed for powder cocaine offenses more than doubled to 99 months, and average sentences for crack cocaine offenses increased to 124 months. With the abolition of parole, actual prison time served by cocaine offenders was 300 to 400 percent longer in 1992 than it had been in 1986. Yet, over this period, the average retail price per pure gram decreased by 29 percent, from $315 in 1986 to $224 in 1992, and subsequently has stabilized at slightly below this level.

As described in previous chapters, crack cocaine is trafficked principally at the retail level and is usually converted from powder cocaine near the point of retail sale. The available data on retail prices, from the Department of Justice, Drug Enforcement Administration, Office of Domestic Intelligence (2001), show that the price of crack cocaine remained relatively stable between 1988 and 2000, at $88 per gram and $83 per gram, respectively.

The declining prices for powder cocaine during the period of increasing penalties appear inconsistent with a deterrent effect of federal cocaine penalties. Federal penalties and law enforcement in general, however, are only some of the factors that determine cocaine prices. Increasing crop yields, competition among growers and refiners, proliferation of importation channels, reduction of labor or transaction costs, and many other factors could serve to reduce prices, even if increasing penalties exerted upward price pressure. In addition, a decrease in demand would depress prices, so the following analysis examines data on crack cocaine and powder cocaine use.

C. CRACK AND POWDER COCAINE USE

The total demand for cocaine in the United States in a given year is determined by the number of active users and the amount that they consume. Reliable data on cocaine consumption is lacking,[139] but proxies are available that can serve as rough approximates of actual trends in demand. One such proxy is the absolute number of drug users.

The most widely used estimates of the number of active users and their frequency of use come from surveys of households and high school students. The National Household Survey on Drug Abuse (NHSDA) was begun in 1979.[140] It was conducted every few years throughout the 1980s and now is conducted annually. The Monitoring the Future (MTF) survey of high school students is available from 1975 and is conducted annually.[141] Both surveys measure crack cocaine and powder cocaine use separately beginning in the late 1980s.

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The NHSDA and MTF, like all surveys, have known limitations. Some persons are not available to be included in the survey sample. Indeed, the subpopulations believed to be among the heaviest drug users – high school dropouts, the homeless, the imprisoned, and the hospitalized – are particularly under represented in these surveys. Persons who are available may nonetheless refuse to respond or may under report their actual drug use.[142] Thus, data from self-

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[139] *See* the discussion in NRC, *supra* note 135, at 86-87.

[140] Department of Health and Human Services, Substance Abuse and Mental Health Services, Office of Applied Studies, *Summary of Findings from the 2000 National Household Survey on Drug Abuse*. http://www.samhsa.gov/publications/publications.html.

[141] The University of Michigan Institute for Social Research, *Monitoring the Future, National Survey Results on Drug Use, 1975-2000*, (2001). Monitoring the Future (MTF)is a nationwide annual survey of a representative sample of eighth, tenth, and twelfth grade students. http://www.monitoringthefuture.org/pubs/monographs/vol1_2000.pdf.

[142] *See* NRC, *supra* note 135, at 96 indicating that about 25 percent of persons who are contacted for participation in the household survey fail to respond. ("The Committee is not aware of empirical evidence that supports the view that nonresponse is random. . . . [N]onrespondents have higher [drug use] prevalence rates than do respondents."); *see also* R. Casper, *Followup of nonrespondents in 1990, in*

report surveys must be considered underestimates of actual drug use. But, because the biases in the surveys appear to be reasonably constant over time, comparisons of the rates of reported use across years can be illuminating, even if the reported rate of use in any given year is an underestimate.[143]

As shown in Figure 23, data from the NHSDA indicate that the number of persons using powder cocaine in the month prior to the survey peaked at about 5.7 million in 1985 and trended largely downward to 1.4 million in 1992.[144] Powder cocaine use as reported by NHDSA has remained fairly stable since then with a slight increase in recent years to 1.7 million in 1998. The number of past-month crack cocaine users has remained fairly stable at a significantly lower level, averaging 569,000 users for the period of 1988 to 1998. Together, these data suggest a decrease in the total number of cocaine users in the late 1980s. This trend roughly parallels the changes in retail price, suggesting that reductions in demand may have contributed to the price reductions noted above.

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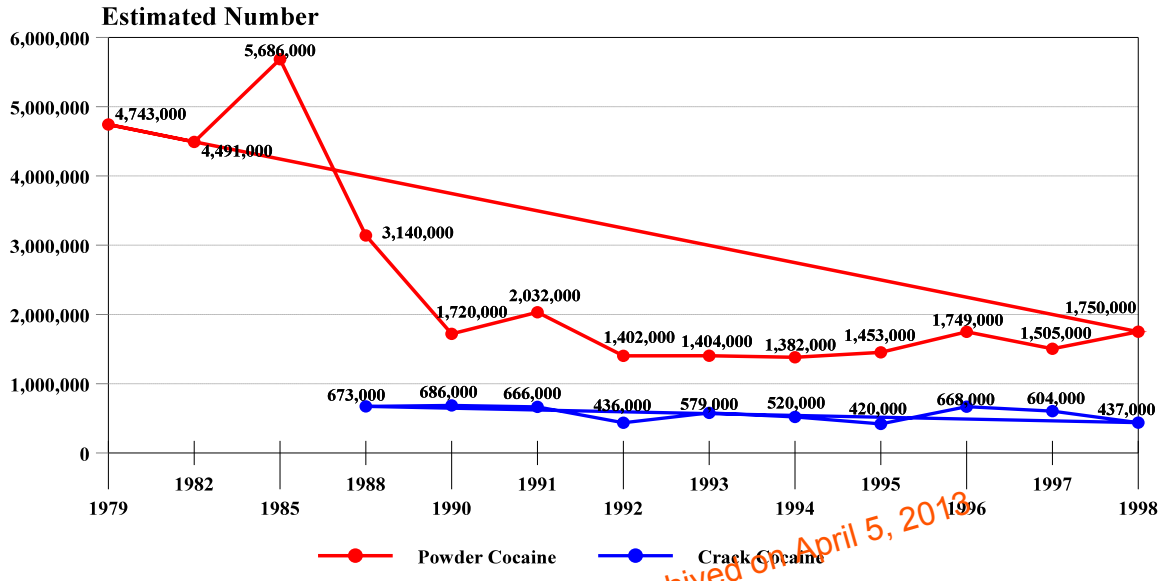
SURVEY OF MEASUREMENT OF DRUG USE: METHODOLOGICAL STUDIES, (C. F. Turner, et al., eds.), U.S. Department of Health and Human Services, Washington, DC (1992). The non-response rate for the MTF is approximately 15 percent.

[143] Data from 1999 and 2000 reflect substantial methodological changes in this survey. Consequently the results for those years cannot be compared to previous years.

[144] Estimates from the DHHS *Summary of NHSDA 1998 Findings*, *supra* note 140, Table 5A. Cocaine use is defined as reported use among persons over 12 years of age during the month prior to the survey.

Figure 23
Estimated Number of Adults
Reporting Cocaine Use In Past 30 Days

National Household Survey of Drug Abuse 1979 - 1998



SOURCE: National Household Survey on Drug Abuse 1996 & 1998.

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Trend data on the number of users is an imperfect proxy for demand. If each user consumed the same amount, then demand would closely parallel the number of users. But users vary widely from one time experimenters to addicts requiring multiple doses daily. There is some evidence that the proportion of light to heavy users of cocaine shifted during the 1980s, resulting in a lower total number of users but a higher proportion of heavy users.[145] If so, decreases in the number of users do not necessarily reflect a decrease in demand.

The data on trends in cocaine use raise the question of whether the federal penalty increases of the late 1980s contributed to the decline in the number of cocaine users observed during that period. Although federal prosecution is targeted at traffickers, the penalties associated with a drug are part of the social disapproval symbolized and communicated by the criminal law. Perhaps this deterrent signal registered with the nation's cocaine users.

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[145] S. M. S. Everingham, et al., *Cocaine Consumption in the United States: Estimating Past Trends and Future Scenarios*, 29 SOCIO-ECONOMIC PLANNING SCIENCES 305-314 (1995).

To address the question of whether the federal cocaine penalty structure has deterred cocaine use, MTF data is informative.[146] While estimates of the number of users are a proxy for total demand for cocaine in a given year, absolute numbers are not the best measure of possible deterrent effects on users for several reasons. First, the number of users is related to the size of the total population. Using percentages or rates instead of absolute numbers controls for changes in the population size. Second, because drug use decreases with age, the number of users is related to the age distribution of the population. As subpopulations like the baby boomers age, drug use patterns may change apart from any deterrent effect from penalties or any other factor affecting drug use. Thus, the trends in the *rates* of use among a single age group should be examined.

Figure 24 presents data from the MTF survey of self-reported drug use by high school seniors during the month prior to the survey for the years 1976 to 2000. During the late 1970s use of all types of drugs increased. Then, throughout the 1980s, drug use declined sharply before starting to increase again in 1993. This latest increase appears to have plateaued in recent years.

Cocaine use historically has been relatively rare among high school seniors. Powder cocaine use peaked in 1985, when 6.7 percent of high school seniors reported use, and decreased to its lowest point (1.3%) in 1992. Crack cocaine use (on which data is available only from 1987) peaked in 1988, when 1.6 percent of high school seniors reported use, and decreased to its lowest level, also in 1992, at 0.6 percent.[147]

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As discussed above, the decline in cocaine prices in the late 1980s does not prove that federal penalties failed to exert an upward pressure on price. Similarly, the decrease in use during the 1980s does not prove that federal penalties succeeded in deterring use because federal prosecution remains targeted on drug trafficking – not simple drug possession.[148] Some have noted that the same social and cultural factors that led to the penalty increases – growing public intolerance of the harms caused by drugs, increasing awareness of the negative health consequences of drugs, etc. – also may have contributed to decreasing rates of drug use, apart

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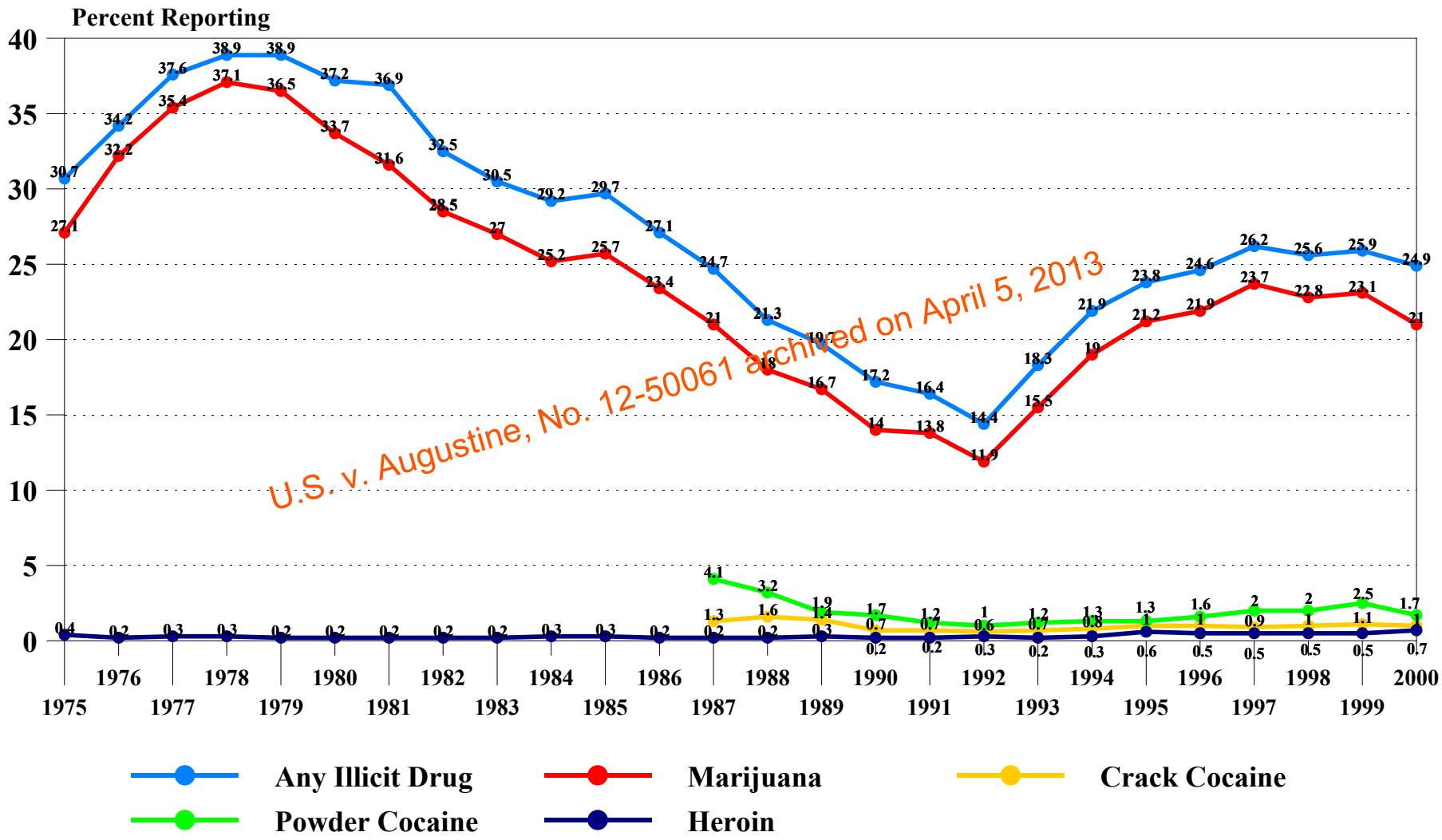
[146] MTF, *supra* note 141. http://www.monitoringthefuture.org/pubs/monographs/vol1_2000.pdf.

[147] Data from the NHSDA suggest that crack cocaine use among 18- to 25-year old adults is even more rare than among high school seniors, and has shown a similar plateau in recent years. Between 1994 and 1998, on average less than 0.4 percent of those young adults reported using crack cocaine within the last 30 days, and in 1998 powder cocaine was used by seven times as many young adults as crack.. *Supra* note 140, *Summary from 1999 NHSDA Findings*. http://www.samhsa.gov/oas/nhsda/1999/TitlePage.html.

[148] Although simple possession of five or more grams of crack cocaine requires a mandatory minimum sentence of five years imprisonment, federal prosecutions for simple possession of crack cocaine are rare (only 69 total between 1998 and 2000).

Figure 24
Trends in Reported Drug Use in Past 30 Days Among High School Seniors

1975 - 2000



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SOURCE: Monitoring the Future A Continuing Study of American Youth at http:monitoringthefuture.org/index.html.

from any change in penalties.[149] Growing concern over the drug problem led to significant expansion of drug treatment, education, and prevention programs during this period. Disentangling the effects of these various interventions is impossible with current data.

Recent research has not found a relationship between the length of prison terms prescribed in various states and the rates of cocaine or marijuana use by high school seniors in the state.[150] The National Research Council recently concluded that:

> existing research seems to indicate that there is little apparent relationship between severity of sanctions prescribed for drug use and prevalence or frequency of use, and that perceived legal risk explains very little in the variance of individual drug use. However, there are many gaps in current knowledge . . . .[151]

D. CONCLUSION

The analysis of cocaine price trends presented above appears inconsistent with a finding that the federal cocaine penalties established under the 1986 Act and incorporated into the guidelines have had a deterrent effect on cocaine trafficking. Specifically, declining prices for powder cocaine during a period of increased federal cocaine penalties appear inconsistent with a reduction in the supply of cocaine. However, declining prices alone do not necessarily indicate a lack of deterrence because a number of other factors not taken into account in this analysis could explain the decrease in cocaine prices observed during that period.

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On the other hand, evidence indicates that cocaine use declined during the late 1980s and early 1990s. But, because federal law enforcement is targeted at cocaine traffickers and not users, it is unlikely that the federal cocaine sentencing policy had a significant deterrent effect on users. Rather, it is more likely that many of the factors that led Congress to increase the penalties for cocaine trafficking (*e.g.*, perceptions about the harmfulness of the drug) also contributed to the decrease in cocaine use during that time. In fact, the decline in cocaine use began prior to the establishment of the current federal cocaine sentencing structure. In any event, to the extent that federal cocaine sentencing policy contributed to the decline in cocaine use, that contribution may have abated in the mid to late-1990s, when powder cocaine use increased.

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[149] *See e.g.*, DAVID F. MUSTO, THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL (3rd ed., 1999). Musto describes a historic dynamic of cycles of tolerance and intolerance of drugs. Penalty increases, such as the 1986 Act, often occur after the pendulum already has begun swinging from high levels of tolerance (reflected, for example, in the high rates of use in the late 1970s) to widespread social disapproval of drug use and users.

[150] F. J. M. Chaloupa, et al., The Demand for Cocaine and Marijuana on Youth, Working Paper No. 6411, National Bureau of Economic Research (1998).

[151] NRC, *supra* note 135, at 193.

Chapter 7

STATE SENTENCING POLICY AND PROSECUTORIAL DECISIONS

A. STATE COCAINE SENTENCING POLICIES

In order to provide some contextual framework in which to assess federal cocaine sentencing policy, the 1995 Commission Report included a survey of the laws of the 50 states, the District of Columbia, and the Virgin Islands to determine whether and to what extent states distinguish between crack cocaine and powder cocaine penalties.[152] The Commission conducted a similar survey for this report to determine whether there have been any recent trends in state legislative action that might be relevant to evaluating federal cocaine sentencing policy.[153]

As part of this update, the Commission sought the following information:

(1) Whether the state uses sentencing guidelines (and, if so, whether they are advisory or mandatory).
(2) Whether state statutes and/or guidelines distinguish between crack cocaine and powder cocaine.
(3) Whether state sentences are determinate or, alternatively, whether early release through parole is available.
(4) Whether the state has enacted drug statutes containing mandatory minimum penalties.

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Similar to the findings in the 1995 Report, and contrary to federal sentencing policy, the overwhelming majority of states do not distinguish between powder cocaine and crack cocaine offenses. Only 14 states have some form of distinction between crack cocaine and powder cocaine in their penalty schemes. Nebraska, Louisiana, Wisconsin, and the District of Columbia, among the 14 jurisdictions which did distinguish between the two forms of cocaine in 1995, no longer do. Conversely, Arizona, Maine, New Hampshire, and Ohio now have a statutory distinction between cocaine powder and crack cocaine, whereas they did not in 1995.

Of interest, only one state, Iowa, has a 100-to-1 drug quantity ratio in its statutory scheme. Unlike the federal statutory scheme, however, Iowa distinguishes between crack cocaine and powder cocaine only for purposes of statutory maximum penalties, not mandatory minimum penalties.

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[152] *See* USSC, *supra* note 1, at ch. 6, 129-138.

[153] In conducting the survey, the Commission reviewed state narcotics statutes addressing cocaine penalties and contacted each state sentencing commission or its counterpart, if the respective state had such an agency.

The Commission also researched whether states had sentencing guideline systems and whether imposed sentences were determinate (*i.e.*, sentence imposed is the sentence served) or indeterminate (*i.e.*, sentence or sentence range imposed with release into the community after service of less than the full sentence). Currently, 22 states use some form of sentencing guidelines compared to 21 states in 1995. Thirty states have determinate sentencing structures, some in combination with guidelines, compared to 20 states in 1995.

Currently, 38 states have statutory mandatory minimum penalties for drug offenses. In 1995, 32 states had mandatory minimum penalties for one or more type of drug offense (*e.g.*, trafficking, repeat trafficking, repeat possession, and sale of drugs within a certain distance of a protected area such as a school or playground).

The penalties structure of the 14 states that currently distinguish between powder cocaine and crack cocaine offenses are described briefly below.

1. Alabama

Alabama does not provide different penalties for crack cocaine and powder cocaine offenses, but uses a 10-to-1 drug quantity ratio for determining eligibility for its drug abuse diversion program. Under this program, any person arrested or charged with a controlled substance offense may file a request with the district attorney to enroll in a drug abuse treatment program in lieu of undergoing prosecution. The statutory provisions outlining eligibility for the diversion program provide different quantity levels for powder cocaine and crack cocaine offenders. For powder cocaine, the quantity cannot exceed five grams for eligibility for diversion. For crack cocaine, the quantity cannot exceed 500 milligrams (one-half gram).[154] For non-diversionary cocaine offenses, Alabama does not distinguish between crack cocaine and powder cocaine. For 28 grams or more but less than 500 grams, an offender is subject to a mandatory minimum term of three years imprisonment; for 500 grams but less than one kilogram, an offender is subject to a mandatory minimum term of five years imprisonment; for one kilogram but less than ten kilograms, an offender is subject to a mandatory minimum term of 15 years imprisonment.[155]

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[154] Alabama Code § 12-23-5(2) (2001).

[155] Alabama Code § 13A-12-231 (2001).

2. Arizona

Arizona distinguishes between offenses involving powder cocaine and crack cocaine using a drug quantity ratio of 12-to-1. Under Arizona's statute, nine grams of powder cocaine or 750 milligrams of cocaine base trigger the threshold amount for trafficking, with a presumptive sentence of five years imprisonment. The judge may sentence an offender to a minimum of four years imprisonment if mitigating factors are present, or a maximum of ten years if aggravating factors are present.[156] An offender convicted of trafficking is not eligible for suspension of sentence or release until the offender has served the sentence imposed by the court.[157]

3. California

Offenders convicted of possession or possession with intent to sell crack cocaine and powder cocaine are sentenced to different terms under California law. Crack cocaine defendants are sentenced to either a three, four, or five-year term of imprisonment, while powder cocaine defendants are sentenced to either two, three, or four-year terms. Absent mitigating or aggravating factors, the sentencing judge sentences an offender to the middle of the statutory ranges.[158] Although the ranges fluctuate, a crack cocaine offender in effect serves 1.25 to 1.5 times longer than a powder cocaine offender. Possession with intent to sell carries a mandatory minimum penalty if a defendant has a prior conviction. California statutes provide enhancements if large quantities of drugs are involved in the offense. When calculating the quantity levels necessary to trigger these enhancements, however, California does not distinguish between crack cocaine and powder cocaine.

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4. Connecticut

Connecticut distinguishes between trafficking offenses involving crack cocaine and powder cocaine using a drug quantity ratio of 56.7-to-1.[159] The penalty for trafficking in one ounce or more of powder cocaine is five years to life imprisonment. The same penalty applies for trafficking in .5 grams or more of cocaine base.

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[156] Arizona Revised Statutes § 13-702 (2001).

[157] Arizona Revised Statutes §§ 3401(36), 3408(B) (2001).

[158] California Health and Safety Code §§ 11351, 11351.5. In California, sentencing ranges comprise three possible terms: normal, aggravating, and mitigating. The "normal" offender convicted of crack cocaine possession with intent to distribute receives a four-year term. If aggravating circumstances exist, the offender receives a five-year term. If mitigating circumstances exist, the offender receives a three-year term.

[159] Connecticut General Statutes Annotated § 21a-278(a) West Supp (2000).

5. Iowa

Iowa distinguishes between trafficking offenses involving crack cocaine and powder cocaine using a 100-to-1 drug quantity ratio. Unlike the federal statutes, however, this ratio is not reflected in the threshold amounts that trigger the mandatory minimum penalties; rather, the 100-to-1 ratio is reflected in the threshold amounts that determine the maximum statutory penalty. For example, more than five kilograms of powder cocaine or more than fifty grams of cocaine base trigger a maximum penalty of fifty years imprisonment. An offender with more than 500 grams of powder cocaine or more than five grams of cocaine base is subject to a maximum penalty of 25 years imprisonment.[160] Essentially, an offender must have 100 times more powder cocaine than crack cocaine to trigger the same statutory maximum penalty. Iowa also requires an offender who commits one of these offenses to serve a minimum period of confinement of one-third of the maximum sentence prescribed by law before being eligible for parole.[161]

6. Maine

Maine distinguishes between trafficking offenses involving crack cocaine and powder cocaine using a 3.5-to-1 drug quantity ratio. If an offender knowingly possesses 14 grams or more of powder cocaine or four grams or more of cocaine base, a presumption of unlawful trafficking is established.[162] For aggravated trafficking, *i.e.*, 112 grams or more of powder cocaine or 32 grams or more of cocaine base, an offender is subject to a mandatory minimum sentence of four years imprisonment.[163]

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7. Maryland

Maryland distinguishes between offenses involving powder cocaine and crack cocaine using a 9-to-1 drug quantity ratio. Maryland has a five-year mandatory minimum penalty for trafficking 448 grams or more of powder cocaine or 50 grams or more of cocaine base.[164]

8. Missouri

Missouri differentiates between offenses involving powder cocaine and crack cocaine using a 75-to-1 drug quantity ratio. Offenders who traffick more than 150 grams but less than 450 grams of cocaine powder are Class A felons. For cocaine base, two grams but less than six

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[160] Iowa Code § 124.401 (2001).

[161] Iowa Code § 124.413 (2001).

[162] Maine Revised Statutes 17 § 1103(3) (2000).

[163] Maine Revised Statutes 17 § 1252(5-A) (2000).

[164] Maryland Code Annotated, Penal § 286(f) (2000).

grams trigger the same penalty. Offenders who traffick 450 grams or more of powder cocaine, or six or more grams of cocaine base, both Class A felonies, are ineligible for probation or parole.[165] Class A felonies carry an imprisonment term of not less than ten years and not more than thirty years.

9. New Hampshire

New Hampshire differentiates between trafficking offenses involving powder cocaine and crack cocaine using a 28-to-1 drug quantity ratio. New Hampshire provides a maximum penalty of 30 years imprisonment for trafficking in five ounces or more of powder cocaine. The same penalty applies for trafficking in five grams or more of cocaine base.[166]

10. North Dakota

North Dakota differentiates between offenses involving powder cocaine and crack cocaine using a 10-to-1 ratio. North Dakota has an enhanced penalty that provides a maximum of life imprisonment with or without an opportunity for parole for trafficking fifty grams or more of powder cocaine or five grams or more of cocaine base. An offender who is classified as a Class AA felon, and who receives a sentence of life imprisonment with the possibility of parole, will not be eligible for parole for 30 years, less any sentence reduction earned for good conduct. Cocaine quantities less than the above-mentioned amounts qualify as a Class A felony, with a maximum penalty of 20 years imprisonment. Mandatory minimums apply if an offender has prior offenses. An offender with a prior offense is subject to a mandatory minimum of five years imprisonment; an offender with a third or subsequent offense is subject to a mandatory minimum of twenty years imprisonment.[167]

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11. Ohio

Ohio differentiates between offenses involving powder cocaine and crack cocaine using a graduated scale based on threshold amounts and felony categories imposed by statute. The felony categories are defined by degree: first, second, third, and fourth. The ratios vary between each individual felony category based on quantities from the low end of the range to the high end. For example, it is a felony in the third degree to distribute ten grams but less than 100 grams of powder cocaine. For cocaine base, the third-degree felony range is five grams but less than ten grams. The minimal drug quantity ratio is 2-to-1; the maximum drug quantity ratio for this category is 10-to-1. To qualify for a first-degree felony, an offender must distribute 500 grams but less than 1,000 grams of powder cocaine, and at least 25 grams but less than 100 grams of cocaine base, which results in a ratio fluctuation of between 10-to-1 and 20-to-1. For major drug offenders, Ohio uses a 10-to-1 ratio (1,000 grams cocaine powder and 100 grams of

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[165] Missouri Annotated Statutes § 195.222(2) (2000).

[166] New Hampshire Revised Statutes Annotated § 318-B:26(I)(a)(1) (2000).

[167] North Dakota Century Code §§ 19-03.1-to-23.1(1)(C)&(2); 12.1-32-01; 19-03.1-23 (2000).

cocaine base) and prescribes a mandatory minimum term of ten years imprisonment with an additional one to ten-year term subject to judicial discretion.

12. Oklahoma

Oklahoma differentiates between trafficking offenses involving powder cocaine and crack cocaine using a 6-to-1 drug quantity ratio. The Oklahoma statutes provide mandatory minimum penalties of ten years imprisonment for offenses involving 28 grams or more of cocaine powder or five grams or more of cocaine base. The statutes also provide a 20-year mandatory minimum for offenses involving 300 grams or more of powder cocaine or 50 grams or more of cocaine base.[168]

13. South Carolina

South Carolina's statutory scheme for cocaine penalties is complex, with different minimum and maximum penalties for possession, distribution, and trafficking of powder cocaine and crack cocaine. For possession offenses, crack cocaine is penalized more severely than powder cocaine. A first time offender with ten grains (.648 grams) or less of powder cocaine is subject to a statutory maximum penalty of two years imprisonment, but a first time offender with less than one gram of crack cocaine is subject to a statutory maximum penalty of five years imprisonment.[169] The penalties for first time distribution offenses do not differ between the two forms of cocaine, but the statutory inference that triggers applicability of the distribution statute varies somewhat. Offenses involving ten grains or more of powder cocaine (.648 grams) are presumed to be distribution offenses, and offenses involving one gram or more of crack cocaine are presumed to be distribution offenses. Interestingly, second time distribution offenses involving powder cocaine are penalized more severely (five to thirty years imprisonment) than those involving crack cocaine (zero to 25 years imprisonment).

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14. Virginia

Virginia's statutes do not distinguish between offenses involving powder cocaine and crack cocaine generally. The penalties are determined by the schedule of the controlled substance involved in the offense, and all forms of cocaine are listed in schedule II. Virginia's "drug kingpin" statute, however, does distinguish between the two forms of cocaine using a 2-to-1 drug quantity ratio. Under this statute, an offender who trafficks five kilograms or more of powder cocaine or 2.5 kilograms or more of cocaine base is subject to a 20-year mandatory minimum sentence.

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[168] Oklahoma Statutes Annotated Tit. 63, § 2-415(C)(2).

[169] South Carolina Code Annotated §§ 44.53-370, 44.53-375 (2000).

Table 4
State Cocaine Penalties

State	Crack/Powder Distinction	Guidelines System	Determinate Sentencing	Mandatory Minimum
Total Affirmative Responses	**14**	**22**	**30**	**38**
Alabama	Yes (10:1 ratio)	No	No	Yes
Alaska	No	No	Yes	Yes
Arizona	Yes (12:1 ratio)	No	Yes	Yes
Arkansas	No	Yes	Yes	Yes
California	Yes[170]	No	Yes	Yes
Colorado	No	No	Yes	Yes
Connecticut	Yes (56.7:1 ratio)	No	Yes	Yes
Delaware	No	Yes	Yes	Yes
District of Columbia	No	Yes	Yes	Yes
Florida	No	Yes	Yes	Yes
Georgia	No	No	Yes	Yes
Hawaii	No	No	No	No
Idaho	No	Yes	Yes	Yes
Illinois	No	No	Yes	Yes
Indiana	No	Yes	Yes	Yes
Iowa	Yes (100:1 ratio)	No	No	Yes
Kansas	No	Yes	No	Yes

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[170] California does not use quantity-based distinctions between crack cocaine and powder cocaine; rather, it uses a penalty-based system. Crack cocaine offenders are sentenced to a three, four, or five-year term of imprisonment, while powder cocaine offenders are sentenced to a two, three, or four-year term. Quantities are irrelevant in this scheme.

Table 4 cont'd

State	Crack/Powder Distinction	Guidelines System	Determinate Sentencing	Mandatory Minimum
Kentucky	No	No	No	No
Louisiana	No	Yes	Yes	Yes
Maine	Yes (3.5:1 ratio)	No	Yes	Yes
Maryland	Yes (9:1 ratio)	Yes	No	Yes
Massachusetts	No	No	Yes	No
Michigan	No	No	Yes	Yes
Minnesota	No	Yes	Yes	Yes
Mississippi	No	No	No	Yes
Missouri	Yes (75:1 ratio)	Yes	No	Yes
Montana	No	No	No	No
Nebraska	No	No	No	No
Nevada	No	No	Yes	Yes
New Hampshire	Yes (28:1 ratio)	No	Yes	No
New Jersey	No	Yes	No	Yes
New Mexico	No	No	Yes	No
New York	No	No	No	Yes
North Carolina	No	Yes	Yes	Yes
North Dakota	Yes (10:1 ratio)	No	Yes	Yes
Ohio	Yes (10:1 ratio)[171]	Yes	No	Yes
Oklahoma	Yes (6:1 ratio)	No	Yes	Yes
Oregon	No	Yes	Yes	No
Pennsylvania	No	Yes	Yes	Yes

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[171] Ohio has a ten-year mandatory minimum for its major drug offenders and uses a 10-to-1 drug quantity ratio at this category.

Table 4 cont'd

State	Crack/Powder Distinction	Guidelines System	Determinate Sentencing	Mandatory Minimum
Rhode Island	No	Yes	No	Yes
South Carolina	Yes	No	No	Yes
South Dakota	No	No	Yes	Yes
Tennessee	No	Yes	Yes	No
Texas	No	No	No	No
Utah	No	Yes	No	No
Vermont	No	No	No	No
Virgin Islands	No	No	No	Yes
Virginia	Yes (2:1 ratio)[172]	Yes	Yes	Yes
Washington	No	Yes	Yes	No
West Virginia	No	Yes	No	Yes
Wisconsin	No	No	No	Yes
Wyoming	No	No	No	No

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B. INTERACTION OF PROSECUTORIAL DECISIONS AND STATE PENALTIES

Federal law enforcement and judicial resources are too limited to process all drug trafficking offenses at the federal level. In fact, one of the stated goals of the 1986 Act was to "give greater direction to the DEA and the U.S. Attorneys on how to focus scarce law enforcement resources."[173] As stated in the preceding chapter, only a small minority – about ten percent – of all drug trafficking cases are brought at the federal level.

Because the states generally have not adopted the federal penalty structure for cocaine offenses, the decision whether to prosecute a crack cocaine offense at the federal or state level can have an especially significant effect for a crack cocaine offender. Commission data indicate that prosecutorial practices vary substantially among the various federal judicial districts, which

[172] Virginia differentiates between the two forms of cocaine under its "drug kingpin" statute. Absent "kingpin" status, the statutes make no distinction between the two forms.

[173] H.R. Rep. No. 99–845, pt. 1, at 11-12 (1986).

suggests that the proportion of offenders negatively affected by the decision to prosecute at the federal level varies nationwide.

Table 5 shows, for each federal district, the number of crack cocaine and powder cocaine cases and the median drug quantity involved for both forms of cocaine. The districts are listed in ascending order by the median quantity of crack cocaine. The data demonstrate some interesting variations in prosecution practices. For example, largely rural jurisdictions such as Southern Iowa (41), Western North Carolina (51), New Hampshire (31), and Kansas (53) prosecute more crack cocaine cases than Northern Illinois (16), which includes Chicago, and Central California (31), which includes Los Angeles.

Table 5 also suggests that there are significant differences in the types of cocaine cases brought in the various federal districts. Based on median drug quantity in crack cocaine cases, prosecutors in some federal districts appear to focus on cases involving large quantities of crack cocaine, for example Eastern North Carolina (1,490.0 grams) and Northern Florida (812.0 grams), while other jurisdictions prosecute cases involving much smaller median quantities, for example Western New York (10.3 grams) and Northern West Virginia (14.2 grams). Even among federal judicial districts within states there is often significant variation in the types of crack cocaine cases prosecuted. For example, in Eastern New York the median quantity of crack cocaine is 362.4 grams, compared to 15.0 grams in Northern New York. Similarly, in Western Kentucky the median quantity of crack cocaine is 135.4 grams, compared to 14.6 grams in Eastern Kentucky.

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Table 5
Median Drug Weight for Powder Cocaine and Crack Cocaine Cases in Each Federal District
Fiscal Year 2000[174]

	Primary Drug Type			
	Crack Cocaine		Powder Cocaine	
District	Number of Cases	Median Weight (Grams)	Number of Cases	Median Weight (Grams)
All Districts	**3,800**	**71.6**	**3,732**	**3,012.5**
North Dakota	0	-	0	-
Guam	0	-	0	-
Idaho	0	-	0	-
Montana	0	-	19	935.6

[174] Of the 22,639 cases sentenced under USSG §2D1.1, the primary drug trafficking guideline, 4,806 had crack cocaine and 5,241 had powder cocaine as their primary drug type. Due to missing drug weight data, 1,006 of the 4,806 crack cocaine cases and 1,509 of the 5,241 powder cocaine cases were excluded from the table.

Table 5 cont'd

District	Crack Cocaine Number of Cases	Crack Cocaine Median Weight (Grams)	Powder Cocaine Number of Cases	Powder Cocaine Median Weight (Grams)
Northern Mariana Islands	0	-	0	-
Oklahoma, Eastern	0	-	0	-
Virgin Islands	6	1.9	3	312,600.0
New Hampshire	31	3.7	5	442.0
Washington, Eastern	7	5.7	8	287.6
Alaska	7	6.8	34	2,360.9
Louisiana, Middle	5	7.0	3	2,000.0
New York, Western	28	10.3	17	192.4
Iowa, Northern	13	12.0	3	510.3
West Virginia, Northern	51	14.2	12	292.4
Kentucky, Eastern	32	14.6	58	1,130.0
New York, Northern	46	15.0	20	500.0
Missouri, Western	19	16.4	39	1,983.9
New Mexico	27	20.5	7	1,000.0
Rhode Island	31	20.6	14	529.0
West Virginia, Southern	50	22.3	20	568.7
Vermont	9	25.5	11	288.3
Kansas	53	25.7	25	3,000.0
Arkansas, Eastern	26	28.6	12	1,665.0
Missouri, Eastern	101	29.4	40	1,270.0
Tennessee, Eastern	74	29.5	31	610.9
Texas, Eastern	104	30.4	47	2,600.0
Oregon	11	33.0	9	2,253.8
Ohio, Northern	41	33.7	32	2,173.5
California, Southern	3	37.9	140	23,710.0
California, Northern	4	38.5	36	3,260.0
Michigan, Eastern	62	40.1	41	483.0
Texas, Western	78	40.4	198	2,042.0
Washington, Western	4	42.4	42	1,965.0
Puerto Rico	8	42.6	48	3,750.0
Arkansas, Western	8	42.8	6	896.8
Mississippi, Northern	30	46.8	1	1,117.7
Arizona	21	46.8	76	5,000.0
Utah	4	46.9	17	1,199.0
Illinois, Central	60	49.3	20	5,750.0
Wisconsin, Western	9	49.6	10	1,510.0

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Table 5 cont'd

District	Crack Cocaine Number of Cases	Crack Cocaine Median Weight (Grams)	Powder Cocaine Number of Cases	Powder Cocaine Median Weight (Grams)
Pennsylvania, Middle	41	50.0	13	997.7
Georgia, Middle	63	50.0	31	1,000.0
Georgia, Northern	35	50.2	59	6,000.0
Massachusetts	75	52.0	48	1,000.0
Virginia, Western	67	52.9	9	453.6
Louisiana, Eastern	60	53.4	43	4,000.0
Alabama, Northern	43	53.7	19	1,000.0
Maine	6	54.4	11	689.7
Florida, Southern	110	55.5	504	7,574.5
Texas, Southern	142	57.4	312	10,575.0
New York, Southern	123	59.0	127	10,000.0
Tennessee, Middle	8	60.5	8	1,670.0
Nevada	30	60.9	9	82.9
Indiana, Northern	82	62.9	24	2,797.8
Georgia, Southern	29	63.5	8	248.3
Ohio, Southern	31	66.7	35	2,000.0
Alabama, Middle	32	69.2	8	625.0
California, Eastern	9	69.6	11	22,000.0
Nebraska	32	75.0	22	920.2
District of Columbia	57	77.0	8	943.5
Wyoming	3	84.0	11	1,200.0
Illinois, Southern	81	87.5	12	1,905.0
Florida, Middle	207	88.4	150	2,996.5
Pennsylvania, Eastern	65	93.6	56	2,870.0
Pennsylvania, Western	45	99.9	12	1,260.0
Mississippi, Southern	32	115.2	26	1,000.0
Colorado	14	118.4	39	1,444.2
Iowa, Southern	41	120.0	15	3,000.0
Wisconsin, Eastern	27	121.0	17	2,600.0
Texas, Northern	39	123.3	82	6,000.0
Connecticut	19	125.2	16	12,500.0
California, Central	31	126.0	68	27,910.0
Tennessee, Western	45	127.5	33	3,000.0
New Jersey	15	135.0	48	2,265.0
Kentucky, Western	18	135.4	18	989.6
Virginia, Eastern	219	135.5	47	990.0

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District	Crack Cocaine Number of Cases	Crack Cocaine Median Weight (Grams)	Powder Cocaine Number of Cases	Powder Cocaine Median Weight (Grams)
South Carolina	131	148.5	37	2,028.0
North Carolina, Middle	56	168.5	31	2,443.0
Maryland	34	189.0	13	4,900.0
Michigan, Western	18	192.3	15	2,500.0
Hawaii	6	197.5	14	2,577.2
Minnesota	35	203.0	49	1,100.0
Delaware	11	204.0	4	537.5
Louisiana, Western	97	218.0	26	23,220.0
Illinois, Northern	16	248.5	99	4,750.0
Alabama, Southern	31	353.8	14	10,000.0
New York, Eastern	44	362.4	188	2,995.5
Indiana, Southern	13	381.1	11	4,000.0
North Carolina, Western	51	425.3	20	1,210.0
South Dakota	3	426.1	2	38.3
Florida, Northern	65	812.0	32	4,565.0
North Carolina, Eastern	116	1,490.0	26	1,023.1
Oklahoma, Western	31	3,694.6	7	496.2
Oklahoma, Northern	3	5,000.0	11	1,500.0

SOURCE: U.S. Sentencing Commission, 2000 Datafile, USSCFY00.

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Table 6, which provides data on the number of cases involving less than 25 grams of crack cocaine brought in each federal jurisdiction, also demonstrates the prevalence of crack cocaine cases involving relatively small drug quantities in the various jurisdictions. Nationwide, 28.5 percent of all federal crack cocaine offenses in 2000 involved less than 25 grams of the drug. However, cases involving less than 25 grams represented over three-quarters of the crack cocaine cases prosecuted in the Virgin Islands (100.0%), Alaska (85.7%), Middle Louisiana (80.0%), and New Hampshire (77.4%). In contrast, such cases comprised less than five percent of the federal crack cocaine caseload in Eastern Wisconsin (3.7%), Central California (3.2%), Eastern North Carolina (0.9%), Southern Indiana (0.0%), South Dakota (0.0%), Western Washington (0.0%), Northern Oklahoma (0.0%), and Wyoming (0.0%).

The differences in prosecutorial practices suggested by this data occur for a number of reasons. For example, prosecutors may decide that prosecution at the federal level is not necessary because the state penalty for the particular offense is deemed adequate.[175] Or federal

[175] *See, e.g.,* written statement by Bridget G. Brennan, Special Narcotics Prosecutor for the City of New York, to the U.S. Sentencing Commission, regarding Drug Penalties (February 26, 2002) at 2.

resources in a specific jurisdiction may be prioritized toward another drug type that is particularly problematic for that jurisdiction. Nevertheless, because of the significant difference between the federal and state cocaine penalty structures, these prosecutorial decisions can have a profound impact on the ultimate sentence visited on an individual crack cocaine offender.

Table 6[176]
Crack Cocaine Cases With Less Than 25 Grams for Each District
Fiscal Year 2000

		Crack Cocaine Cases with Less than 25g	
District	**Total**	**Number**	**Percent**
All Districts	3,800	1,083	28.5
Virgin Islands	6	6	100.0
Alaska	7	6	85.7
Louisiana, Middle	5	4	80.0
New Hampshire	31	24	77.4
Washington, Eastern	7	5	71.4
New York, Western	28	18	64.3
Missouri, Western	19	12	63.2
New York, Northern	46	29	63.0
New Mexico	27	16	59.3
Rhode Island	31	18	58.1
West Virginia, Northern	51	29	56.9
Kentucky, Eastern	32	18	56.3
Iowa, Northern	13	7	53.8
West Virginia, Southern	50	26	52.0
Kansas	53	25	47.2
Arkansas, Eastern	26	12	46.2
Tennessee, Eastern	74	34	45.9

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("We have worked on successful joint investigations with federal prosecutors, during which we evaluated which set of laws would allow us to most appropriately prosecute and punish violent drug dealers. . . . Not every crack case went to federal prosecutors – only the narcotics cases against the most violent gang members.").

[176] Of the 22,639 cases sentenced under the primary drug trafficking guideline, USSG §2D1.1, 4,806 had crack cocaine as the primary drug type. Of these 4,806 crack cocaine cases, 1,006 were excluded from the table due to missing data on drug weight. In each row, the percentages are based on the total number of crack cocaine cases in each district, regardless of weight, indicated in the Total column.

Table 6 cont'd

District	Total	Crack Cocaine Cases with Less than 25g	
		Number	Percent
Oregon	11	5	45.5
Texas, Western	78	34	43.6
Michigan, Eastern	62	27	43.5
Missouri, Eastern	101	43	42.6
Texas, Eastern	104	44	42.3
New York, Southern	123	47	38.2
Georgia, Northern	35	13	37.1
Indiana, Northern	82	30	36.6
Texas, Southern	142	50	35.2
Illinois, Central	60	21	35.0
Pennsylvania, Middle	41	14	34.1
Maine	6	2	33.3
Massachusetts	75	25	33.3
Vermont	9	3	33.3
Mississippi, Northern	30	10	33.3
Wisconsin, Western	9	3	33.3
Arizona	21	7	33.3
California, Southern	3	1	33.3
Hawaii	6	2	33.3
Ohio, Southern	31	10	32.3
Nevada	30	9	30.0
Virginia, Western	67	20	29.9
Illinois, Southern	81	24	29.6
Georgia, Middle	63	18	28.6
Georgia, Southern	29	8	27.6
Ohio, Northern	41	11	26.8
Puerto Rico	8	2	25.0
Mississippi, Southern	32	8	25.0
Tennessee, Middle	8	2	25.0
California, Northern	4	1	25.0
Utah	4	1	25.0
Virginia, Eastern	219	54	24.7
Alabama, Northern	43	10	23.3
Kentucky, Western	18	4	22.2
South Carolina	131	29	22.1
Florida, Southern	110	24	21.8
Pennsylvania, Eastern	65	14	21.5

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Table 6 cont'd

District	Total	Crack Cocaine Cases with Less than 25g	
		Number	Percent
Colorado	14	3	21.4
Pennsylvania, Western	45	9	20.0
Florida, Middle	207	40	19.3
Nebraska	32	6	18.8
North Carolina, Western	51	9	17.6
District of Columbia	57	10	17.5
Louisiana, Western	97	16	16.5
New York, Eastern	44	7	15.9
Alabama, Middle	32	5	15.6
Tennessee, Western	45	7	15.6
Texas, Northern	39	6	15.4
Louisiana, Eastern	60	9	15.0
Illinois, Northern	16	2	12.5
Arkansas, Western	8	1	12.5
Maryland	34	4	11.8
Michigan, Western	18	2	11.1
California, Eastern	9	1	11.1
North Carolina, Middle	56	6	10.7
Oklahoma, Western	31	3	9.7
Alabama, Southern	31	3	9.7
Delaware	11	1	9.1
Iowa, Southern	41	3	7.3
New Jersey	15	1	6.7
Florida, Northern	65	4	6.2
Minnesota	35	2	5.7
Connecticut	19	1	5.3
Wisconsin, Eastern	27	1	3.7
California, Central	31	1	3.2
North Carolina, Eastern	116	1	0.9
Indiana, Southern	13	0	0.0
South Dakota	3	0	0.0
Washington, Western	4	0	0.0
Oklahoma, Northern	3	0	0.0
Wyoming	3	0	0.0
North Dakota	0	-	-
Guam	0	-	-
Idaho	0	-	-

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Table 6 cont'd

District	Total	Crack Cocaine Cases with Less than 25g	
		Number	Percent
Montana	0	-	-
Northern Mariana Islands	0	-	-
Oklahoma, Eastern	0	-	-

SOURCE: U.S. Sentencing Commission, 2000 Datafile, USSCFY00.

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Chapter 8

FINDINGS, DISCUSSION, AND RECOMMENDATIONS

A. OVERVIEW

This chapter discusses the most important findings of the preceding chapters, evaluates the current federal penalty structure for cocaine offenses in terms of both the purposes of sentencing set forth in the Sentencing Reform Act and specific congressional objectives set forth in other relevant legislation, and offers concrete recommendations for changes to the penalty structure.

In 1986, Congress responded to a national sense of urgency surrounding drugs generally and crack cocaine specifically, expedited the usual legislative process, and enacted the Anti-Drug Abuse Act of 1986. The 1986 Act created the basic framework of statutory mandatory minimum penalties currently applicable to federal drug trafficking offenses generally, and the legislative history indicates that Congress targeted "serious" and "major" drug traffickers for five and ten-year mandatory minimum sentences, respectively.

The 1986 Act also established the 100-to-1 drug quantity ratio between powder cocaine and crack cocaine offenses that lies at the heart of the ongoing debate over the federal sentencing policy for cocaine offenses. As a result of both the statutory and guideline 100-to-1 drug quantity differentiation between the two forms of cocaine, the sentencing guideline range for crack cocaine offenses based solely on drug quantity is three to over six times longer than powder cocaine offenses involving equivalent drug quantities, depending on the exact quantity of drug involved. In addition, the average sentence for crack cocaine offenses (118 months) is 44 months – or almost 60 percent – longer than the average sentence for powder cocaine offenses (74 months), in large part due to the effects of the 100-to-1 drug quantity ratio.

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The legislative history is ambiguous as to whether Congress intended the penalty structure for crack cocaine offenses to fit within the general two-tiered, five and ten-year penalty structure for serious and major traffickers created by the 1986 Act. The legislative history is clear, however, that Congress considered crack cocaine much more dangerous than powder cocaine and, therefore, those who trafficked crack cocaine warranted significantly higher punishment. Specifically, the establishment of the 100-to-1 drug quantity ratio was based on beliefs that (1) crack cocaine was extremely addictive; (2) crack cocaine distribution and use were highly associated with violence and other systemic crime; (3) crack cocaine use was especially perilous, with particularly devastating harms to children prenatally exposed to the drug; (4) young people were particularly prone to crack cocaine use; and (5) crack cocaine's purity, potency, low cost per dose, and ease of distribution and administration were leading to its widespread use.

Much as been learned about crack cocaine and crack cocaine offenders in the intervening years. Crack cocaine was a relatively new phenomenon at the time Congress was considering the 1986 Act, having been mentioned first in the major media by the *Los Angeles Times* only two years earlier on November 25, 1984.[177] Some of the information available to Congress in retrospect proved not to be empirically sound. For example, recent studies report that prenatal exposure to crack cocaine produces identical effects as prenatal exposure to powder cocaine and is far less devastating than previously reported.

Recent information also indicates that some of the conclusions reached in 1986 regarding the prevalence of certain aggravating conduct in crack cocaine trafficking may no longer be accurate. For example, establishment of the 100-to-1 drug quantity ratio was in part based on reports that crack cocaine offenses were highly associated with violence. Anecdotal evidence and Commission sentencing data indicate, however, that the violence has abated considerably. In 2000, almost *three-quarters (74.5%) of federal crack cocaine offenders had no weapon involvement*. Even when weapons were present, rarely were they actively used (2.3% of crack cocaine offenders).

Equally important, at the time Congress was considering the 1986 Act, the sentencing guidelines authorized by the Sentencing Reform Act of 1984 were still being developed by the Commission. Consequently, to effect its will that crack cocaine trafficking offenses be punished much more severely than powder cocaine trafficking offenses, Congress had only one instrument directly available to differentiate penalties for the two forms of cocaine: mandatory minimum penalties. Congress therefore used this mechanism and provided substantially different trigger drug quantities for the mandatory five and ten-year penalties for trafficking powder cocaine and crack cocaine. The advent of the more finely calibrated sentencing guideline system, which provides a more just and targeted mechanism to account for a number of aggravating factors, may in and of itself warrant some reconsideration of the severity of the mandatory minimum penalties.

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After carefully considering all of the information currently available – some 16 years after the 100-to-1 drug quantity ratio was enacted – the Commission firmly and unanimously believes that the current federal cocaine sentencing policy is unjustified and fails to meet the sentencing objectives set forth by Congress in both the Sentencing Reform Act and the 1986 Act. The
100-to-1 drug quantity ratio was established based on a number of beliefs about the relative harmfulness of the two drugs and the relative prevalence of certain harmful conduct associated with their use and distribution that more recent research and data no longer support.

Moreover, with the establishment and settled usage of the sentencing guidelines, sentencing proportionality can be better achieved by disentangling some of the harms accounted for in the 100-to-1 drug quantity ratio. This can be accomplished by (1) using specific

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[177] USSC, *supra* note 1, at 122.

sentencing enhancements to target the minority of offenders who engage in the most harmful conduct that concerned Congress in 1986; (2) decreasing the residual quantity-based penalties that apply to all crack cocaine offenders accordingly (to at least 25 grams for the five-year mandatory minimum penalty, and at least 250 grams for the ten-year mandatory minium penalty); and (3) maintaining at current levels the quantity-based penalties for powder cocaine offenses.

In reaching this conclusion, the Commission carefully considered the view of the Department of Justice that the current federal sentencing policy for crack cocaine offenses is appropriate.[178] In support of its position, the Department of Justice reports, among other things, that crack cocaine abuse is more associated with certain urban crime and risky sexual behavior. In addition, the typical user of crack cocaine is exposed to a greater risk of addiction than the typical user of powder cocaine. The Department of Justice concludes that the 100-to-1 drug quantity ratio is appropriate to ensure that those harms are adequately reflected in the penalty structure.

The premise apparently underlying this position is the view that because *all* of the discrete harms that may have been incorporated into the 100-to-1 drug quantity ratio cannot be fully addressed through specific guideline sentencing enhancements, *none* of the harms should be disentangled from the 100-to-1 drug quantity ratio. To the contrary, specific guideline sentencing enhancements can account for certain harmful conduct (*e.g.*, defendant weapon involvement and bodily injury) in a more targeted manner than quantity-based penalties, particularly for conduct that occurs in a small minority of offenses. If the Department of Justice's view on this point is accepted, *all* crack cocaine offenders would be punished *as if* they engaged in certain more harmful conduct, even though sentencing data demonstrate that the overwhelming majority of federal crack cocaine offenders are not involved in such conduct. As a result, the seriousness of most crack cocaine offenses and the culpability of most crack cocaine offenders would continue to be overstated.

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The Commission agrees, however, that differences in the intrinsic harms posed by the two drugs (*e.g.*, addictiveness) should be reflected in different base offense penalties and therefore different quantity-based penalties. Similarly, differences in other harms that cannot be adequately accounted for by specific sentencing enhancements (*e.g.*, association with certain systemic crime) also should be reflected appropriately in different base offense penalties. Consequently, while there are reasons to punish crack cocaine offenses more seriously than powder cocaine offenses involving equivalent quantities, the Commission concludes that a

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[178] *See* written statement by Larry D. Thompson, Deputy Attorney General, Department of Justice, to the U.S. Sentencing Commission regarding Drug Penalties (March 19, 2002); *see also,* U.S. Department of Justice*, Federal Cocaine Offenses: An Analysis of Crack and Powder Penalties* (March 17, 2002) [hereinafter DOJ Report].

100-to-1 drug quantity ratio is excessive to account for the differences in harms between the two drugs.[179]

Congress and the Commission now have improved tools – namely a refined sentencing guideline system that can account for variations in offender culpability and offense seriousness and more recent extensive data about crack cocaine and crack cocaine offenders – to provide a more appropriate and proportionate penalty structure than currently exists.

B. FINDINGS

1. Current Penalties Exaggerate the Relative Harmfulness of Crack Cocaine

As explained in Chapter 1, the legislative history of the 1986 Act is ambiguous as to whether Congress intended the penalties for crack cocaine offenses to fit within the general two-tiered, five and ten-year penalty structure for serious and major traffickers. However, using the evidence then available, Congress clearly concluded that crack cocaine was a more dangerous form of cocaine than powder cocaine and that conclusion formed a significant basis for the establishment of the 100-to-1 drug quantity ratio. Assessing the relative dangers posed by any two drugs is a difficult and inexact task, but recent research indicates that the current penalty structure – which yields a five-year mandatory minimum sentence for ten to fifty doses of crack cocaine compared to 2,500 to 5,000 doses of powder cocaine – greatly overstates the relative harmfulness of crack cocaine.

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a. Cocaine and Addiction

Both powder cocaine and crack cocaine are potentially addictive. (*See* Chapter 2.) The risk and severity of addiction to cocaine is directly related to the method by which the drug is administered into the body, rather than the form of the drug. Smoking or injecting any drug, including cocaine, generally produces the quickest onset, shortest duration, and most intense effects, and therefore produces the greatest risk of addiction.

Crack cocaine can only be readily smoked, which means that crack cocaine is always in a form and administered in a manner that puts the user at the greatest potential risk of addiction. Powder cocaine can be injected, snorted, or consumed orally. Injecting powder cocaine puts the user at a similar risk of addiction as smoking crack cocaine, but only 2.8 percent of powder

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[179] One study heavily cited by the Department of Justice to support their position concludes that the 100-to-1 drug quantity ratio is excessive and recommends a drug quantity ratio of 2 or perhaps 3-to-1. DOJ Report, *id.* at 2, citing Dorothy Hatsukami & Marian Fischman, *Crack Cocaine and Cocaine Hydrochloride: Are the Differences Myth or Reality?*, 276 JAMA 1580, 1582 (1996).

cocaine users inject the drug.[180] Most powder cocaine users snort the drug, which puts the user at a lower risk of addiction than smoking crack cocaine.

In short, while crack cocaine always represents the most addictive form of cocaine, powder cocaine typically represents a somewhat less addictive form of the drug because it is usually snorted. Precisely quantifying this difference is impossible and, as a result, determining an appropriate degree of punishment differential to account for any difference in addiction potential is difficult.[181] The addictive nature of crack cocaine, however, independently does not appear to warrant the 100-to-1 drug quantity ratio.

b. Prenatal Cocaine Exposure

Congress also provided heightened penalties for crack cocaine offenses based on the widespread fears of an epidemic of "crack baby syndrome." During the congressional debates surrounding the 1986 Act, many members voiced concern about the increasing number of babies prenatally exposed to crack cocaine and the devastating effects such exposure causes. Congress further expressed its concern about prenatal exposure to drugs generally in the 1995 disapproval legislation. That legislation expressly stated that enhanced sentences should be imposed on a defendant who, in the course of a drug offense, "involves . . . a woman who the defendant knows or should know to be pregnant."[182]

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A number of conclusions from more recent data are relevant to assessing the 100-to-1 drug quantity ratio in this context. First, recent research indicates that the negative effects of prenatal crack cocaine exposure are identical to the negative effects of prenatal powder cocaine exposure. To this point, Dr. Deborah Frank states "there are no physiologic indicators that show to which form of the drug the newborn was exposed. The biologic thumbprints of exposure to these two substances in utero are identical."[183] Since recent research reports no difference between the negative effects from prenatal crack cocaine and powder cocaine exposure, no differential in the drug quantity ratio based directly on this particular heightened harm appears warranted.

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[180] *See* NHSDA, *supra* note 60.

[181] It is noteworthy that the federal penalties for other major drugs of abuse that can be administered in multiple ways do not provide differentiation based on the method of administration. For example, the penalties for marijuana do not differ depending on whether the drug is smoked or orally ingested.

[182] *See supra* note 40.

[183] Frank, *supra* note 64; Chasnoff, *supra* note 62. Dr. Ira J. Chasnoff supports this position, stating that "[t]he physiology of [powder] cocaine and crack are the same, and the changes in the dopamine receptors in the fetal brain are the same whether the mother has used [powder] cocaine or crack."

Second, recent research indicates that the negative effects of prenatal cocaine exposure are significantly less severe than believed when the current penalty structure was established. Although there does appear to be an association between prenatal cocaine exposure and some negative developmental effects (*e.g.*, attention and emotional regulation), the Acting Director of the National Institute on Drug Abuse (NIDA), Dr. Glen Hanson, reports that "researchers have found the effects to be not as devastating as originally believed . . . ."[184]

Additionally, Dr. Frank's recent findings are in accord with NIDA's position. Dr. Frank testified before the Commission that "there are small but identifiable effects" of prenatal cocaine exposure on infants, but that evidence of any negative long-term effects is inconsistent.[185] Dr. Frank further finds that the negative effects associated with prenatal cocaine exposure do not differ in severity, scope, or kind from prenatal exposure to other illegal and legal substances. In fact, the negative effects from prenatal exposure to cocaine are very similar to those associated with prenatal tobacco exposure and less severe than the negative effects of prenatal exposure to alcohol.[186] The fact that prenatal exposure to *legal* substances causes similar harms as prenatal exposure to cocaine further complicates accounting for the harms of prenatal cocaine exposure by quantity-based *criminal* penalties, particularly penalties that purport to distinguish between different forms of cocaine in part because of those perceived harms.

Third, even these findings of "small but identifiable effects" of prenatal cocaine exposure must be used cautiously in setting sentencing policy to account for this heightened harm because of other complicating factors. Dr. Hanson explained:

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> Factors such as the amount and number of all drugs used, inadequate prenatal care, socio-economic status, poor maternal nutrition, and other health problems, and exposure to sexually transmitted diseases are just some examples of why it is difficult to determine the exact effects of prenatal drug exposure. . . . *[W]e must be cautious in drawing causal relationships in this area . . . .*[187]

Dr. Chasnoff echoed this warning, asserting that "the home environment is *the* critical determinant of the child's ultimate outcome."[188]

In view of these research findings, the 1995 legislation disapproving equalization of cocaine penalties at powder cocaine levels sets forth a preferable way to address the heightened

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[184] Hanson, *supra* note 49.

[185] Frank, *supra* note 64.

[186] *Id.*

[187] Hanson, *supra* note 49. (emphasis added.)

[188] Chasnoff, *supra* note 62. (emphasis added.)

harm of prenatal drug exposure in the penalty structure. Instead of accounting for prenatal exposure indirectly in quantity-based penalties, which apply to all offenders regardless of whether they contributed to this particular harm, sentencing proportionality would be better achieved by imposing enhanced sentences directly on the small minority of offenders who distribute drugs knowingly to pregnant women.[189]

c. Young People as Users and Distributors

Congress also appears to have based heightened penalties for crack cocaine offenses in part on the widely-held belief that the drug's potency, low cost per dose, and ease with which it is manufactured and administered were leading to an epidemic of crack cocaine use. The legislative history surrounding the 1986 Act indicates that Congress was concerned that young people were especially prone to both using and distributing the drug. Congress further expressed its concern about involvement of minors in drug trafficking generally in the 1995 disapproval legislation by expressly stating that enhanced sentences should be imposed on a defendant who involves a juvenile.[190]

Although these Congressional concerns of the mid-1980s were understandable at the time, recent data indicate that the epidemic of crack cocaine use by youth never materialized to the extent feared. The National Household Survey on Drug Abuse reports that crack cocaine use among 18- to 25-year old adults historically has been low. Between 1994 and 1998, on average less than 0.4 percent of those young adults reported using crack cocaine within the past 30 days.[191] In fact, in 1998 *the rate of powder cocaine use among young adults was almost seven times as high* as the rate of use of crack cocaine.

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Monitoring the Future surveys report similar findings about cocaine use by high school seniors. From 1987 to 2000, on average less than 1.0 percent of high school seniors reported crack cocaine use within the past 30 days. (Fig. 23.) During that same period, *the rate of powder cocaine use by high school seniors was almost twice as high*, but averaged only 1.9 percent. The low rate of crack cocaine use by young people also is consistent with Commission sentencing data indicating that in 2000 only 0.5 percent of federal crack cocaine offenses involved the sale of the drug to a minor. (Fig. 20.)

Data are not available regarding the number of underage crack cocaine traffickers at the

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[189] The Commission draft model revised drug trafficking guideline *(see* App. A) would apply this enhancement to all trafficking defendants whose relevant conduct was proven by a preponderance of the evidence to have involved knowing sales to pregnant women. By expressing the enhancement in this form, the Commission believes it would apply more broadly and appropriately than the current enhancement, which covers only those charged and convicted of this aggravating conduct.

[190] *See supra* note 40.

[191] NHSDA*, supra* note 147.

state and local levels, but sentencing data suggest youth do not play a major role in crack cocaine trafficking at the federal level. Minors were involved in only 4.2 percent of federal crack cocaine offenses in 2000. (Fig. 20.) The average age of federal crack cocaine traffickers was 29 years old, only four years younger than the average age of all federal drug traffickers (33 years).[192]

The 1995 disapproval legislation sets forth a preferable way to address the heightened harm of involving minors in drug trafficking, either as users or co-participants in the crime. Instead of accounting for this harmful conduct in the quantity-based penalties, sentencing proportionality would be better achieved by imposing enhanced sentences on the small minority of offenders who sell any type of drug to juveniles, conduct drug distribution in areas likely to be frequented by juveniles (*e.g.*, near schools and playgrounds), or use juveniles in drug distribution activities.[193]

2. Current Penalties Sweep Too Broadly and Apply Most Often to Lower Level Offenders

a. The Impact of the Mandatory Minimum Threshold Quantities on Prosecutorial Decisions

In passing the 1986 Act, Congress recognized that all drug trafficking offenses cannot be prosecuted at the federal level and established the current mandatory minimum penalty structure in part to "give greater direction to the DEA and the U.S. Attorneys on how to focus scarce law enforcement resources."[194]

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Data indicate that, as Congress intended, the drug quantities that trigger the five and ten-year mandatory minimum penalties significantly influence federal prosecutorial decisions regarding which cocaine cases to bring at the federal level. For both crack cocaine and powder cocaine, only a small proportion of cases involve drug quantities below the five-year mandatory minimum threshold quantities. (*See* Fig. 11.) Both drugs also have noticeable "spikes" in the proportion of cases involving the five and ten-year threshold quantities. (*See* Fig. 11.)

Nevertheless because of the low quantity threshold for crack cocaine, a significant proportion of federal crack cocaine offenses involve relatively small drug quantities. In 2000, 1,083 crack cocaine offenses, representing *over one-quarter* – 28.5 percent – of federal crack cocaine offenses, involved less than 25 grams of the drug. In contrast, only 2.7 percent of federal powder cocaine offenses involved less than 25 grams of the drug. (*See* Table 6.) The 100-to-1 drug quantity ratio no doubt significantly contributes to the fact that *ten times* as many

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[192] USSC 2000 datafile, USSCFY00.

[193] As incorporated in the Commission's draft model drug trafficking guideline (*see* App. A), this enhancement would be more broadly applied based on a defendant's relevant conduct. *Supra* note 189.

[194] *See* H.R. Rep. No. 99-845, *supra* note 22.

federal crack cocaine offenses involve less than 25 grams than powder cocaine offenses.[195]

In terms of avoiding unwarranted sentencing disparity, the significant proportion of crack cocaine cases involving relatively small quantities is problematic for a number of reasons. Because the states generally have not adopted the federal penalty structure for cocaine offenses, the decision whether to federally prosecute an offense can have a significant effect on a crack cocaine offender, especially for an offense involving a small drug quantity. Further, Commission data indicate that the prosecutorial practices vary substantially among the various federal judicial districts, which may suggest some unwarranted geographical disparity.[196]

b. The Sentencing Impact of the Current Penalty Structure on Offenders with Relatively Small Drug Quantities

The fact that a significant proportion of federal crack cocaine offenders are responsible for relatively small drug quantities is troublesome because they receive especially disparate penalties in comparison to similar powder cocaine offenders. The Department of Justice's report concludes that "crack defendants received higher average sentences than powder defendants, and that *the ratio of crack to powder sentences was greater for lower amounts of cocaine than for higher amounts of the drug.*"[197] Specifically, the Department of Justice reports that defendants convicted of trafficking less than 25 grams of crack cocaine received an average sentence 4.8 times longer than the sentence received by equivalent powder cocaine defendants.[198]

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However, couching the differential in terms of a "penalty ratio" masks the significant real impact that the 100-to-1 drug quantity ratio has on sentences. According to the Department of Justice, defendants convicted of trafficking less than 25 grams of powder cocaine received an average sentence of 13.6 months, just over one year. In contrast, defendants convicted of trafficking an equivalent amount of crack cocaine received an average sentence of *64.8 months, over five years.*

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[195] The importance of the five-year trigger quantity in prosecutorial decisions is further evidenced by the fact that 72.7 percent (747) of those crack cocaine cases trafficking less than 25 grams involved between five and twenty grams, the quantities that receive the sentencing guideline range that currently corresponds to the five-year mandatory minimum penalty.

[196] *See* ch. 7, pt. B. As discussed in Chapter 7, the differences in prosecutorial practices suggested by the data can occur for a number of reasons.

[197] DOJ Report, *supra* note 178, at 23. (emphasis added.)

[198] *Id.*

Moreover, as the Department of Justice report admits, the "penalty ratio" widens even further to 8.3 to 1 for crack cocaine and powder cocaine offenders with *the lowest drug quantities and the least criminal history* (Criminal History Category I).[199] For those offenders, the 100-to-1 drug quantity ratio results in average sentences of 33 months for crack cocaine offenders compared to four months for powder cocaine offenders with equivalent drug quantities.[200] The Department of Justice reports that this heightened differential in sentences affected 1,637 crack cocaine defendants sentences between 1996 and 2000. The Commission strongly believes that sentencing differentials of this magnitude are inappropriate especially for this category of least culpable offenders.

c. The Impact of the Current Penalty Structure on Crack Cocaine Offenders Who Perform Low-Level Functions

As explained in Chapter 1, the mandatory minimum penalty structure established by the 1986 Act generally was designed to target "serious" and "major" drug traffickers for federal prosecution. Committee reports issued by the House Judiciary Subcommittee on Crime following its consideration of a predecessor bill defined *serious traffickers* as "the managers of the retail traffic" and *major traffickers* as "manufacturers or the heads of organizations who are responsible for creating and delivering very large quantities," and provided five and ten-year mandatory minimum penalties for those categories of offenders, respectively.

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Although Congress purposely may have deviated from that general structure for crack cocaine offenses, a number of results appear inconsistent with the fundamental purposes of the 1986 Act. In 2000, the majority of federal crack cocaine offenders – *two-thirds* – were *street-level dealers*. (*See* Fig. 5.) Because of this high concentration, the mandatory minimum penalties apply most often (64.2 percent) to smaller scale street-level dealers, not to serious and major traffickers as intended by Congress, at least for other major drugs of abuse.

The high concentration of federally sentenced street-level crack cocaine dealers also may indicate that scarce federal law enforcement resources are not being focused on serious and major traffickers, as Congress appears to have desired. According to the Commission's analyses of sentencing data, in 2000, only 5.9 percent of federal crack cocaine offenders performed trafficking functions (manager, supervisor) that are most consistent with the functions described in the Subcommittee report as warranting a five-year penalty. And only 15.2 percent performed trafficking functions (importer, high-level supplier, organizer, leader, wholesaler) that are most consistent with the functions described as warranting a ten-year penalty.

In sum, instead of targeting serious and major traffickers in a manner similar to the articulated congressional design of penalties for other major drugs of abuse, crack cocaine mandatory minimum penalties currently apply most often to offenders who perform low-level

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[199] *Id.* at 25.

[200] *Id.* at Appendix B.

trafficking functions, wield little decision-making authority, and have limited responsibility. Based solely on trafficking functions, the penalties appear to overstate the culpability of most crack cocaine offenders.

3. Current Penalties Overstate the Seriousness of Most Crack Cocaine Offenses and Fail to Provide Adequate Proportionality

The legislative history of the 1986 Act suggests that the 100-to-1 drug quantity ratio was designed in part to account for certain more harmful conduct believed to be associated to a greater degree with crack cocaine offenses than with powder cocaine offenses. The underlying assumptions that existed in 1986 about the pervasiveness of some of that conduct, however, do not accurately reflect more recent federal crack cocaine offenses and no longer should be relied upon in setting sentencing policy.

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 any degree by any participant in the offense in almost *two-thirds* (64.8%) of crack cocaine *offenses*. (Fig. 16.) Furthermore, *three-quarters* of federal crack cocaine offenders (74.5%) had *no personal weapon involvement*. (Fig. 16.) Further, when weapons were present, they rarely were actively used. In 2000, only 2.3 percent of crack cocaine *offenders* used a weapon. (Fig. 17.) Bodily injury of any type occurred in 7.9 percent of crack cocaine offenses in 2000. (Fig. 19.)

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As mentioned earlier, recent data on protected classes of individuals and locations also do not substantially support previous concerns about the high prevalence of other aggravating conduct in crack cocaine offenses. In 2000, only 4.2 percent of crack cocaine offenses involved minor co-participants, and even fewer – 0.5 percent – involved the sale of the drug to a minor. (Fig. 20.) Only 4.5 percent of crack cocaine offenses occurred in protected locations such as near schools and playgrounds, and sales of crack cocaine to pregnant women were almost never documented.

In short, although the harmful conduct described above does occur more often in crack cocaine offenses than in powder cocaine offenses, it occurs in only a relatively small minority of crack cocaine offenses. This finding raises two principal concerns. First, to the extent that the 100-to-1 drug ratio was designed to account for the harmful conduct examined in this section, it sweeps too broadly by treating *all* crack cocaine offenders *as if* they committed these various harmful acts, even though most crack cocaine offenders in fact had not. In other words, the offense seriousness of most crack cocaine offenders is overstated by the 100-to-1 drug quantity ratio, suggesting that a differential this extreme is unjust.

A second, related proportionality problem is that the current penalty structure provides no

sentencing differential between crack cocaine offenders who do in fact commit those harmful acts and those who do not. Because the current penalty structure assumingly accounts for those harmful acts in the quantity-based penalties, there are no specific sentencing enhancements in the primary drug trafficking guideline more appropriately targeting those offenders who actually commit those acts for especially severe penalties (with the exception of a two-level sentencing enhancement for possession of a dangerous weapon). As a result, the current penalty structure fails to provide adequate sentencing proportionality. In other words, the current penalty structure results in inappropriate sentencing uniformity for the most serious offenders.

Congress itself recognized this deficiency as early as 1995. The disapproval legislation expressly stated that "enhanced sentences should generally be imposed on a defendant who, in the course of a drug offense," among other things, murders or causes serious bodily injury to an individual, uses a dangerous weapon (including a firearm), involves a juvenile or a woman who the defendant knows or should know to be pregnant, or distributes cocaine within 500 feet of a school.[201] Providing specific sentencing enhancements appropriately targeted at the very offenders who cause those heightened harms, instead of accounting for them entirely in the overbroad, quantity-based penalties, would be more consistent with the 1995 congressional directive.

In sum, the current penalty structure's almost exclusive reliance on quantity-based penalties to account for the entirety of the harms examined in this section fails to provide adequate sentencing proportionality. Proportionate sentencing would be better achieved by (1) providing specific sentencing enhancements targeted at the more culpable traffickers of crack cocaine or other drugs who commit those harmful acts, and (2) decreasing the quantity-based penalties for crack cocaine to correct for the overstatement of the offense seriousness and culpability of the majority of offenders who do not commit such acts.

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Admittedly, Commission sentencing data on weapon involvement and bodily injury do not fully capture all systemic crime associated with crack cocaine (*e.g.*, crimes such as prostitution committed by users to sustain an addiction). The Department of Justice reports findings that urban crime rates in 1991 would have been 10 percent lower in the absence of crack cocaine use and distribution.[202] The Department of Justice also reports that crack cocaine is more closely linked to trends in homicide rates than any other major drug of abuse.[203]

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[201] *See supra* note 40.

[202] *See* DOJ Report, *supra* note 178, at 8, 9, citing Jeff Grogger and Michael Willis, *The Emergence of Crack Cocaine and the Rise in Urban Crime Rates*, 4 REVIEW OF ECON. AND STATS. 519, 526 (2000).

[203] *Id.*, at 9, also citing K. Jack Riley, *Homicide and Drugs: A Tale of Six Cities*, 2 HOMICIDE STUDIES 176, 196-97 (1998).

There is no single definitive reason for the link between crack cocaine and certain systemic crime. Dr. Alfred Blumstein suggests that the link with violence is a result of the means and locus of crack cocaine distribution. Describing the crack market in the 1980s, Dr. Blumstein states:

> [T]he aggressive marketing of crack, particularly to new customers, typically took place in street markets, typically in the poorest neighborhoods where violence is much more common than in the more affluent neighborhoods where powder would be more likely to be sold. Also, the participants in street drug markets need their own protection against street robbers, who might see these markets as prime targets because their victims would not be likely to call for help from the police. Thus, those in the street markets were likely to carry a handgun for self-protection, and the presence of these handguns inevitably escalated the level of violence in any disputes.[204]

The Department of Justice suggests that the fact that crack cocaine typically is sold in smaller units and involves a higher volume of transactions than powder cocaine contributes to its association with violence. The crack cocaine market also is relatively decentralized, with many small independent groups competing for territory.[205]

The trafficking of any drug involves collateral systemic crime. To the extent that trafficking in crack cocaine is associated with somewhat greater levels of systemic crime, the cocaine penalty structure should reflect that greater association, regardless of the underlying cause. Because specific sentencing enhancements for weapon involvement and bodily injury would not fully account for this factor, some differential in the quantity-based penalties for crack cocaine and powder cocaine is warranted on this basis. The Commission believes, however, that this basis alone does not support the 100-to-1 drug quantity ratio.

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4. Current Penalties' Severity Mostly Impacts Minorities

One of the key issues surrounding the debate concerning the different penalty structures for crack cocaine offenses and powder cocaine offenses relates to the racial composition of federal crack cocaine offenders. The overwhelming majority of offenders subject to the heightened crack cocaine penalties are black, about 85 percent in 2000. This has contributed to a

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[204] Blumstein, *supra note* 123.

[205] *See* DOJ Report, *supra* note 178, at 9, citing Ko-Lin Chin & Jeffrey Fagan, *The Impact of Crack on Drug and Crime Involvement* 19-21 (1991). The Department of Justice also cites studies linking crack cocaine use to prostitution, *id.,* citing Chin & Fagan, at 15; *see also* DOJ Report, *supra* note 179, at 2, citing Hatsukami & Fischman, at 1585.

widely-held perception that the current penalty structure for federal cocaine offenses promotes unwarranted disparity based on race.

In order to evaluate whether the crack cocaine penalties disproportionately impact blacks, data regarding the racial composition of the entire population of crack cocaine traffickers would be required. For example, if 85 percent of federally convicted and sentenced crack cocaine traffickers are black, the fact that the same percentage of all crack cocaine traffickers are black would tend to undermine the assertion of unwarranted disparity based on race. On the other hand, if 85 percent of federally convicted and sentenced crack cocaine traffickers are black, the fact that some lower percentage of all crack cocaine traffickers are black would tend to support the assertion of unwarranted disparity based on race. Although data regarding the racial composition of crack cocaine *users* are available, such data do not exist for crack cocaine *traffickers* generally. As a result, this assertion cannot be evaluated scientifically.

Nevertheless, the Commission finds even the perception of racial disparity to be problematic. Perceived improper racial disparity fosters disrespect for and lack of confidence in the criminal justice system among those very groups that Congress intended would benefit from the heightened penalties for crack cocaine. The legislative history surrounding the 1986 Act indicates that one of Congress's primary concerns was to protect poor and minority neighborhoods that were most afflicted by crack cocaine trafficking and its associated secondary harms. The fact that those same communities and many of their representatives now seek change in the federal cocaine penalty structure suggests a critical re-examination of the current penalty structure may be warranted.

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Furthermore, to the extent that the preceding analysis has shown that the 100-to-1 drug quantity ratio results in unduly severe penalties for most crack cocaine offenders, the effects of that severity fall primarily upon black offenders.

C. RECOMMENDATIONS

In assessing the current federal cocaine sentencing policy, the Commission has carefully considered the purposes of sentencing set forth in the Sentencing Reform Act of 1984, the objectives of the Anti-Drug Abuse Act of 1986, and the factors listed in the 1995 legislation disapproving penalty equalization at powder cocaine levels. The Commission has thoroughly examined the results of its own extensive data research project, reviewed the scientific and medical literature, considered written public comment, and considered expert testimony at three public hearings from federal and local law enforcement representatives, including the Department of Justice, the scientific and medical communities, academics, and civil rights organizations.

The Commission strongly believes that Congress and the Commission, informed by updated research and data and making use of the sentencing guideline system's capacity to account for variations in offender culpability and offense seriousness, can and should work

together to revise federal cocaine sentencing policy to provide more appropriate and proportionate sentencing.

The Commission recommends that Congress generally adopt a three-pronged approach for revising federal cocaine sentencing policy: (1) increase the five-year mandatory minimum threshold quantity for crack cocaine offenses to *at least* 25 grams (and the ten-year threshold quantity to *at least* 250 grams); (2) provide direction for more appropriate sentencing enhancements within the guidelines' structure that target the most serious drug offenders (without regard to the drug involved) for more severe penalties; and (3) maintain the current mandatory minimum threshold quantities for powder cocaine offenses.

The specific recommendations set forth below would result in guideline sentencing ranges (based solely on drug quantity) for crack cocaine offenses approximately two to four times as long as powder cocaine offenses involving equivalent drug quantities, depending on the precise quantity involved. The Commission further estimates that the recommendations if adopted would significantly reduce the difference between average sentences for crack cocaine and powder cocaine offenses from 44 months to approximately one year.[206] Specifically, average sentences for crack cocaine offenses would decrease from 118 months to 95 months, and the average sentences for powder cocaine offenses would increase from 74 months to 83 months (after accounting for aggravating and mitigating factors, other than drug quantity, discussed in Chapter 4 and addressed by the guidelines).

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1. Penalties for Crack Cocaine

a. Mandatory Minimum Threshold Quantity

Having concluded that the 100-to-1 drug quantity ratio no longer is supportable, determining the appropriate threshold quantity for triggering the five-year mandatory minimum penalty for crack cocaine offenses is a difficult and imprecise undertaking. There is a strong sense by some Commissioners that an alternative to the current approach should be explored. One approach suggested is to equate crack cocaine penalties to those for other major drugs of abuse such as methamphetamine and heroin, that are themselves severely punished.

Making comparisons among various drugs of abuse, however, is a complicated task yet still deserving of fair consideration. Heroin is an opioid that is abused because of its euphoric properties. The pharmacologic effects on the user are dramatically different for heroin and crack cocaine, and it cannot be easily said that the pharmacologic effects of either drug are worse than the other. Heroin users can experience clouded mental functioning, a slowing of both breathing and cardiac function, and in some circumstances sufficient respiratory depression to cause death. Heroin is most frequently administered by injection, which is the method of administration with

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[206] *See* Appendix B for the prison impact of the recommendations set forth in this section assuming Congress increases the five-year mandatory minimum threshold quantity to 25 grams for crack cocaine offenses and the sentencing guidelines are amended as modeled in Appendix B.

an equal addictive potential as smoking crack cocaine. (*See* Chapter 2.) Injecting heroin, however, more directly exposes users to secondary health risks such as exposure to HIV (the AIDS virus), hepatitis, and other infections than does smoking crack cocaine.[207]

Although both heroin and crack cocaine are addictive and sudden cessation of using either drug causes withdrawal symptoms, there is an effective pharmacologic treatment for withdrawing heroin addicts. The prescription drug methadone is effective at eliminating heroin withdrawal symptoms and has an established record as a successful addiction treatment.[208] No such pharmacologic treatments for cocaine have yet proven as broadly effective.

Crack cocaine also is more widely used than heroin. (*See* Fig. 24.) In addition, because the effects of crack cocaine are shorter lived than the effects of heroin (20 to 30 minutes for crack cocaine compared to a few hours for heroin),[209] crack cocaine users require multiple doses to maintain the desired effects over a given period of time.

In many ways, comparisons between crack cocaine and methamphetamine are more straightforward. Both drugs are highly addictive stimulants that produce the same euphoric effects. Both drugs pose the same secondary health risks to the user, including increased heart rate, blood pressure, respiration, wakefulness, body temperature, irritation, and anxiety. Chronic abuse of either drug can lead to dependence, but crack cocaine may pose a greater risk of addiction to the user because it can only be readily consumed in a form most likely to lead to addiction, *i.e.*, by smoking. In contrast, methamphetamine can be snorted, smoked, injected, or ingested.[210] Dependence is dictated by the method of delivery as opposed to the drug itself.

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The association of methamphetamine and crack cocaine with violence does not provide a clear answer as to how the two drugs should be penalized in relation to one another. Violence can be and sometimes is associated with both drugs, but no hard data exist to draw any concrete conclusions.

The quantity-based penalty structure for methamphetamine offenses, however, does provide some guidance as to what may be a more appropriate quantity-based penalty structure for crack cocaine offenses. Currently, fifty grams of a methamphetamine mixture trigger a five-year mandatory minimum sentence. As explained in chapter 2, crack cocaine is not pure. To

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[207] National Institute on Drug Abuse (NIDA), National Institute of Health (NIH), NIDA Research Report, *Heroin Abuse and Addiction*, Pub. No. 00-4165, (October 1997) at 15. http://165.112.78.61/ ResearchReports/Heroin/Heroin.htm.

[208] *Id.*

[209] *Id.*

[210] National Institute on Drug Abuse (NIDA), National Institute of Health (NIH), NIDA Notes, *Comparing Methamphetamine and Cocaine*, Pub. No. 98-3478 (June 1998). http//:www.nida.nih.gov/NIDA_Notes/NNVol13N1/Comparing.html.

manufacture crack cocaine, powder cocaine, which itself contains cutting agents and is less than 100 percent pure, is dissolved in a solution of sodium bicarbonate and water and boiled. Crack cocaine then separates from the boiling substance, is dried, and broken into "rocks." The purity of the crack cocaine, like the purity of methamphetamine, depends largely on the level of care and expertise of the manufacturer. In New York City, for example, mid-level dealers typically convert a given amount of powder cocaine into *a third more crack cocaine*, indicating a significantly lower level of purity.[211]

In sum, crack cocaine's impurity may suggest that the quantity-based penalties for crack cocaine should be less severe than the quantity-based penalties for pure methamphetamine. However, crack cocaine's greater risk of addiction (because of its method of use) suggests that the quantity-based penalties for crack cocaine offenses should be higher than the quantity-based penalties for methamphetamine mixture.

As the discussion above indicates, tying the penalty structure for crack cocaine offenses to the penalty structure for another drug can be complicated. The Commission, however, unanimously concludes that the five-year mandatory minimum threshold quantity for crack cocaine offenses should be increased to *at least* 25 grams. If the threshold were benchmarked to methamphetamine mixture, the five-year threshold quantity would be 50 grams, and if to heroin, the five-year threshold quantity would be 100 grams. The Commission believes that the penalty structure for crack cocaine offenses should more closely reflect the overall penalty structure established by the 1986 Act, and that increasing the five-year mandatory minimum threshold quantity for crack cocaine offenses to *at least* 25 grams would provide a penalty structure significantly more consistent with the penalty structure for other major drugs of abuse.

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For example, if Congress increased the five-year trigger quantity to 25 grams, the sentencing guidelines would incorporate such a change by assigning offenses involving 25 to 100 grams of crack cocaine a base offense level 26. Offense level 26 provides a guideline sentencing range that corresponds to a five-year mandatory minimum penalty (63 to 78 months for defendants with minimal or no criminal history). Furthermore, the sentencing guideline range would be adjusted for offenses involving almost any quantity of crack cocaine because resetting the mandatory minimum threshold quantities reverberates throughout the Drug Quantity Table. Appendix A shows in detail how the Drug Quantity Table would incorporate an increase in the five-year threshold quantity to 25 grams for crack cocaine offenses.[212]

Based on information received from federal law enforcement representatives, the Commission also believes that a base offense level quantity range of 25 to 100 grams more closely reflects a serious trafficker of crack cocaine as described generally in the legislative

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[211] *See* Statement of Bridget Brennan, Special Narcotics Prosecutor, at Tr. 18-19.

[212] *See* Appendix A, at A3-A6.

history of the 1986 Act.[213] The Drug Enforcement Administration reports that mid-level traffickers distribute ounce-sized (one ounce equals 28.5 grams) or multi-ounce packages of freshly processed crack cocaine to lower level distributors, who subsequently break down and repackage the crack cocaine into dosage units.[214] The Department of Justice also reports that mid-level distributors package crack cocaine into ounces for sale by retail sellers.[215] Testimony from an experienced state narcotics prosecutor confirmed the general association between these quantity thresholds and the serious trafficker classification.[216]

Moreover, increasing the five-year threshold quantity to at least 25 grams for crack cocaine offenses would likely cause a modest shift in federal prosecutorial resources that is more consistent with the objectives of the 1986 Act and that also apparently corresponds more closely to the revised enforcement priorities recently announced by the Department of Justice. In 2000, a significant proportion (28.5%) of federal crack cocaine offenses involved less than 25 grams, but relatively few involved less than the five-year threshold quantity of five grams (8%). If prosecutorial decisions were to follow a similar pattern subsequent to increasing the threshold quantity, relatively few offenses involving small quantities of less than 25 grams of crack cocaine could be expected at the federal level. In contrast, a significant proportion of federal crack cocaine offenses could be expected to involve 25 to 100 grams, which would be more consistent with the goal of targeting mid-level crack cocaine dealers.

As examined in the preceding section, a number of harms more associated with crack cocaine, such as using a weapon or causing bodily injury, can be accounted for by specific sentencing enhancements narrowly targeted to those offenders who engage in such conduct. Other harms more associated with crack cocaine offenses, such as certain systemic crime and its greater addictive potential, cannot be fully accounted for by specific sentencing enhancements and therefore must be reflected in different quantity-based penalties for the two drugs. The Commission believes that a drug-quantity ratio of not more than 20-to-1 (by increasing the five-year mandatory minimum threshold quantity to at least 25 grams for crack cocaine offenses) would appropriately reflect those harms that cannot be fully addressed by specific sentencing enhancements.

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[213] In addition, the five-year threshold quantities for methamphetamine mixture (50 grams) and heroin (100 grams) fall within this quantity range.

[214] *See* Teresi, *supra* note 44, at 2.

[215] DOJ Report, *supra* note 178, at 7.

[216] Brennan, *supra* note 211.

b. Specific Sentencing Enhancements

As part of a restructuring of federal cocaine sentencing policy, the Commission recommends that a number of sentencing enhancements be added to the primary drug trafficking guideline specifically targeting more severe punishment on offenders who cause heightened harm and are more culpable. Furthermore, the Commission recommends that these proposed sentencing enhancements apply across all drug types, including powder cocaine, and not solely to crack cocaine offenses. As discussed in the preceding section, the Commission believes that adding enhancements to the drug trafficking guideline to account for certain harms will better achieve sentencing proportionality than accounting for such harms entirely in the quantity-based penalties. In addition, providing such enhancements enables Congress to recalibrate the mandatory minimum penalties to more accurately reflect the seriousness of most crack cocaine offenses and the culpability of most crack cocaine offenders.

Specifically, the Commission recommends that Congress generally direct the Commission to provide appropriate sentencing enhancements to more adequately account for:

(1) involvement of a dangerous weapon (including a firearm);

(2) bodily injury resulting from violence;

(3) an offense under 21 U.S.C. §§ 849 (Transportation Safety Offenses), 859 (Distribution to Persons Under Age Twenty-One), 860 (Distribution or Manufacturing in or Near Schools and Colleges), and 861 (Employment or Use of Persons Under 18 Years of Age);

(4) repeat felony drug trafficking offenders; and

(5) importation of drugs by offenders who do not perform a mitigating role in the offense.

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Appendix A shows how sentencing enhancements accounting for these factors might possibly be incorporated into the primary drug trafficking guideline in response to such a directive.[217]

The Commission has determined that the proposed sentencing enhancements are appropriate because offenses that involve those heightened harms are more serious, and the drug offenders who cause them are more culpable and warrant increased punishment.[218] The Commission also recommends that Congress provide the Commission emergency amendment authority to facilitate implementation of the directive as soon as practicable so that there is not a significant lag between enactment of modified crack cocaine mandatory minimum penalties and

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[217] *See* Appendix A, at A1-A2.

[218] This analysis assumes that the quantity-based penalties for crack cocaine offenses are adjusted.

the effective date of these proposed enhancements.

(3) Simple Possession

The Commission again strongly urges Congress to repeal the mandatory minimum penalty for simple possession of crack cocaine.[219] Under the relevant statute, 21 U.S.C. § 844, the five gram five-year mandatory minimum threshold quantity *for distribution* of crack cocaine also applies to *simple possession* of crack cocaine. This unique mandatory minimum penalty for simple possession results in significantly disproportionate sentencing. Under the current penalty structure, an offender who simply *possesses* five grams of crack cocaine receives the same five-year mandatory minimum penalty as an offender who *distributes* five grams of the drug – and the same mandatory minimum penalty as a serious trafficker of other drugs. Simple possession of any quantity of any of the other serious drugs of abuse (*e.g.*, methamphetamine, heroin, LSD) and simple possession of less than 5 grams of crack cocaine, is punished under 21 U.S.C. § 844 by a maximum penalty of one years imprisonment, with no mandatory minimum (for a first offender). The crack simple possession statute is thus anomalous in its treatment of crack cocaine relative to other drugs, as well as in the structural "cliff" that occurs at the five gram threshold. Although relatively few crack cocaine offenses involve simple possession (a total of 69 over the past three fiscal years), the Commission unanimously reiterates its prior findings that the mandatory minimum for simple possession of crack cocaine is unjustified and should be repealed.[220]

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(4) Statutory Definition of "Cocaine Base"

The heightened statutory mandatory minimum penalties in 21 U.S.C. § 841 apply to "cocaine base," but the term is not defined in the statute. Some courts have interpreted cocaine base to be broader than crack cocaine and to include, for example, coca paste (an intermediate step in the processing of coca leaves into cocaine hydrochloride). To resolve a circuit conflict over the interpretation of the term, the Commission in 1993 defined cocaine base for purposes of guideline application to be limited to crack cocaine because the legislative history of the 1986 Act strongly suggested that crack cocaine was Congress's primary concern.[221]

The Commission further recommends that Congress amend the statutory penalties

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[219] USSC, *supra* note 1; *supra* note 2.

[220] Appendix A, at A9, shows how the sentencing guidelines might possibly be amended in response to a repeal of the mandatory minimum penalty for simple possession of crack cocaine.

[221] Specifically, the Commission added the following definition to the notes following the Drug Quantity Table in USSG §2D1.1(c): "'Cocaine base,' for 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 a lumpy, rocklike form." USSG, App. C (amend. 487) (effective Nov. 1, 1993).

provisions similarly to limit application of the heightened mandatory minimum penalties to crack cocaine, and equate the penalties for trafficking offenses involving other forms of cocaine base that do not present the heightened concerns associated with crack cocaine with the penalties for powder cocaine.

2. Penalties for Powder Cocaine

The Commission unanimously concludes, further, that a restructuring of federal cocaine policy should *not* include an increase in the statutory *mandatory minimum penalties* for powder cocaine offenses, as some have proposed. Some have suggested that Congress and the Commission should address the differential treatment of crack cocaine and powder cocaine offenses by increasing the quantity-based penalties for powder cocaine offenses,[222] but others have cautioned against that approach.[223]

The Commission finds that there are insufficient reasons to justify an increase in the statutory, quantity-based penalties for powder cocaine offenses. First, and most important, there does not appear to be evidence that the current quantity-based penalties for powder cocaine offenses are inadequate. At the Commission's public hearing on the subject on March 19, 2002,

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[222] *See, e.g.,* the 1997 Commission Report (recommending that Congress decrease the five-year quantity threshold for powder cocaine offenses to a level between 125 and 375 grams); S. 1847, the Drug Sentencing Reform Act of 2001 (proposing to decrease the five-year quantity threshold quantity for powder cocaine offenses to 400 grams); Attorney General Janet Reno & Barry R. McCaffrey, Director, Office of National Drug Control Policy, letter to President Clinton: Crack and Powder Cocaine Sentencing Policy in the Federal Criminal Justice System (July 3, 1997) (recommending decreasing the five-year quantity threshold for powder cocaine offenses to 250 grams); *see also supra* note 11; *see* written statement of Larry D. Thompson, *supra* note 178, at 14 ("We believe it would be more appropriate to address the differential between crack and powder penalties by recommending that penalties for powder cocaine be increased.").

[223] *See, e.g.,* written statement by 28 United States Circuit Court of Appeals and District Court Judges who previously served as United States Attorneys to the U.S. Sentencing Commission, April 15, 2002 ("We disagree with those who suggest that the disparity in treatment of powder and crack cocaine should be remedied by altering the penalties relating to powder cocaine. The penalties for powder cocaine, both mandatory minimum and guideline sentences, are severe and should not be increased); Judge Martin, Jr. et al., *supra* note 7, at 2 ("[W]e do not believe there is any reason to increase the severity of the penalties for those who deal in powder cocaine . . . ."); written statement by Julie Stewart, President, Families Against Mandatory Minimums Foundation, to the U.S. Sentencing Commission, regarding Drug Penalties, March 26, 2002, at 4; Henderson, *supra* note 9, at 7; Kamasaki, *supra* note 10, at 6; written statement by Ronald Weich, American Bar Association, to the U.S. Sentencing Commission, regarding Drug Penalties, Feb. 26, 2002, at 11.

Deputy Attorney General Larry Thompson testified that he was "not aware of any specific information we have regarding the fact that the existing powder penalties are too low."[224]

To the contrary, even though the quantities of powder cocaine required to trigger the mandatory minimum penalties are 100 times greater than the quantities of crack cocaine, powder cocaine penalties create some of the same problematic results. For example, in 2000 the majority of federal powder cocaine offenders – 60 percent – performed relatively low-level trafficking functions (street-level dealers or couriers/mules) much like federal crack cocaine offenders. (*See* Fig. 4.) Conversely, only 5.8 percent of federal powder cocaine offenders performed trafficking functions (manager, supervisor) that are most consistent with the functions described in the Subcommittee report as warranting a five-year penalty, and only 19.0 percent performed trafficking functions (importer, high-level supplier, organizer, leader, wholesaler) most consistent with the functions described as warranting a ten-year penalty.

Second, the Commission is mindful of the impact an increase in the mandatory minimum penalties for powder cocaine would have on minority populations, particularly Hispanics. One-half of federal powder cocaine offenders in 2000 were Hispanic, and 30.5 percent were black. In addressing certain perceived disparities associated with crack cocaine penalties, Congress and the Commission must be careful not to create new perceptions that could undermine the confidence of some in a restructured federal cocaine sentencing policy.

Third, the Commission believes that an increase in powder cocaine penalties should promote sentencing proportionality to a greater degree than can be accomplished by simply raising the mandatory minimum penalties. Specifically, the Commission proposes that Congress increase powder cocaine penalties by directing the Commission to promulgate the specific sentencing enhancements described in the preceding section. Those enhancements would apply across all drug types, including powder cocaine.

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Particularly relevant to powder cocaine, the proposed importation enhancement would affect 17.4 percent of powder cocaine offenses and increase the sentences of those *affected* from 80 months to 99 months.[225] This enhancement would reflect the fact that powder cocaine importers should reasonably foresee that at least some portion of the quantity imported will be converted into crack cocaine, as well as their increased culpability for introducing the illegal substance into the country. The proposed enhancements as a package would increase the average sentence for *all* powder cocaine offenses by ten months, from 74 months to 84 months.[226]

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[224] Statement of Larry Thompson, Deputy Attorney General, Department of Justice, to the U.S. Sentencing Commission, regarding Drug Penalties, March 19, 2002, at Tr. 71.

[225] *See* Appendix B, at B2.

[226] *See* Appendix B, tbl. B2, at B4.

D. CONCLUSION

The Commission hopes that the information contained in this report contributes meaningfully to the ongoing assessment of federal cocaine sentencing policy by Congress and others in the federal criminal justice system. The Commission is eager to continue its work with Congress to develop the most appropriate and effective federal cocaine sentencing policy possible and believes that the recommendations outlined in this chapter and the model sentencing guideline implementation of those recommendations shown in Appendix A represent significant steps toward that end.

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Appendix A

MODEL GUIDELINE AMENDMENT IMPLEMENTING RECOMMENDATIONS SET FORTH IN CHAPTER 8[1]

§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy

* * *

(b) Specific Offense Characteristics

(1) ~~If a dangerous weapon (including a firearm) was possessed, increase by **2** levels.~~

(Apply the greatest):

(A) If the defendant discharged a firearm, increase by **6** levels.

(B) If (i) the defendant (I) brandished or otherwise used a dangerous weapon (including a firearm); or (II) possessed a firearm described in 18 U.S.C. § 921(a)(30) or 26 U.S.C. § 5845(a); or (ii) eight or more firearms were possessed, increase by **4** levels.

(C) If a dangerous weapon (including a firearm) was possessed, increase by **2** levels.

(2) If the offense involved bodily injury other than bodily injury that resulted from the use of the controlled substance, increase the offense level according to the seriousness of the injury:

Degree of Injury	Increase in Level
(A) Bodily Injury	add **2** levels

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[1] This amendment assumes that Congress increases the five-year mandatory minimum threshold quantity to 25 grams for crack cocaine offenses, and the ten-year mandatory minimum threshold quantity to 250 grams.

(B)	Serious Bodily Injury	add **4** levels
(C)	Permanent or Life-Threatening Bodily Injury	add **6** levels.

The cumulative adjustments from subsections (b)(1) and (b)(2) shall not exceed **10** levels.

(3) If the defendant (A) was convicted of an offense under 21 U.S.C. § 849, § 859, § 860, or § 861; (B) distributed a controlled substance to a pregnant individual knowing, or having a reasonable cause to believe, that the individual was pregnant at that time; (C) distributed a controlled substance to a minor individual knowing, or having a reasonable cause to believe, that the individual was a minor at that time; or (D) used a minor individual to commit the offense or to assist in avoiding detection or apprehension for the offense, increase by **2** levels. If the offense level is less than **26**, increase to level **26**.

~~(2)~~(4) * * *

~~(3)~~(5) * * *

~~(4)~~(6) If the defendant (A) ~~the offense involved the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine~~ (i) imported a controlled substance, or (ii) manufactured a controlled substance from listed chemicals that the defendant knew ~~were~~ imported unlawfully~~,~~; and (B) ~~the defendant is not subject to~~does not receive an adjustment under §3B1.2 (Mitigating Role), increase by **2** levels.

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~~(5)~~(7) * * *

(8) If the defendant committed any part of the instant offense after sustaining one felony conviction of a controlled substance offense, increase by **2** levels.

~~(6)~~(9) * * *

(c) DRUG QUANTITY TABLE

Controlled Substances and Quantity*	Base Offense Level
(1) ● 30 KG or more of Heroin (or the equivalent amount of other Schedule I or II Opiates); ● 150 KG or more of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); ● ~~1.5~~7.5 KG or more of Cocaine Base; ● 30 KG or more of PCP, or 3 KG or more of PCP (actual); ● 15 KG or more of Methamphetamine, or 1.5 KG or more of Methamphetamine (actual), or 1.5 KG or more of "Ice";	**Level 38**
* * *	
(2) ● At least 10 KG but less than 30 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); ● At least 50 KG but less than 150 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); ● At least ~~500 G~~2.5 KG but less than ~~1.5~~7.5 KG of Cocaine Base; ● At least 10 KG but less than 30 KG of PCP, or at least 1 KG but less than 3 KG of PCP (actual); ● At least 5 KG but less than 15 KG of Methamphetamine, or at least 500 G but less than 1.5 KG of Methamphetamine (actual), or at least 500 G but less than 1.5 KG of "Ice";	**Level 36**
* * *	
(3) ● At least 3 KG but less than 10 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); ● At least 15 KG but less than 50 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); ● At least ~~150~~750 G but less than ~~500 G~~2.5 KG of Cocaine Base; ● At least 3 KG but less than 10 KG of PCP, or at least 300 G but less than 1 KG of PCP (actual); ● At least 1.5 KG but less than 5 KG of Methamphetamine, or at least 150 G but less than 500 G of Methamphetamine (actual), or at least 150 G but less than 500 G of "Ice";	**Level 34**
* * *	
(4) ● At least 1 KG but less than 3 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); ● At least 5 KG but less than 15 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); ● At least ~~50~~250 G but less than ~~150~~750 G of Cocaine Base; ● At least 1 KG but less than 3 KG of PCP, or at least 100 G but less than 300 G of PCP (actual); ● At least 500 G but less than 1.5 KG of Methamphetamine, or at least 50 G but	**Level 32**

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less than 150 G of Methamphetamine (actual), or at least 50 G but less than 150 G of "Ice";

* * *

(5) ● At least 700 G but less than 1 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates);
● At least 3.5 KG but less than 5 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
● At least ~~35~~175 G but less than ~~50~~250 G of Cocaine Base;
● At least 700 G but less than 1 KG of PCP, or at least 70 G but less than 100 G of PCP (actual);
● At least 350 G but less than 500 G of Methamphetamine, or at least 35 G but less than 50 G of Methamphetamine (actual), or at least 35 G but less than 50 G of "Ice"; **Level 30**

* * *

(6) ● At least 400 G but less than 700 G of Heroin (or the equivalent amount of other Schedule I or II Opiates);
● At least 2 KG but less than 3.5 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
● At least ~~20~~100 G but less than ~~35~~175 G of Cocaine Base;
● At least 400 G but less than 700 G of PCP, or at least 40 G but less than 70 G of PCP (actual);
● At least 200 G but less than 350 G of Methamphetamine, or at least 20 G but less than 35 G of Methamphetamine (actual), or at least 20 G but less than 35 G of "Ice"; **Level 28**

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* * *

(7) ● At least 100 G but less than 400 G of Heroin (or the equivalent amount of other Schedule I or II Opiates);
● At least 500 G but less than 2 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
● At least ~~5~~25 G but less than ~~20~~100 G of Cocaine Base;
● At least 100 G but less than 400 G of PCP, or at least 10 G but less than 40 G of PCP (actual);
● At least 50 G but less than 200 G of Methamphetamine, or at least 5 G but less than 20 G of Methamphetamine (actual), or at least 5 G but less than 20 G of "Ice"; **Level 26**

* * *

(8) ● At least 80 G but less than 100 G of Heroin (or the equivalent amount of other Schedule I or II Opiates);
● At least 400 G but less than 500 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
● At least ~~4~~20 G but less than ~~5~~25 G of Cocaine Base;
● At least 80 G but less than 100 G of PCP, or at least 8 G but less than 10 G of **Level 24**

PCP (actual);

- At least 40 G but less than 50 G of Methamphetamine, or at least 4 G but less than 5 G of Methamphetamine (actual), or at least 4 G but less than 5 G of "Ice";

* * *

(9) **Level 22**

- At least 60 G but less than 80 G of Heroin (or the equivalent amount of other Schedule I or II Opiates);
- At least 300 G but less than 400 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
- At least ~~3~~15 G but less than ~~4~~20 G of Cocaine Base;
- At least 60 G but less than 80 G of PCP, or at least 6 G but less than 8 G of PCP (actual);
- At least 30 G but less than 40 G of Methamphetamine, or at least 3 G but less than 4 G of Methamphetamine (actual), or at least 3 G but less than 4 G of "Ice";

* * *

(10) **Level 20**

- At least 40 G but less than 60 G of Heroin (or the equivalent amount of other Schedule I or II Opiates);
- At least 200 G but less than 300 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
- At least ~~2~~10 G but less than ~~3~~15 G of Cocaine Base;
- At least 40 G but less than 60 G of PCP, or at least 4 G but less than 6 G of PCP (actual);
- At least 20 G but less than 30 G of Methamphetamine, or at least 2 G but less than 3 G of Methamphetamine (actual), or at least 2 G but less than 3 G of "Ice";

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* * *

(11) **Level 18**

- At least 20 G but less than 40 G of Heroin (or the equivalent amount of other Schedule I or II Opiates);
- At least 100 G but less than 200 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
- At least ~~1~~5 G but less than ~~2~~10 G of Cocaine Base;
- At least 20 G but less than 40 G of PCP, or at least 2 G but less than 4 G of PCP (actual);
- At least 10 G but less than 20 G of Methamphetamine, or at least 1 G but less than 2 G of Methamphetamine (actual), or at least 1 G but less than 2 G of "Ice";

* * *

(12) **Level 16**

- At least 10 G but less than 20 G of Heroin (or the equivalent amount of other Schedule I or II Opiates);
- At least 50 G but less than 100 G of Cocaine (or the equivalent amount of

other Schedule I or II Stimulants);

- At least ~~500 MG~~2.5 G but less than ~~1~~5 G of Cocaine Base;
- At least 10 G but less than 20 G of PCP, or at least 1 G but less than 2 G of PCP (actual);
- At least 5 G but less than 10 G of Methamphetamine, or at least 500 MG but less than 1 G of Methamphetamine (actual), or at least 500 MG but less than 1 G of "Ice";

* * *

(13) ● At least 5 G but less than 10 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); **Level 14**

- At least 25 G but less than 50 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
- At least ~~250 MG~~1.25 G but less than ~~500 MG~~2.5 G of Cocaine Base;
- At least 5 G but less than 10 G of PCP, or at least 500 MG but less than 1 G of PCP (actual);
- At least 2.5 G but less than 5 G of Methamphetamine, or at least 250 MG but less than 500 MG of Methamphetamine (actual), or at least 250 MG but less than 500 MG of "Ice";

* * *

(14) ● Less than 5 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); **Level 12**

- Less than 25 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
- Less than ~~250 MG~~1.25 G of Cocaine Base;
- Less than 5 G of PCP, or less than 500 MG of PCP (actual);
- Less than 2.5 G of Methamphetamine, or less than 250 MG of Methamphetamine (actual), or less than 250 MG of "Ice";

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* * *

Commentary

Statutory Provisions: 21 U.S.C. §§ 841(a), (b)(1)-(3), (7), 849, 859, 860, 861, 960(a), (b); 49 U.S.C. § 46317(b). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

* * *

3. ~~*Definitions of "firearm" and "dangerous weapon" are found in the Commentary to §1B1.1 (Application Instructions). The enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense. For example, the enhancement would not be applied if the defendant, arrested at his residence, had an unloaded hunting rifle in the closet. The enhancement also applies to offenses*~~

~~that are referenced to §2D1.1; see §§2D1.2(a)(1) and (2), 2D1.5(a)(1), 2D1.6, 2D1.7(b)(1), 2D1.8, 2D1.11(c)(1), 2D1.12(c)(1), and 2D2.1(b)(1).~~

Application of Subsection (b)(1).—

(A) Definitions.—For purposes of this subsection:

"Brandished", "dangerous weapon", "firearm", and "otherwise used" have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).

"A firearm described in 18 U.S.C. 921(a)(30)" does not include a weapon described in 18 U.S.C. § 922(v)(3).

(B) Application of Subsections (b)(1)(A) and (b)(1)(B)(i).—Under subsections (b)(1)(A) and (b)(1)(B)(i), the defendant is accountable for the defendant's own conduct and for conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused.

(C) Possession of Dangerous Weapon or Firearm.—Subsections (b)(1)(B)(i)(II), (b)(1)(B)(ii), and (b)(1)(C) apply if a dangerous weapon or firearm was present, unless it is clearly improbable that the dangerous weapon or firearm was connected with the offense. For example, the enhancement would not apply if the defendant, arrested at his residence, had an unloaded hunting rifle in the closet.

* * *

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[18. Application of Subsection (b)(6).

(A) In General.—Under subsection (b)(6), the defendant is accountable for the defendant's own conduct and for conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused. [This enhancement ordinarily would not apply, for example, to a "courier" or "mule" whose role in the offense was limited to transporting the controlled substance under the direction of another person.]

(B) Non-applicability of Subsection (b)(6).—If the offense involved importation of ~~amphetamine or methamphetamine~~ a controlled substance, and an adjustment from subsection (b)(2) applies, do not apply subsection (b)~~(4)~~(5).]

* * *

22. Subsection (b)(2) Definitions.—For purposes of subsection (b)(2), "bodily injury", "permanent or life-threatening bodily injury", and "serious bodily injury" have the meaning given those terms in Application Note 1 of §1B1.1 (Application Instructions).

23. Non-applicability of §3B1.4 in Certain Instances.—If the conduct that forms the basis for an enhancement under subsection (b)(3) is the only conduct that forms the basis for an adjustment under §3B1.4 (Using a Minor to Commit a Crime), do not apply that adjustment under §3B1.4.

24. Application of Subsection (b)(8).—

(A) Definitions.—For purposes of this subsection:

"Controlled substance offense" has the meaning given that term in §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2 (Definitions of Terms Used in Section 4B1.1).

"Felony conviction" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen years or older is an adult conviction. A conviction for an offense committed prior to age eighteen years is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (e.g., a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

(B) Qualifying Prior Felony Conviction and Computation of Criminal History Points.—Subsection (b)(8) applies only to a prior felony conviction that receives criminal history points under §4A1.1(a), (b), or (c). Accordingly, this enhancement does not apply if the prior felony conviction is part of relevant conduct for the instant offense or if the prior felony conviction is outside the applicable time periods set forth in §4A1.2. See §1B1.3, comment. (n. 8), §§4A1.1, §4A1.2. A prior felony conviction that results in application of subsection (b)(8) also is counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).

* * *

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~~**§2D1.2. Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy**~~

~~(a) Base Offense Level (Apply the greatest):~~

~~(1) **2** plus the offense level from §2D1.1 applicable to the quantity of controlled substances directly involving a protected location or an underage or pregnant individual; or~~

~~(2) **1** plus the offense level from §2D1.1 applicable to the total quantity of controlled substances involved in the offense; or~~

~~(3) **26**, if the offense involved a person less than eighteen years of age; or~~

~~(4) **13**, otherwise.~~

~~*Commentary*~~

~~*Statutory Provisions: 21 U.S.C. §§ 859 (formerly 21 U.S.C. § 845), 860 (formerly 21 U.S.C. § 845a), 861 (formerly 21 U.S.C. § 845b).*~~

~~*Application Note:*~~

~~*1. This guideline applies only in a case in which the defendant is convicted of a statutory violation of drug trafficking in a protected location or involving an underage or pregnant individual*~~

~~*(including an attempt or conspiracy to commit such a violation) or in a case in which the defendant stipulated to such a statutory violation. See §1B1.2(a). In a case involving such a conviction but in which only part of the relevant offense conduct directly involved a protected location or an underage or pregnant individual, subsections (a)(1) and (a)(2) may result in different offense levels. For example, if the defendant, as part of the same course of conduct or common scheme or plan, sold 5 grams of heroin near a protected location and 10 grams of heroin elsewhere, the offense level from subsection (a)(1) would be level 16 (2 plus the offense level for the sale of 5 grams of heroin, the amount sold near the protected location), the offense level from subsection (a)(2) would be level 17 (1 plus the offense level for the sale of 15 grams of heroin, the total amount of heroin involved in the offense).*~~

~~*Background: This section implements the direction to the Commission in Section 6454 of the Anti-Drug Abuse Act of 1988.*~~

* * *

§2D2.1. Unlawful Possession; Attempt or Conspiracy

* * *

(b) Cross References~~s~~

~~(1) If the defendant is convicted of possession of more than 5 grams of a mixture or substance containing cocaine base, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking) as if the defendant had been convicted of possession of that mixture or substance with intent to distribute.~~

~~(2)~~(1) If the offense involved possession of a controlled substance in a prison, correctional facility, or detention facility, apply §2P1.2 (Providing or Possessing Contraband in Prison).

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Commentary

* * *

Background: Mandatory (statutory) minimum penalties for several categories of cases, ranging from fifteen days' to five years' imprisonment, are set forth in 21 U.S.C. § 844(a). When a mandatory minimum penalty exceeds the guideline range, the mandatory minimum becomes the guideline sentence. See §5G1.1(b). Note, however, that 18 U.S.C. § 3553(f) provides an exception to the applicability of mandatory minimum sentences in certain cases. See §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases).

~~*Section 2D2.1(b)(1) provides a cross reference to §2D1.1 for possession of more than five grams of a mixture or substance containing cocaine base, an offense subject to an enhanced penalty under Section 6371 of the Anti-Drug Abuse Act of 1988. Other cases for which enhanced penalties are provided under Section 6371 of the Anti-Drug Abuse Act of 1988 (e.g., for a person with one prior conviction, possession of more than three grams of a mixture or substance containing cocaine base; for a person with two or more prior convictions, possession of more than one gram of a mixture or substance containing cocaine base) are to be sentenced in accordance with §5G1.1(b).*~~

* * *

APPENDIX A - STATUTORY INDEX

~~21 U.S.C. § 845~~	~~2D1.2~~
~~21 U.S.C. § 845a~~	~~2D1.2~~
~~21 U.S.C. § 845b~~	~~2D1.2~~
21 U.S.C. § 846	2D1.1, ~~2D1.2,~~ 2D1.5, 2D1.6, 2D1.7, 2D1.8, 2D1.9, 2D1.10, 2D1.11, 2D1.12, 2D1.13, 2D2.1, 2D2.2, 2D3.1, 2D3.2
	* * *
21 U.S.C. § 849	~~2D1.2~~2D1.1
	* * *
21 U.S.C. § 859	~~2D1.2~~2D1.1
21 U.S.C. § 860	~~2D1.2~~2D1.1
21 U.S.C. § 861	~~2D1.2~~2D1.1
	* * *
21 U.S.C. § 963	2D1.1, ~~2D1.2,~~ 2D1.5, 2D1.6, 2D1.7, 2D1.8, 2D1.9, 2D1.10, 2D1.11, 2D1.12, 2D1.13, 2D2.1, 2D2.2, 2D3.1, 2D3.2

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Appendix B

PRISON IMPACT OF RECOMMENDATIONS

This section summarizes the estimated impact on prison sentences and the federal prison system of the recommendations described in Chapter 8 and the model sentencing guideline amendment in Appendix A showing one possible implementation of those recommendations.[1] This analysis uses the Commission's prison impact model to assess the independent and combined effects of the changes for all drug trafficking offenses and for individual drug types. The impact analysis of the recommended changes to the drug quantity threshold and sentencing guideline enhancements is followed by an explanation of the prison impact model.

PRISON IMPACT OF RECOMMENDED DRUG QUANTITY THRESHOLD

The Commission recommends increasing the drug quantity threshold for the five-year statutory minimum sentence for crack cocaine offenses from five grams to *at least* 25 grams (and the ten-year minimum to *at least* 250 grams). Because the prison impact model cannot estimate the impact of an inexact threshold quantity, this prison impact estimate on crack cocaine offenses assumes that Congress resets the threshold at 25 grams and the guidelines' Drug Quantity Table is modified to reflect that change across all quantity ranges.

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Almost all, 93.3 percent, of crack cocaine offenders would be affected by increasing the drug quantity required to trigger the mandatory five-year prison term from five grams to 25 grams. If the drug quantity threshold were changed accordingly but none of the proposed enhancements were adopted, the average prison sentence of all crack cocaine offenses would decrease from 118 months to 86 months.

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[1] This analysis does not include the prison impact of a drug-related guideline amendment sent to Congress on May 1, 2002. Excluded from the current analysis are: 1) the increase in maximum base offense level from 16 to 26 under USSG §2D1.8(a)(2)(Renting or Managing a Drug Establishment); 2) the maximum base offense level of 30 for offenders sentenced under USSG §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses, Attempt or Conspiracy) who also receive an adjustment under USSG §3B1.2 (Mitigating Role); 3) modification of the Typical Weight Per Unit (Dose, Pill, or Capsule) Table in USSG §2D1.1 relating to MDMA and MDA; and 4) the clarification of the applicability of the two-level reduction in subsection (b)(6) of USSG §2D1.1 for offenders who meet the criteria set forth in USSG §5C1.1 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases).

PRISON IMPACT OF RECOMMENDED SENTENCING GUIDELINE ENHANCEMENTS

The individual and combined impacts on all drug trafficking offenders of the recommended sentencing guideline enhancements appear in Table B1. Each of the first four rows of Table B1 indicates the independent effect of the recommended sentencing guideline enhancement, absent any other guideline or statutory changes. The table shows the percent of all drug trafficking cases affected by the implementation of each enhancement, the current average sentence for the *affected* cases, the new average sentence for the *affected* cases, and the estimated number of prison beds that would be required five years after implementation of that adjustment.[2] The bottom row in Table B1 shows the prison impact on all drug offenders of all the adjustments combined.[3]

The graduated weapon enhancement would affect 2.4 percent of all drug trafficking offenders, increasing the average sentence for those affected from 118 months to 148 months. The enhancement for bodily injury would increase the average sentence for 1.2 percent of drug trafficking offenders from 93 months to 159 months. Almost twenty percent of all drug offenders would be subject to the enhancement for prior drug felony convictions. The average sentence for offenders with prior drug felonies would increase from 98 months to 120 months.

The prison impact of the importation enhancement was calculated for only powder cocaine and crack cocaine offenses.[4] In fiscal year 2000, 17.4 percent of powder cocaine offenders would be eligible for the enhancement compared to only 1.7 percent of crack cocaine cases.[5]

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The combined impact of the recommended enhancements appears in the last row of Table B1. The package of enhancements would affect 23.2 percent of all drug trafficking cases. The average sentence of the affected drug trafficking cases would increase from 94 months to 124 months. Implementation of these sentencing enhancements would require an additional 1,816

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[2] Changes in average sentences are reported for affected cases because the proportion of affected cases in each category is relatively small. The effects on sentence length of the adjustments would be indiscernible if grouped with the unaffected cases.

[3] Data for the adjustments are derived from the 1995 and 2000 drug samples. Rates of eligibility for each adjustment were collected for each drug type and applied at those rates to cases in the FY2000 datafile.

[4] The 2000 drug sample, which is the basis for this analysis, includes data on whether the defendant was directly involved with the importation of drugs. At the writing of this report, this information was available for powder cocaine and crack cocaine offenses only.

[5] The impact to sentences of the importation enhancement would be substantial for each type of cocaine. The average sentence for the 17.4 percent of affected powder cocaine cases would increase from 80 months to 98 months and the average sentence for the 1.7 percent of affected crack cocaine cases would increase from 118 months to 146 months.

prison beds after five years. These results likely underestimate the proportion of affected cases because data for the importation enhancement only were available for powder cocaine and crack cocaine offenders and it would likely apply to some proportion of heroin and marijuana offenses as well.[6]

Table B1[7]
Prison Impact of Recommended Sentencing Guideline Enhancements

	Percent of Cases Affected	Current Average Sentence	New Average Sentence	Five-year Prison Beds
Graduated Weapon Enhancement	2.4%	118	148	+127
Bodily Injury Enhancement	1.2%	93	159	+207
Prior Drug Felony Enhancement	19.9%	98	120	+1,263
Importation Enhancement[8]	9.6%	83	102	+370
All Enhancements Combined	23.2%	95	124	+1,816

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[6] Methamphetamine offenders would not be affected by the proposed importation enhancement because those offenders already are subject to such an enhancement under USSG §2D1.1(b)(4). In FY2000, 0.43 percent of methamphetamine offenders received the importation enhancement in its current form.

[7] U.S. Sentencing Commission 2000 Datafile, USSCFY00, Prison Impact Model, 1995 Drug Sample, and 2000 Drug Sample.

[8] This row shows the impact for powder cocaine and crack cocaine cases *only*.

COMBINED PRISON IMPACT OF RECOMMENDED DRUG QUANTITY THRESHOLD AND SENTENCING GUIDELINE ADJUSTMENTS

Table B2 summarizes the combined impact of all four guideline enhancements and the increased drug quantity threshold for crack cocaine. The recommendation as a whole (including the increase in the mandatory minimum threshold penalty for crack cocaine offenses, and the sentencing enhancements) would affect approximately one-third of all drug offenders. The proportion of offenders affected varies by drug type, ranging from eight percent for marijuana offenses to 85 percent for crack cocaine offenses. Average sentences for all drug offenses would decrease slightly from 72 months to 71 months.[9] The combined impact of these changes would make available 1,011 prison beds after five years.

Table B2[10]
Prison Impact of Recommended Sentencing Guideline Enhancement and Drug Quantity Threshold Increase to 25 Grams

	Percent of Cases Affected	Current Average Sentence	New Average Sentence
TOTAL	33.0%	72	71
Powder Cocaine	30.8%	74	83
Crack Cocaine	85.8%	118	95
Heroin	12.3%	62	66
Marijuana	8.8%	35	36
Methamphetamine	22.1%	86	91

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[9] This figure actually understates the impact of the recommendation. The 85.8 percent *affected* crack cocaine cases had increased or decreased offense levels after the drug quantity threshold and all of the proposed guideline enhancements were applied. If the application of these changes resulted in a net zero change in offense level, it was *not* classified as an affected case. The net effect of these changes is zero for 7.5 percent of crack cocaine offenders. Consequently, these offenders are not affected by the model.

[10] Table B2 reports the current and new average sentences for *all* (affected and unaffected) cases for each drug type. U.S. Sentencing Commission 2000 Datafile, USSCFY00, Prison Impact Model, 1995 Drug Sample, and 2000 Drug Sample.

As expected from the change in the crack cocaine drug quantity threshold, the majority of offenders affected by the recommendation were sentenced for crack cocaine offenses. The combined impact of the recommended guideline enhancements and the increased drug quantity threshold would affect 85.8 percent of crack cocaine offenders, decreasing their average sentence from 118 months to 95 months. Approximately one-third of powder cocaine offenders (30.8%) would be affected by the recommendation, increasing the average sentence for those offenders from 74 months to 83 months.

The prison impact is less substantial for the remaining three drug types. The recommendation would affect 22.1 percent of methamphetamine offenders, increasing average sentences from 86 months to 91 months. There is a lesser impact for heroin and marijuana offenders, affecting 12.3 percent and 8.8 percent of those cases, respectively. The sentence increases also are smaller, increasing heroin sentences an average of four months (62 months to 66 months) and increasing marijuana sentences an average of one month (35 months to 36 months).

Finally, it is noteworthy that the recommendations do not affect the hierarchy of average sentences by drug type. Current average sentences are longest for crack cocaine offenders, followed by methamphetamine, powder cocaine, heroin, and marijuana. The recommendations would preserve this order, assuming that Congress sets the five-year and ten-year threshold quantity at 25 grams and 250 grams, respectively, but the gap between average sentences for powder cocaine and crack cocaine would be narrowed substantially (from 44 months to 12 months). In addition, crack cocaine penalties would be only four months longer on average than methamphetamine penalties.

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THE PRISON IMPACT MODEL

The U.S. Sentencing Commission's Prison Impact computer model identifies and re-sentences cases in Commission datafiles. The model recalculates the relevant guideline based on specified changes (*e.g.,* drug amounts that correspond to base offense levels) and compares the recalculated offense levels to existing offense levels. The model then reassigns any Chapter Three adjustments and departures that currently exist in each case. Finally, the model "respots" the new sentence in the corrected guideline range to a location equivalent to the current sentence. The model makes the following assumptions in calculating estimated sentences:

1) Defendants earn the maximum allowable good-time (currently 54 days per year served for imposed sentences greater than one year but not life imprisonment).

2) Defendants serve the minimum of a) the sentence imposed less the maximum allowable good-time, or b) their estimated remaining life expectancy, based upon an actuary table incorporating age, race, and gender.

3) Changes are made to a "steady-state" prison population. A "steady-state" population

assumes a prison system in homeostasis in which the number of new, incoming inmates is equal to the number of outgoing (released) inmates and all beds are assumed to be occupied. Change is measured in person-years of imprisonment.

4) All factors other than the proposed change in the specific sentencing policy under review (*e.g.*, arrest rates, charging practices, conviction rates, and other sentencing policies) remain constant over time. As a result, changes in the specific policy under review are isolated from other systemic change.

If the proposed amendment lengthens sentences, the "steady-state" prison population increases because inmate release dates would be later if the new, longer sentence were applied. These delayed release dates would cause offenders to accumulate in the prison system. Because new inmates arrive at a constant rate, additional beds are required. If the proposed amendment shortens sentences, the "steady-state" prison population decreases because inmates would be released earlier and early releases would free up prison beds.

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Appendix C

DATA SOURCES AND METHODOLOGY

COMMISSION MONITORING DATAFILES

The Commission monitoring datafiles contain information collected from court documents (*i.e.* Presentence Investigation Reports, Judgement of Conviction Orders, and Statements of Reasons) for criminal felony cases sentenced under the federal sentencing guidelines. For each case sentenced under the guidelines, the Commission routinely collects defendant demographics, statutes of conviction, sentencing guideline application, and sentence outcomes.[1]

A case was categorized as a powder cocaine case or a crack cocaine case based on the drug that determined the offender's sentence, which is the drug that produces the highest base offense level and results in the longest sentence.[2] This report contains data for powder cocaine offenders and crack cocaine offenders sentenced under the federal sentencing guidelines and is representative of that population of offenders only. Therefore, the data in this report are not necessarily representative of state or local level cocaine offenders or trafficking offenders of other types of drugs at any level, federal or otherwise.

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1995 DRUG SAMPLE

The 1995 Drug Sample is a combination of two datafiles created from special projects at the Commission: the Intensive Study Sample (ISS) and Drug Supplemental Sample (DSS). The ISS and DSS were created to supplement data in the Commission's 1995 monitoring datafile. The Commission collected information by reviewing court documents for each case in the

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[1] For more information on the Commission's monitoring datafiles, see the USSC 2000 Sourcebook of Federal Sentencing Statistics and 2000 Annual Report.

[2] For cocaine offenses involving both powder cocaine and crack cocaine, the primary drug type usually is crack cocaine because of the 100-to-1 drug quantity ratio. Because of the 100-to-1 drug quantity ratio, a case may involve a greater quantity of powder cocaine, but the smaller quantity of crack cocaine determined the sentence. Such a case is classified as a crack cocaine case for this analysis. In FY 2000, 581 drug trafficking cases involved both powder cocaine and crack cocaine, and the sentence was determined by crack cocaine in 85 percent of those cases.

sample. Combining the ISS and DSS samples, the 1995 drug sample consists of 639 powder cocaine cases and 851 crack cocaine cases.

The ISS consists of a five percent random sample of cases from the Commission's 1995 monitoring datafile and contains detailed information on criminal history, personal defendant characteristics, weapon involvement, victimization, conspiracy organization, and defendant function in the offense. The DSS is a stratified[3] random sample of 1995 drug cases from the monitoring datafile that were not selected for the ISS. The DSS contains a 10 percent sample of powder cocaine cases, 20 percent samples each of crack cocaine, heroin, and marijuana cases, and a 50 percent sample of methamphetamine cases. The DSS contains information on drug amount, weapon involvement, and defendant function in the offense.

2000 DRUG SAMPLE

The 2000 drug sample consists of a 20 percent random sample of crack cocaine (n=802) and powder cocaine (n=793) cases sentenced in fiscal year 2000. Data collected from the sample were designed to duplicate the data collected in the 1995 drug sample to enable comparisons over time and to conduct trend analyses.[4]

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[3] A stratified sample is used to maximize the likelihood that a sufficient number of cases are selected for a sample to obtain a greater degree of representativeness. The sample population is first organized into homogeneous subgroups (*e.g.,* drug type) and random samples of different sizes are selected from each subgroup. This method ensures that subgroups containing smaller numbers are represented in the sample.

[4] Specifically, data were collected on offender function in the drug conspiracy, scope and length of the offense, weapon involvement, victim injury, and criminal history profiles.

Table C1
Trafficking Function Definitions

Function	Definition
Importer/High-level supplier	Imports or otherwise supplies large quantities of drugs; is near the top of the distribution chain; has ownership interest in drugs (not merely transporting drugs for another individual); usually supplies drugs to other drug distributors and does not deal in retail amounts, may employ no or very few subordinates.
Organizer/Leader	Organizes, leads, directs, or otherwise runs a drug distribution organization; has the largest share of the profits and the most decision-making authority.
Grower/Manufacturer	Grows, cultivates, or manufactures a controlled substance, and is the principal owner of the drugs.
Financier/Money launderer	Provides money for purchase, importation, manufacture, cultivation, transportation, or distribution of drugs; launders proceeds of drug sales or purchases.
Aircraft Pilot/Vessel captain	Pilots vessel or aircraft; requires special skill; does not include offender who is only participant directing a small boat (e.g., a go-fast boat) onto which drugs had been loaded from a "mother ship" (such person is a courier).
Wholesaler	Sells more than retail/user-level quantities in a single transaction.
Manager	Serves as a lieutenant to assist one of the above; manages all or a significant portion of a drug manufacturing, importation, or distribution operation; takes instructions from one of the above and conveys to subordinates; supervises directly at least one other co-participant in an organization of at least five co-participants.
Bodyguard/Strongman/Debt collector	Provides physical and personal security for another co-participant in the offense; collects debts owed, or punishes recalcitrant persons.
Chemists/Cooks/Chemical supplier	Produces LSD, methamphetamine, crack or other illegal drugs, but does not qualify as a Grower/Manufacturer because is not the principal owner of the drugs. Chemical supplier does not handle drugs themselves but engages in the unlawful diversion, sale, or furnishing of listed chemicals or equipment used in the synthesis or manufacturing of controlled substances.

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Table C1
Trafficking Function Definitions

Function	**Definition**
Supervisor	Supervises at least one other co-participant; however, has limited authority and does not qualify as a Manager.
Street-level dealer	Distributes retail quantities directly to the user.
Broker/Steerer/Go-between	Arranges for two parties to buy/sell drugs, or directs potential buyer to a potential seller.
Courier	Transports or carries drugs with the assistance of a vehicle or other equipment. Includes situations where the offender, who is otherwise considered to be a crew member, is the only participant directing a vessel (e.g., a go-fast boat) onto which drugs had been loaded from a "mother-ship."
Mule	Transports or carries drugs internally or on their person, often by airplane, or by walking across a border. Also, includes an offender who only transports or carries drugs in baggage, souvenirs, clothing, otherwise.
Renter/Storer	Provides (for profit/compensation) own residence, structures (barns, storage bins, buildings), land, or equipment for use to further the offense. This offender is distinguished from the enabler because he is paid (in some way) for his services.
Money runner	Transports/carries money and/or drugs to and from the street-level dealer.
Off-loader/Loader	Performs the physical labor required to put large quantities of drugs into storage, hiding, or onto some mode of transportation.
Gopher/Lookout/Deckhand/ Worker/Employee	Performs very limited, low-level function in the offense (whether or not ongoing); includes running errands, answering the telephone, receiving packages, packaging the drugs, manual labor, acting as a lookout to provide early warnings during meetings, exchanges, or off-loading, or acting as a deckhand/crew member on vessel or aircraft used to transport large quantities of drugs.

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Table C1
Trafficking Function Definitions

Function	**Definition**
Enabler (Passive)	Plays no more than passive role in the offense, knowingly permitting certain unlawful criminal activity to take place without affirmatively acting in any way to further such activity; may be coerced or unduly influenced to play such a function (e.g., a parent or grandparent threatened with displacement from a home unless they permit the activity to take place), or may do so as a "favor" (without compensation).
User Only	Possessed small amount of drugs apparently for personal use only; no apparent function in any conspiratorial criminal activity.
Other	If none of the above adequately describe the function of the offender.

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Appendix D

SUMMARY OF WRITTEN PUBLIC COMMENT ON COCAINE SENTENCING POLICY

On January 12, 2002, the Commission published in the *Federal Register* a notice requesting comment on a variety of proposed drug amendments. Of particular relevance, the Commission requested comment regarding whether the current penalty structure for crack cocaine offenses is appropriate, and whether the penalties for crack cocaine offenses should be more severe, less severe, or equal to the penalties for heroin or methamphetamine. The Commission also sought comment on several proposed enhancements in §2D1.1.

The Commission received written comment from several groups, including the United States Department of Justice, the Commission's own Probation Officers' Advisory Group, the Commission's Practitioners' Advisory Group, Families Against Mandatory Minimums, the Mexican American Legal Defense and Education Fund, the International Association of Chiefs of Police, the NAACP Legal Defense and Educational Fund, the Committee on Criminal Law of the Judicial Conference of the United States, as well as numerous letters from individual citizens.

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1. U.S. Department of Justice

The Department of Justice submitted a document entitled *Federal Cocaine Offenses: An Analysis of Crack and Powder Penalties*, dated March 17, 2002, which conducted a number of different analyses based on federal sentencing data for cocaine offenses collected by the U.S. Sentencing Commission between 1996 and 2000. The Department of Justice indicated that its position would be stated more fully when Deputy Attorney General Larry D. Thompson testified before the Commission on March 19, 2002.

2. Committee on Criminal Law of the Judicial Conference of the United States (CLC)

CLC endorsed significantly reducing the current 100-to-1 drug quantity ratio without increasing the penalties for powder cocaine offenses. However, CLC was concerned that without legislation reducing the minimum sentences for crack cocaine, a guideline amendment would create "cliffs" between those to whom a mandatory minimum sentence would apply and those to whom they would not.

3. Probation Officers' Advisory Group (POAG)

POAG supported a change to the drug quantity ratio but did not propose a specific ratio. It also commented favorably on a number of proposed enhancements, including those relating to distribution involving protected individuals and locations, violence, and prior felony convictions for crimes of violence or drug trafficking.

4. Practitioners' Advisory Group (PAG)

PAG stated that the 100-to-1 drug quantity ratio is arbitrary because (1) there is no scientific justification for the differential, (2) powder cocaine is sold to street dealers who then turn it into crack cocaine, and (3) it results in racially disparate sentencing because most of the street crack cocaine dealers are African American. PAG indicated that one of the oft-stated reasons for the severe crack cocaine penalties was the perception that crack cocaine trafficking was marked by greater violence, sufficient to warrant the extreme penalties, even for possession for personal use. In fact, crack cocaine defendants possess fewer weapons, commit fewer violent crimes, and engage in less aggravating conduct than in the early 1990s.

According to PAG, decreasing the quantity-based penalties for crack cocaine offenders while targeting increased punishment for aggravating conduct is a better approach than increasing the quantity-based penalties for powder cocaine offenses. PAG contended that increasing powder cocaine penalties is unwarranted. PAG urged the Commission to establish a drug quantity ratio as close to 1-to-1 as possible.

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PAG noted that the specific sentencing enhancements for violence, weapon possession, and weapon use should apply only to defendants who actually possess a weapon or injure another person, or to those who directly order such possession and/or injury. In other words, the enhancements should not be based on broad concepts of vicarious liability of conspiracy participants.

PAG sent a follow-up letter on March 25, 2002, responding to the March 19, 2002 testimony of the U.S. Department of Justice. In the letter, PAG contended that the Department of Justice's claim that crack cocaine is associated with greater dangers than powder cocaine can be adequately addressed by the other proposed guideline enhancements.

5. Families Against Mandatory Minimum (FAMM)

FAMM supported the Commission in its efforts to revise the penalties for crack cocaine offenses. It urged the Commission to follow the approach originally intended by Congress – that the ten-year mandatory minimum penalty apply to major distributors and the five-year mandatory minimum penalty apply to serious distributors. FAMM urged sentencing policy makers to use the average quantity of crack cocaine handled by mid- and high-level dealers to determine the trigger drug quantities. FAMM opposed increasing powder cocaine penalties

because the problem lies with crack cocaine penalties. Any increase in powder cocaine penalties would send those offenders (50 percent of whom are Hispanic and 80 percent of whom are minorities) to prison longer for no discernible reason. It also opposed the proposed enhancements unless base offense levels for all the drug guidelines are lowered. FAMM further stated that any enhancement should be offender specific and not applied through vicarious liability.

FAMM, in conjunction with several other witnesses who testified before the Commission (*i.e.,* Leadership Conference on Civil Rights, National Council of La Raza, American Civil Liberties Union, National Association of Criminal Defense Attorneys, and Human Rights Watch), submitted a letter on April 4, 2002 responding to the U.S. Department of Justice's March 19, 2002 testimony. These groups argued against raising the powder cocaine mandatory minimum threshold quantities because there is no evidence that existing powder cocaine penalties are too low. It noted that in 1997, 27 federal judges who formerly served as U.S. Attorneys wrote Congress opposing an increase in powder cocaine sentences that they termed "severe." These organizations stated that the Department of Justice was endorsing an unfair system under which all crack cocaine defendants are presumed to be violent even when there is no evidence that a particular defendant was in fact violent.

6. Mexican American Legal Defense and Education Fund (MALDEF)

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MALDEF stated that the disparity between crack cocaine and powder cocaine penalties has a discriminatory effect on minorities, including Latinos. MALDEF submitted nine pages of statistics and background concerning racial profiling and examples of other discrimination of Hispanics within the criminal justice system. MALDEF supported assigning a five-year penalty for serious drug offenders and a ten-year penalty for major drug traffickers but stated that this currently is not the sentencing structure for crack cocaine. It recommended that the crack cocaine mandatory minimum drug quantity threshold be increased and that the powder cocaine threshold be maintained. MALDEF urged against proposals that would reduce the powder cocaine mandatory minimum threshold quantity because this would exacerbate racial disparity and have a negative impact on the Latino community. MALDEF further stated that to the extent the Drug Quantity Table takes into account aggravating conduct, the base offense levels should be reduced and enhancements should be added to account for aggravating factors, such as violence and weapons.

7. International Association of Chiefs of Police

Chief William B. Berger, President of the International Association of Chiefs of Police, stated that both crack cocaine and powder cocaine are closely associated with crime, violence, death and destruction and, therefore, the existing penalties for crack cocaine offenses should not be decreased. Rather, he suggested that the mandatory minimum threshold quantities for powder cocaine offenses be decreased so that they more closely track those for crack cocaine offenses. In this fashion, the Commission would achieve the goal of reducing or eliminating any disparity between crack cocaine and powder cocaine offenses, while at the same time ensuring that those

who participate in the sale and use of these illegal narcotics are penalized in an appropriate manner.

8. NAACP Legal Defense and Educational Fund, Inc. (LDF)

LDF stated that the current sentencing scheme for crack cocaine is irrational because it treats every crack cocaine offender disproportionately severely, rather than distinguishing crack cocaine offenders who engage in aggravating or violent conduct. It recommended that the guidelines be amended to rely less upon the type or quantity of drugs and more upon aggravating or mitigating conduct. LDF maintained that the crack cocaine sentencing scheme has a disproportionate impact on African Americans, many of whom are serving excessively long sentences for minor, non-violent offenses. LDF stated that the injustice of the current scheme promotes a mistrust of the government and exacts enormous costs on the families and communities of those incarcerated. Because many people incarcerated for crack cocaine offenses have children, and children of prisoners run a higher risk of becoming prisoners themselves, LDF contended that the guidelines may contribute to higher crime rates in minority communities, instead of deterring crime. LDF recommended that the Commission close the ratio between crack cocaine and powder cocaine sentences without decreasing the powder cocaine mandatory minimum threshold quantities. According to LDF, decreasing powder cocaine thresholds is unjustified and would add to the racial disparity in sentencing by increasing the number of non-violent Hispanic and African Americans sentenced to prison.

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9. Citizen Letters

The Commission received over 1,000 letters from individual citizens expressing their opinions on the proposed drug amendments. A significant portion consisted of form letters, many from inmates and their families. Although it is impossible to summarize accurately and concisely such a large volume of correspondence, numerous citizens expressed their disagreement with the current 100-to-1 drug quantity ratio, and suggested a variety of alternative ratios, including 10-to-1, 7-to-1, or 5-to-1. None of the letters suggested maintaining the status quo or increasing powder cocaine penalties in order to reduce the 100-to-1 drug quantity ratio.

Appendix E

SUMMARY OF PUBLIC HEARINGS ON COCAINE SENTENCING POLICY

A. INTRODUCTION

The Commission held three public hearings in Washington, DC, on February 25, 2002, February 26, 2002, and March 19, 2002. It heard testimony from nineteen witnesses representing the federal judiciary, law enforcement agencies, private practitioners, the scientific and medical communities, academics, civil rights organizations, community representatives, and other interested parties.

Representing the Sentencing Commission at the hearing were Chair Diana E. Murphy; Vice Chairs Ruben Castillo, William K. Sessions, III, and John R. Steer; Commissioners Sterling Johnson, Jr., Joe Kendall, and Michael E. O'Neill, and *ex officio* Commissioners John P. Elwood and Edward F. Reilly, Jr.

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B. FEDERAL JUDGES

Senior Judge Richard P. Conaboy (M.D. Pa.), former Chairman of the U.S. Sentencing Commission, described his experience at the Commission in 1995 when they proposed a crack cocaine amendment. Judge Conaboy testified that the most basic argument for change is the need to let the guidelines work properly in determining proportionality and the appropriate sentence in each case. He maintained that the 100-to-1 drug quantity ratio should be changed.

Judge Sim Lake (S.D. Tex.), Chair of the Subcommittee on Sentencing Guidelines of the Committee on Criminal Law of the Judicial Conference of the United States, testified that the current ratio between crack cocaine and powder cocaine defendants "too severely punishes defendants who are responsible for crack cocaine." Judge Lake concluded by stating that the Criminal Law Committee would like to see Congress and the Commission act in concert with one another on this issue.

C. LAW ENFORCEMENT

Larry D. Thompson, Deputy Attorney General, represented the U.S. Department of Justice. Mr. Thompson stated that current federal policy and the guidelines for sentencing crack cocaine offenses are appropriate. In support of the current penalty structure, the Department of

Justice indicated that crack cocaine is associated with greater dangers than powder cocaine since it is more psychologically addictive than powder cocaine and its low cost makes it particularly attractive to some of the more vulnerable members of our society. According to the Department of Justice, crack cocaine contributes heavily to the deterioration of neighborhoods and communities, including minority communities. Moreover, crack cocaine is associated with violent crime to a greater extent than powder cocaine and sentencing enhancements for weapons and bodily injury are not sufficient to account for all the differences because of the systemic nature of some of the harms.

If sentencing policy makers wish to address the disparity between crack cocaine and powder cocaine penalties, the Department of Justice stated that the penalty for powder cocaine offenses should be increased. Nevertheless, Mr. Thompson acknowledged that he was not aware of any specific information establishing that the existing powder cocaine penalties are too low.

Bridget Brennan, Special Narcotics Prosecutor for the City of New York, testified that the lowest level members of a narcotics organization tend to be street dealers, who often are addicts. She testified that an important part of her office's mission is to find alternatives to incarceration for addicts and low-level street dealers who are facing the threat of incarceration. Addicts and low-level street dealers often are enrolled in treatment programs such as "shock incarceration," which is a six-month rehabilitation program. She testified that, in her experience, federal and local authorities have targeted different offenders. She noted that in the last several years she has seen an increase in federal prosecutions of such offenders.

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William J. Nolan, representing the Fraternal Order of Police, testified that his organization does not oppose addressing the disparate penalties associated with crack cocaine and powder cocaine offenses, but would do so by increasing the penalties for offenses involving powder cocaine. The Fraternal Order of Police indicated that any decrease in penalties would harm the overall effort to keep drugs off the street and violence out of the communities. Moreover, the dangers associated with cocaine have not completely disappeared. While crime rates have been reduced in recent years, illegal drugs still have a devastating impact on society.

D. PRACTITIONERS

A. J. Kramer, the Federal Public Defender from Washington, DC, and Jon Sands, Assistant Federal Public Defender from Arizona, testified on behalf of the Federal Public and Community Defenders. The Defenders supported the modification or elimination of the 100-to-1 drug quantity ratio between powder cocaine and crack cocaine offenses. The Defenders stated that powder cocaine penalties should not be increased but that the crack cocaine penalties should be brought closer to powder cocaine penalties.

The Defenders argued that the current penalty structure leads to sentencing disparity among cocaine defendants within the country. They stated that the overwhelming majority of states do not differentiate between powder cocaine and crack cocaine. The Defenders maintained that the two drugs essentially are the same and should be punished similarly.

Furthermore, they indicated that another source of disparity arises out of the profits generated by the quantities for different drugs. For example, for quantities of drugs that are assigned to base offense level 26, for powder cocaine the typical trafficking profit is just over $50,000; for heroin the profit is $100,000; whereas for crack cocaine the profit is only approximately $600.

Irwin Schwartz, President of the National Association of Criminal Defense Lawyers (NACDL), supported modification of the 100-to-1 drug quantity ratio. NACDL stated that the average sentence for crack cocaine (119.5 months) is 55 percent higher than that for powder cocaine offenses (77 months). The NACDL argued that street-level crack cocaine dealers are punished more severely than major traffickers in wholesale quantities of powder cocaine. Thus, current sentencing policies and law enforcement practices operate in a racially disparate manner and erode public confidence in our criminal justice system, particularly in minority communities. The NACDL recommended that the drug quantity ratio be set as close to 1-to-1 as possible.

E. MEDICAL/ACADEMIC COMMUNITIES

Dr. Glen Hanson, Acting Director of the National Institute on Drug Abuse, testified that stimulants continue to be the dominant drugs of abuse in this country. Although marijuana remains the most commonly used illicit drug, Dr. Hanson indicated that 1.2 million Americans used cocaine in 2000. Like other central nervous system stimulants, such as amphetamine and methamphetamine, Dr. Hanson noted that cocaine increases internal levels of the neurotransmitter dopamine, producing euphoria and increasing alertness and energy. In terms of pharmacological effects, crack cocaine is no more harmful than powder cocaine. Although cocaine in any form produces the same effects, the onset, intensity, and duration of its effects are related directly to the method of use and how rapidly cocaine enters the brain. Repeated use by any route of administration can produce addiction and other adverse health consequences, such as heart attack and stroke. Cocaine inhalation and intravenous usage produce the quickest and highest peak blood levels in the brain and share similar addictive potentials.

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Dr. Hanson also noted that babies born to mothers who abused drugs during pregnancy often are delivered prematurely, have low birth weights, smaller head circumferences, and are shorter in length. There does appear to be an association between cocaine exposure and some developmental outcomes (*e.g.,* attention and emotional regulation).

Dr. Deborah Frank, Professor of Pediatrics at Boston University School of Medicine, described her study of developmental outcomes of inner city children exposed in utero to crack cocaine or powder cocaine. She testified that the biologic "thumbprint" of exposure to powder cocaine or crack cocaine in utero is identical and that there are no physiologic indicators identifying the form of the drug to which the newborn was exposed. Dr. Frank stated that based on years of careful research, the term "crack baby" is a grotesque media stereotype, not a scientific diagnosis. Compared to newborns exposed prenatally to opiates (such as heroin or methadone) who exhibit clinically obvious symptoms of drug withdrawal, an infant exposed to crack cocaine or powder cocaine will be clinically indistinguishable from other babies in a nursery. Dr. Frank added that small but identifiable effects of prenatal exposure to powder or

crack cocaine are prevalent in certain newborn outcomes, very similar to those associated with prenatal tobacco exposure, such as decreases in birth weight, length, or head circumference.

Dr. Ira J. Chasnoff, President of the Children's Research Triangle, stated that prenatal exposure to substances of abuse can have a significant effect on the long-term outcome of children. However, given that the physiology of crack cocaine and powder cocaine are the same and that changes in the fetal brain are similar whether the mother used crack cocaine or powder cocaine, it is impossible to differentiate the detrimental effects of any one specific drug from that of any other. Dr. Chasnoff noted that the home environment is *the* critical determinant of the child's ultimate outcome.

Dr. Alfred Blumstein, Professor of Urban Systems and Operations Research at Carnegie Mellon University, stated that the 100-to-1 drug quantity ratio conveys a strong sense of racial discrimination. The evolution of crack cocaine markets has resulted in a significantly lower level of violence today than that which characterized these markets' early years. Dr. Blumstein stated that it seems more rational to use sentencing enhancements to punish individuals who use violence, regardless of the drug type, rather than to base the sentencing difference on the chemical itself. Such enhancements should also account for an offender's role in the distribution hierarchy. Dr. Blumstein saw no reason why there should be any difference in sentencing guidelines between crack cocaine and powder cocaine offenses.

F. COMMUNITY REPRESENTATIVES AND INTERESTED PARTIES

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Ronald Weich, Vice Chair for Government Relations of the American Bar Association (ABA), Criminal Justice Section, testified on behalf of the ABA. The ABA stated that the different treatment of crack cocaine and powder cocaine offenses has a clearly discriminatory effect on minority defendants. If, as the ABA suspects, there remains a strong empirical basis for reducing the disparity between the threshold quantities, it urged the adoption of a drug quantity ratio as close as possible to equalization. Finally, the ABA did not support increasing the penalties for powder cocaine offenses.

Laura Murphy, Director of the National Office American Civil Liberties Union (ACLU) testified on behalf of that organization. The ACLU opposed the disparity in sentencing for equal amounts of crack cocaine and powder cocaine. It viewed the mandatory minimum of five years for simple possession of more than five grams of crack cocaine as "extraordinarily harsh." The ACLU also was concerned that national drug policy, especially crack cocaine policy, is tinged with racial bias, despite numerous legislative efforts since 1995 to remedy the situation. The ACLU opposed increasing the penalties for powder cocaine offenses.

William D. McColl, Director of National Affairs, testified for the Drug Policy Alliance. The Drug Policy Alliance favored increasing crack cocaine mandatory minimum drug quantity thresholds without increasing penalties for powder cocaine offenses. States are adopting more of a treatment approach to drug defendants and, as reported by the Drug Policy Alliance, a number of states across the nation are re-examining sentencing schemes that relate to drug defendants, as well as mandatory minimum penalties.

Julie Stewart, President of Families Against Mandatory Minimums (FAMM), testified that the same organizing principle that applies to other drugs should also apply to crack cocaine offenses, *i.e.,* punish a mid-level dealer with a five-year minimum sentence and a high-level dealer with a ten-year minimum sentence. FAMM stated that the average quantity of crack cocaine handled by mid- and high-level dealers should determine the trigger quantity for five and ten-year penalties.

Jamie Fellner, U.S. Program Director and Associate General Counsel, testified on behalf of Human Rights Watch. The Human Rights Watch directed the Commission's attention to three treaties that it believed were relevant to federal narcotics sentencing: (1) The International Covenant on Civil Rights and Political Rights; (2) The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and (3) The Convention on the Elimination of All Forms of Racial Discrimination. It indicated that the current federal sentencing structure violates two of the key human rights principles contained implicitly in those treaties: proportionality and nondiscrimination. Human Rights Watch recommended that sentences for crack cocaine offenders be equalized with those for powder cocaine offenders who engage in equivalent conduct and that this should be done by decreasing the penalties for crack cocaine offenses and not by increasing the penalties for powder cocaine offenses.

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Wade Henderson, Executive Director, Leadership Conference on Civil Rights, stated that the 100-to-1 drug quantity ratio in is one of the most visible manifestations of racial disparity in the federal criminal justice system. According to the Leadership Conference on Civil Rights, there is no scientific or pharmacological evidence to justify treating crack cocaine as though it were a hundred times more dangerous than powder cocaine. Minorities almost exclusively are targeted for cocaine arrests and then are subject to a mechanical sentencing system with unacceptably high incarceration rates. The Leadership Conference on Civil Rights urged the repeal of mandatory sentencing laws and the elimination of the crack/powder cocaine disparity, "If anti-drug efforts are to have any credibility, especially in the minority communities, these penalties must be significantly revised."

Charles Kamasaki, Senior Vice President of the Office of Research, Advocacy, and Legislation at the National Council of La Raza, stated that his organization shared the concerns of other groups regarding the discriminatory effect of the 100-to-1 drug quantity ratio, but would oppose any attempt to reduce the disparities by increasing penalties for powder cocaine offenders. According to the National Council of La Raza, Hispanics accounted for approximately 25 percent of the Federal inmate population in 1997 and such statistics are largely the result of irregularities in drug enforcement. Moreover, Latinos are overly represented among

those convicted of powder cocaine offenses. It supported increasing crack cocaine mandatory minimum threshold quantities while maintaining the powder cocaine thresholds. The National Council of La Raza contended that the current penalty structure and ratio "severely undermine the credibility of and confidence in the nation's entire system of criminal justice."

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