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 2007

COCAINE
AND
FEDERAL SENTENCING POLICY

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Chapter 1

OVERVIEW

A. INTRODUCTION

This is the United States Sentencing Commission's fourth report to Congress on the subject of federal cocaine sentencing policy.[1] The Commission submits this update 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).[2] Congress has not acted on any of the various statutory recommendations set forth in the Commission's prior reports and expressly disapproved the Commission's guideline amendment addressing crack cocaine penalties submitted on May 1, 1995.

Against a backdrop of renewed congressional interest in federal cocaine sentencing policy,[3] the need to update the Commission's prior reports has become more important. The Supreme Court's decision in *United States v. Booker*[4] has given rise to litigation and resulted in differences among federal courts on the issue of whether, and how, sentencing courts should consider the 100-to-1 drug quantity ratio.[5] Congressional enactment of a uniform remedy to the problems created by the 100-to-1 drug quantity ratio, as opposed to the employment of varied remedies by the courts, would better

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[1] United States Sentencing Commission [hereinafter USSC or Commission], 2002 REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (May 2002) [hereinafter 2002 Commission Report]; USSC, 1997 SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (as directed by section 2 of Pub. L. No. 104–38) (April 1997) [hereinafter 1997 Commission Report]; USSC, 1995 SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (as directed by section 280006 of Pub. L. No. 103–322) (February 1995) [hereinafter 1995 Commission Report].

[2] *See* 28 U.S.C. § 995(a)(20) (authorizing the Commission 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"). The Commission's duties and authorities are fully set forth in chapter 58 of title 28, United States Code.

[3] A number of members of Congress have requested that the Commission update the information in its prior reports and bills have been introduced recently addressing federal cocaine sentencing policy. *See, e.g.*, S. 3725, 109th Cong. (2006) ("Drug Sentencing Reform Act of 2006"), introduced by Sen. Sessions (co-sponsored by Sens. Pryor, Cornyn, and Salazar); H.R. 79, 110th Cong. (2007) ("Powder-Crack Cocaine Penalty Equalization Act of 2007") introduced by Rep. Bartlett; H.R. 460, 110th Cong. (2007) ("Crack-Cocaine Equitable Sentencing Act of 2007") introduced by Rep. Rangel.

[4] *United States v. Booker*, 543 U.S. 220 (2005).

[5] *See* Chapter 6.

promote the goals of the Sentencing Reform Act, including avoiding unwarranted sentence disparities among defendants with similar criminal records who have been found guilty of similar criminal conduct.

Federal cocaine sentencing policy, insofar as it provides substantially heightened penalties for crack cocaine offenses, continues to come under almost universal criticism from representatives of the Judiciary, criminal justice practitioners, academics, and community interest groups, and inaction in this area is of increasing concern to many, including the Commission.[6] The Commission submits this update as a continuation of its efforts to work with the legislative, executive, and judicial branches of government and other interested parties to foster change in federal cocaine sentencing policy. It is the Commission's firm desire that this report will facilitate prompt and appropriate legislative action by Congress.

B. CURRENT PENALTY STRUCTURE FOR FEDERAL COCAINE OFFENSES

1. Two-Tiered Penalties for Powder Cocaine and Crack Cocaine Trafficking

The Anti-Drug Abuse Act of 1986[7] 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. A detailed legislative history of the 1986 Act, both as it pertains to major drugs of abuse generally and to cocaine specifically, is set forth in the Commission's 2002 Report.[8]

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In establishing the mandatory minimum penalties for cocaine, Congress differentiated between the two principal forms of cocaine – cocaine hydrochloride [hereinafter referred to as powder cocaine] and cocaine base [hereinafter referred to as crack cocaine] – and provided significantly higher punishment for crack cocaine offenses.[9] As a result of the 1986 Act, federal law[10] requires a five-year mandatory

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[6] *See* Appendix B (Summary of Public Hearings on Cocaine Sentencing Policy); Appendix C (Summary of Written Public Comment on Cocaine Sentencing Policy).

[7] Pub. L. No. 99–570, 100 Stat. 3207 (1986) [hereinafter 1986 Act].

[8] USSC, 2002 COMMISSION REPORT, *supra* note 1, at 4-10.

[9] 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 cocaine, and to 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

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."

When Congress passed the 1986 Act, the Commission was in the process of developing 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 months for a defendant in Criminal History Category I[11] (a guideline range that exceeded the five-year statutory minimum for such offenses by at least three months). 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 exceeded the ten-year statutory minimum for such offenses by at least one month). Crack cocaine and powder cocaine offenses for quantities above and below the mandatory minimum penalty threshold quantities were set proportionately using the same 100-to-1 drug quantity ratio.[12]

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Because of the 100-to-1 drug quantity ratio, the sentencing guideline penalties based solely on drug quantity (*i.e.*, the base offense level provided by the Drug Quantity Table in the primary drug trafficking guideline, USSG §2D.1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy)) are three to over six times longer for crack cocaine offenders than for 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 factors examined in Chapter 2, the resulting sentences for offenses involving crack cocaine are significantly longer than those for similar offenses involving powder cocaine for any quantity of drug.

(effective Nov. 1, 1993). 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.

[10] *See* 21 U.S.C. § 841(b).

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

[12] *See generally* 1995 COMMISSION REPORT, *supra* note 1, ch. 7 (providing a more thorough explanation of how sentences are determined under the federal sentencing guidelines).

2. Simple Possession of Crack Cocaine

Congress further differentiated between powder cocaine and crack cocaine offenses, and between crack cocaine and other drugs, in the Anti-Drug Abuse Act of 1988[13] [hereinafter the 1988 Act]. The 1988 Act established a mandatory minimum penalty for simple possession of crack cocaine, which is the only federal mandatory minimum penalty for a first offense of simple possession of a controlled substance.

Under current law, possession of five grams or more of crack cocaine triggers a mandatory *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.[14] In other words, an offender who simply possesses five grams of crack cocaine receives the same five-year mandatory minimum penalty as a trafficker of other drugs. In order to account for the new statutory mandatory minimum in the guideline for simple possession offenses, the Commission added a cross reference to the drug trafficking guideline for offenders who possess more than five grams of crack cocaine. (*See* USSG §2D2.1(b)(1) (Unlawful Possession, Attempt or Conspiracy)).

3. Crack Cocaine Penalties Compared to Other Major Drugs of Abuse

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In addition to being more severe than powder cocaine penalties, crack cocaine penalties generally are more severe than penalties for the other drugs of abuse that comprise the federal caseload. In the overwhelming majority of federal drug cases, the primary drug type is cocaine, heroin, marijuana, or methamphetamine.[15] With the exception of methamphetamine-actual, which is discussed in more detail below, the threshold quantities that trigger the mandatory minimum provisions set forth in current law are greater for these drug types than for crack cocaine. For heroin, for example, 100 grams and 1,000 grams trigger the five-year and ten-year mandatory minimum penalties, respectively. For marijuana, 100 kilograms (or 100 marijuana plants) and 1,000 kilograms (or 1,000 marijuana plants) trigger the five-year and ten-year mandatory minimum penalties, respectively.[16]

Congress did not establish mandatory minimum penalties for methamphetamine offenses until the 1988 Act. Under the 1988 Act, ten grams and 100 grams of actual methamphetamine triggered five-year and ten-year mandatory minimum penalties,

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[13] Pub. L. No. 100–690, 102 Stat. 4181 (1988).

[14] *See* 21 U.S.C. § 844. Simple possession of flunitrazepan carries a statutory maximum penalty of three years imprisonment but does not have a statutory mandatory minimum penalty.

[15] *See* USSC, *2006 Sourcebook of Federal Sentencing Statistics* 104 (February 2007).

[16] *See* 21 U.S.C. § 841.

respectively; and 100 grams and 1,000 grams of a mixture or substance containing methamphetamine triggered five-year and ten-year mandatory minimum penalties, respectively. The Commission responded by incorporating these mandatory minimum thresholds in the same manner it had previously used for other drugs, including powder cocaine and crack cocaine.

Congress stiffened the penalties for methamphetamine offenses in the Methamphetamine Trafficking Penalty Enhancement Act of 1998.[17] This legislation cut in half the relevant threshold quantities such that five grams and 50 grams of methamphetamine-actual trigger five-year and ten-year mandatory minimum penalties, respectively; and 50 grams and 500 grams of methamphetamine-mixture trigger five-year and ten-year mandatory minimum penalties, respectively. The Commission again responded by incorporating these mandatory thresholds into the guidelines in its usual manner for drug offenses.

Obvious comparisons are drawn between the current federal penalty scheme for methamphetamine and cocaine, in part because penalties for both drugs vary depending on the form of the drug and in part because the mandatory minimum threshold quantities for crack cocaine and methamphetamine-actual are the same. Nevertheless, important differences in their penalty structure remain. For crack cocaine offenses, the threshold quantities are triggered by the weight of any mixture or substance that contains crack cocaine, regardless of the purity of the mixture or substance. Any additives to powder cocaine or impurities created in the manufacturing process of crack cocaine count toward the weight of the drug for purposes of both triggering the mandatory minimum and determining the guideline sentencing range. By contrast, for methamphetamine-actual, the threshold quantities are triggered solely by the weight of pure methamphetamine.

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Thus, to the extent crack cocaine is impure,[18] quantity-based penalties for crack cocaine remain more severe than for methamphetamine-actual. However, the effect of this particular differential treatment is significantly muted by the manner in which the guidelines treat "ice." Ice is a mixture or substance, crystalline in structure, containing d-methamphetamine hydrochloride that is typically 80 to 90 percent pure. In response to a directive in the 1990 Crime Control Act,[19] the Commission amended the guidelines to treat a mixture or substance containing d-methamphetamine hydrochloride as methamphetamine-actual if the mixture or substance is at least 80 percent pure.[20] Therefore, crack cocaine that is at least 80 percent pure will be accorded the same guideline penalties based on drug quantity alone as ice.

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[17] Pub. L. No. 105–277, Division E, 112 Stat. 2681 (1998), codified at 28 U.S.C. § 841.

[18] *See* Chapter 4 for discussion of crack cocaine purity.

[19] Pub. L. No. 101–647, § 2701, 104 Stat. 4912 (1990).

[20] *See* USSC *Guidelines Manual* App. C Amend 370 (1991).

Another perhaps more important distinction between crack cocaine and methamphetamine penalties is that, unlike for crack cocaine offenses, there are a number of guideline sentencing enhancements, or specific offense characteristics (SOCs), specifically targeted at aggravating conduct or harm associated with methamphetamine offenses. For example, the Comprehensive Methamphetamine Control Act of 1996[21] directed the Commission to focus specifically on environmental hazards posed by methamphetamine manufacturing laboratories and to enhance the penalties for environmental offenses associated with methamphetamine manufacture and trafficking. The Commission responded by adding an enhancement of two offense levels that applies if the offense involved the importation of methamphetamine or its manufacture from chemicals the defendant knew were imported unlawfully.[22] Similarly, in the Methamphetamine and Club Drug Anti-Proliferation Act of 2000,[23] Congress expressed continued concern with the problems and risks associated with domestic methamphetamine production, commonly known as "meth labs," and specifically directed the Commission to provide enhancements for methamphetamine offenses that create a substantial risk of harm to the environment, human life, and minors or incompetents. In response, the Commission adopted a graduated sentencing enhancement of up to six offense levels for methamphetamine manufacturing offenses that create a substantial risk of such harms.[24] In contrast, there are no guideline sentencing enhancements that pertain specifically to crack cocaine offenses.

C. RECOMMENDATIONS

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In updating its assessment of federal cocaine sentencing policy, the Commission carefully considered the purposes of sentencing set forth in the Sentencing Reform Act of 1984, specifically the factors set forth in 18 U.S.C. § 3553(a), the objectives of the 1986 Act, and the factors listed in the 1995 legislation disapproving sentencing guideline penalty equalization at powder cocaine levels.[25] The Commission thoroughly examined

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[21] Pub. L. No. 104–237, §§ 301, 303, 110 Stat. 3099 (1996).

[22] *See* USSC *Guidelines Manual* App. C Amend 555 (1997); USSG §2D1.1(b)(4).

[23] Pub. L. No. 106–310 (2000).

[24] *See* USSC *Guidelines Manual* App. C Amend 608 (2000); USSG §2D1.1(b)(8). On April 18, 2007, the Commission promulgated an amendment that provides additional sentencing enhancements to address two new offenses created by the USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109–177, 21 U.S.C. § 865 (Smuggling methamphetamine or methamphetamine precursor chemicals into the United States while using facilitated entry programs) and 21 U.S.C. § 860a (Consecutive sentence for manufacturing or distributing, or possessing with intent to manufacture or distribute, methamphetamine or premises where children are present or reside). This amendment becomes effective November 1, 2007, absent congressional action to the contrary.

[25] *See* Pub. L. No. 104–38, 109 Stat. 334 (1995), requiring the Commission to consider several factors, specifically:

the results of its own extensive data research project, reviewed the scientific and medical literature, considered written public comment and expert testimony at public hearings that included representatives of the Executive Branch, the Judiciary, the medical and scientific communities, state and local law enforcement, criminal justice practitioners, academics, and community interest groups, and surveyed state cocaine sentencing policies.

Current data and information continue to support the core findings contained in the 2002 Commission Report, among them:

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(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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(1) The current quantity-based penalties overstate the relative harmfulness of crack cocaine compared to powder cocaine.

(2) The current quantity-based penalties sweep too broadly and apply most often to lower level offenders.

(3) The current quantity-based penalties overstate the seriousness of most crack cocaine offenses and fail to provide adequate proportionality.

(4) The current severity of crack cocaine penalties mostly impacts minorities.

Based on these findings, the Commission maintains its consistently held position that the 100-to-1 drug quantity ratio significantly undermines the various congressional objectives set forth in the Sentencing Reform Act.

Determining the appropriate threshold quantities for triggering the mandatory minimum penalties is a difficult and imprecise undertaking that ultimately is a policy judgment, based upon a balancing of competing considerations, which Congress is well suited to make. Accordingly, the Commission again unanimously and strongly urges Congress to act promptly on the following recommendations:

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(1) Increase the five-year and ten-year statutory mandatory minimum threshold quantities for crack cocaine offenses to focus the penalties more closely on serious and major traffickers as described generally in the legislative history of the 1986 Act.[26]

(2) Repeal the mandatory minimum penalty provision for simple possession of crack cocaine under 21 U.S.C. § 844.

(3) Reject addressing the 100-to-1 drug quantity ratio by decreasing the five-year and ten-year statutory mandatory minimum threshold quantities for powder cocaine offenses, as there is no evidence to justify such an increase in quantity-based penalties for powder cocaine offenses.[27]

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[26] The Subcommittee on Crime of the House Committee on the Judiciary generally defined serious traffickers as "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" and major traffickers as "manufacturers or the heads of organizations who are responsible for creating and delivering very large quantities." *See* H.R. Rep. No. 99-845, pt. 1, at 11-12 (1986). In the 2002 Commission Report, the Commission concluded that increasing the five-year mandatory minimum threshold quantity to *at least* 25 grams, resulting in a drug quantity ratio of *not more than* 20 to 1, would provide a penalty structure for crack cocaine offenses that would more closely reflect the overall penalty structure established by the 1986 Act. USSC, 2002 COMMISSION REPORT, *supra* note 1, at 106-07.

[27] In the 2002 Commission Report, the Commission suggested that if, in Congress's judgment, penalties for powder cocaine offenses should be increased, specific sentencing enhancements

In addition, the Commission recommends that any legislation implementing these recommendations include emergency amendment authority for the Commission to incorporate the statutory changes in the federal sentencing guidelines. Emergency amendment authority would enable the Commission to minimize the lag between any statutory and guideline modifications for cocaine offenders.

D. RECENT COMMISSION ACTION

The Commission's strong desire for prompt legislative action notwithstanding, the problems associated with the 100-to-1 drug quantity ratio as detailed in this report are so urgent and compelling that on April 27, 2007, the Commission promulgated an amendment to USSG §2D1.1 to somewhat alleviate those problems. The Commission concluded that the manner in which the Drug Quantity Table in USSG §2D1.1 was constructed to incorporate the statutory mandatory minimum penalties for crack cocaine offenses is an area in which the federal sentencing guidelines contribute to the problems associated with the 100-to-1 drug quantity ratio.

The amendment, which absent congressional action to the contrary will become effective November 1, 2007, modifies the drug quantity thresholds in the Drug Quantity Table so as to assign, for crack cocaine offenses, base offense levels corresponding to guideline ranges that include the statutory mandatory minimum penalties (as opposed to guideline ranges that exceed the statutory mandatory minimum penalties).[28] Accordingly, pursuant to the amendment, five grams of crack cocaine will be assigned a base offense level of 24 (51 to 63 months at Criminal History Category I, which includes the five-year (60 month) statutory minimum for such offenses), and 50 grams of cocaine base will be assigned a base offense level of 30 (97 to 121 months at Criminal History Category I, which includes the ten-year (120 month) statutory minimum for such offenses). In order to partially address some of the problems that are unique to crack cocaine offenses because of the 100-to-1 drug quantity ratio, crack cocaine quantities above and below the mandatory minimum threshold quantities will be adjusted downward by two levels.[29]

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Having concluded once again that the 100-to-1 drug quantity ratio should be modified, the Commission recognizes that establishing federal cocaine sentencing policy, as underscored by past actions, ultimately is Congress's prerogative. The Commission, therefore, tailored the amendment to fit within the existing statutory penalty scheme by

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targeting more culpable offenders would promote sentencing proportionality to a greater degree than could be accomplished simply by raising the quantity-based penalties for powder cocaine offenses. USSC, 2002 COMMISSION REPORT, *supra* note 1, at 110-11.

[28] *See supra* pp. 2-3.

[29] The amendment also includes a mechanism to determine a combined base offense level in an offense involving crack cocaine and other controlled substances.

assigning base offense levels that provide guideline ranges that include the statutory mandatory minimum penalties for crack cocaine offenses.

The Commission, however, views the amendment only as a partial remedy to some of the problems associated with the 100-to-1 drug quantity ratio. It is neither a permanent nor a complete solution to those problems. Any comprehensive solution requires appropriate legislative action by Congress. It is the Commission's firm desire that this report will facilitate prompt congressional action addressing the 100-to-1 drug quantity ratio.

E. ORGANIZATION

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

Chapter 2 analyzes Commission data on federal cocaine offenses and offenders. Appendix A explains the methodology used in this chapter.

Chapter 3 describes the forms of cocaine, methods of use, effects, dependency potential, effects of prenatal exposure, and prevalence of cocaine use.

Chapter 4 describes trends in cocaine trafficking patterns, price, and use.

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Chapter 5 reviews state sentencing policies and examines the interaction of state penalties with federal prosecutorial decisions.

Chapter 6 reports recent case law developments relating to federal cocaine sentencing.

Appendices B and C summarize public hearing testimony and written public comment on cocaine sentencing policy.

Appendix D presents sentencing and prison impact information on a variety of modifications to the penalty levels for crack cocaine offenses.

Appendix E sets forth the guideline amendment promulgated on April 27, 2007, and presents the sentencing and prison impact information for the amendment.

Chapter 2

ANALYSIS OF FEDERAL SENTENCING DATA

A. INTRODUCTION

This chapter presents an analysis of key data about cocaine offenses collected by the Commission and updates and supplements much of the data presented in Chapter 4 of the 2002 Commission Report. This analysis demonstrates that the major conclusions of the 2002 Commission Report remain valid.

- The majority of powder cocaine and crack cocaine offenders perform low-level trafficking functions, although there has been an increase since 2000 in the proportion of cocaine offenders identified as performing a wholesaler function.

- The majority of powder cocaine offenses and crack cocaine offenses do not involve aggravating conduct, such as weapon involvement, bodily injury, and distribution to protected persons or in protected locations. However, the proportion of cases involving some aggravating conduct has increased since 2000 for both types of cocaine offenses.

- Certain aggravating conduct occurs more often in crack cocaine offenses than in powder cocaine offenses, but still occurs in a minority of cases.

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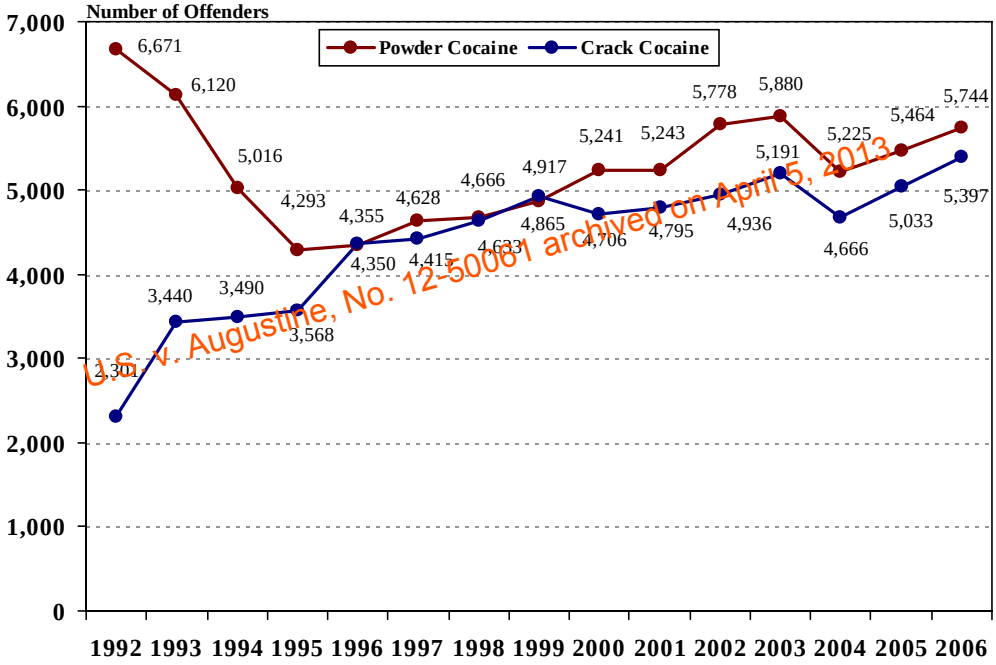
Historically, sentence lengths for crack cocaine offenses have exceeded those for powder cocaine offenses. This chapter examines the offense conduct and offender characteristics that have contributed to this trend. The data in this chapter are derived from the Commission's Fiscal Year 1992 through 2006 datafiles (hereafter, 1992 - 2006) and special coding and analysis projects consisting of random samples of both the 2000 and 2005 Fiscal Year datafiles (hereafter, 2000 Drug Sample and 2005 Drug Sample, respectively).[30] Relevant data in the Commission's Fiscal Year datafiles include information on drug type and quantity, guideline applications, sentences imposed, and sentences relative to the guideline range. Data in the 2000 and 2005 Drug Samples supplement the Fiscal Year data with information on offender characteristics and offense conduct collected from the narrative offense conduct sections of the Presentence Reports, as adopted by the sentencing courts.

[30] The random sample of the Fiscal Year 2005 datafile was collected for the Commission's quinquennial series of drug coding projects and consists of a 25 percent random sample (2,570) of powder cocaine (1,398) and crack cocaine (1,172) cases sentenced after the date of the decision in *Booker* (i.e., January 12, 2005 through September 30, 2005). Data on trends and analyses of the overall powder cocaine and crack coaine offender populations use the Fiscal Year 2005 and Fiscal Year 2006 datafiles rather than the 2005 datafile in order to use the most current data available.

1. Background

Powder cocaine and crack cocaine offenses together historically have accounted for about half of the federally-sentenced drug trafficking offenders, approximately 11,000 in 2006. In 1992, powder cocaine offenses comprised 74 percent of the 8,972 cocaine offenses and crack cocaine offenses accounted for 26 percent of the cocaine offenses. By 1996, the total number of cocaine offenses decreased slightly to 8,705 and approximately half of cocaine offenses were powder cocaine and half were crack cocaine offenses. This even distribution of types of cocaine has remained consistent through 2006, with 5,744 powder cocaine offenses and 5,397 crack cocaine offenses sentenced in that Fiscal Year. (*See* Figure 2-1).

Figure 2-1
Trend in Number of Powder Cocaine and Crack Cocaine Offenders
FY1992-FY2006



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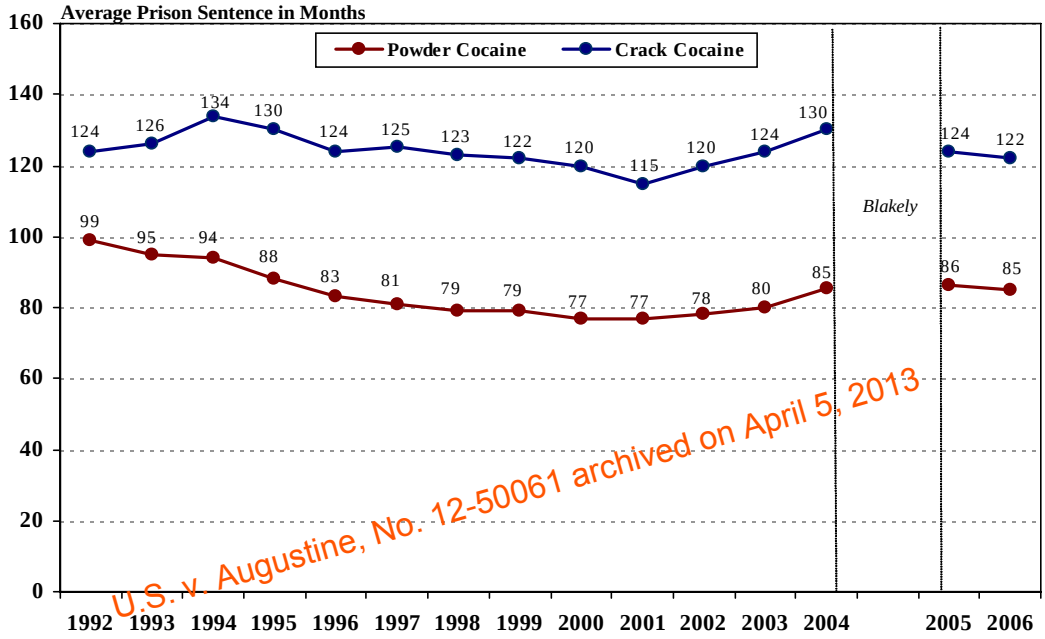
Only cases sentenced under USSG §2D1.1 (Drug Trafficking) with a primary drug type of powder cocaine or crack cocaine are included in this figure. This figure excludes cases with missing information for the variables required for analysis.

SOURCE: U.S. Sentencing Commission, 1992-2006 Datafiles, MONFY92 – USSCFY06.

Federal crack cocaine offenders consistently have received substantially longer sentences than powder cocaine offenders, and the difference in sentence length between these two groups of offenders has widened since 1992. As Figure 2-2 shows, this increase largely results from an overall decline in average sentences for powder cocaine offenses (99 months in 1992 to 85 months in 2006), while the average sentences for crack cocaine offenses remained stable during the same period (124 months in 1992 and 122 months in 2006). This difference steadily increased between 1992 and 1997 and leveled out from 1997 through 2004 (Fig. 2-2). Figure 2-3 combines the average sentence data provided in Figure 2-2 and displays the percent difference between powder cocaine sentences and crack cocaine

sentences for the same period. Between 1997 and 2004, the difference in average sentence was relatively stable, with crack cocaine sentences between 49.4 percent and 55.8 percent longer than powder cocaine sentences. In 2005 and 2006, the difference in average sentences narrowed somewhat with crack cocaine sentences 44.2 percent and 43.5 percent higher than powder cocaine sentences, respectively.

Figure 2-2
Trend in Prison Sentences for Powder Cocaine and Crack Cocaine Offenders
FY1992-FY2006



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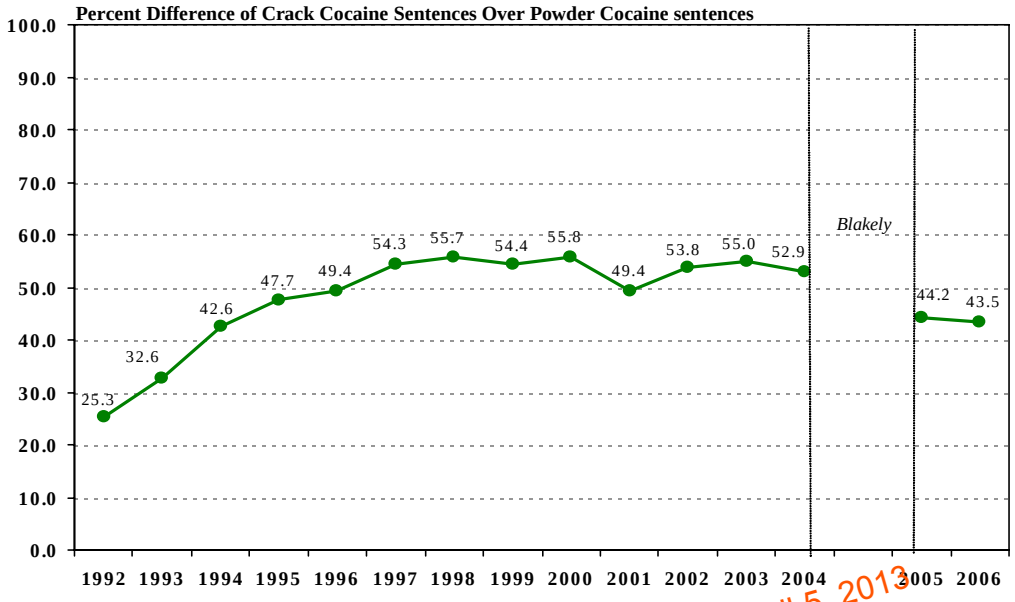
Only cases sentenced under USSG §2D1.1 (Drug Trafficking) with a primary drug type of powder cocaine or crack cocaine are included in this figure. Cases with sentences of probation or any time of confinement as defined in USSG §5C1.1 are not included in this figure. Cases with sentences greater than 470 months were included in the sentence average computation as 470 months. This figure excludes cases with missing information for the variables required for analysis.

SOURCE: U.S. Sentencing Commission, 1992-2006 Datafiles, MONFY92 – USSCFY06, 2004 Pre-*Blakely* Only Cases (October 1, 2003 – June 24, 2004), and 2005 Post-*Booker* Only Cases (January 12, 2005 – September 30, 2005).

As detailed throughout this chapter, these changes in average sentences are attributable to, among other things, changes in drug quantities involved, the occurrence of certain aggravating factors in the offenses, the impact of certain changes in statutory and guideline sentencing policy (*e.g.*, the enactment of the "safety valve" sentence reduction for some non-violent offenders),[31] and the criminal history of offenders.

[31] USSG §5C1.2 (Limitation of Applicability of Statutory Minimum Sentences in Certain Cases) allows the court to sentence qualifying offenders below the quantity-based statutory mandatory minimum penalty. In order to qualify for the safety valve, the defendant must not have more than one criminal history point, must not have used violence or weapons, must not have been an organizer or leader, must not have engaged in a continuing criminal enterprise, and must have provided, 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. Pursuant to USSG §2D1.1(b)(9) offenders meeting the criteria set forth in USSG §5C1.2 also may be eligible for a two level offense level reduction.

Figure 2-3
Trend in Proportional Differences Between Average Cocaine Sentences
FY1992-FY2006



Only cases sentenced under USSG §2D1.1 (Drug Trafficking) with a primary drug type of powder cocaine or crack cocaine are included in this figure. Cases with sentences of probation or any time of confinement as defined in USSG §5C1.1 are not included in this figure. Cases with sentences greater than 470 months were included in the sentence average computation as 470 months. This figure excludes cases with missing information for the variables required for analysis. The figure shows, for each year, the percentage difference between prison sentences for crack cocaine and powder cocaine. For example, in Fiscal Year 1992, crack cocaine sentences were 25.3 percent greater than powder cocaine sentences. The percentage was calculated by dividing the difference between the average crack cocaine sentence and the average powder cocaine sentence by the average powder cocaine sentence.

SOURCE: U.S. Sentencing Commission, 1992-2006 Datafiles, MONEY92 – USSCFY06, 2004 Pre-*Blakely* Only Cases (October 1, 2003 – June 24, 2004), and 2005 Post-*Booker* Only Cases (January 12, 2005 – September 30, 2005).

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B. OFFENSE AND OFFENDER CHARACTERISTICS

Sentencing ranges for drug offenses sentenced under the federal sentencing guidelines are determined by drug quantity and type, the presence of aggravating factors (*e.g.*, aggravating role, weapon involvement) and mitigating factors (*e.g.*, minor role), and the offender's criminal history. This section provides trend data for these factors from the 1992 through 2006 Fiscal Year datafiles, as well as complementary data from the 2000 and 2005 Drug Samples. The major conclusions that may be drawn from these data are:

- The majority of federal cocaine offenders generally perform low-level functions, but the proportion of powder cocaine and crack cocaine wholesalers has increased since 2000.

- The majority of federal cocaine offenses do not involve aggravating conduct.

- Some types of aggravating conduct occur more often in crack cocaine than powder cocaine offenses.

- Historically, the majority of crack cocaine offenders are black. Powder cocaine offenders are now predominately Hispanic.

- While the average age of federal powder cocaine offenders has remained unchanged, the average age of crack cocaine offenders has increased.

1. Demographics

This section updates the demographic data and trends presented in the 2002 Commission Report. The data from the Commission's Fiscal Year datafiles provide information comparing race and ethnicity, citizenship, gender (offender characteristics which are not relevant in the determination of a sentence[32]), and age (a factor which is not ordinarily relevant in determining whether a departure from the guidelines is warranted[33]) for federal powder cocaine and crack cocaine offenders.

Table 2-1 presents the demographic characteristics of federal cocaine offenders. Historically the majority of crack cocaine offenders are black, but the proportion steadily has declined since 1992: 91.4 percent in 1992, 84.7 percent in 2000, and 81.8 percent in 2006. Conversely, the proportion of white crack cocaine offenders has increased steadily from 3.2 percent in 1992 to 5.6 percent in 2002, to 8.8 percent in 2006. For powder cocaine, Hispanic offenders have comprised a growing proportion of cases. In 1992, Hispanics accounted for 39.8 percent of powder cocaine offenders. This proportion increased to over half (50.8%) by 2000 and continued increasing to 57.5 percent in 2006. There has been a corresponding decrease in the proportion of white offenders for powder cocaine, comprising 32.3 percent of offenders in 1992, decreasing by approximately half to 17.8 percent by 2000, and continuing to decrease to 14.3 percent by 2006.

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Nearly all crack cocaine offenders are United States citizens (96.4% in 2006, which is consistent with the rates in 1992 and 2000), reflecting the fact that this form of the drug almost exclusively is produced and trafficked domestically. *See* Chapter 4. In contrast, in 2006 only 60.6 percent of powder cocaine offenders were United States citizens, continuing a steady decline of United States citizens convicted of powder cocaine offenses since 1992 and reflecting the international aspects of the powder cocaine trade that are absent for crack cocaine.[34]

The two drug types are more similar in other demographic measures. Male offenders comprised the overwhelming majority of offenders for both drug types (90.2% of powder

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[32] *See* USSG §5H1.10.

[33] *See* USSG §5H1.1.

[34] *See* Drug Enforcement Administration, U.S. Department of Justice, *Drugs of Abuse* 33 (2005). Cocaine hydrochloride is processed in and exported from South America. Crack cocaine is produced in the United States using the imported powder cocaine.

Table 2-1
Demographic Characteristics of Federal Cocaine Offenders
Fiscal Years 1992, 2000, and 2006

	Powder Cocaine						Crack Cocaine					
	1992		2000		2006		1992		2000		2006	
	N	%	N	%	N	%	N	%	N	%	N	%
Race/Ethnicity												
White	2,113	32.3	932	17.8	821	14.3	74	3.2	269	5.6	474	8.8
Black	1,778	27.2	1,596	30.5	1,550	27.0	2,096	91.4	4,069	84.7	4,411	81.8
Hispanic	2,601	39.8	2,662	50.8	3,296	57.5	121	5.3	434	9.0	452	8.4
Other	44	0.7	49	0.9	66	1.2	3	0.1	33	0.7	56	1.0
Total	6,536	100.0	5,239	100.0	5,733	100.0	2,294	100.0	4,805	100.0	5,393	100.0
Citizenship												
U.S. Citizen	4,499	67.7	3,327	63.9	3,463	60.6	2,092	91.3	4,482	93.4	5,195	96.4
Non-Citizen	2,147	32.3	1,881	36.1	2,256	39.4	199	8.7	318	6.6	196	3.6
Total	6,646	100.0	5,208	100.0	5,719	100.0	2,291	100.0	4,800	100.0	5,391	100.0
Gender												
Female	787	11.8	722	13.8	561	9.8	270	11.7	476	9.9	461	8.5
Male	5,886	88.2	4,518	86.2	5,179	90.2	2,032	88.3	4,330	90.1	4,936	91.5
Total	6,673	100.0	5,240	100.0	5,740	100.0	2,302	100.0	4,806	100.0	5,397	100.0
Average Age	Average=34		Average=34		Average=34		Average=28		Average=29		Average=31	

This table excludes cases missing information for the variables required for analysis.

SOURCE: U.S. Sentencing Commission, 1992, 2002, and 2006 Datafiles, MONFY92, USSCFY00, and USSCFY06.

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cocaine offenders and 91.5% of crack cocaine offenders) in Fiscal Year 2006, which is consistent with federal drug offenders generally across drug type and over time. There is a small difference in the average age of powder cocaine and crack cocaine offenders, with powder cocaine offenders being slightly older.

The age trend since 1992 indicates stability in the average age of powder cocaine offenders (34 years in 1992 and 2006). This differs from the trend in crack cocaine offenders, whose average age increased across the same years from 28 to 29 to 31 years of age.[35] The aging of federal crack cocaine offenders is consistent with testimony received from Professor Al Blumstein and Dr. Bruce Johnson, who link the aging of crack cocaine traffickers to the reduction in violence in crack cocaine street markets. *See* Chapter 4.

2. Offender Function

To provide a more complete profile of federal cocaine offenders, particularly their function in the offense, the Commission undertook a special coding and analysis project to supplement the data reported in the 2002 Commission Report. This section reports data from the recent project as well as that reported in the 2002 Commission Report. The methodologies used in these two projects are described in Appendix A. Using actual cases sentenced after the date of the *Booker* decision, this analysis project assessed the function performed by drug offenders as part of the offense.

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Offender function was determined by a review of the narrative in the offense conduct section of the Presentence Report independent of any application of sentencing guideline enhancements, reductions, or drug quantity and, therefore, does not indicate a court determination of function in the offense. Furthermore, offender function was assigned based on the most serious trafficking function performed by the offender in the drug distribution offense and, therefore, provides a measure of culpability based on the offender's level of participation in the offense, independent of the offender's quantity-based offense level in the Drug Quantity Table in the drug trafficking guideline. Offenders at higher levels of the drug distribution chain are presumed to be more culpable based on their greater responsibilities and higher levels of authority as compared to other participants in the offense.

Each offender was assigned to one of 21 separate function categories based on his or her most *serious* conduct described in the Presentence Report. Terms used to describe offender function do not necessarily correlate with guideline definitions of similar terms. For example, as seen below, the definition of manager/supervisor used in the coding project to describe offender function does not match the guideline definition of manager or supervisor in USSG §3B1.1 (Aggravating Role). The 21 categories were combined into eight categories to facilitate analysis and presentation of the data. The eight analytic categories are listed below with brief descriptions of the conduct involved. A complete list of the 21 function categories and definitions appears in Appendix A. Function categories are displayed on the figures in this chapter in decreasing order of culpability from left to right. The categories

[35] For a graphic representation of this trend, see Figure 4-1 in Chapter 4.

described below represent a continuum of decreasing culpability ranging from importer/high-level supplier to user only.

- Importer/high-level supplier: Imports or supplies large quantities of drugs, is near the top of the distribution chain, and has ownership interest in the drugs.

- Organizer/leader/grower/manufacturer/financier/money launderer: Organizes or leads a drug distribution organization, cultivates or manufactures a controlled substance, or provides money for importation or distribution of drugs, or launders sales proceeds.

- Wholesaler: Sells more than retail/user-level quantities (more than one ounce) in a single transaction, purchases two or more ounces in a single transaction, or possesses two ounces or more on a single occasion, or sells *any* amount to another dealer for resale.

- Manager/supervisor: Takes instruction from higher-level individual and manages a significant portion of drug business, supervises at least one other co-participant but has limited authority.

- Pilot/captain/bodyguard/chemist/cook/broker/steerer: Pilots vessel or aircraft, provides personal security for another co-participant, produces drugs but is not the principal owner, arranges for drug sales by directing potential buyers to potential sellers.

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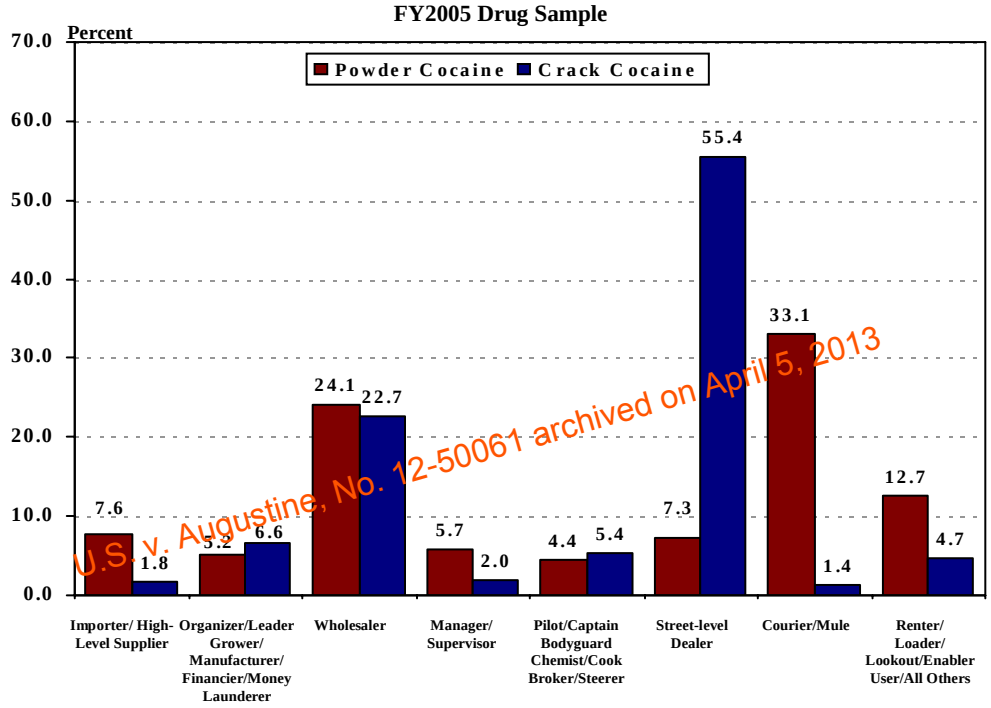
- Street-level dealer: Distributes retail quantities (less than one ounce) directly to users.

- Courier/mule: Transports or carries drugs with the assistance of a vehicle or other equipment, or internally, or on his or her person.

- Renter/loader/lookout/enabler/user/all others: Performs limited, low-level functions such as providing a location for drug transactions, runs errands, knowingly permits conduct to take place, possesses small amount of drugs for personal use (includes offenders whose function was not determinable from the description in the Presentence Report).

Figure 2-4 shows the offender function category distributions for powder cocaine and crack cocaine offenders from the 2005 Drug Sample. As in 2000, the function category with the largest proportion of powder cocaine offenders remains couriers/mules (33.1%) and for crack cocaine offenders, street-level dealers (55.4%). While this concentration of functions is consistent with the 2000 Drug Sample, some changes had occurred by 2005.

Figure 2-4
Most Serious Function for Powder Cocaine and Crack Cocaine Offenders
(Based on Conduct Described in the Presentence Report)
FY2005 Drug Sample



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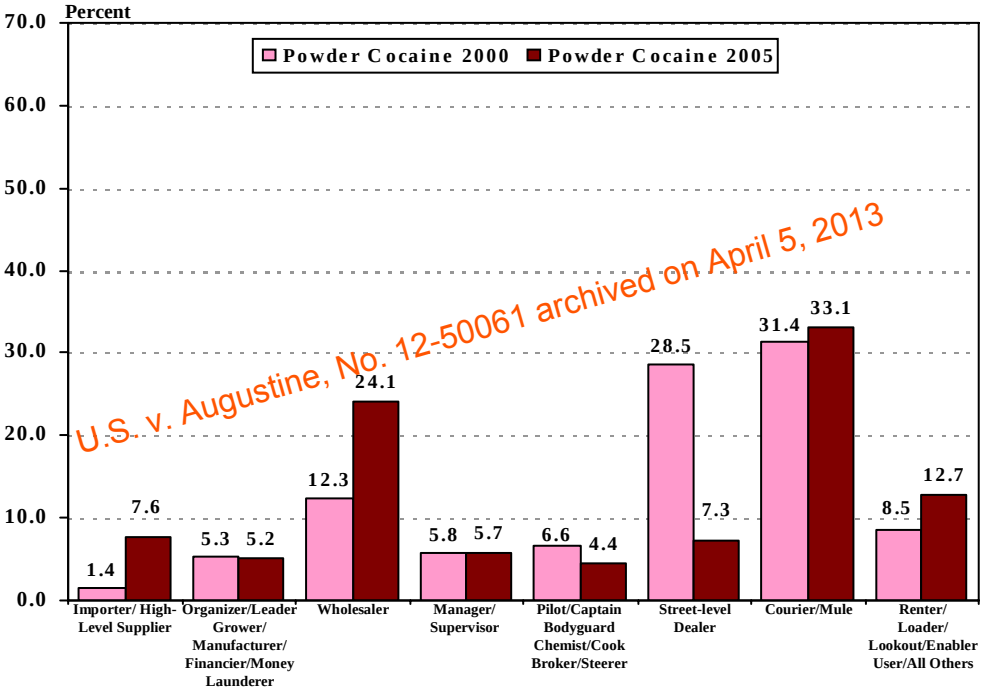
Classifications were based on descriptions of conduct found in the offense conduct section of the Presentence Report. These classifications may not reflect court findings on application of specific guideline enhancements. This figure excludes cases with missing information for the variables required for analysis.

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

The concentration of powder cocaine offenders in low-level functions shifted somewhat toward higher level functions between 2000 and 2005. In the 2000 Drug Sample, street-level dealers (28.5%) and couriers/mules (31.4%) combined to account for more than half (59.9%) of powder cocaine offenders (Fig. 2-5). In 2005, these two functions accounted for only 40.4 percent of powder cocaine offenders. The decrease in the proportion of these two lower level functions seems to be attributable to a shift from street-level dealing (28.5% of offenders in 2000 compared to 7.3% in 2005) to wholesaling (12.3% of offenders in 2000 compared to 24.1% in 2005).

Figure 2-5
Most Serious Function for Powder Cocaine Offenders
(Based on Conduct Described in the Presentence Report)
FY2000 and FY2005 Drug Samples



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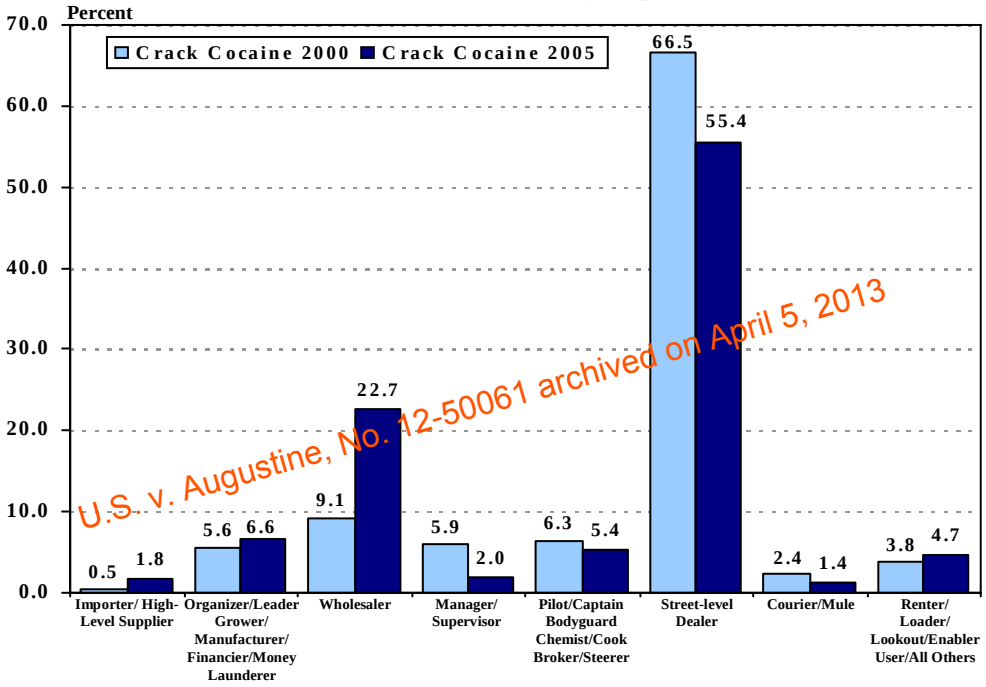
Classifications were based on descriptions of conduct found in the offense conduct section of the Presentence Report. These classifications may not reflect court findings on application of specific guideline enhancements. This figure excludes cases with missing information for the variables required for analysis.

SOURCE: U.S. Sentencing Commission, 2002 Commission Report and 2005 Sample.

Crack cocaine offenders also are concentrated in lower level functions. In contrast to powder cocaine, however, crack cocaine offenders continue to cluster only in the street-level dealer category. Approximately two-thirds (66.5%) of crack cocaine offenders were street-level dealers in the 2000 sample, but this proportion decreased to 55.4 percent in 2005 (Fig. 2-6). As with powder cocaine, there was a corresponding increase in crack cocaine wholesalers, from 9.1 percent in 2000 to 22.7 in 2005.

Figure 2-6
Most Serious Function for Crack Cocaine Offenders
(Based on Conduct Described in the Presentence Report)
FY2000 and FY2005 Drug Samples



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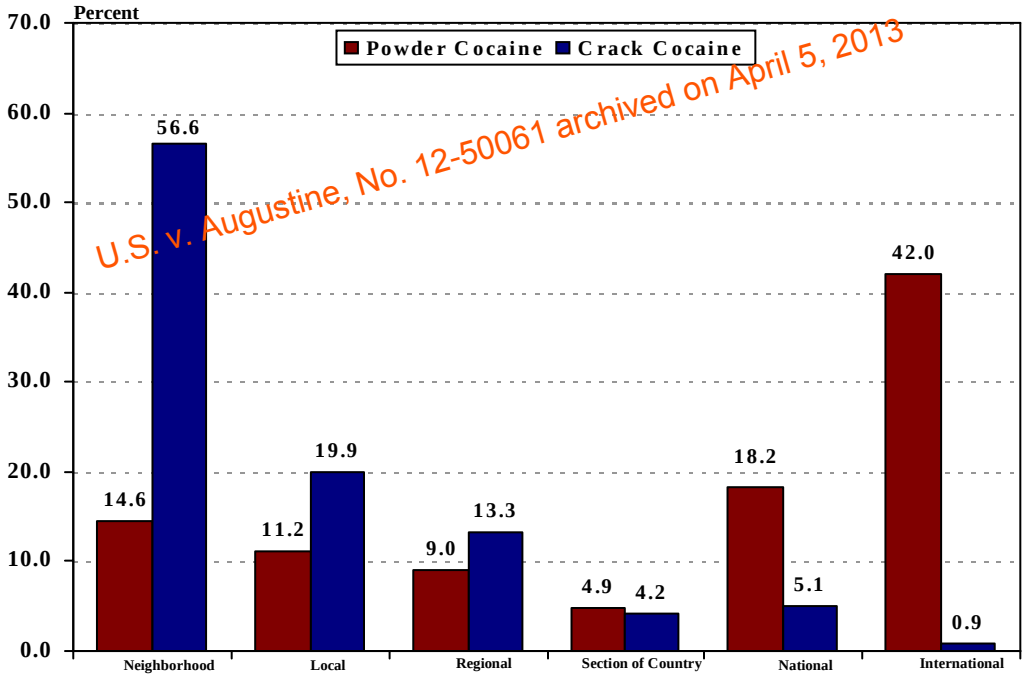
Classifications were based on descriptions of conduct found in the offense conduct section of the Presentence Report. These classifications may not reflect court findings on application of specific guideline enhancements. This figure excludes cases with missing information for the variables required for analysis.

SOURCE: U.S. Sentencing Commission, 2002 Commission Report and 2005 Sample.

The sources of the two drugs likely account for these differences in offender function. Figure 2-7 demonstrates the different trafficking patterns for each type of cocaine by illustrating the geographic scope of each type of offense. Powder cocaine is produced outside the United States and must be imported. The trafficking of powder cocaine requires couriers to bring the cocaine into the United States and other mid- and low-level participants to distribute it throughout the country. Supporting this fact is the large proportion of powder cocaine offenses, nearly two-thirds (60.2%), that are international (42.0%) or national (18.2%) in scope. In contrast, with rare exception, crack cocaine is produced and distributed domestically and the international courier/mule component largely is absent. This fact also is supported by the data in Figure 2-7 showing that a small proportion of crack cocaine offenses (6.0%) are either national or international in scope, and more than half (56.6%) occur at the neighborhood level. These data on geographic scope further underscore the function data reported above that couriers/mules predominate in powder cocaine offenses and street-level dealers predominate in crack cocaine offenses.

Figure 2-7
Geographic Scope of Powder Cocaine and Crack Cocaine Offenses

FY2005 Drug Sample



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Classifications were based on descriptions of conduct found in the offense conduct section of the Presentence Report. These classifications may not reflect court findings on application of specific guideline enhancements. This figure excludes cases with missing information for the variables required for analysis.

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

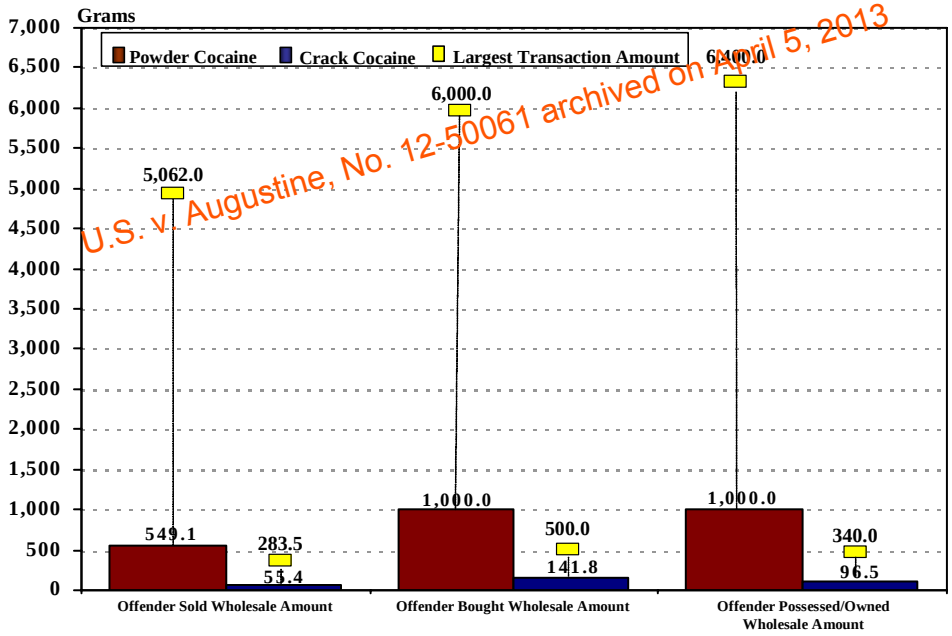
3. Wholesalers

Due to the increase in wholesalers noted in the 2005 Drug Sample, the Commission undertook further analysis of the offenders in this group to learn more about their activities. An offender was categorized as a wholesaler if his offense conduct as described in the

Presentence Report indicated that the offender sold any drug quantity to an individual who resold the drugs, sold more than a retail or user level quantity (*i.e.*, more than one ounce) of the drug in a single transaction, or possessed or purchased in a single transaction more than two ounces of the drug. The quantities used in this definition are consistent with the findings from the literature regarding the organization and distribution patterns of drug trafficking organizations discussed in Chapter 5.

Despite the fact that the wholesaler function is defined as transactions of one ounce or more, the median quantity bought or sold by these offenders is much greater for both forms of the drug. Figure 2-8 shows, for powder cocaine and crack cocaine wholesalers, the median largest single quantity associated with the conduct defining the wholesaler category: sale, purchase, or possession. Overall, the median wholesale amounts for powder cocaine (ranging from 549.1 grams to one kilogram) are substantially greater than for crack cocaine (ranging from 55.4 grams to 141.8 grams).

Figure 2-8
Median Single Largest Wholesale Quantity by Conduct for Powder Cocaine and Crack Cocaine Offenders
FY2005 Drug Sample



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

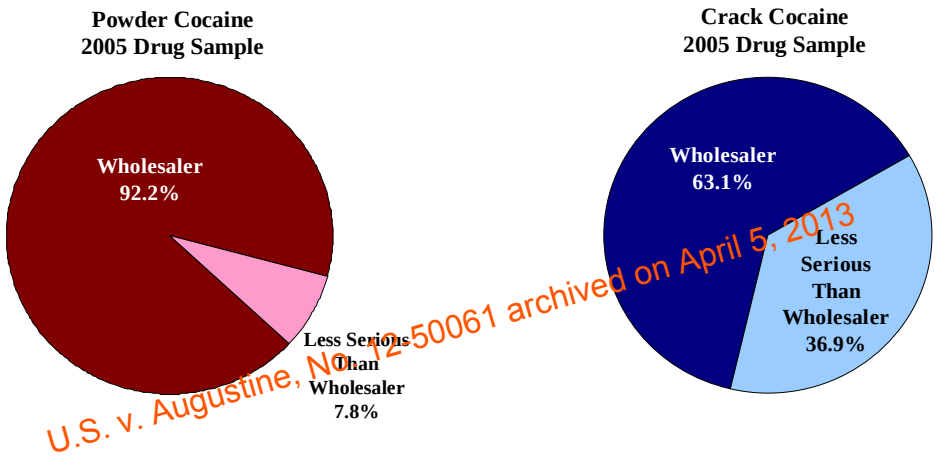
Classifications were based on descriptions of conduct found in the offense conduct section of the Presentence Report. These classifications may not reflect court findings on application of specific guideline enhancements. This figure excludes cases with missing information for the variables required for analysis.

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

As discussed above, the offender function distribution in Figure 2-4 illustrates the most *serious* function the offender performed. The Commission also analyzed the most *frequent* function of powder cocaine and crack cocaine wholesalers. As to those offenders for whom wholesaler was the most *serious* function performed in the drug trafficking enterprise, (24.1% of powder cocaine offenses and 22.7% of crack cocaine offenses in the

2005 Drug Sample), wholesaler also was the function most *frequently* performed. In some cases, however, the most serious function described in the Presentence Report is a step or two above the most frequently performed function. As Figure 2-9 shows, 7.8 percent of powder cocaine wholesalers most frequently performed functions less serious than wholesaler. Slightly more than one-third (36.9%) of crack cocaine wholesalers most often performed less culpable functions.[36] For these offenders, classification as a wholesaler may overstate their overall culpability as measured by most serious function.

Figure 2-9
Most Common Function for Powder Cocaine and Crack Cocaine Wholesalers
FY2005 Drug Sample



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Classifications were based on descriptions of conduct found in the offense conduct section of the Presentence Report. These classifications may not reflect court findings on application of specific guideline enhancements. This figure excludes cases with missing information for the variables required for analysis.

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

4. Drug Quantity

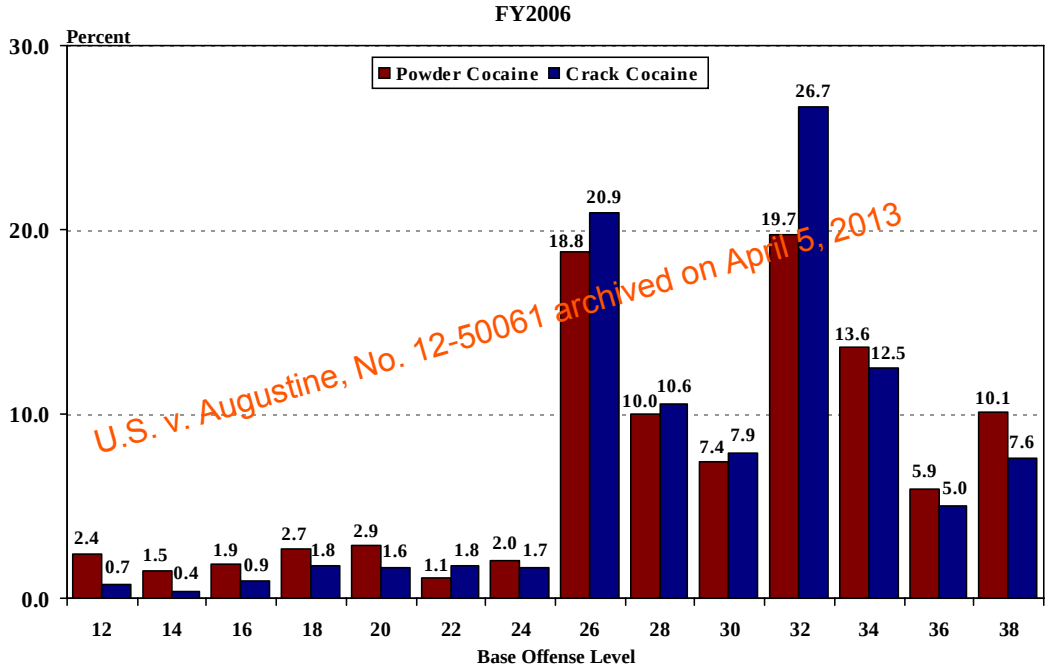
Drug type and quantity are the two primary factors that determine offense levels under the federal sentencing guidelines, combining to establish the base offense level for drug trafficking offenses.[37] Figure 2-10 shows the distribution of quantity-driven base

[36] The 2000 Drug Sample data show a similar distribution, that is, 3.1 percent of powder cocaine wholesalers and 20.5 percent of crack cocaine wholesalers most commonly acted in less serious roles in the drug trafficking offense. Additional analysis of wholesalers can be found in Appendix A.

[37] 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 offender conduct, and the intersection of these calculated values determines the sentencing guideline

offense levels for powder cocaine and crack cocaine offenders. The distribution of offenders across base offense levels is similar for both drug types. The overwhelming majority of both powder cocaine (85.5%) and crack cocaine (91.2%) offenders receive base offense levels of 26 or greater (that is, drug quantities at or above the five-year mandatory minimum threshold quantity). For both powder cocaine (19.7%) and crack cocaine offenders (26.7%), base offense level of 32 (which corresponds to the threshold quantities for the ten-year statutory mandatory minimum) is received most often, followed by base offense level 26 (18.8% of powder cocaine offenders and 20.9% of crack cocaine offenders). This base offense level distribution tends to support testimony that federal law enforcement targets offenses at the point they involve the minimum quantity thresholds for prosecution.[38]

Figure 2-10
Distribution of Drug Trafficking Guideline (USSG §2D1.1) Base Offense Levels for Powder Cocaine and Crack Cocaine Offenders



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Only cases sentenced under USSG §2D1.1 (Drug Trafficking) with complete guideline application information and a primary drug type of powder cocaine or crack cocaine are included in this figure. Offenders receiving the Mitigating Role Cap (USSG § 2D1.1(a)(3)) are excluded from this figure. Offenders with base offense levels less than 12 or greater than 38 were excluded from analysis. This figure excludes cases with missing information for the variables required for analysis.

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

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range for the offense. Base offense level 43 is applicable under drug trafficking guideline: USSG §2D1.1(a)(1) for violations of specific subsections of title 21, United States Code, and resulting death or serious bodily injury from use of the substance for offenders with one or more prior convictions for a similar offense. Base offense level 38 can be applied both based on the Drug Quantity Table and pursuant to USSG §2D1.1(a)(2) for violations of specific subsections of title 21, United States Code resulting death or serious bodily injury from use of the substance. In addition, §2D1.1(a)(3) provides for reductions in quantity-based base offense levels for offenders receiving mitigating role reductions under USSG §3B1.2.

[38] *See* Statement of R. Alexander Acosta, United States Attorney, Southern District of Florida, to the USSC, regarding Cocaine Sentencing Policy, November 14, 2006, at Tr. 50.

Figure 2-11 shows the median drug weights for powder cocaine and crack cocaine offenses at guideline base offense levels of 26 through 36 (for those offenders who did not receive the "mitigating role cap" as provided in USSG §2D1.1(a)(3)).[39] Base offense level 32, the level comprising the largest proportion of both powder cocaine and crack cocaine offenses, includes drug quantities that trigger the ten-year statutory mandatory minimum penalty and provides for a sentencing guideline range of 121-151 months.[40] The median drug weights for the powder cocaine and crack cocaine offenses at base offense level 32 are 8.045 kilograms and 79.8 grams, respectively.

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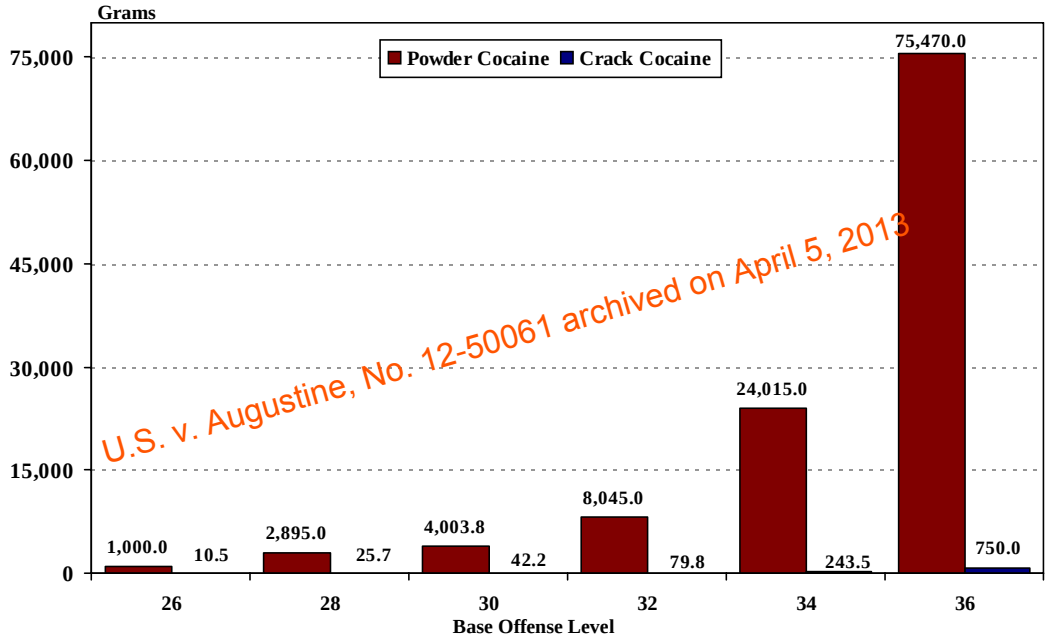
[39] The majority of base offense levels for powder cocaine (85.5%) and crack cocaine (91.2%) offenses were quantity based and at level 26 or higher. Cases with base offense levels of 38 have been excluded because, as the highest base offense level on the Drug Quantity Table, this category has no upper limit for drug quantity. The very large drug quantities for some offenses at this base offense level make presentation of results impractical. For example, in Fiscal Year 2006 the single largest drug quantities for powder cocaine and crack cocaine offenders with base offense levels of 38 were 12,000,000 grams and 500,000 grams, respectively.

[40] This is the applicable sentencing guideline range for offenders in Criminal History Category I with little or no prior criminal history.

Base offense level 26, the level comprising the second largest proportion of both powder cocaine and crack cocaine offenses, includes drug quantities that trigger the five-year statutory mandatory minimum penalties and provides for a sentencing guideline range of 63-78 months.[41] The median drug weights for the powder cocaine and crack cocaine offenses at base offense level 26 are 1,000 grams and 10.5 grams, respectively. Thus for both base offense levels 26 and 32, the median drug quantities are approximately 100 times greater for powder cocaine than for crack cocaine, as would be expected given the 100-to-1 drug quantity ratio.[42]

Figure 2-11
Median Drug Weight for Powder Cocaine and Crack Cocaine Offenders
FY2006



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Only cases sentenced under USSG §2D1.1 (Drug Trafficking) with complete guideline application information and a primary drug type of powder cocaine or crack cocaine are included in this figure. Cases receiving the Mitigating Role Cap (USSG §2D1.1(a)(3)) are excluded from this figure. This figure excludes cases with missing information for the variables required for analysis.

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

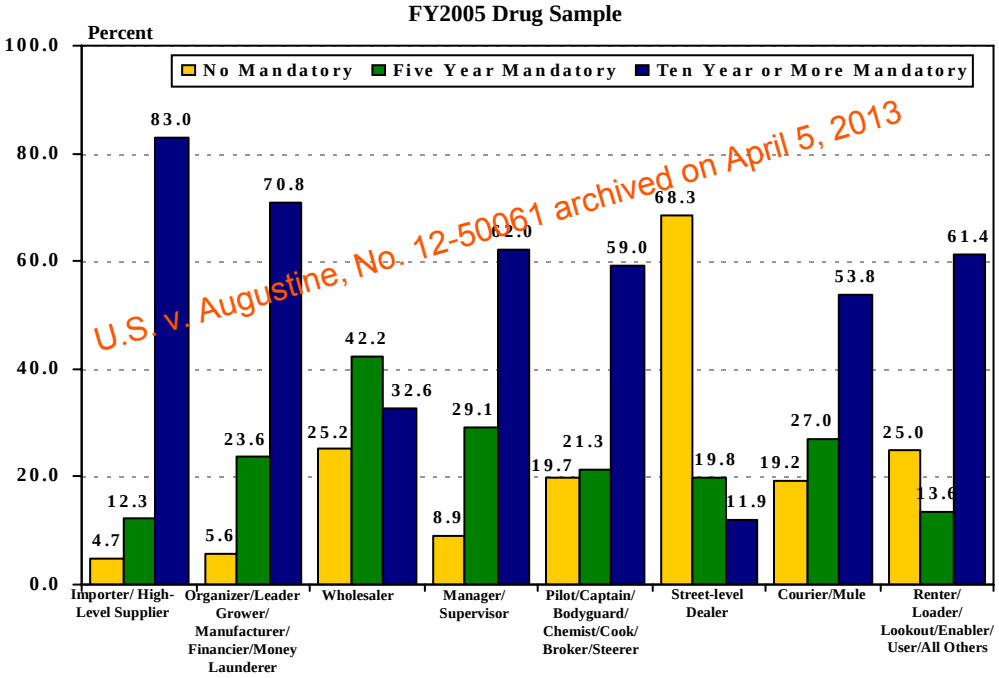
[41] This is the applicable sentencing guideline range for offenders in Criminal History Category I with little or no prior criminal history.

[42] The 100-to-1 drug quantity ratio between powder cocaine and crack cocaine offenses is provided for by federal statute as the basis for quantity thresholds that determine the statutory mandatory minimum sentences.

Most cocaine offenders in the federal system are convicted of statutes carrying a five- or ten-year mandatory minimum penalty. In Fiscal Year 2006, 79.1 percent of powder cocaine offenders and 79.9 percent of crack cocaine offenders were convicted of statutes carrying mandatory minimums. Figures 2-12 and 2-13 show, for powder cocaine and crack cocaine offenses in the 2005 Drug Sample, respectively, the proportion of offenders in each function category exposed to mandatory minimum sentences based on drug quantity.[43]

Exposure to mandatory minimum penalties does not decrease substantially with offender culpability as measured by offender function. For example, 95.3 percent of the highest level powder cocaine offenders (importers/high-level suppliers) faced mandatory minimum penalties, as did more than 80.8 percent of powder cocaine couriers/mules, the most prevalent offender function for powder cocaine.

Figure 2-12
Powder Cocaine Offenders Exposed to Mandatory Minimum Penalties for Each Offender Function
FY2005 Drug Sample



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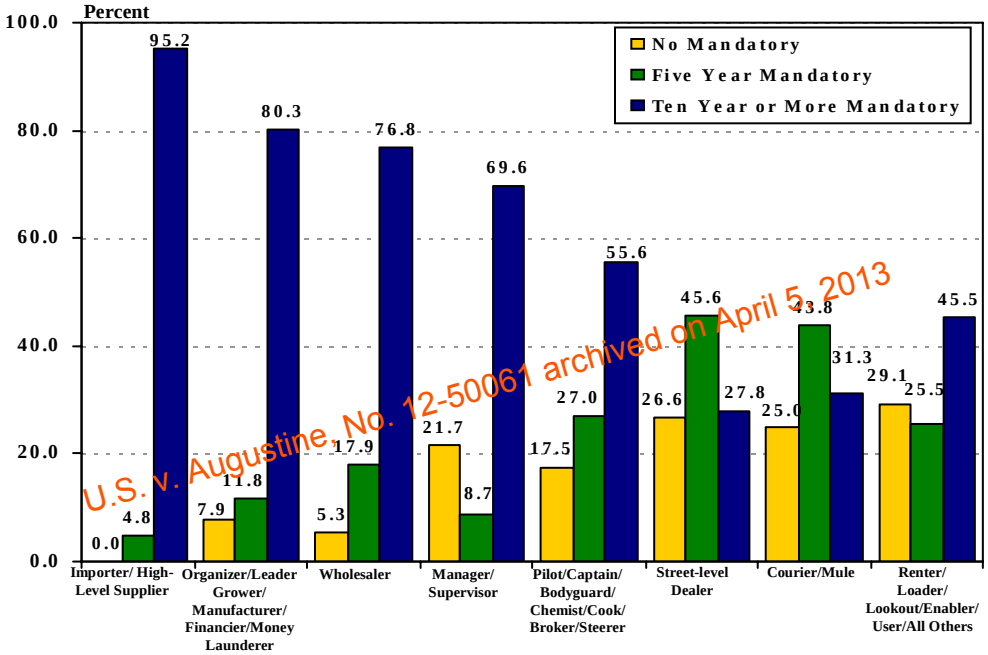
Classifications were based on descriptions of conduct found in the offense conduct section of the Presentence Report. These classifications may not reflect court findings on application of specific guideline enhancements. The No Mandatory category includes offenders exposed to mandatory minimums of less than five years in addition to those not facing a mandatory minimum sentence. This figure excludes cases with missing information for the variables required for analysis.

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

[43] Figures 2-12 and 2-13 demonstrate the differential in the percentage of powder cocaine defendants who face but are not sentenced to mandatory minimum penalties versus crack cocaine defendants who are convicted of but are not sentenced to mandatory minimum penalties.

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 three most culpable offender function categories were subject to mandatory minimum penalties (Fig. 2-13). Additionally, the majority (73.4%) of street-level dealers, the most prevalent type of crack cocaine offenders, were subject to mandatory minimum penalties.

Figure 2-13
Crack Cocaine Offenders Exposed to Mandatory Minimum Penalties for Each Offender Function
FY2005 Drug Sample



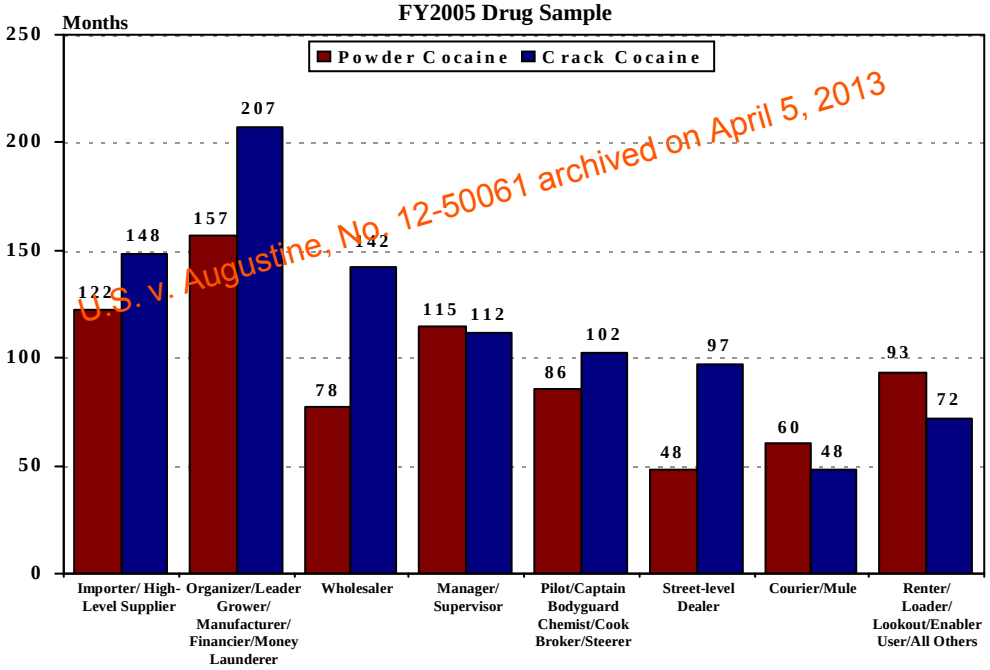
U.S. v. Augustine, No. 12-50061 archived on April 5, 2013

Classifications were based on descriptions of conduct found in the offense conduct section of the Presentence Report. These classifications may not reflect court findings on application of specific guideline enhancements. The No Mandatory category includes offenders exposed to mandatory minimums of less than five years in addition to those not facing a mandatory minimum sentence. This figure excludes cases with missing information for the variables required for analysis.

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

Average imprisonment terms for cocaine offenders in each of the offender function categories reflect the mandatory minimum distributions described above. For both types of cocaine the longest prison terms were imposed for offenders in the two most serious function categories, offenders who most often were exposed to ten-year (or more) mandatory minimum penalties (Fig. 2-14). Powder cocaine importers/high-level suppliers and organizers/leaders/growers/ manufacturers/financiers/money launderers had average prison terms of 122 months and 157 months, respectively. The same two groups of crack cocaine offenders, importers and organizers, had average prison terms of 148 months and 207 months, respectively. The most substantial differences between powder cocaine and crack cocaine offenders illustrated in Figure 2-14 are the longer sentences for street-level dealers of crack cocaine (97 months compared to 48 months for powder cocaine offenders) and wholesalers of crack cocaine (142 months compared to 78 months for powder cocaine offenders).

Figure 2-14
Average Length of Imprisonment for Powder Cocaine and Crack Cocaine Offenders for Each Offender Function
FY2005 Drug Sample



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Classifications were based on descriptions of conduct found in the offense conduct section of the Presentence Report. These classifications may not reflect court findings on application of specific guideline enhancements. Cases with sentences of probation or any time of confinement as defined in USSG §5C1.1 are not included in this figure. Cases with sentences greater than 470 months were included in the sentence average computation as 470 months. This figure excludes cases with missing information for the variables required for analysis. In the 2005 Drug Sample, 97.4 percent of powder cocaine offenders and 98.2 percent of crack cocaine offenders received prison sentences.

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

5. Aggravating Conduct

Only a minority of powder cocaine offenses and crack cocaine offenses involve the most egregious aggravating conduct, but the presence of this conduct has increased for both forms of the drug since 2000. In addition, aggravating conduct continues to occur more often in crack cocaine than in powder cocaine offenses.

The federal sentencing guidelines provide for increased sentences in cases where aggravating conduct (*e.g.*, weapon possession) is present, and the application rates of such enhancements are collected in the Commission's Fiscal Year datafiles. The 2000 and 2005 Drug Samples supplement that information with analysis of whether such aggravating conduct occurred, regardless of whether the guideline or statutory sentencing enhancements for that conduct were applied by the sentencing court, as well as whether other aggravating conduct that is not currently covered by a guideline sentencing enhancement. The latter analysis was based on a review of the offense conduct narrative in the Presentence Report and does not reflect findings by the sentencing court. The following is an analysis of the aggravating conduct based on both the Commission's Fiscal Year 2000 and 2006 datafiles and the 2000 and 2005 Drug Samples.

a. Weapon Involvement

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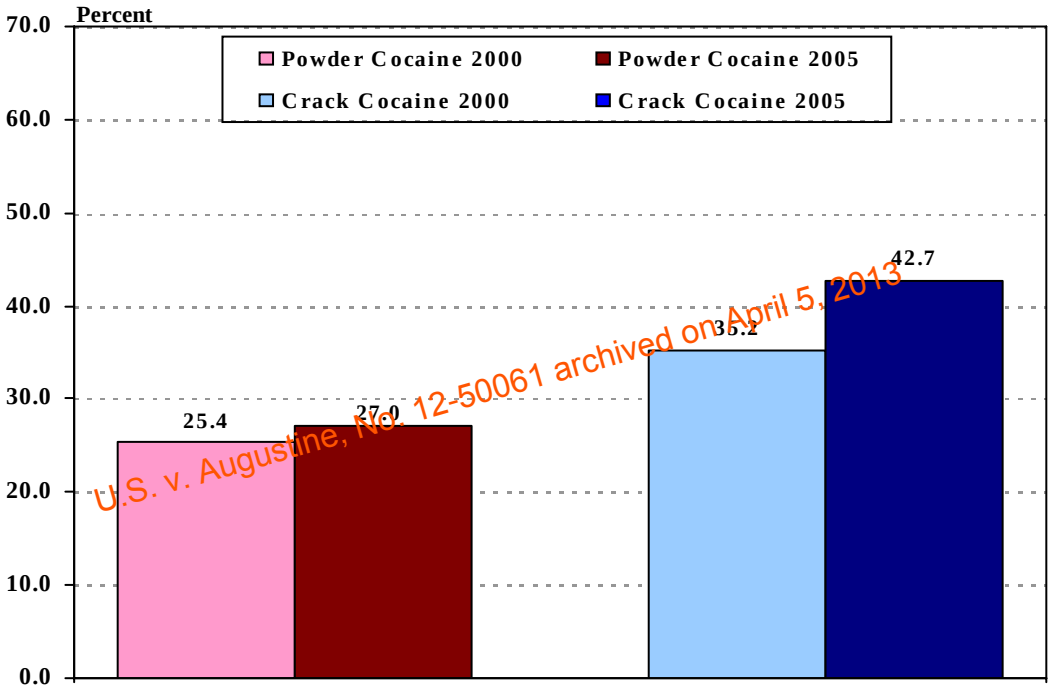
Weapon involvement, by any measure, is the most common aggravating conduct in both powder cocaine and crack cocaine offenses but is present in only a minority of both powder cocaine and crack cocaine offenses. However, weapon involvement, broadly defined, has increased since 2000 in both powder cocaine and crack cocaine offenses, and crack cocaine offenses continue to involve this conduct more often than powder cocaine offenses.

Figure 2-15 shows weapon involvement data from the 2000 and 2005 Drug Samples. In these samples, weapon involvement is defined as weapon involvement in the offense by *any* participant, a broad definition that ranges from weapon use by the offender to mere access to a weapon by an un-indicted co-participant. In 2000, 25.4 percent of powder cocaine offenses and 35.2 percent of crack cocaine offenses involved weapons under this definition. The rate of weapon involvement increased to 27.0 percent for powder cocaine offenses and 42.7 percent for crack cocaine offenses in 2005 under this definition.

Figure 2-15
Weapon Involvement for Powder Cocaine and Crack Cocaine Offenses
FY2000 and FY2005 Drug Samples



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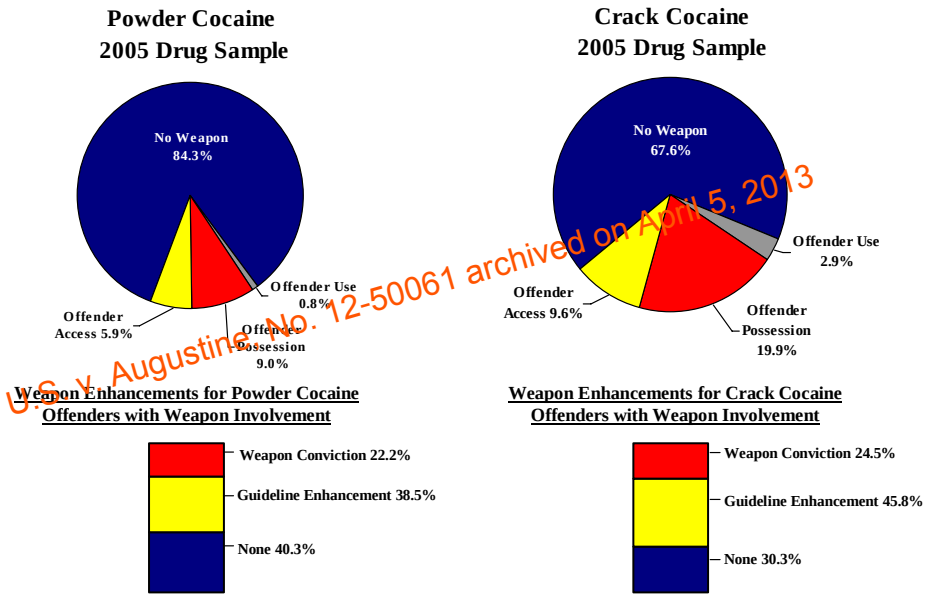
Classifications were based on descriptions of conduct found in the offense conduct section of the Presentence Report. These classifications may not reflect court findings on application of specific guideline enhancements. Weapon Involvement includes weapon involvement by any participant, broadly defined, ranging from weapon use by the offender to weapon accessibility by an un-indicted participant. This figure excludes cases with missing information for the variables required for analysis.

SOURCE: U.S. Sentencing Commission, 2002 Commission Report and 2005 Sample.

Using a narrower measure of weapon involvement also indicates an increase in weapon use in crack cocaine offenses but not in powder cocaine offenses. This measure relies exclusively on offender conduct and excludes weapon involvement by others in the offense. Using this narrower measure, powder cocaine offenders had access to, possession of, or used a weapon in 15.7 percent of cases in 2005 compared to 17.6 percent in 2000 (a decrease of 1.9 percentage points). Crack cocaine offenders, however, had access to, possession of, or used a weapon in 32.4 percent of cases in 2005 compared to 25.5 percent in 2000 (an increase of 6.9 percentage points). (*See* Figure 2-16; *see also* Figure 17 in 2002 Commission Report).

Figure 2-16
Offender Weapon Involvement and Weapon Enhancements for Powder Cocaine and Crack Cocaine Offenses
FY2005 Drug Sample



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Classifications were based on descriptions of conduct found in the offense conduct section of the Presentence Report. These classifications may not reflect court findings on application of specific guideline enhancements. The bar charts may sum to more than 100 percent due to the rare occurrence of both a weapon conviction and application of the guideline enhancement. This figure excludes cases with missing information for the variables required for analysis.

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

The finding that only a minority of powder cocaine and crack cocaine offenses involve weapons (using the narrower measure) is consistent with the 2000 Drug Sample, that showed 17.6 percent of powder cocaine and 25.5 percent of crack cocaine offenders had weapon involvement. Moreover, like the 2000 Drug Sample, when examining only offenses in which weapons were accessible, possessed, or used by the offender, the nature of the weapon involvement tended to be relatively less aggravated in nature. Powder cocaine offenders used a weapon in only 0.8 percent of the cases (compared to 1.2% in 2000) and crack cocaine offenders used a weapon in only 2.9 percent of the cases (compared to 2.3% in 2000). Weapon use by the offender continues to occur in only a minority of both powder

cocaine and crack cocaine offenses, as evidenced by the fact that 84.3 percent of powder cocaine and 67.6 percent of crack cocaine offenders had no weapon involvement in 2005.

The current federal sentencing scheme provides two alternative means for increasing sentences for weapon possession in drug trafficking offenses, and application rates of these sentencing enhancements provide an even narrower measure of weapon involvement. Federal drug offenders with weapons may be either convicted under 18 U.S.C. § 924(c) (involving 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.[44]

The bar charts in Figure 2-16 show that not all cocaine offenders whose offense conduct include weapon involvement (based on the offense conduct narrative in the Presentence Report) receive guideline or statutory sentencing enhancements for this conduct. More than 40 percent of powder cocaine offenders who had access to, possession of, or used a weapon received *neither* the guideline weapon enhancement nor a conviction under 18 U.S.C. § 924(c). Similarly, nearly one-third (30.3%) 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 (*e.g.*, evidentiary issues, plea bargaining, etc.).

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Figure 2-17 shows trends in the application rates of statutory and guideline weapon enhancements for *all* cocaine offenses sentenced between 1995 and 2006.[45] Figure 2-17 indicates that, since 2000, application rates of sentencing enhancements for weapon involvement have increased for both powder cocaine (10.6% to 13.0%) and crack cocaine (21.6% to 26.5%) offenses. This increase largely is attributable to an increase in convictions under 18 U.S.C. § 924(c). Between 2000 and 2006, the proportion of powder cocaine offenders receiving a statutory weapon enhancement more than doubled, increasing from 2.4 percent to 4.9 percent. The trend for crack cocaine offenses is similar with rates of statutory weapons enhancements increasing from 4.0 percent in 2000 to 10.9 percent in 2006.

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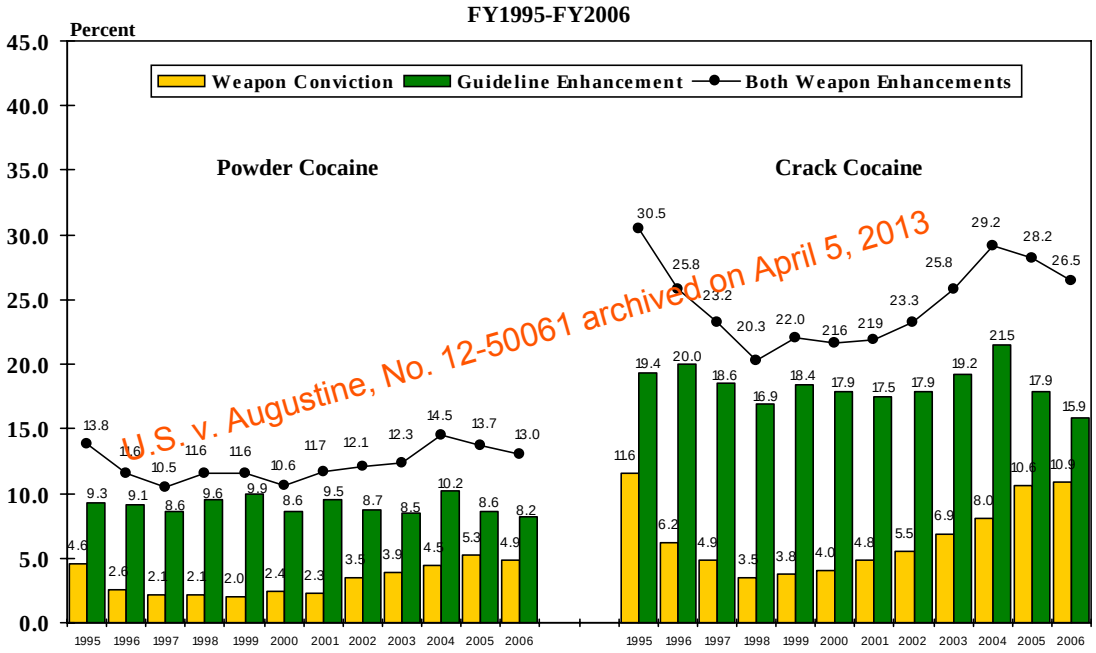
[44] A conviction under 18 U.S.C. § 924(c) requires a mandatory minimum consecutive sentence of at least five years, seven years, or ten years, depending on whether the weapon was possessed, brandished, or discharged, and the guideline enhancement at USSG §2D1.1(b)(1) provides for an increase of two 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.

[45] The lines in Figure 2-17 show the combined application rates of *both* the statutory and guideline weapon enhancements and the bars show the individual application rates for each enhancement.

Crack cocaine offenders consistently have been more likely than powder cocaine offenders to receive statutory or guideline weapon enhancements, and this difference has increased over time. In 2000, 21.6 percent of crack cocaine offenders received one of the weapon-related sentencing enhancements, compared to 10.6 percent of powder cocaine offenders, a difference of 11 percentage points. This difference increased to 13.5 percentage points by 2006, when the percentage of crack cocaine offenders receiving either of the two sentencing enhancements increased somewhat to 26.5 percent and the percentage of powder cocaine offenders increased slightly to 13.0 percent.

Figure 2-17
Trends in Weapon Enhancements for Powder Cocaine and Crack Cocaine Offenses

FY1995-FY2006



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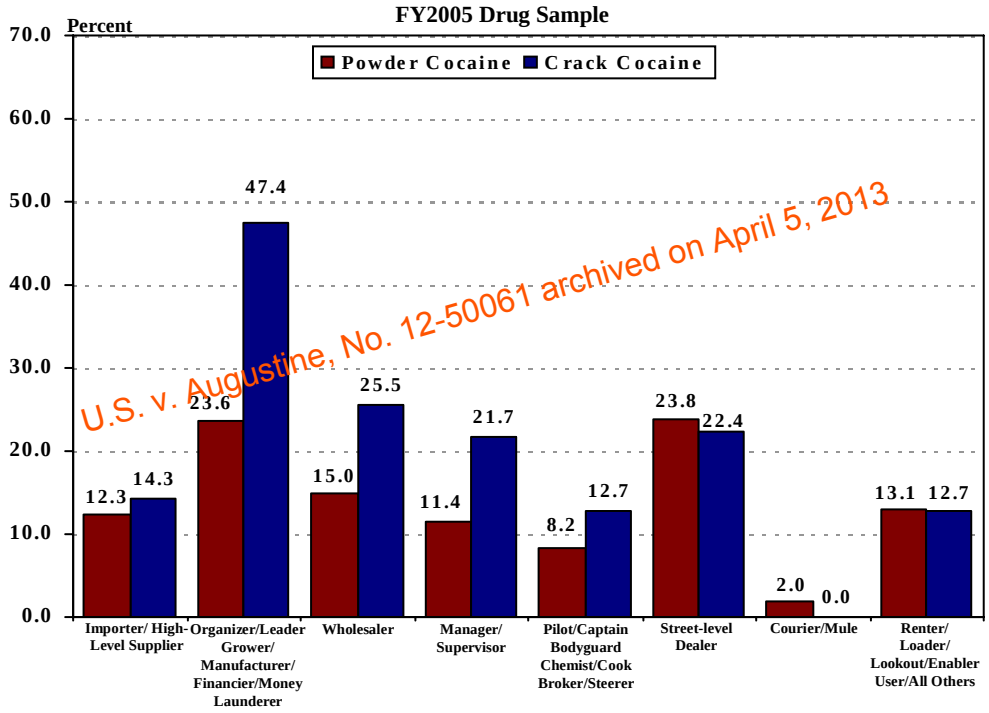
Only cases sentenced under USSG §2D1.1 (Drug Trafficking) with complete guideline application information and a primary drug type of powder cocaine or crack cocaine are included in this figure. Weapon Conviction indicates a conviction under 18 U.S.C. § 924(c) and accompanying mandatory sentence. Guideline Enhancement indicates application of the weapon sentencing enhancement pursuant to §2D1.1(b)(1). The lines combine the two weapon enhancements to demonstrate the overall trend from Fiscal Year 1995 to Fiscal Year 2006 for both drug types. This figure excludes cases with missing information for the variables required for analysis.

SOURCE: U.S. Sentencing Commission, 1995-2006 Datafiles, MONFY95-USSCFY06.

The 2005 Drug Sample data in Figure 2-18 show the application rates of the combined guideline and statutory weapon enhancements for cocaine offenders in each offender function category. Crack cocaine offenders consistently have received weapon enhancements at a greater rate than powder cocaine offenders for the five most serious offender functions. Weapon enhancement rates were nearly equal for powder cocaine offenders and crack cocaine offenders at the low-level functions of street-level dealer (23.8% for powder cocaine offenses versus 22.4% for crack cocaine offenses), courier/mule (2.0% for powder cocaine offenses versus 0.0% crack cocaine offenses), and renter/loader/lookout/enabler/user/all others (13.1% for powder cocaine offenses versus 12.7% crack cocaine offenses).

Figure 2-18
Statutory and Guideline Weapon Enhancements Applied to Powder Cocaine and Crack Cocaine Offenses for Each Offender Function
FY2005 Drug Sample



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

Classifications were based on descriptions of conduct found in the offense conduct section of the Presentence Report. These classifications may not reflect court findings on application of specific guideline enhancements. This figure excludes cases with missing information for the variables required for analysis.

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

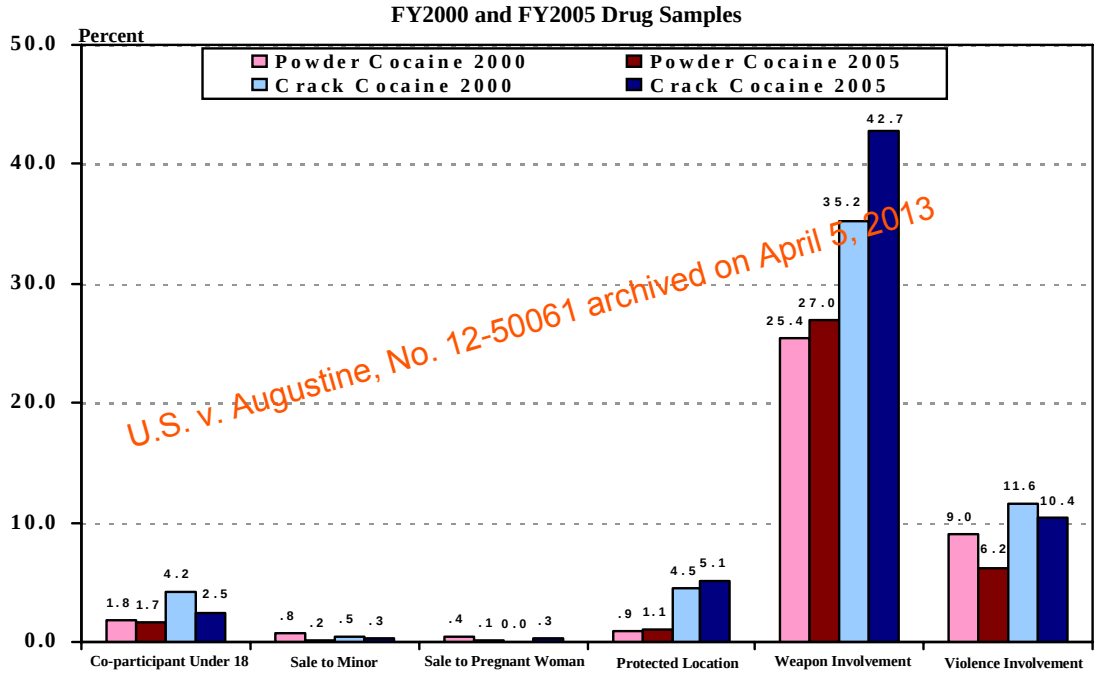
b. Violence

Contrary to the pattern for weapon involvement, the prevalence of violence decreased for both powder cocaine and crack cocaine offenses and, continuing a trend identified in the 2002 Commission Report, continues to occur in only a minority of offenses. Violence continues to occur more often in crack cocaine cases than in powder cocaine cases.

Although several guidelines contain specific guideline enhancements covering conduct indicative of violence, such as bodily injury or threat, the drug trafficking guideline

does not. Therefore, the Commission cannot use its Fiscal Year datafiles to measure this conduct in drug offenses. Instead, the Commission analyzed the 2000 and 2005 Drug Samples to find cases where violence was described in the offense conduct narrative in the Presentence Report. An offense was defined as "violent" if *any* participant in the offense made a credible threat, or caused any actual physical harm, to another person. Using this relatively broad definition, violence decreased in powder cocaine offenses from 9.0 percent in 2000 to 6.2 percent in 2005, and decreased in crack cocaine offenses from 11.6 percent in 2000 to 10.4 percent in 2005. (Fig. 2-19). In addition, actual injury continued to be rare in both powder cocaine and crack cocaine offenses, occurring in 3.1 percent and 5.5 percent, respectively.

Figure 2-19
Offense Conduct of Powder Cocaine and Crack Cocaine Offenders



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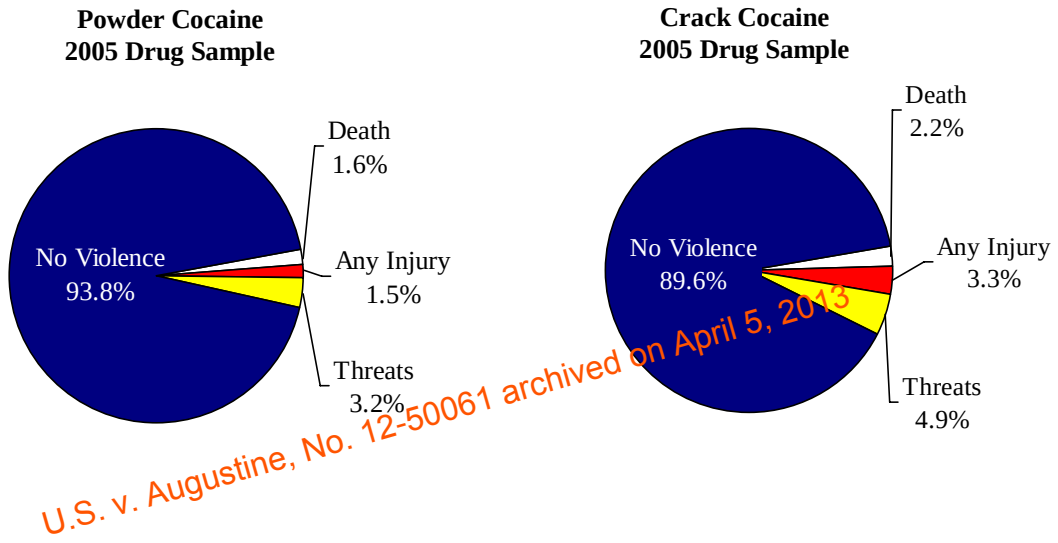
Classifications were based on descriptions of conduct found in the offense conduct section of the Presentence Report. These classifications may not reflect court findings on application of specific guideline enhancements. Weapon Involvement includes weapon involvement by any participant, broadly defined, ranging from weapon use by the offender to weapon accessibility by an un-indicted participant. Violence Involvement includes threats of violence. This figure excludes cases with missing information for the variables required for analysis.

SOURCE: U.S. Sentencing Commission, 2002 Commission Report and 2005 Sample.

Figure 2-20 provides data on the specific types of violence that occurred in those cocaine offenses that involved violence. For both powder cocaine (3.2%) and crack cocaine (4.9%) offenses, threats were the most common form of violence documented. Actual bodily injury or death occurred in a very small minority of both powder cocaine (1.5% and 1.6%, respectively) and crack cocaine (3.3% and 2.2%, respectively) offenses.

Figure 2-20
Violence Involvement in Powder Cocaine and Crack Cocaine Offenses
FY2005 Drug Sample



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

Classifications were based on descriptions of conduct found in the offense conduct section of the Presentence Report. These classifications may not reflect court findings on application of specific guideline enhancements. This figure excludes cases with missing information for the variables required for analysis.

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

c. Protected Individuals and Locations

The involvement of co-participants under 18 years of age, rare in both powder cocaine and crack cocaine offenses, decreased for both drug types from 2000 to 2005. In 2000, 1.8 percent of powder cocaine offenses and 4.2 percent of crack cocaine offenses involved minors as co-participants, and these figures decreased to 1.7 percent and 2.5 percent, respectively, in 2005. The proportion of cocaine offenses that occurred in a protected location[46] increased for both drug types between 2000 and 2005, but these offenses continued to occur infrequently. In 2000, 0.9 percent of powder cocaine offenses and 4.5 percent of crack cocaine offenses occurred in a protected location. Each increased slightly to 1.1 percent and 5.1 percent, respectively, in 2005. *See* Figure 2-19.

The other aggravating conduct depicted in Figure 2-19, sale to a minor and sale to a pregnant woman, occurred in less than one percent of cocaine offenses in both 2000 and 2005.

6. Role Adjustments

Under the federal sentencing guidelines, an offender's role in the offense, as determined by the sentencing court, may impact the final sentencing range. Guideline role adjustments,[47] whether aggravating or mitigating, have been applied at different rates in powder cocaine and crack cocaine offenses.

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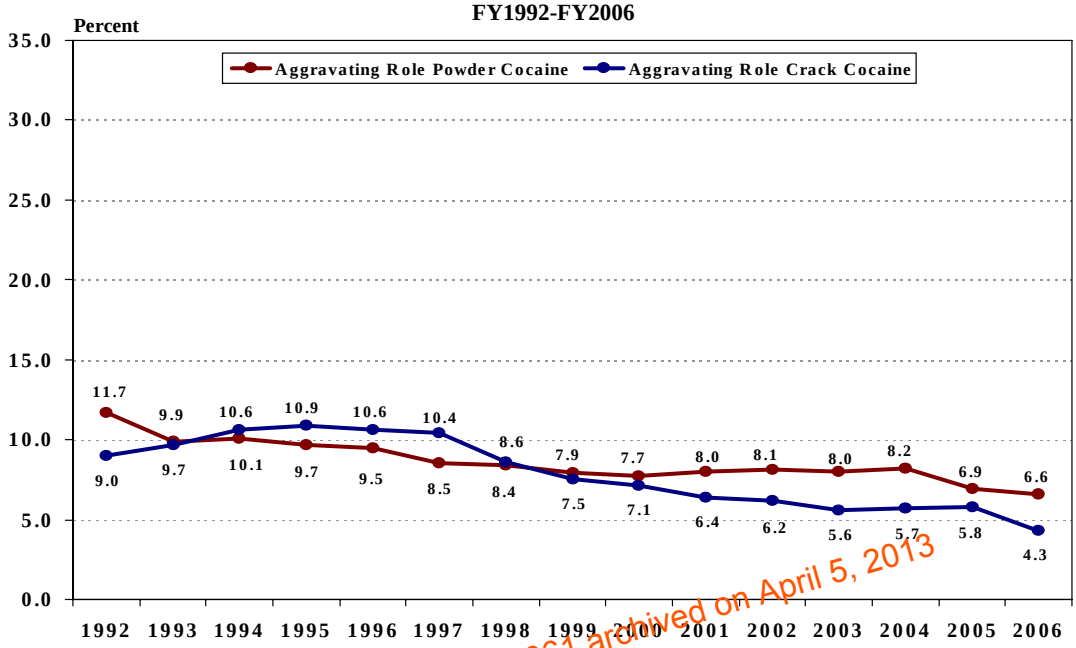
[46] This conduct is described in 21 U.S.C. § 860.

[47] Guideline role adjustments refer to the two to four level offense level increase for an offender's aggravating role in the offense pursuant to USSG §3B1.1 (which includes those whose role in the offense is an organizer or leader of five or more participants (or otherwise extensive criminal activity), a manager or supervisor of five or more participants (or otherwise extensive criminal activity), or an organizer, leader, manager, or supervisor in any other way). The two to four level offense level reduction for an offender's mitigating role in the offense pursuant to USSG §3B1.2 includes offenders whose role in the offense was minimal or minor (or between minimal and minor).

Figure 2-21
Trend in Application of Aggravating Role Adjustment (USSG §3B1.1) in Powder Cocaine and Crack Cocaine Offenses
FY1992-FY2006



Only cases sentenced under USSG §2D1.1 (Drug Trafficking) with complete guideline application information and a primary drug type of powder cocaine or crack cocaine are included in this figure. This figure excludes cases with missing information for the variables required for analysis.

SOURCE: U.S. Sentencing Commission, 1992-2000 Datafiles, MONFY92 – USSCFY06, 2004 Pre-*Blakely* Only Cases (October 1, 2003 – June 24, 2004), and 2005 Post-*Booker* Only Cases (January 12, 2005 – September 30, 2005).

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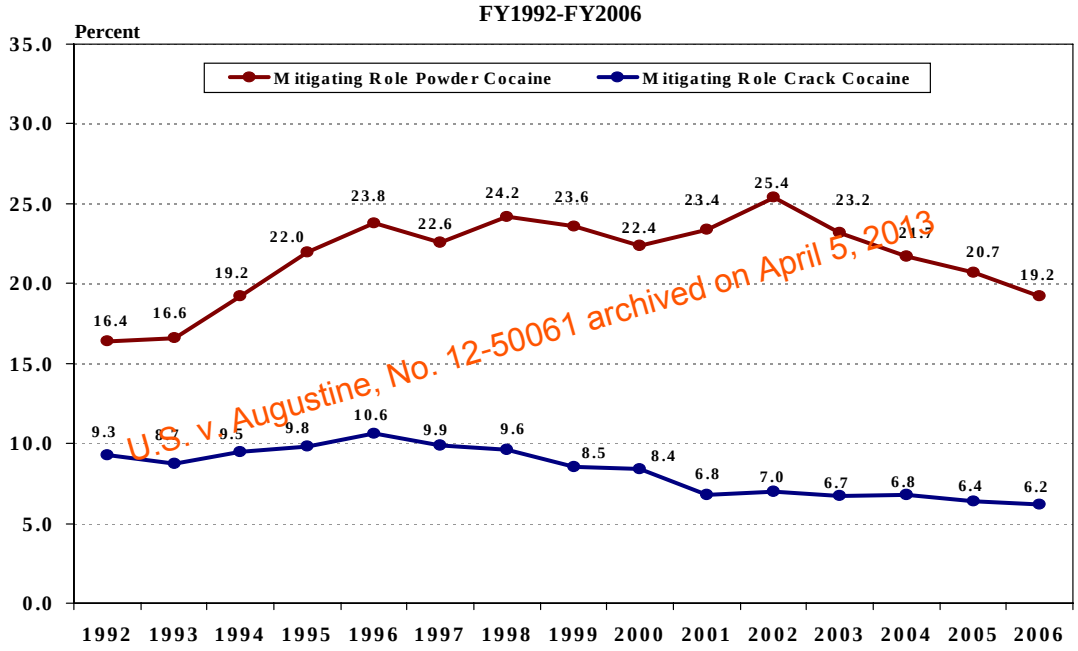
Aggravating role enhancements consistently have been applied at relatively low rates for both powder cocaine and crack cocaine offenses. Figure 2-21 illustrates the trend in aggravating role enhancement rates for powder cocaine and crack cocaine offenders from 1992 through 2006. During this period, rates of aggravating role enhancements have remained relatively low, have been nearly equal for the two types of cocaine, and have decreased for both powder cocaine and crack cocaine offenders. The proportion of powder cocaine offenders receiving an aggravating role adjustment decreased from 11.7 percent in 1992 to 6.6 percent in 2006. Similarly, the proportion of crack cocaine offenders receiving an aggravating role adjustment decreased from 9.0 percent in 1992 to 4.3 percent in 2006.

Conversely, mitigating role reductions historically have been applied in powder cocaine offenses at rates two to three times higher than in crack cocaine offenses. The higher application rate of mitigating role reductions for powder cocaine is shown in Figure 2-22. Between 1992 and 2006 the proportion of powder cocaine offenders receiving mitigating role reductions increased (from 16.4% to 19.2%), while the proportion of crack cocaine offenders receiving mitigating role reductions decreased to a similar degree (from 9.3% to 6.2%). This trend represents a near doubling of the difference between the two types of cocaine from a 7.1 percentage point difference in 1992 to a 13 percentage point difference in 2006.

Figure 2-22
Trend in Application of Mitigating Role Adjustment (USSG §3B1.2) in Powder Cocaine and Crack Cocaine Offenses
FY1992-FY2006



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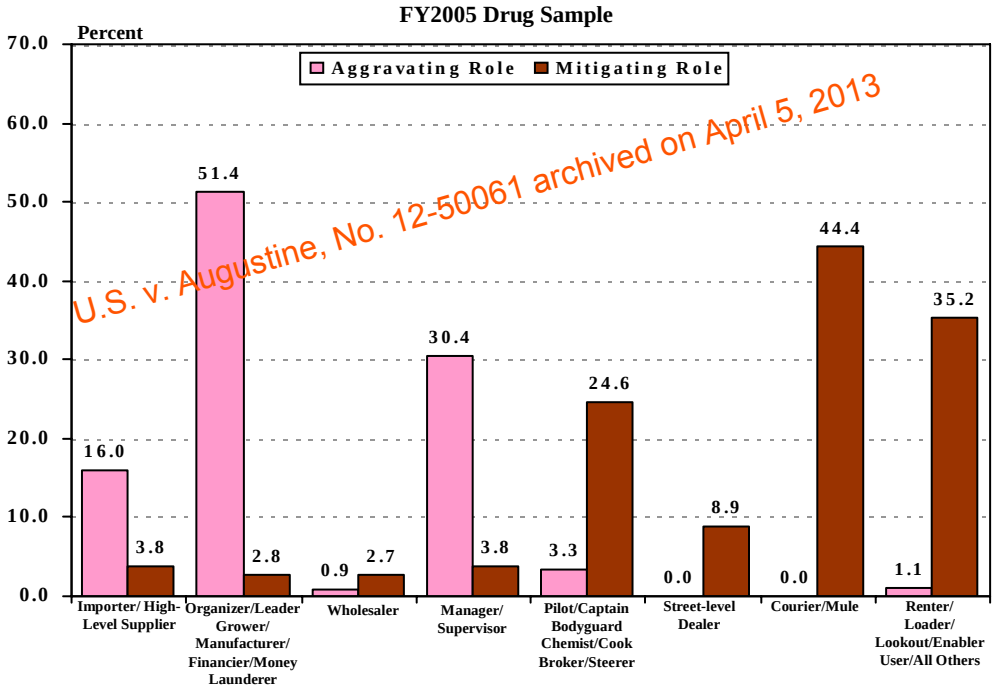
Only cases sentenced under USSG §2D1.1 (Drug Trafficking) with complete guideline application information and a primary drug type of powder cocaine or crack cocaine are included in this figure. This figure excludes cases with missing information for the variables required for analysis.

SOURCE: U.S. Sentencing Commission, 1992-2006 Datafiles, MONFY92 – USSCFY06, 2004 Pre-*Blakely* Only Cases (October 1, 2003 – June 24, 2004), and 2005 Post-*Booker* Only Cases (January 12, 2005 – September 30, 2005).

Figures 2-23 and 2-24 show the application of the aggravating and mitigating role adjustments for each offender function category for powder cocaine and crack cocaine offenders, respectively. The two figures represent offenders who met the guideline criteria for the aggravating role adjustment or the mitigating role adjustment, as determined by the sentencing court and independent of the offender function categories displayed.

The application rates of role adjustments for powder cocaine offenders also corroborate the offender functions as coded from the review of the Presentence Report (Fig. 2-23.). The powder cocaine offenders classified in the organizer/leader/grower/ manufacturer/financier/money launderer category had the highest rate, 51.4 percent, of *aggravating* role adjustments. In contrast, couriers/mules had the highest rate, 44.4 percent, of *mitigating* role adjustments.

Figure 2-23
Application of Role Adjustments for Each Offender Function
Powder Cocaine Offenders
FY2005 Drug Sample



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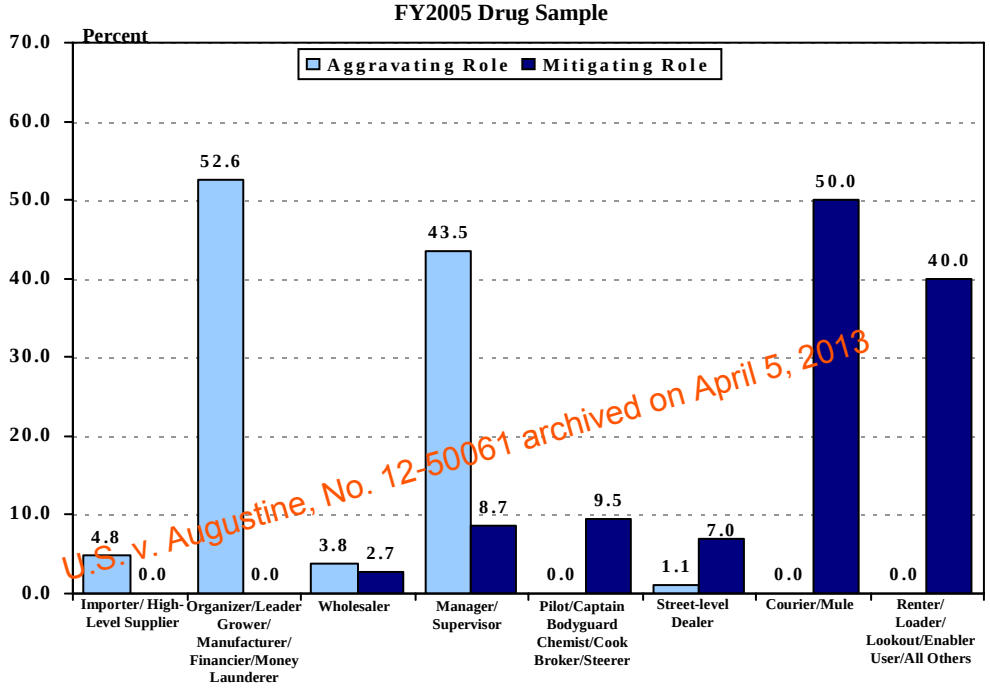
Classifications were based on descriptions of conduct found in the offense conduct section of the Presentence Report. These classifications may not reflect court findings on application of specific guideline enhancements. Role adjustments refer to the Aggravating Role (USSG §3B1.1) and Mitigating Role (USSG §3B1.2) adjustments in Chapter 3 of the Federal Sentencing Guidelines. This figure excludes cases with missing information for the variables required for analysis.

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

The application rates of role adjustments for crack cocaine offenders also support the offender function categories assessed in the Presentence Report reviews (Fig. 2-24). Similar to powder cocaine, crack cocaine organizers/leaders/growers/manufacturers/financiers/ money launderers had the highest rates of *aggravating* role adjustments (52.6%), and crack cocaine couriers/mules had the highest rates (50.0%) of *mitigating* role adjustments.

Figure 2-24
Application of Role Adjustments for Each Offender Function
Crack Cocaine Offenders
FY2005 Drug Sample



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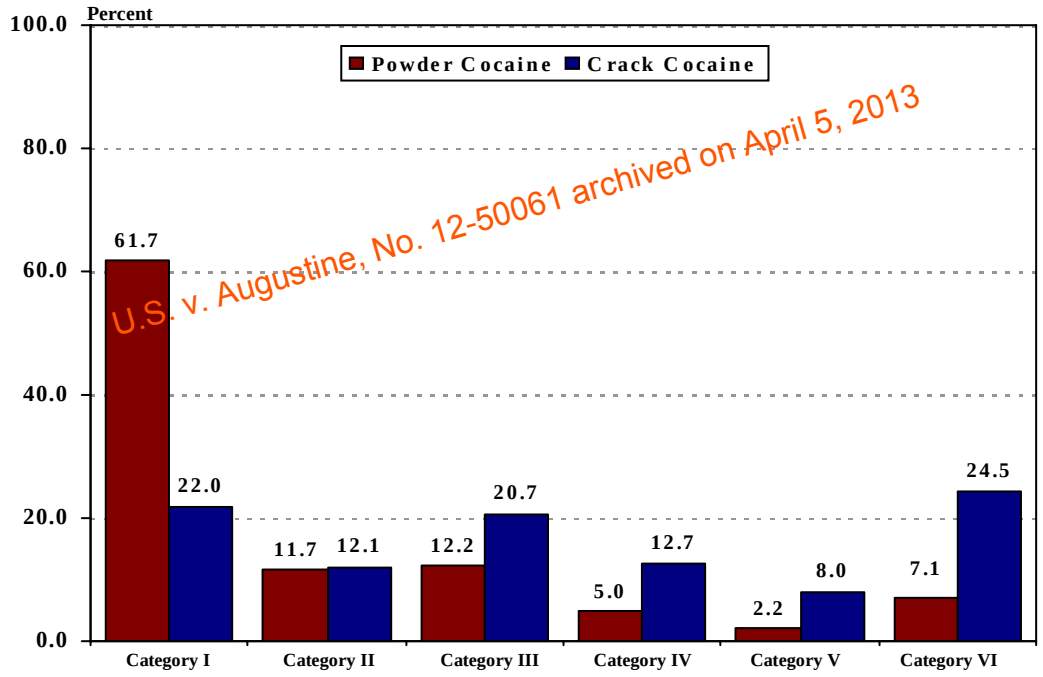
Classifications were based on descriptions of conduct found in the offense conduct section of the Presentence Report. These classifications may not reflect court findings on application of specific guideline enhancements. Role adjustments refer to the Aggravating Role (USSG §3B1.1) and Mitigating Role (USSG §3B1.2) adjustments in Chapter 3 of the Federal Sentencing Guidelines. This figure excludes cases with missing information for the variables required for analysis.
SOURCE: U.S. Sentencing Commission, 2005 Sample.

7. Criminal History

While offense severity (based on drug type and quantity) is the preliminary determinant of the sentencing guideline range, an offender's criminal history also plays a significant role. In general, crack cocaine offenders have more extensive criminal histories than powder cocaine offenders. Figure 2-25 illustrates this difference, showing the substantially lower rate of crack cocaine offenders (22.0%) in Criminal History Category I (containing offenders with little or no criminal history) compared to powder cocaine offenders (61.7%). In addition, the proportion of crack cocaine offenders (24.5%) assigned to Criminal History Category VI (containing offenders with the most extensive criminal histories) is substantially greater than the proportion of powder cocaine offenders (7.1%) in that category.

Figure 2-25
Criminal History Category Distribution for Powder Cocaine and Crack Cocaine Offenders
FY2006



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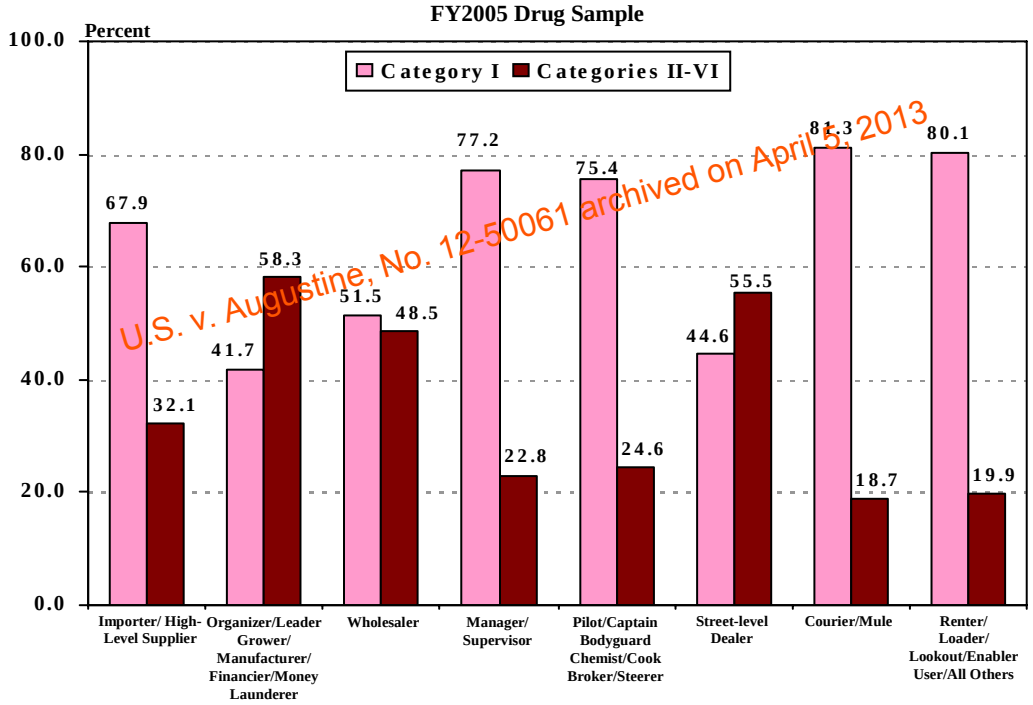
Only cases sentenced under USSG §2D1.1 (Drug Trafficking) with complete guideline application information and a primary drug type of powder cocaine or crack cocaine are included in this figure. This figure excludes cases with missing information for the variables required for analysis.

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

An offender's Criminal History Category, however, appears unrelated to the offender's most serious function in the offense. Figures 2-26 and 2-27 show the proportion of offenders in Criminal History Category I compared to the proportion of offenders in Criminal History Categories II through VI (combined) for each offender function category in the 2005 Drug Sample. Little, if any, relationship between the two can be observed. Reflecting the overall Criminal History Category distribution for powder cocaine offenders, the largest proportion of offenders in each powder cocaine function are in Criminal History Category I (with the exception of organizers/leaders and street-level dealers) (Fig. 2-26). Conversely, Figure 2-27 illustrates the overall Criminal History Category distribution for crack cocaine and shows that the largest proportion of offenders in each function category are in Criminal History Category II through VI (except importers/high-level suppliers).

Figure 2-26
Criminal History Category for Each Offender Function
Powder Cocaine Offenders
FY2005 Drug Sample



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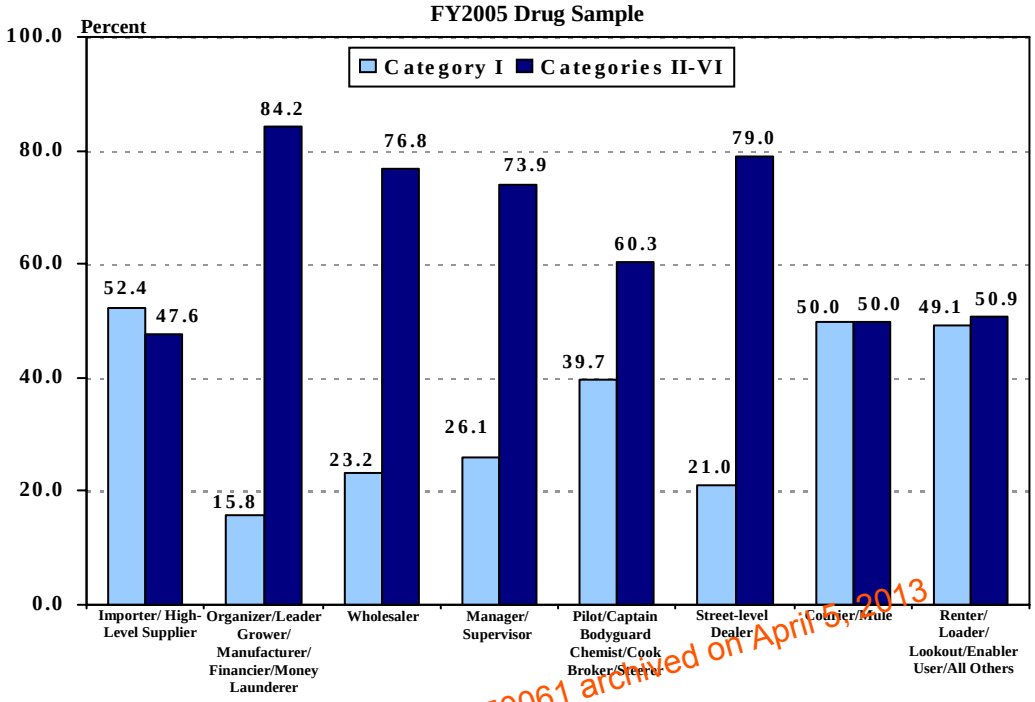
Classifications were based on descriptions of conduct found in the offense conduct section of the Presentence Report. These classifications may not reflect court findings on application of specific guideline enhancements. This figure excludes cases with missing information for the variables required for analysis.

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

Figure 2-27
Criminal History Category for Each Offender Function
Crack Cocaine Offenders
FY2005 Drug Sample



Classifications were based on descriptions of conduct found in the offense conduct section of the Presentence Report. These classifications may not reflect court findings on application of specific guideline enhancements. This figure excludes cases with missing information for the variables required for analysis.

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

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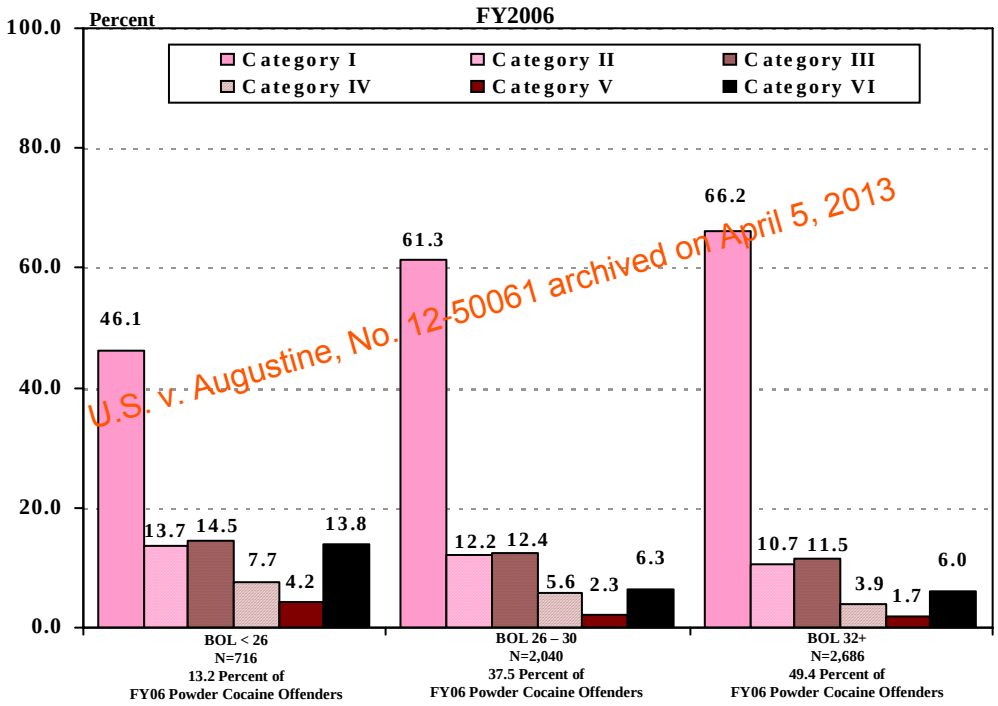
Criminal History Category also does not appear related to the drug quantity involved in the offense. Figure 2-28 shows that powder cocaine offenders tend to cluster in Criminal History Category I across three drug quantity groupings. Forty-six percent of powder cocaine offenders with base offense levels less than 26 (less than 500 grams) are in Criminal History Category I. Slightly greater proportions of powder cocaine offenders trafficking in larger drug quantities are in Criminal History Category I. Specifically, 61.3 percent of powder cocaine offenders with base offense levels of 26-30 (at least 500 grams and less than five kilograms), and 66.2 percent of powder cocaine offenders with base offense levels of 32 or greater (at least 15 kilograms or more) are in Criminal History Category I.

Figure 2-28
Criminal History Categories for Drug Quantity-Based Offense Levels
Powder Cocaine Offenders



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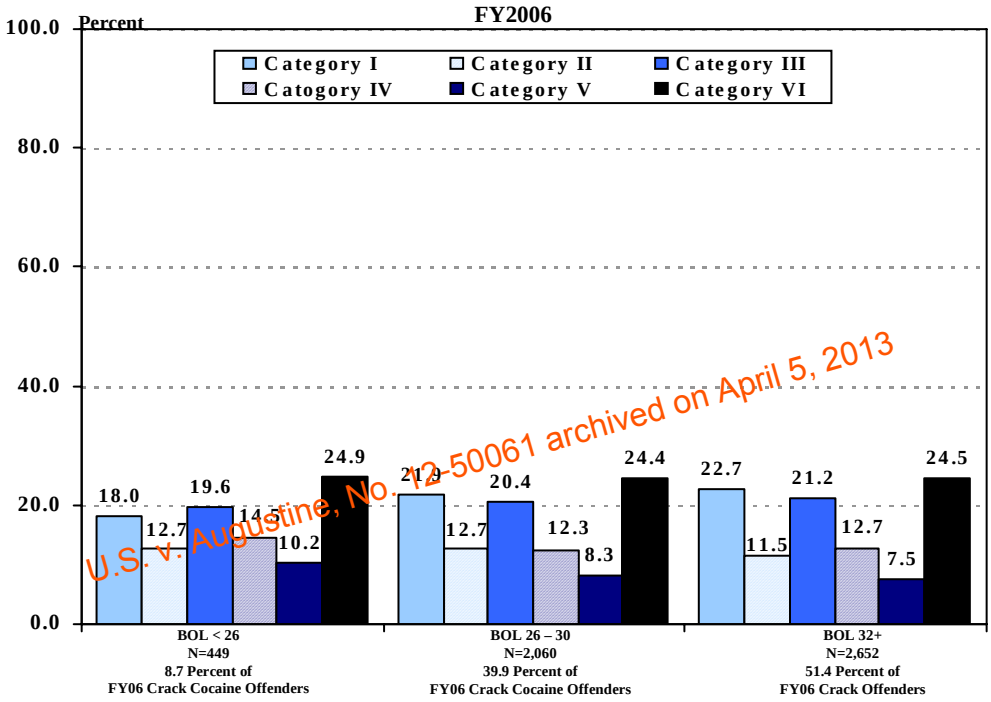
Only cases sentenced under USSG §2D1.1 (Drug Trafficking) with complete guideline application information and a primary drug type of powder cocaine are included in this figure. This figure excludes cases with missing information for the variables required for analysis.

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

Similarly, Figure 2-29 shows that the largest proportion of crack cocaine offenders consistently are in Criminal History Category VI across base offense level categories: 24.9 percent of offenders with base offense levels less than 26 (less than five grams), 24.4 percent of offenders with base offense levels of 26-30 (at least five grams and less than 50 grams), and 24.5 percent of offenders with base offense levels of 32 and greater (at least 50 grams or more).

Figure 2-29
Criminal History Categories for Drug Quantity-Based Offense Levels
Crack Cocaine Offenders
FY2006



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Only cases sentenced under USSG §2D1.1 (Drug Trafficking) with complete guideline application information and a primary drug type of crack cocaine are included in this figure. This figure excludes cases with missing information for the variables required for analysis.

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

8. Safety Valve

In 1994, Congress enacted the "safety valve" provision to provide nonviolent, low-level, first-time drug offenders relief from mandatory minimum sentences.[48] Under this provision, certain nonviolent drug offenders with little or no criminal history can receive the full benefit of applicable mitigating adjustments under the guidelines and receive sentences below mandatory minimum penalty levels. On November 1, 1995, the Commission promulgated a specific offense characteristic in the drug trafficking guideline providing for a two-level reduction for offenders who meet the safety valve criteria and whose offense level is 26 or greater. On November 1, 2001, the Commission expanded the scope of this provision to include offenders with offense levels less than 26.[49]

Powder cocaine offenders tend to qualify for the safety valve reduction much more often than crack cocaine offenders. In Fiscal Year 2006, 48.4 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 contributes 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.

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[48] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 80001, 108 Stat. 1796 (1994).

[49] In order to qualify for the safety valve, the defendant must have no more than one criminal history point, cannot have used violence or weapons, was not an organizer or leader, did not engage in a continuing criminal enterprise, and provided, 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. *See* USSG §5C1.2.

9. Sentences Relative to the Guideline Range

Following the decision in *Booker*,[50] courts must calculate the applicable guideline range and consider the guideline range and guideline policy statements, including departures, when sentencing defendants. In addition, courts must also consider the factors set forth in 18 U.S.C. § 3553(a). Outside the range sentences are those above or below the applicable guideline range. Below-range sentences include both government sponsored below-range sentences and non-government sponsored below-range sentences. Government sponsored below-range sentences include substantial assistance departures which, on motion of the government, permit the court to sentence below the otherwise applicable mandatory minimum sentence;[51] early disposition programs which, upon motion of the Government, permit the court to depart (up to four levels below the guideline range) pursuant to a program authorized by the Attorney General for that district,[52] and below-range sentences agreed to by the parties (*e.g.*, pursuant to a plea agreement). Other below-range sentences are imposed at the court's discretion.

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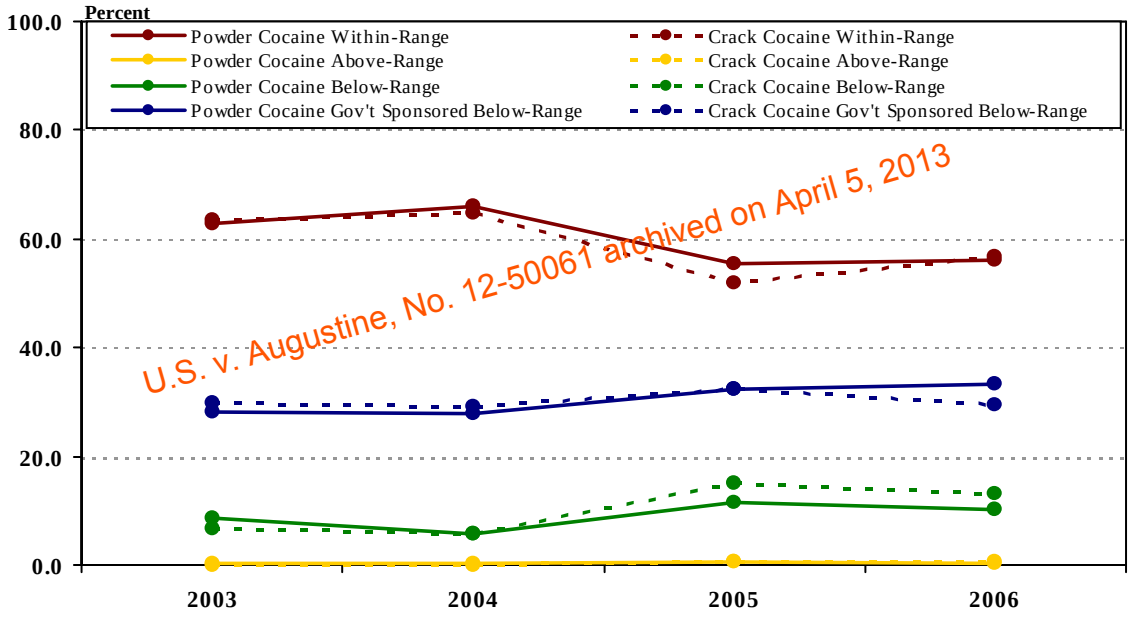
[50] *Supra* note 4.

[51] *See* USSG §5K1.1 (Substantial Assistance to Authorities).

[52] *See* USSG §5K3.1 (Early Disposition Programs).

Trends in within, below, and above-range sentences have been similar for powder cocaine and crack cocaine cases over time, with the largest proportion of offenders for each drug type consistently sentenced within the applicable guideline range. Figure 2-30 shows the similar trends in the rates of sentences relative to the guideline range for powder cocaine and crack cocaine offenders since the PROTECT Act.[53] During the period between 2003 and 2006, between one-half and two-thirds of both powder cocaine (ranging from 55.6% to 65.9%) and crack cocaine (ranging from 52.0% to 64.9%) offenders were sentenced within the guideline range. In addition, rates of government sponsored below-range, other below-range, and above-range sentences were nearly identical for the two types of cocaine.

Figure 2-30
Within Guideline Range and Out-of-Range Sentences for Powder Cocaine and Crack Cocaine Offenses
FY2003-FY2006



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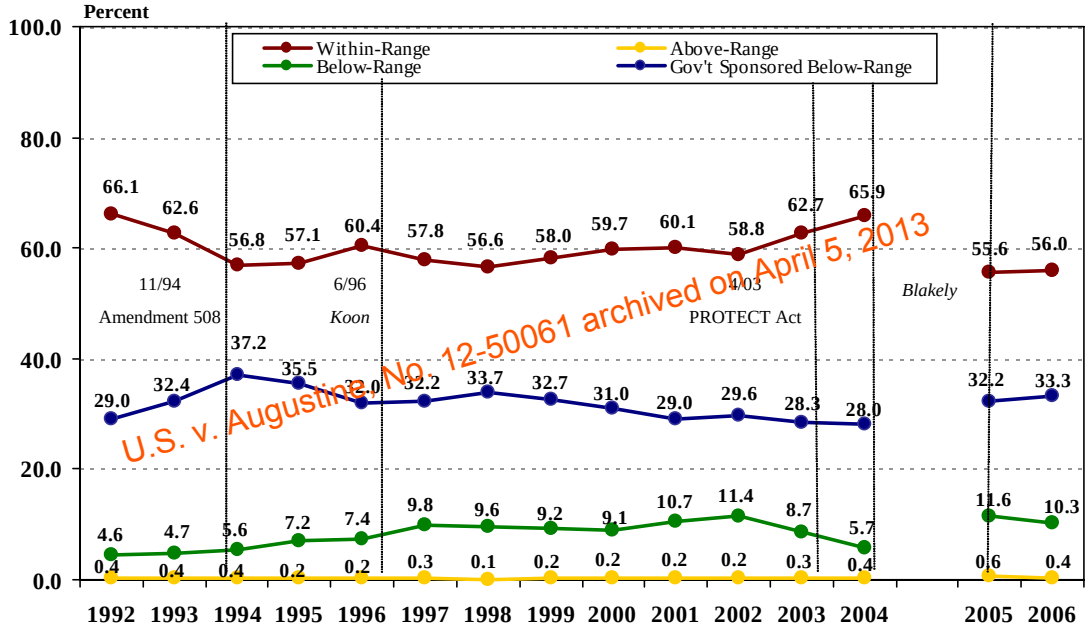
Only cases sentenced under USSG §2D1.1 (Drug Trafficking) with a primary drug type of powder cocaine or crack cocaine are included in this figure. Government Sponsored Below-Range is comprised of: USSG §5K1.1 and Other Government Sponsored Departures (FY03), USSG §5K1.1, USSG §5K3.1 and Other Government Sponsored Departures (FY04) and USSG §5K1.1, USSG §5K3.1 and Other Government Sponsored Departures/Variances (FY05-FY06). This figure excludes cases with missing information for the variables required for analysis.
SOURCE: U.S. Sentencing Commission, 2003-2006 Datafiles, USSCFY03 – USSCFY06, 2004 Pre-*Blakely* Only Cases (October 1, 2003 – June 24, 2004), and 2005 Post-*Booker* Only Cases (January 12, 2005–September 30, 2005).

[53] Pub. L. No. 108-21, 117 Stat. 650 (2003).

Figure 2-31 shows the trend in sentences relative to the guideline range for powder cocaine offenses from 1992 through 2006. Throughout this period, the majority of powder cocaine sentences were within the applicable guideline range (ranging from 55.6 % to 66.1%). The majority of below-range powder cocaine sentences were government sponsored,[54] and the proportion of government sponsored below-range sentences increased somewhat between 1992 and 2006 from 29.0 percent to 33.3 percent. During that same period, the proportion of other below-range sentences remained substantially lower than the proportion of government sponsored below-range sentences, but also has increased from 4.6 percent to 10.3 percent.

Figure 2-31
Rates of Within-Range and Out-of-Range Sentences for Powder Cocaine Offenses
FY1992 to FY2006



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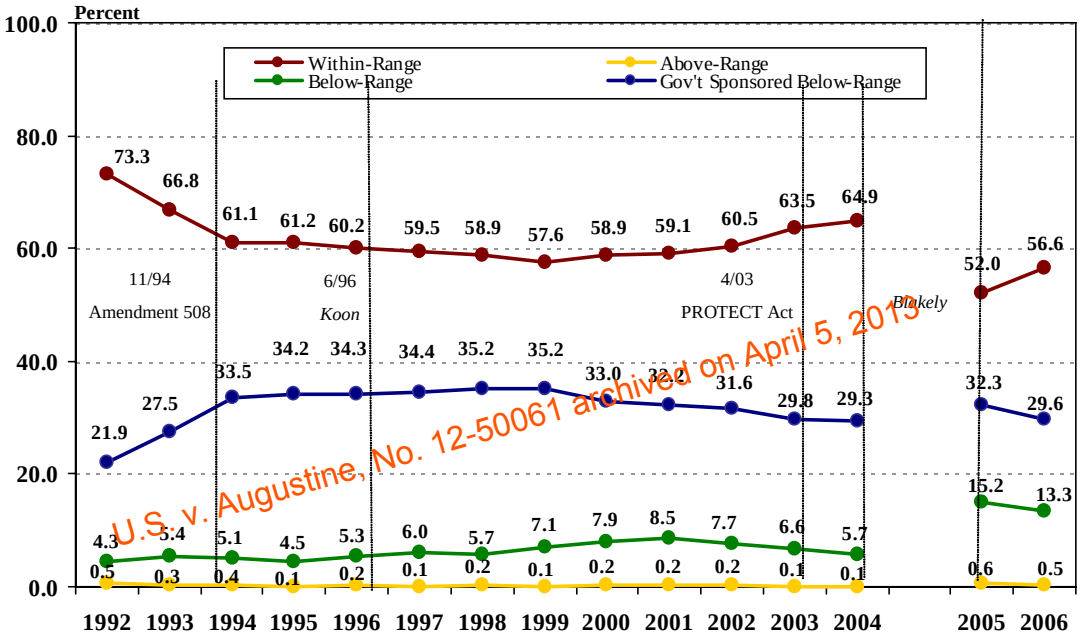
Only cases sentenced under USSG §2D1.1 (Drug Trafficking) with a primary drug type of powder cocaine are included in this figure. Government Sponsored Below-Range is comprised of: USSG §5K1.1 Departures Only (FY92-FY02), USSG §5K1.1 and Other Government Sponsored Departures (FY03), USSG §5K1.1, USSG §5K3.1 and Other Government Sponsored Departures (FY04) and USSG §5K1.1, USSG §5K3.1 and Other Government Sponsored Departures/Variances (FY05-FY06). This figure excludes cases with missing information for the variables required for analysis.

SOURCE: U.S. Sentencing Commission, 1992-2006 Datafiles, MONFY92 – USSCFY06, 2004 Pre-*Blakely* Only Cases (October 1, 2003 – June 24, 2004), and 2005 Post-*Booker* Only Cases (January 12, 2005–September 30, 2005).

[54] In an effort to provide more detailed information regarding attribution of below-range sentences, the categories that comprise Government Sponsored Below-Range have expanded in recent years. Between 1992 and 2002 the category includes substantial assistance (USSG §5K1.1) departures only. For 2003, the category includes substantial assistance (USSG §5K1.1) and other government sponsored downward departures. In 2004 the category includes substantial assistance (USSG §5K1.1), early disposition (USSG §5K3.1), and other government sponsored downward departures. In 2005 and 2006 the category includes substantial assistance (USSG §5K1.1), early disposition (USSG §5K3.1), other government sponsored downward departures, and other government sponsored variances.

Figure 2-32 shows the trend in sentences relative to the guideline range for crack cocaine offenses from 1992 to 2006. Between 1992 and 2006, the majority of crack cocaine sentences were within the applicable guideline range (ranging from 52.0% to 73.3%). Also, similar to powder cocaine sentences, government sponsored below-range sentences account for the majority of below-range crack cocaine sentences and increased somewhat from 21.9 percent in 1992 to 29.6 percent in 2006.

Figure 2-32
Rates of Within-Range and Out-of-Range Sentences for Crack Cocaine Offenses
FY1992 to FY2006



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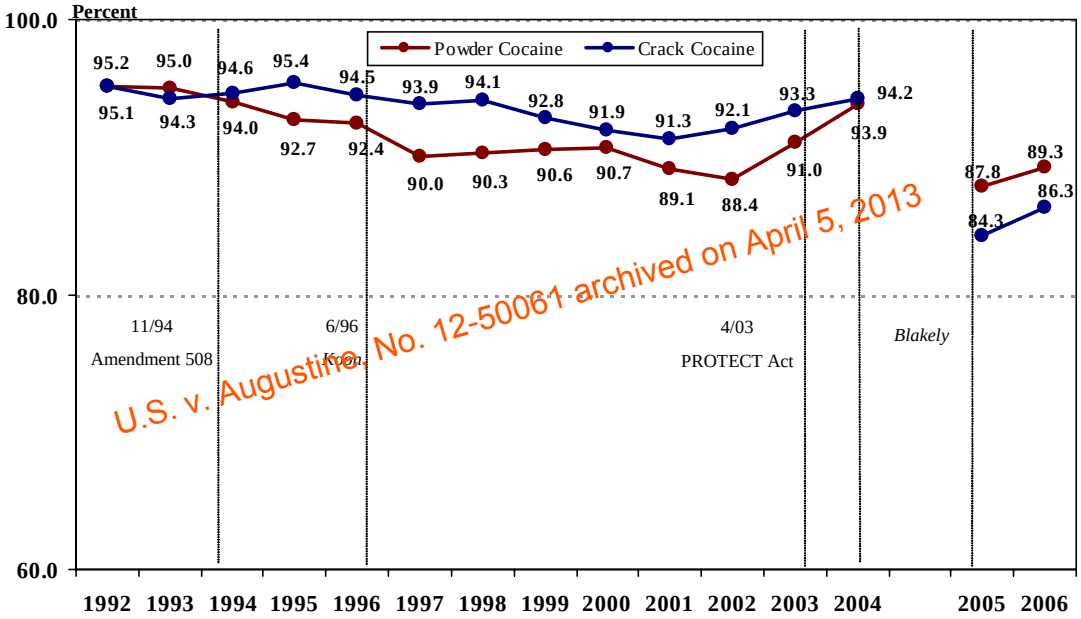
Only cases sentenced under USSG §2D1.1 (Drug Trafficking) with a primary drug type of crack cocaine are included in this figure. Government Sponsored Below-Range is comprised of: USSG §5K1.1 Departures Only (FY92-FY02), USSG §5K1.1 and Other Government Sponsored Departures (FY03), USSG §5K1.1, USSG §5K3.1 and Other Government Sponsored Departures (FY04) and USSG §5K1.1, USSG §5K3.1 and Other Government Sponsored Departures/Variances (FY05-FY06). This figure excludes cases with missing information for the variables required for analysis.
SOURCE: U.S. Sentencing Commission, 1992-2006 Datafiles, MONFY92 – USSCFY06, 2004 Pre-*Blakely* Only Cases (October 1, 2003 – June 24, 2004), and 2005 Post-*Booker* Only Cases (January 12, 2005–September 30, 2005).

The overwhelming majority of cocaine offenders were sentenced either within the guideline range or below the range pursuant to a government motion or agreement. Combining these two categories and using trend data from 1992 through 2006 for each drug type, Figure 2-33 illustrates that consistently more than 84.0 percent of powder cocaine and crack cocaine offenders were sentenced in conformance with the guidelines under this measure. Put another way, fewer than 16.0 percent of cocaine sentences are below the guideline range without the express agreement by the government, as discerned from the sentencing documents received by the Commission.

Figure 2-33
Rates of Within-Range and Government Sponsored Below-Range Sentences for Powder Cocaine and Crack Cocaine Offenses
FY1992 to FY2006

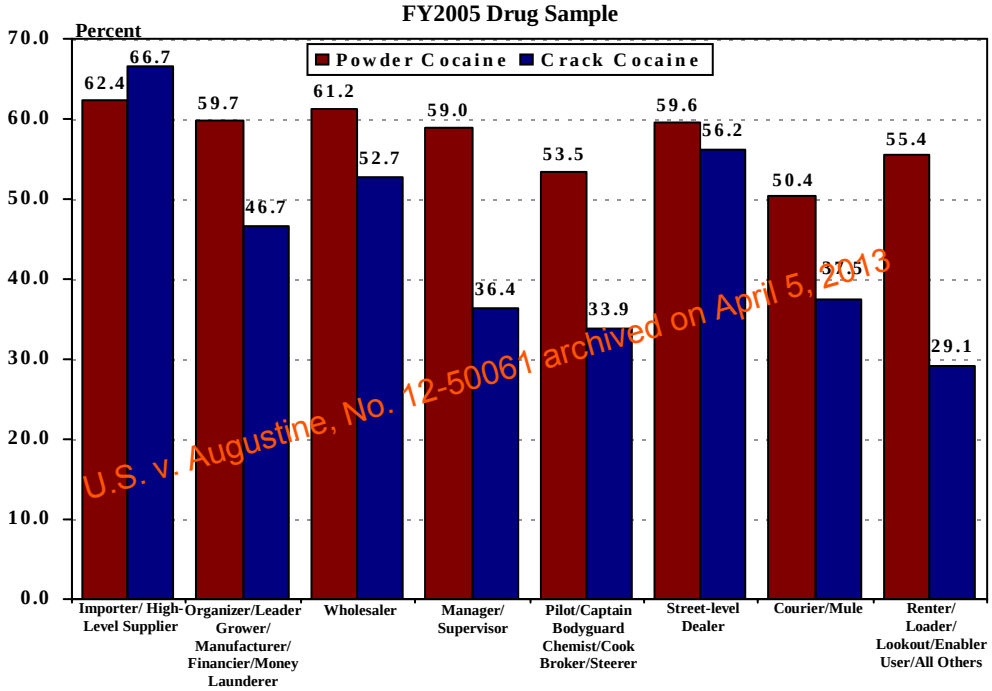


U.S. v. Augustine, No. 12-50061 archived on April 5, 2013

Only cases sentenced under USSG §2D1.1 (Drug Trafficking) with a primary drug type of powder cocaine or crack cocaine are included in this figure. Government Sponsored Below-Range is comprised of: USSG §5K1.1 Departures Only (FY92-FY02), USSG §5K1.1 and Other Government Sponsored Departures (FY03), USSG §5K1.1, USSG §5K3.1 and Other Government Sponsored Departures (FY04) and USSG §5K1.1, USSG §5K3.1 and Other Government Sponsored Departures/Variances (FY05-FY06). This figure excludes cases with missing information for the variables required for analysis.
SOURCE: U.S. Sentencing Commission, 1992-2006 Datafiles, MONFY92 – USSCFY06, 2004 Pre-*Blakely* Only Cases (October 1, 2003 – June 24, 2004), and 2005 Post-*Booker* Only Cases (January 12, 2005–September 30, 2005).

Figure 2-34 shows the proportion of within-range sentences for powder cocaine and crack cocaine for each offender function in the 2005 Drug Sample. The proportion of within-range sentences for powder cocaine offenders is relatively consistent across offender function, ranging from 50.4 percent for couriers/mules to 62.4 percent for importers/high-level suppliers. In contrast, the proportion of within-range sentences for crack cocaine offenders varies substantially from 29.1 percent for renters/loaders/lookouts/enablers/users/all others to 66.7 percent for importers/high-level suppliers.

Figure 2-34
Rates of Within-Range Sentences for Each Offender Function for Powder and Crack Cocaine Offenses
FY2005 Drug Sample



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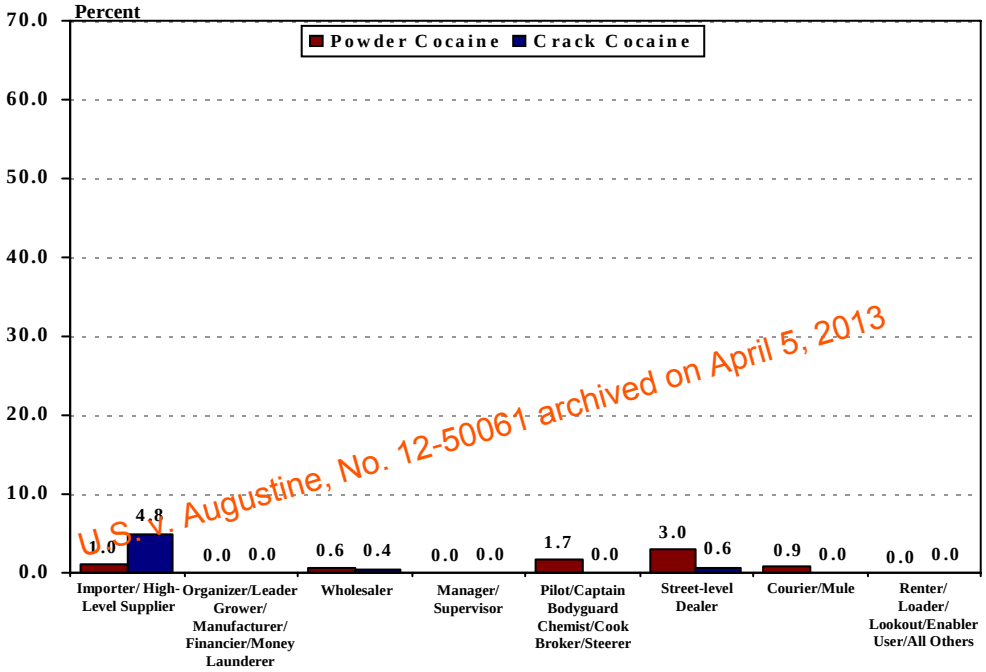
Classifications were based on descriptions of conduct found in the offense conduct section of the Presentence Report. These classifications may not reflect court findings on application of specific guideline enhancements. This figure excludes cases with missing information for the variables required for analysis.

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

As shown in Figure 2-35, above-range sentences also are similarly distributed across offender function for both powder cocaine and crack cocaine offenses. The largest proportion of powder cocaine offenders receiving sentences above the guideline range are street-level dealers at 3.0 percent. The highest rate of above-range sentences for crack cocaine offenders is for importers/high-level suppliers at 4.8 percent.

Figure 2-35
Rates of Above-Range Sentences for Each Offender Function for Powder Cocaine and Crack Cocaine Offenses
FY2005 Drug Sample



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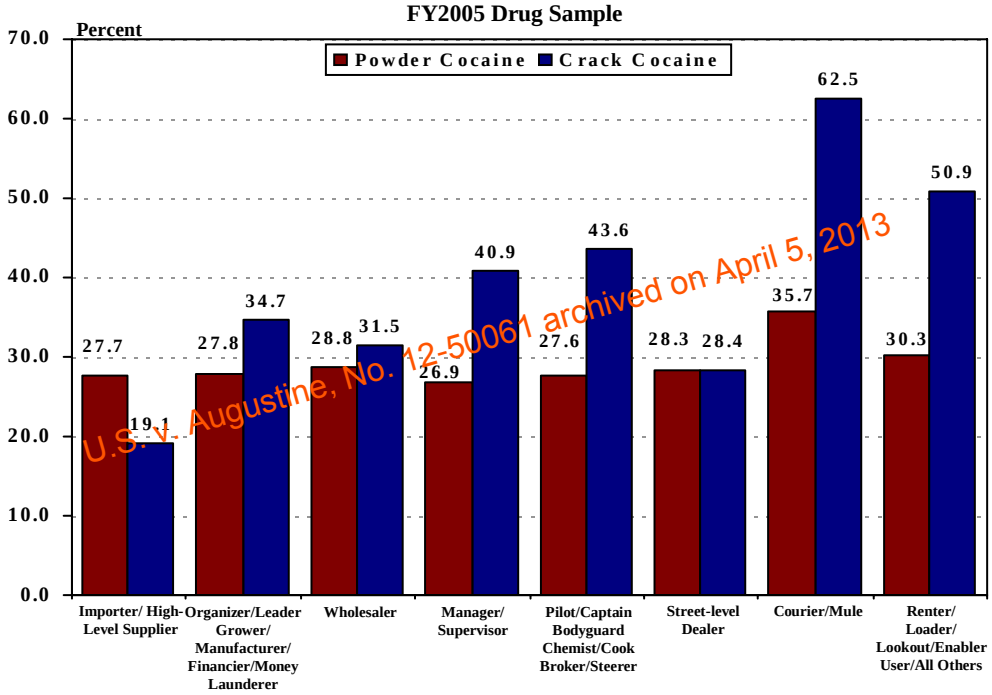
Classifications were based on descriptions of conduct found in the offense conduct section of the Presentence Report. These classifications may not reflect court findings on application of specific guideline enhancements. This figure excludes cases with missing information for the variables required for analysis.

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

As discussed above, government sponsored below-range sentences have accounted for the largest proportion of below-range sentences for both types of cocaine offenders over time. Figure 2-36 shows, for the 2005 Drug Sample, the proportion of government sponsored below-range sentences for each offender function category for powder cocaine and crack cocaine offenders. The highest rates of government sponsored below-range sentences are for couriers/mules (35.7% for powder cocaine offenders and 62.5 percent for crack cocaine offenders) and renters/loaders/lookouts/enablers/users/all others (30.3% for powder cocaine offenders and 50.9% for crack cocaine offenders).

Figure 2-36
Rates of Government Sponsored Below-Range Sentences for Each Offender Function for Powder Cocaine and Crack Cocaine Offenses
FY2005 Drug Sample



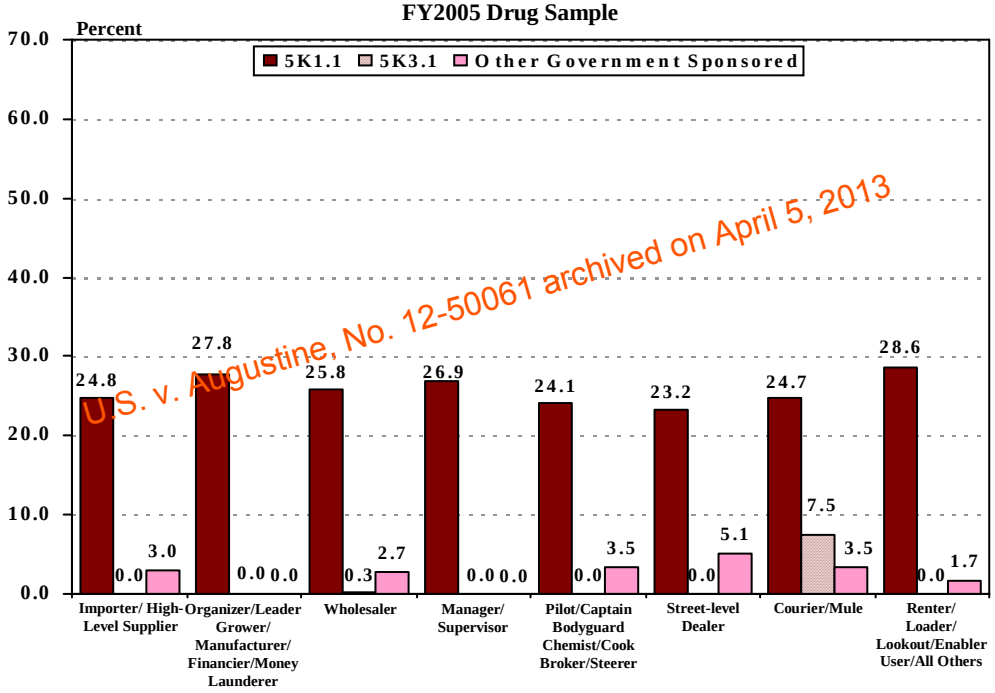
U.S. v. Augustine, No. 12-50061 archived on April 5, 2013

Classifications were based on descriptions of conduct found in the offense conduct section of the Presentence Report. These classifications may not reflect court findings on application of specific guideline enhancements. Government Sponsored Below-Range is comprised of: USSG §5K1.1, USSG §5K3.1 and Other Government Sponsored Departures/Variances. This figure excludes cases with missing information for the variables required for analysis.

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

Figure 2-37 illustrates the distribution of the three types of government sponsored below-range sentences[55] across offender function categories for powder cocaine offenders in the 2005 Drug Sample. Substantial assistance departures consistently account for the majority of government sponsored below-range sentences and apply to approximately one-fourth of powder cocaine offenders across function category. Courier/mule is the only offender function category that receives a substantial proportion of early disposition departures, accounting for 7.5 percent of courier/mule offenders (0.3% of powder cocaine wholesalers, a single offender, received an early disposition departure). This factor reflects the trafficking patterns for powder cocaine, specifically that the drug is imported from other countries, frequently by non-citizens.[56]

Figure 2-37
Distribution of Government Sponsored Below-Range Sentences for Each Offender Function in Powder Cocaine Offenses
FY2005 Drug Sample



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Classifications were based on descriptions of conduct found in the offense conduct section of the Presentence Report. These classifications may not reflect court findings on application of specific guideline enhancements. This figure excludes cases with missing information for the variables required for analysis.

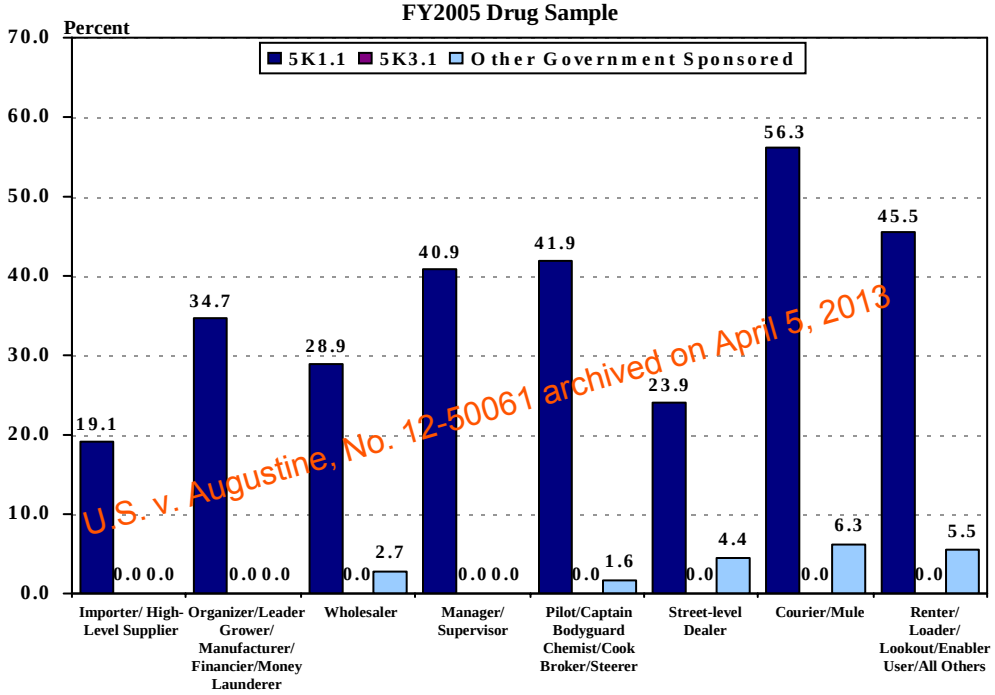
SOURCE: U.S. Sentencing Commission, 2005 Sample.

[55] The government sponsored below-range category includes substantial assistance (USSG §5K1.1), early disposition (USSG §5K3.1), and other government sponsored below-range sentences.

[56] In Fiscal Year 2006, 39.4 percent of powder cocaine offenders were non-U.S. citizens compared to 3.6 percent of crack cocaine offenders.

Similar to powder cocaine offenders, Figure 2-38 shows that government sponsored below-range sentences for crack cocaine offenders primarily consist of substantial assistance departures across offender function categories. However, the rates of substantial assistance departures vary from 19.1 percent for importers/high-level suppliers to 56.3 percent for couriers/mules. Notably, none of the crack couriers/mules received early disposition departures, confirming the lack of importation involved in the trafficking of the drug, as discussed earlier.

Figure 2-38
Distribution of Government Sponsored Below-Range Sentences for Each Offender Function in Crack Cocaine Offenses
FY2005 Drug Sample



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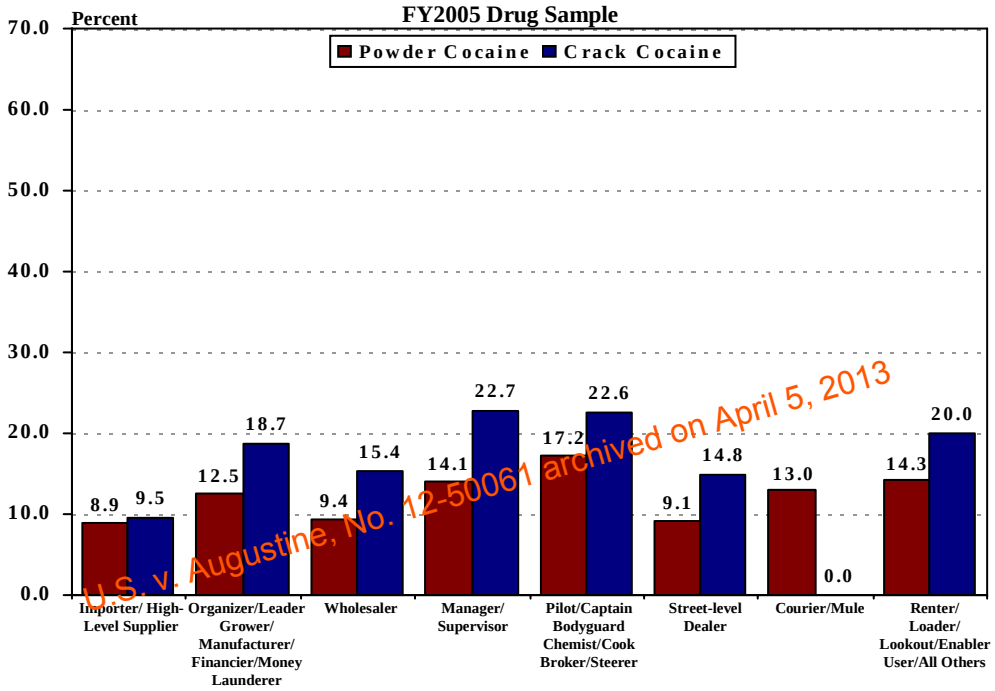
Classifications were based on descriptions of conduct found in the offense conduct section of the Presentence Report. These classifications may not reflect court findings on application of specific guideline enhancements. This figure excludes cases with missing information for the variables required for analysis.

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

Figure 2-39 shows the rates of other below-range sentences for powder cocaine and crack cocaine offenders for each offender function category in the 2005 Drug Sample. For every offender function category except couriers/mules (all of which were accounted for in the within-range, 37.5%, and government-sponsored, 62.5%, categories), the rates of below-range sentences are higher for crack cocaine offenders than powder cocaine offenders.

Figure 2-39
Rates of Other Below-Range Sentences for Each Offender Function for Powder Cocaine and Crack Cocaine Offenses



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Classifications were based on descriptions of conduct found in the offense conduct section of the Presentence Report. These classifications may not reflect court findings on application of specific guideline enhancements. This figure excludes cases with missing information for the variables required for analysis.

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

10. Overview of Powder Cocaine and Crack Cocaine Sentencing

Table 2-2 provides a summary of the offense and offender characteristics contributing to powder cocaine and crack cocaine sentences. The difference in the average prison sentence for the two types of cocaine is more than three years (37 months); the average prison sentences for powder cocaine and crack cocaine offenders are 85 months and 122 months, respectively. While both types of cocaine offenses have the same average base offense level of 30, the base offense levels for powder cocaine and crack cocaine are attributable to substantially different median drug weights of 6,000 grams and 51 grams, respectively. Furthermore, as illustrated in Table 2-2, powder cocaine offenders are subject to higher rates of factors that decrease sentences, such as the safety valve and mitigating role adjustments, compared to crack cocaine offenders. In contrast, factors that increases sentences such as weapon enhancements and criminal history occur at higher rates for crack cocaine offenders than powder cocaine offenders.

Table 2-2
Comparison of Selected Sentencing Factors
for Powder Cocaine And Crack Cocaine Offenders
Fiscal Year 2006[57]

	Powder Cocaine	Crack Cocaine
Average Base Offense Level	30	30
Median Drug Weight (grams)	6,000.0	51.0
Weapon Enhancements		
Weapon SOC (USSG §2D1.1(b)(1))	8.2%	15.9%
18 U.S.C. § 924(c) Conviction	4.9%	10.9%
Safety Valve[58]	45.5%	14.0%
Guideline Role Adjustments		
Aggravating Role (USSG §3B1.1)	6.6%	4.3%
Mitigating Role (USSG §3B1.2)	19.2%	6.2%
Sentences Relative to Guideline Range		
Within-Range	56.2%	56.8%
Above-Range	0.4%	0.4%
Below-Range	43.4%	42.8%
Average Criminal History Category	II	III
Average Prison Sentence (Months)	85	122

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

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[57] Only cases sentenced under USSG §2D1.1 (Drug Trafficking) with complete guideline information and powder cocaine or crack cocaine as the primary drug type are included in this table. Cases with sentences of probation or any time of confinement as defined in USSG §5C1.1 have been excluded. Cases with sentences of 470 months or greater were included in the sentence average computation as 470 months. Cases were excluded due to missing information on drug weight for the primary drug type, missing information on sentence length, or both.

[58] Safety valve includes cases that received either a two-level reduction pursuant to USSG §2D1.1(b)(7) and USSG §5C1.2, or relief from the statutory mandatory minimum sentence pursuant to 18 U.S.C. § 3553(f), or both.

Chapter 3

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

A. INTRODUCTION

This chapter updates information presented in the Commission's 1995 and 2002 reports regarding cocaine use, effects, dependency, and prevalence. For this report, this section again summarizes the core findings and updates the research, primarily using the expert testimony received by the Commission at its November 14, 2006 public hearing on the issue. 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 and personal deterioration may be greater for crack cocaine than for powder cocaine because of their different methods of usual administration (typically crack cocaine is smoked whereas powder cocaine typically is snorted).

- The negative effects of prenatal exposure to crack cocaine are identical to the effects of prenatal exposure to powder cocaine and are significantly less severe than previously believed.

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B. 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. Typically sold to users by the gram, powder cocaine often is "cut" or diluted by adding one or more adulterants (sugars, local anesthetics, other drugs, or other inert substances) prior to distribution.[59] These alterations can cause the purity level of powder cocaine to vary considerably.[60]

Crack cocaine is made by dissolving powder cocaine in a solution of sodium bicarbonate

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[59] USSC, 2002 COMMISSION REPORT, *supra* note 1, at 16. *See also* Memorandum from Toni P. Teresi, Chief, Office of Congressional Affairs, Drug Enforcement Administration to Stacy Shrader, Office of Rep. Asa Hutchinson, U.S. House of Representatives 3 (March 8, 2001) (on file with the Commission) [hereinafter Teresi Memo].

[60] USSC, 2002 COMMISSION REPORT, *supra* note 1, at 16.

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.[61] One gram of pure powder cocaine under ideal conditions will convert to approximately 0.89 grams of crack cocaine. The processes used by some crack cocaine manufacturers, however, may introduce impurities resulting in a product less pure than the powder cocaine from which it was derived.[62]

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 50 doses.[63]

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

Although both powder cocaine and crack cocaine are potentially addictive, administering the drug in a manner that maximizes the effects (*e.g.*, injecting or smoking) increases the risk of addiction. It is, however, "much easier to smoke a drug than to inject it"[64] and some studies have reported that people prefer, to a small degree, the high from smoked cocaine.[65] This difference in *typical* methods of administration, not differences in the inherent properties of the two forms of the drugs, 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. Patients have the same symptoms and receive the same treatment regardless of form of cocaine ingested.

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[61] *See* Bernard Segal & Lawrence K. Duffy, *Biobehavioral effects of psychoactive drugs*, *in* DRUGS OF ABUSE AND ADDICTION: NEUROBEHAVIORAL TOXICOLOGY 50 (R.J.M. Niesink et al. eds., 1999); Teresi Memo, *supra* note 59, at 16.

[62] USSC, 2002 COMMISSION REPORT, *supra* note 1, at 17. *But see* Statement of Elmore Briggs, Director of Clinical Services, Addiction Recovery and Prevention Administration, D.C. Department of Health, to the Commission, regarding Cocaine Sentencing Policy, November 14, 2006, at Tr. 150 (converting powder cocaine to crack cocaine *eliminates* many of the impurities of the drug).

[63] *Id.* at 17.

[64] Statement of Nora D. Volkow, M.D., Director, National Institute on Drug Abuse (NIDA), to the Commission, regarding Cocaine Sentencing Policy, November 14, 2006, at Tr. 180.

[65] *Id* at 186.

Cocaine is a powerful and addictive stimulant that directly affects the brain.[66] In any form (coca leaves, coca paste, powder cocaine, freebase cocaine, and crack cocaine), cocaine produces the same types of physiological[67] and psychotropic[68] effects once the drug reaches the brain.[69] Cocaine's effect, regardless of form, increases dopamine in the brain's reward centers.[70]

The effects experienced by the user of cocaine are summarized by the National Institute on Drug Abuse (NIDA), a branch of the National Institute of Health (NIH):

> Physical effects of cocaine use include constricted blood vessels, dilated pupils, and increased temperature, heart rate, and blood pressure. The duration of cocaine's immediate euphoric effects, which include hyperstimulation, reduced fatigue, and mental alertness, depends on the route of administration. The faster the absorption, the more intense the high. On the other hand, the faster the absorption, the shorter the duration of action. The high from snorting may last 15 to 30 minutes, while that from smoking may last 5 to 10 minutes. Increased use can reduce the period of time a user feels high and increases the risk of addiction.
>
> Some users of cocaine report feelings of restlessness, irritability, and anxiety. A tolerance to the 'high' may develop—many addicts report that they seek but fail to achieve as much pleasure as they did from their first exposure. Some users will increase their doses to intensify and prolong the euphoric effects. While tolerance to the high can occur, users can also become more sensitive to cocaine's anesthetic and convulsant effects without increasing the dose taken. This increased sensitivity may explain some deaths occurring after apparently low doses of cocaine.[71]

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[66] Written statement by Nora D. Volkow, M.D., Director, National Institute on Drug Abuse (NIDA), to the Commission, regarding Cocaine Sentencing Policy, November 14, 2006, at 1.

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

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

[69] Written statement by Glen R. Hanson, Ph.D., D.D.S., Acting Director of the National Institute on Drug Abuse (NIDA), to the Commission, regarding Drug Penalties (Feb. 25, 2002). 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, NIDA Research Report Series, *Cocaine Abuse and Addiction*, (May 1999, revised November 2004), *available at* http://www.drugabuse.gov/ResearchReports/Cocaine/Cocaine.html.

[70] Volkow, *supra* note 64, at Tr. 161.

[71] National Institute of Health, *NIDA InfoFacts: Crack and Cocaine* (April 2006), *available at* http://www.nida.nih.gov/infofacts/cocaine.html.

Medical consequences of cocaine use include complications from the drug's "cardiovascular effects, including disturbances in heart rhythm and heart attacks; respiratory effects, such as chest pain and respiratory failure; neurological effects, including strokes, seizures, and headaches; and gastrointestinal complications, including abdominal pain and nausea."[72]

Cocaine in any form is potentially addictive.[73] Research indicates 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.[74] Cocaine's powerful psychotropic effects can cause the user to use the drug compulsively, regardless of any adverse effects that may occur. A recent study reported that "about five percent of recent-onset cocaine abusers become addicted to cocaine within 24 months of starting cocaine use."[75] Injecting powder cocaine or smoking crack cocaine causes a much greater risk of addiction than does snorting cocaine.[76]

The risk and severity of addiction to drugs generally – including cocaine – are significantly affected by the way they are administered into the body. Once in the brain, the physiological and psychological effects of cocaine are the same, regardless of the form of the drug.[77] The method of administration, however, determines the onset, intensity, and duration of the effects from drug use. Generally the faster a drug reaches the bloodstream, the quicker it is distributed throughout the body, the faster the user feels the desired effects,[78] and the more intense is the associated pleasure.[79] However, the methods of administration that bring about the

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[72] Volkow, *supra* note 66, at 5.

[73] Volkow, *supra* note 66, at 2. For a discussion of a neurobiological mechanism of addiction to cocaine, *see also*, Karen Bolla, *et al.*, *The Neuropsychiatry of Chronic Cocaine Abuse*, 10 JOURNAL OF NEUROPSYCHIATRY AND CLINICAL NEUROSCIENCES 280-289 (1998).

[74] *See* Segal & Duffy, *supra* note 61.

[75] Volkow, *supra* note 66, at 6.

[76] Volkow, *supra* note 64, at Tr. 163.

[77] Volkow, *supra* note 66, at 2.

[78] Volkow, *supra* note 64, at Tr. 162-63. 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.

[79] *Id.*

most intense effects – smoking and injection – also have the shortest duration, thereby necessitating repeated doses to sustain the drug's effects and increasing the likelihood the user will develop an addiction. Smoking (inhalation) and injection typically produce effects that have a quicker onset, a shorter duration, and are more intense than snorting and therefore increase the risk of addiction. (*See* Diagram 3-1.)[80]

As stated above, the faster a drug reaches the brain, the faster the user feels the desired effects and the more intense is the associated pleasure. Snorting or injecting powder cocaine has the effect of diluting the drug that smoking the drug does not, and the quicker onset and more intense effects of smoking cocaine may motivate powder cocaine users who snort the drug to eventually smoke crack cocaine in order to achieve the more intense effect.[81] It is widely accepted that snorting cocaine is often the first manner in which many users begin using cocaine.[82] Smoking crack cocaine to achieve the more intense high, rather than injecting powder cocaine, may result from several factors. It is easier, and perhaps safer from infection, to smoke a drug than inject it.[83] In addition, some users report a small preference for the intoxication produced from smoking (likely due to its slightly more rapid onset).[84]

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[80] Hanson, *supra* note 69.

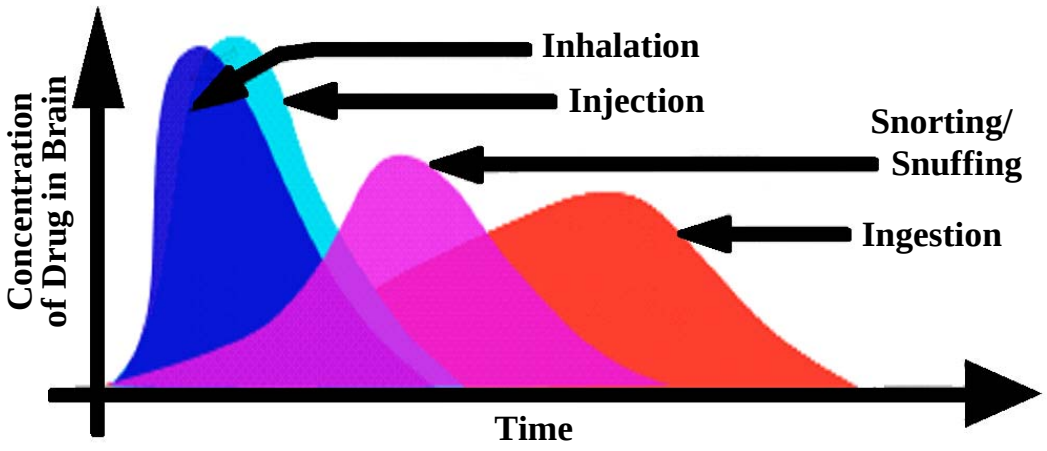
[81] Written testimony of Elmore Briggs, Director of Clinical Services, Addiction Prevention and Recovery Administration, D.C. Department of Health, to the Commission, regarding Cocaine Sentencing Policy (November 14, 2006), at 2-3.

[82] Volkow, *supra* note 66, at 4-5.

[83] Volkow, *supra* note 64, at Tr. 180-181. Dr. Volkow also noted that a similar pattern has been seen with methamphetamine.

[84] *Id.*

Diagram 3-1
Time Course for Drug Distribution in Brain
Based on Route of Drug Administration



SOURCE: Written statement by Glen R. Hanson, Ph.D., D.D.S., Acting Director of the National Institute on Drug Abuse (NIDA), to the U.S. Sentencing Commission, regarding Drug Penalties (Feb. 25, 2002).

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Powder cocaine and crack cocaine addicted patients present at treatment with the same symptoms. In addition, withdrawal from cocaine, regardless of form, is the same.[85] The route of administration of crack cocaine, however, because of its rapid effect on the brain's reward pathway, may intensify "cravings and compulsions to obtain more of the drug."[86] The treatment protocol for cocaine addiction is the same regardless of the form of the drug and is tailored to the needs of the specific client. That said, the personal deterioration associated with continued crack cocaine addiction is often more pronounced.[87] There are no medications approved for the treatment of cocaine addiction and the most effective treatments are behavioral. These are available in both residential and outpatient settings.[88]

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[85] Briggs, *supra* note 81, at 2.

[86] *Id.*

[87] Briggs, *supra* note 81, at 4.

[88] Volkow, *supra* note 66, at 8.

D. PRENATAL COCAINE EXPOSURE

1. Introduction

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.[89] In addition, research indicates that the negative effects from prenatal exposure to cocaine, in fact, are significantly less severe than previously believed. "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."[90]

2. Effects

The 2005 National Survey of Drug Use and Health estimated that 680,600 infants were exposed during pregnancy to tobacco, 496,100 were exposed in utero to alcohol, and 159,000

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[89] Written statement of Ira J. Chasnoff, M.D., President, Children's Research Triangle, to the U.S. Sentencing Commission, regarding Drug Policy, 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.)

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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 would be identical in every way to the women in the study group, except in the use of the drug of interest. Often it is impossible to find a control group that perfectly matches the study group, and so 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.

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. This "confluence of interacting factors" include the abuse of other controlled and legal intoxicants, "low-socioeconomic status, poor nutrition and prenatal care, and chaotic lifestyles" that mask any specific relationships between the drug of interest and negative effects. *See* Volkow, *supra* note 66, at 7. *See also* Vincent L. Smeriglio & Holly C. Wilcox, *Prenatal Drug Exposure and Child Outcome: Past, Present, Future*, 26 CLINICS IN PERINATOLOGY 7 (March 1999).

[90] Deborah A. 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 (2001).

were exposed in utero to an illicit drug. Among the infants exposed to illicit drug use, the drugs to which they are exposed are: marijuana (approximately 73%); unauthorized prescription drugs (34%); powder cocaine (7 %); and crack cocaine (2 %).[91]

Estimating the full extent of the consequences of maternal cocaine, or any other drug, abuse on the fetus and the developing child is very challenging and, therefore, caution should be used in searching for causal relationships.[92] Recent research typically does not distinguish between prenatal exposure to crack cocaine and powder cocaine because of the indistinguishable pharmacologic effects once the drug is ingested.[93] Briefly, in utero exposure to cocaine is associated with a greater risk for premature birth; however, there does not appear to be a neurological difference between cocaine exposed babies and study controls. Follow-up research with children up to the age of ten years has found subtle problems in attention and impulse control in cocaine-exposed children.[94] The long term implications of any of these findings are unknown. For example, among cocaine-exposed children some subtle deficits in language were identified at age six and seven but were not found at follow-up by age nine.[95]

3. Prenatal Exposure to Other Substances

Early in the crack cocaine epidemic there was a great deal of concern regarding the effects on the infant and child of prenatal cocaine exposure; however, the effect of exposure has "not been as devastating as originally believed."[96] As described below, prenatal exposure to a number of intoxicants, legal and illegal, has the potential to produce significant adverse outcomes in the child. Research has documented that "[t]he physical and neurotoxic effects of alcohol exposure are significantly more devastating to the developing fetus than cocaine. The

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[91] Written statement by Harolyn Belcher, M.D., M.H.S., Director of Research, Kennedy Krieger Institute Family Center, to the Commission, regarding Cocaine Sentencing Policy, (November 14, 2006), at 1.

[92] Volkow, *supra* note 66, at 8.

[93] Pharmacologic effects refer to the bio-chemical effects of the drug. Frank, *supra* note 90, ("[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 89, 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").

[94] Volkow, *supra* note 66, at 8.

[95] Belcher, *supra* note 91, at 2.

[96] Volkow, *supra* note 66, at 7.

documented intrauterine effects of tobacco exposure are similar to cocaine"[97] but may be more harmful to the developing brain of the fetus.[98]

Research on the impact of prenatal exposure to other substances, both legal and illegal, generally has reported similar negative effects. Prenatal tobacco exposure is associated with deficits in stature, cognitive development, and educational achievement, as well as problems in temperament and behavioral adjustment.[99] Additionally, maternal smoking during pregnancy is an avoidable risk factor for a number of adverse outcomes in infancy and later childhood, including low birthweight, preterm delivery, and sudden death in infancy.[100]

Alcohol use during pregnancy is 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.[101] 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 is associated with deficits of greater severity.[102] Fetal alcohol syndrome, a specific pattern of mental and physical deficits, is the "leading identifiable and preventable cause of mental retardation and birth defects" in the United States.[103]

Use of marijuana during pregnancy is 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.[104]

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[97] Belcher, *supra* note 91, at 2.

[98] Volkow, *supra* note 64, at Tr. 177-78.

[99] 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).

[100] Ah-Fong Hoo et al., *Respiratory Function Among Preterm Infants Whose Mothers Smoked During Pregnancy*, 158 AMERICAN JOURNAL OF RESPIRATORY AND CRITICAL CARE MEDICINE 700-705 (September 1998).

[101] 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).

[102] *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.

[103] Belcher, *supra* note 91.

[104] 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.), 164 NIDA

As with cocaine, deficiencies associated with prenatal exposure to heroin are not consistently reported.[105] 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.[106]

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. One study of children at 14 years of age found that children exposed to amphetamine lagged in mathematics, language, physical training, and were more likely to be retained in grade.[107]

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RESEARCH MONOGRAPH 242-260 (1996); 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).

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

[106] Frank also 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 indistinguishable from the other infants."). Frank, *supra* note 90, at 2.

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

E. TRENDS IN DRUG USE

1. Introduction

Estimates of the prevalence of drug use in the United States are developed from surveys of households and high school students. Among the most frequently cited surveys are the National Survey on Drug Abuse (NHSDA, renamed the National Survey on Drug Use and Health, NSDUH[108]), begun in 1979 and initially conducted every few years throughout the 1980s, but now conducted annually,[109] and the Monitoring the Future (MTF) survey of high school students, conducted annually since 1975.[110] Both surveys began to measure crack cocaine and powder cocaine use separately in the late 1980s.

The NHSDA and MTF, like all surveys, have known limitations.[111] Because of these limitations, data from self-report surveys should be considered underestimates of actual drug use. However, because the biases in the surveys appear to be reasonably constant over time, comparisons of the rates of reported use across years can be informative, despite these limitations.

2. Use Trends

Figures 3-1 through 3-3 examine the data from the MTF study of high school seniors. The analysis focuses on the self-report of 12th graders on their use of illicit drugs in the 30 days

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[108] Data on the National Survey of Drug Abuse and Health are available at http://www.oas.samhsa.gov/NHSDA/2kNHSDA/2knhsda.htm.

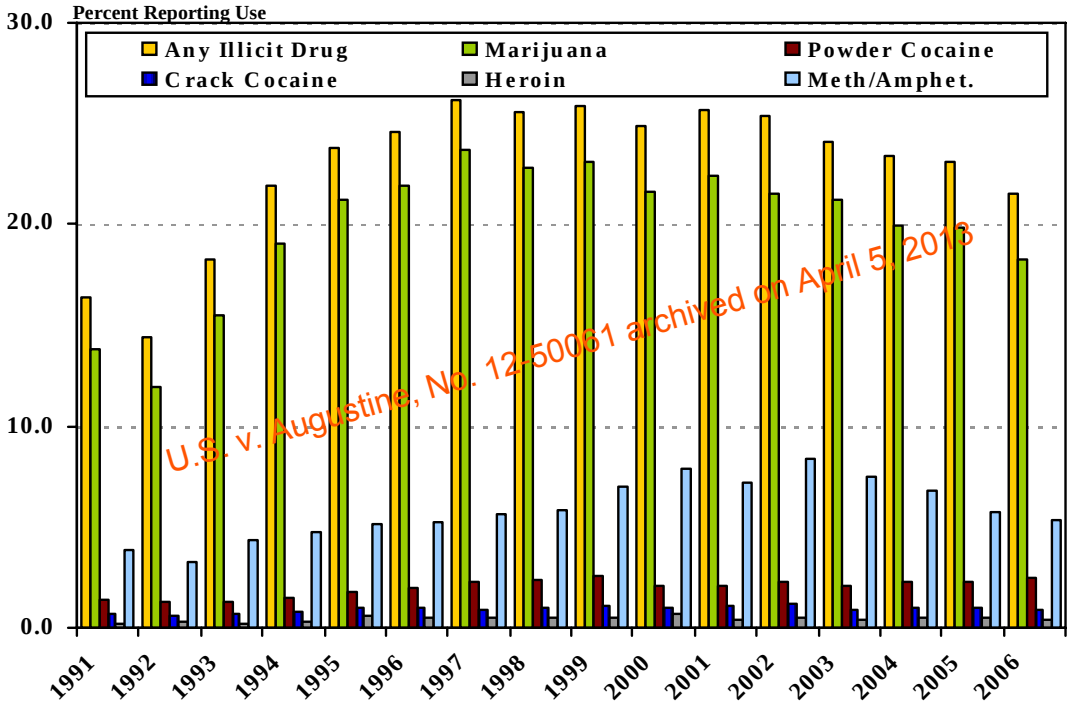
[109] Substance Abuse and Mental Health Services, U.S. Department of Health and Human Services, *Summary of Findings from the 2000 National Household Survey on Drug Abuse, available at* http://www.samhsa.gov/publications/publications.html.

[110] 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. MTF data are available at http://www.monitoringthefuture.org/pubs/monographs/vol1_2000.pdf.

[111] The NHSDA and MTF require that persons live in households or are present in school on the day of the survey, respectively. As a result, the subpopulations believed to be among the heaviest drug users – high school dropouts, the homeless, the imprisoned, and the hospitalized – are under represented in these surveys. Additionally, some of those surveyed refuse to respond or may underreport their actual drug use. *See also* National Research Council, INFORMING AMERICA'S POLICY ON ILLEGAL DRUGS: WHAT WE DON'T KNOW KEEPS HURTING US 96 (Charles F. Manski et al. eds., 2001) (indicating that about 25 percent of persons who are contacted for participation in the household survey fail to respond, and noting that "[t]he 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.

prior to the survey. Figure 3-1 examines the long term trends between 1991 and 2006. Overall illicit drug use peaked in this population between 1997 and 2002, with just over 25 percent of high school seniors reporting the use of any illicit drug. Since then, there has been a steady decline in overall drug use among high school seniors. For any year, marijuana is by far the most frequently reported drug used and is generally two and a half to four times greater in prevalence than the next most frequently reported drug, methamphetamine/amphetamine. Marijuana is approximately nine to 12 times more prevalent than powder cocaine and 18 to 26 times more prevalent than crack cocaine.

Figure 3-1
Trends in Reported Drug Use in Past 30 Days
Among 12th Grade Students



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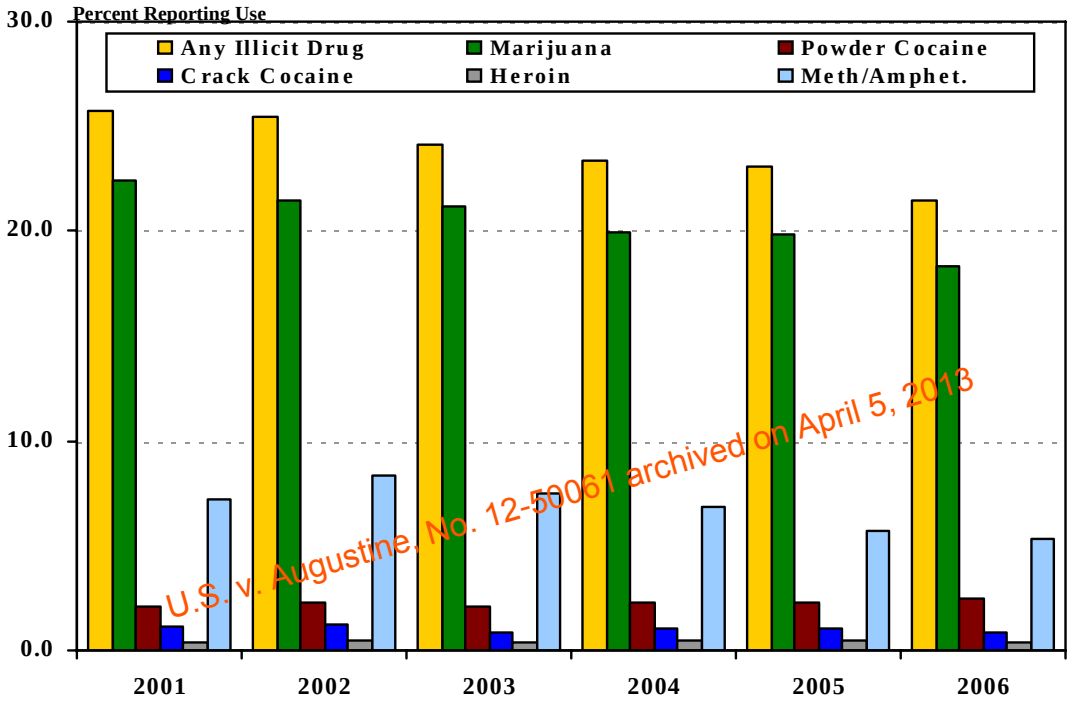
SOURCE: Monitoring the Future, A Continuing Study of American Youth at http://www.monitoringthefuture.org/.

The stability of use of these substances can be seen more clearly in Figure 3-2, which shows this same data but for the past six years only. During this recent period, the rates of use for heroin, powder cocaine and crack cocaine have been very stable, while the rate of methamphetamine/amphetamine use has steadily declined.

Figure 3-2
Trends in Reported Drug Use in Past 30 Days
Among 12th Grade Students Within the Past Six Years



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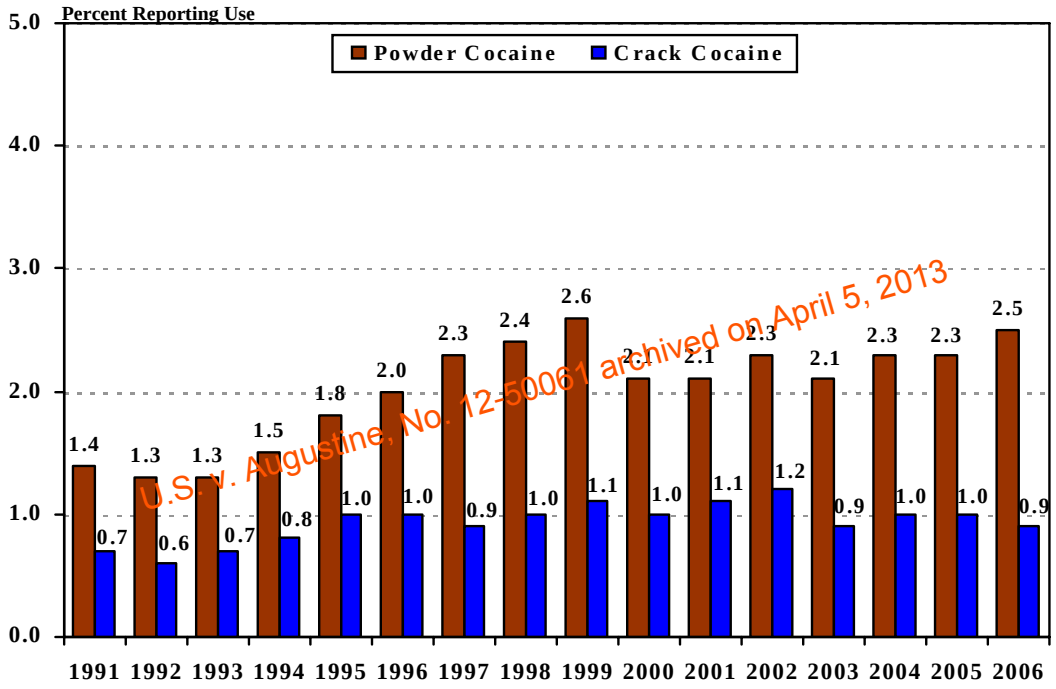
SOURCE: Monitoring the Future, A Continuing Study of American Youth at http://www.monitoringthefuture.org/.

Figure 3-3 presents data from this survey on the long term trends in recent cocaine use among high school seniors. Powder cocaine use peaked in this population in 1999, reaching a prevalence of 2.6 percent. Since 1999 it has remained relatively stable, ranging between 2.1 and 2.5 percent. The peak year reported for crack cocaine use was 2002 at 1.2 percent. As with powder cocaine, the trend in prevalence of crack cocaine has been stable, hovering between 0.9 and 1.2 percent. Comparing the rates of the two forms of cocaine, powder cocaine was reported about twice as frequently as crack cocaine.

Figure 3-3
Trends in Reported Cocaine Use in Past 30 Days
Among 12th Grade Students



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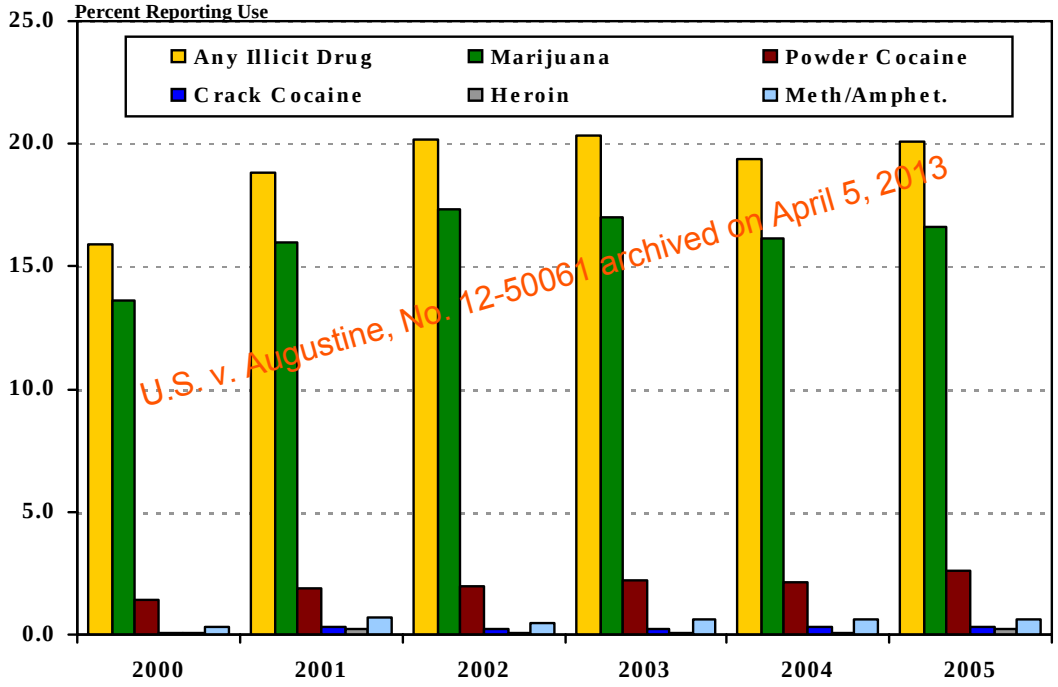
SOURCE: Monitoring the Future, A Continuing Study of American Youth at http://www.monitoringthefuture.org/.

Figure 3-4 presents data from the National Survey on Drug Use and Health (NSDUH). These data present self reported drug use by persons ages 18 to 25 during the month prior to the survey. During the period between 2002 and 2006, approximately 20 percent of these young adults report recent use of any illicit drug, a similar proportion as reported by 12th graders in the MTF survey. As in that survey, marijuana is by far the most prevalent drug reported. The rates of reported use of crack cocaine, powder cocaine, heroin, or methamphetamine/amphetamine are substantially lower. Among these latter four drugs, the overall rates of use have been stable, particularly in the past five years. Use of powder cocaine is reported most frequently among these drugs, 2.6 percent in 2005. The rate of reported powder cocaine use is approximately eight to ten times more often than is crack cocaine use.

Figure 3-4
Reported Past Month Drug Use Among 18-25 Year Olds



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SOURCE: Results from the 2002 and 2005 Summary Findings from the National Survey on Drug Use and Health: Detailed Tables, Department of Health and Human Services, Substance Abuse Mental Health and Services Administration at http://www.samhsa.gov/index.aspx.

3. Social Costs

The social costs of drug abuse are reported in several national datasets. Unlike the surveys reported above, these datasets are not designed to be fully representative of the national experience. Their focus on emergency room admissions, drug treatment episodes, or drug use among arrestees, generally is designed to provide more targeted information than a representative national prevalence. However, they are the only available sources of this information and are informative of variations over time.

The Drug Abuse Warning Network (DAWN) data on emergency room admissions, presented in Figure 3-5, provide a snapshot of the experience in 2004 and 2005.[112] Overall, while the total number of emergency room admissions declined substantially in 2005, the number of admissions for each of the listed drugs remained relatively stable. In both 2004 and 2005, the greatest number of drug-related emergency room admissions was for cocaine-related emergencies. In 2005 they accounted for approximately 31 percent of all drug related emergency room admissions. This is a substantially greater proportion than accounted for by marijuana use (16.7% of admissions), despite the substantially greater prevalence of marijuana use reported by high school seniors and young adults in the MTF survey and NSDUH. Unfortunately, this dataset does not distinguish between the form of cocaine involved or the method of use of cocaine.

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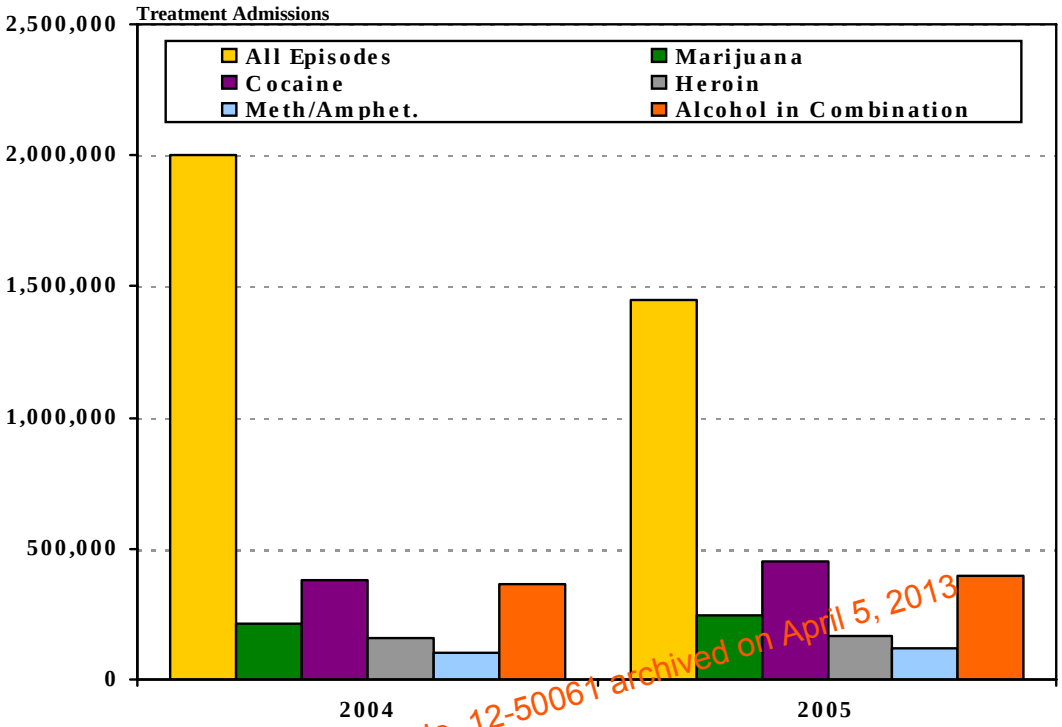
[112] Substance Abuse and Mental Health Services Administration [hereinafter SAMHSA] released its 2003 report on Drug-related Emergency Department Visits in late 2004. This was the first publication to use data from the "new DAWN." Virtually every feature of DAWN, except its name, changed in 2003. In the publication it is referred to "new DAWN" to emphasize this difference and to indicate that these new DAWN data are not comparable to data from prior years. As a result, pre-2003 data are not presented here.

Figure 3-5
Trends in DAWN Emergency Room Episodes and Drug Mentions



SOURCE: Results from the Office of Applied Studies, Substance Abuse Mental Health and Services Administration, SAMHSA, Drug Abuse Warning Network, 2004 (03/2007 update) at http://dawninfo.samhsa.gov/.

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Likewise, in the DAWN data, heroin and methamphetamine/amphetamine account for greater proportions of emergency room admissions (11.4% and 8.3%, respectively, in 2005) than their relatively low prevalence in the national surveys. These greater rates of emergency room visits for cocaine, heroin, and methamphetamine/amphetamine are indicative of greater medical consequences resulting from their use as compared to the illicit use of marijuana, a relatively highly prevalent drug.

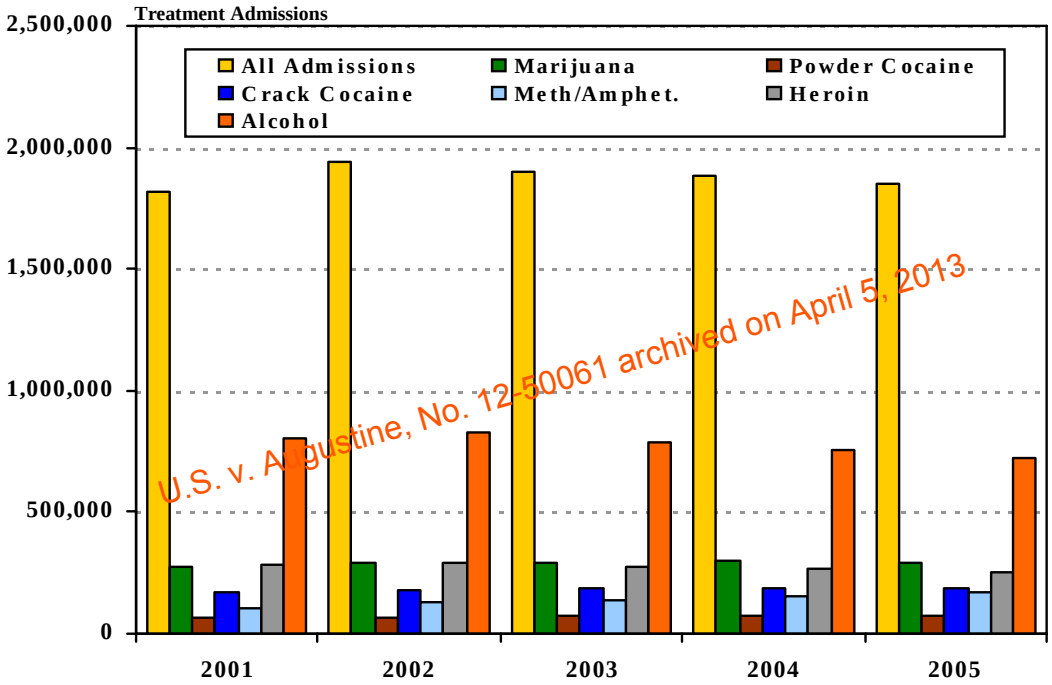
A dataset of admissions to substance abuse treatment, the Treatment Episode Data Set (TEDS), provides descriptive information about the national flow of admissions to providers of substance abuse treatment. It provides annual data on the number and characteristics of persons admitted to public and private substance abuse treatment programs receiving public funding. The unit of analysis is treatment admissions.[113]

Figure 3-6 reports the proportion of treatment admissions accounted for by these drugs over time, and presents several findings. First, treatment admissions have decreased during this period, peaking in 2002 at 1,936,711 and declining to 1,849,548 by 2005. Second, approximately 40 percent of all treatment admissions involve alcohol as the primary drug of

[113] TEDS data are available at http://www.icpsr.umich.edu/cocoon/SAMHDA/STUDY/04626.xml.

abuse, by far accounting for the greatest proportion of admissions. Third, the proportion accounted for by alcohol has steadily declined from 44.3 percent in 2001 to 39.1 percent in 2005, while the proportion of admissions accounted for by methamphetamine/amphetamine has steadily risen from 0.06 percent in 2001 to 0.09 percent in 2005. Fourth, the proportion of admissions accounted for by powder cocaine, crack cocaine, and heroin have remained relatively stable. In 2005 the proportion of admissions accounted for by these drugs was 0.04 percent, 0.10 percent, and 0.14 percent, respectively.

Figure 3-6
Trends in Drug Treatment Admissions
(Primary Drug)



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SOURCE: Results from the Office of Applied Studies, Substance Abuse Mental Health and Services Administration, SAMHSA, Treatment Episode Data Set (TEDS), 2005 at http://wwwdasis.samhsa.gov/teds05.pdf.

Analysis of TEDS data sorted treatment admissions by the three primary types of treatment programs. Detoxification programs, which are generally inpatient treatment programs that provide medically supervised termination of drug use, accounted for 21 percent of all TEDS admissions. Admissions for medical detoxification primarily were for heroin (34%), tranquilizers (32%), and alcohol alone (31%). Residential/inpatient treatment programs, an intensive, experiential form of treatment in which the patient resides at the treatment facility for a period of time, generally between 30 days and one year, accounted for 17 percent of admissions. Most admissions for inpatient residential treatment were for smoked cocaine (29%) and methamphetamine/amphetamine (26%). Finally, outpatient treatment, the least restrictive form of treatment, accounted for 62 percent of TEDS admissions. Most admissions to outpatient treatment were for marijuana abuse (84%).[114]

The next two figures present information collected as part of the Arrestee Drug Abuse Monitoring Program (ADAM),[115] which interviewed persons arrested for all crimes in selected cities about their recent drug use and also conducted urinanalysis. Figure 3-7 reports findings of the research for the years 2000 through 2003. Overall, the proportion of arrested persons testing positive for any of the listed drugs was very stable during this period. Marijuana was the most frequently identified drug followed by cocaine. Urine testing does not distinguish between powder cocaine and crack cocaine, therefore, the ADAM program relied on self-report of the arrestee to determine the form of the cocaine use. Figure 3-8 provides information on self-reported drug use by these arrestees.[116] Based on arrestees' self-reports, crack cocaine is used approximately twice as often as is powder cocaine.

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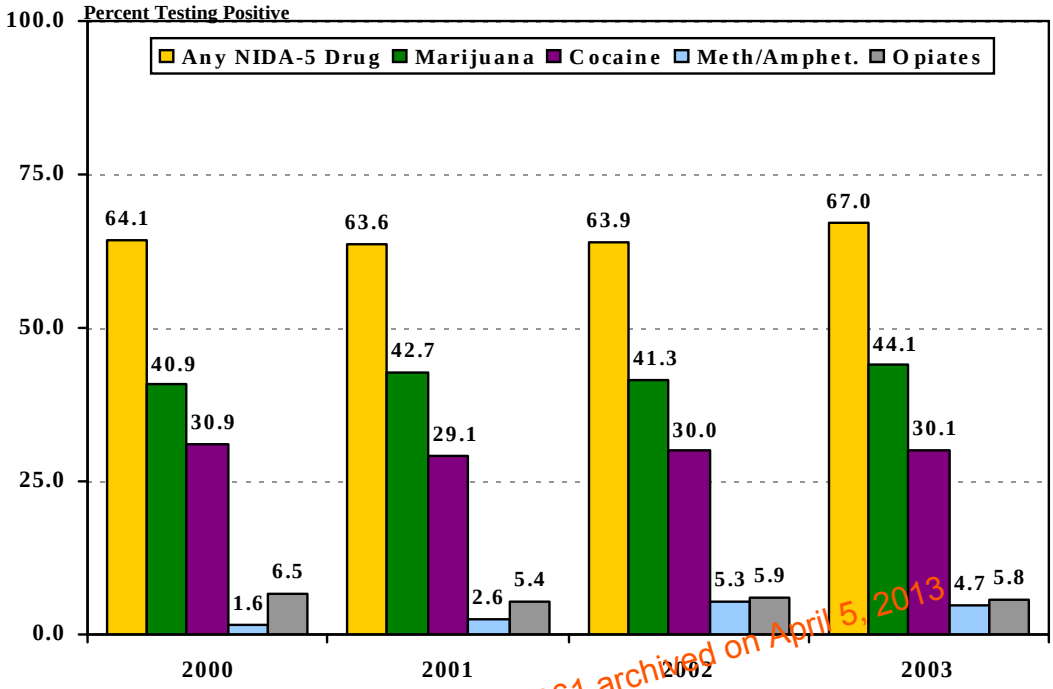
[114] SAMHSA, U.S. Department of Health and Human Services, *Treatment Episode Data Set (TEDS) Highlights - 2005 National Admissions to Substance Abuse Treatment Services* 4 (February 2007); *available at* http://wwwdasis.samhsa.gov/teds05/tedshi2k5_web.pdf.

[115] The ADAM program was sponsored by the National Institute of Justice, the research, development, and evaluation arm of the United States Department of Justice. Data are available through 2003 when the program ended. The goal of the program was to "assist local, state, and national policymakers in monitoring and understanding the consequences of drug use among detainees." National Institute of Justice, U.S. Department of Justice, *Program Brief*: *Arrestee Drug Abuse Monitoring Program*, *available at* http://www.ncjrs.gov/pdffiles/adam.pdf.

[116] It should be noted that arrestees in this dataset self-report drug use at a lower rate than demonstrated through urinanalysis.

Figure 3-7
Median Percentage of Male Arrestees Who Tested Positive for Any Illicit Drug



The NIDA-5 category refers to the standard panel of commonly used illegal drugs established by the NIDA. The five drugs comprising the category are cocaine, marijuana, methamphetamine, opiates and phencyclidine (PCP).

SOURCE: Results from the 2000, 2001, preliminary 2002, and 2003 reports of ADAM's Drug and Alcohol Use and Related Matters Among Arrestees Reports available at http://www.ojp.usdoj.gov/nij/adam/.

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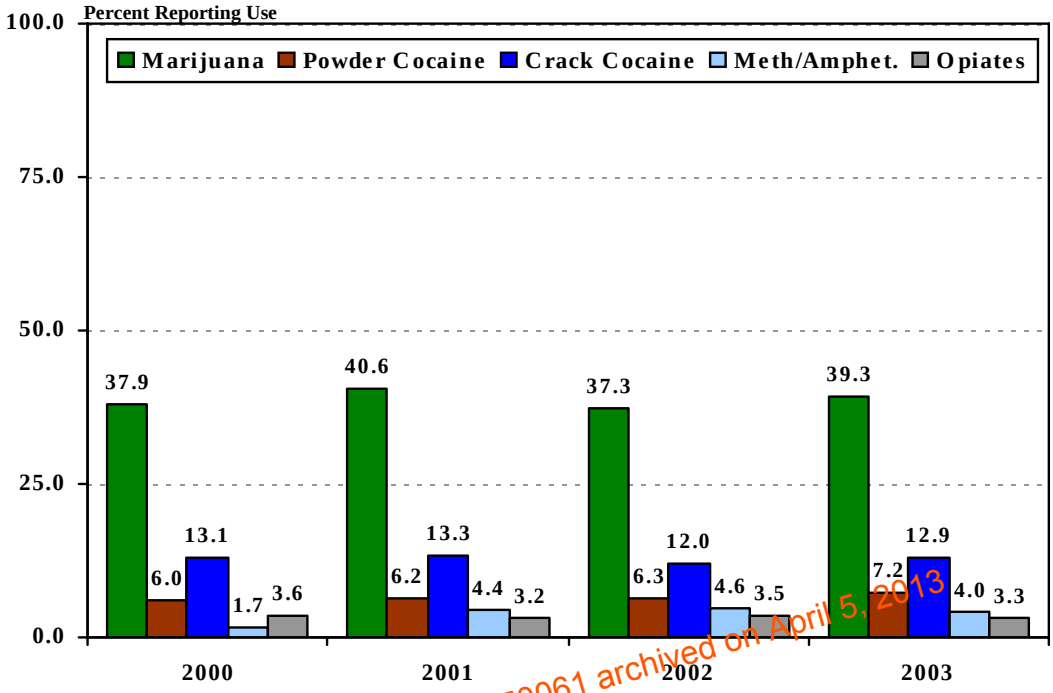
Figure 3-8
Median Percentage of Male Arrestees Who Self Reported Any Illicit Drug Use (Past Seven Days)



SOURCE: Results from the 2000, 2001, preliminary 2002, and 2003 reports of ADAM's Drug and Alcohol Use and Related Matters Among Arrestees Reports available at http://www.ojp.usdoj.gov/nij/adam/.

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Chapter 4

TRENDS IN DRUG TRAFFICKING PATTERN, PRICE, AND USE

A. INTRODUCTION

This chapter presents data from a number of sources to describe cocaine trafficking patterns, trends in the price and purity of powder cocaine, and the price of crack cocaine. Specific findings include:

- Almost all cocaine smuggled into the United States is in the powder form.
- Cocaine markets can be broadly classified into five levels: 1) smugglers; 2) high-level dealers; 3) mid-level dealers; 4) retail sellers; and 5) users.
- Purchases of cocaine cluster at one kilogram, one ounce, and one gram quantity levels and distinguish the different levels of cocaine markets.
- The reported substantial increase in violence in the United States, which peaked in 1992, often is attributed to the introduction of crack cocaine around 1985 and the recruitment of young crack cocaine dealers with access to handguns.
- The reduction in violence experienced since 1992 is consistent with the aging of the crack cocaine trafficker and user populations.
- The price of cocaine, regardless of form, has remained relatively stable during the period 1998 through 2005, and there is substantial similarity in the price of powder cocaine and crack cocaine at the kilogram, ounce, and gram quantity levels.

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B. DRUG TRAFFICKING

The powder cocaine and crack cocaine markets are "inescapably intertwined because virtually all cocaine enters the United States in powder form."[117] Powder cocaine is imported from several source cities, dispersed throughout the United States to regional and wholesale distributors, and at a later point some of the powder cocaine is converted into crack cocaine.[118]

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[117] USSC, 1995 COMMISSION REPORT, *supra* note 1, at 63.

[118] *Id.* at 66.

The process of dispersing drugs throughout the United States is described as a highly pyramidal structure that optimizes the distribution of the specific drug quantities that are imported. There are five broad categories of functions involved in cocaine distribution that can be targeted by law enforcement: 1) smugglers; 2) high-level dealers; 3) mid-level dealers; 4) retail sellers; and 5) users.[119] This structure suggests a potentially attractive target for law enforcement, the "middle market" area – that is, one or two steps below the importation and above the retail level – essentially the high-level and mid-level dealer.[120] These middle market functions, "taking the bundle [of imported drugs] roughly from one kilo[gram] to one ounce,"[121] account for most of the mark-up in the final price of the drug. This niche in the drug distribution chain may make substantial sums of money, far more than the low earnings reported at the retail distribution level. In addition, it has low entry barriers such that upward mobility in the drug trade is easy.[122]

An independent analysis of the Drug Enforcement Administration's (DEA) System to Retrieve Information From Drug Evidence (STRIDE)[123] data conducted in 2004 developed an empirical model of drug trafficking that is consistent with the quantity distinctions described above.[124] It noted that purchases in the STRIDE database clustered at the one kilogram, one

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[119] Peter Reuter, RAND Corporation, *Do Middle Markets for Drugs Constitute an Attractive Target for Enforcement?* (April 2003), available through the National Criminal Justice Reference Service at http://www.ncjrs.gov.

[120] *Id.*

[121] *Id.*

[122] *Id.*

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[123] STRIDE consists of six subsystems providing information on drug intelligence, statistics on markings found on pills and capsules, drug inventory, tracking, statistical information on drugs removed from the market place, utilization of laboratory manpower and information on subsystems analyzed outside of the DEA laboratory system where DEA participated in the seizure(s). STRIDE abstract, http://www.dea.gov/foia/stride.html (last visited May 1, 2007).

[124] R. Anthony & A. Fries, *Empirical Modelling of Narcotics Trafficking from Farm Gate to Street*, 56 BULLETIN ON NARCOTICS 1, (United Nations Office on Drugs and Crime, Vienna, Austria), 2004, at 8, *available at* http://www.unodc.org/pdf/bulletin/bulletin_2004_01_01_1_Art1.pdf. These drug quantity break points are consistent with those reported by others. For example, the Office of National Drug Control Policy reported STRIDE data analysis by categorizing powder cocaine quantities as: number of purchases of two grams or less, purchases of 10-50 grams, and seizures/purchases greater than 750 grams. Classifications for crack cocaine are: purchases of one gram or less, and purchases greater than 15 grams. Office of National Drug Control Policy, Executive Office of the President, *National Drug Control Strategy Data Supplement* 58 (March 2005). *See also* Letter from Janet Reno and Barry McCaffrey to President William Jefferson Clinton (July 3, 1997) ("5 grams of crack is worth a few hundred dollars at most, and its sale is characteristic of a low-level dealer. A mid-level crack dealer typically deals ounce or multi-ounce quantities."); Letter from Paul Daly, Assistant Administrator, Intelligence Division, Drug Enforcement Administration to Chairman Richard Conaboy of the U.S. Sentencing Commission (October, 1996) ("Wholesale crack traffickers purchase cocaine in kilogram or multikilogram allotments from traditional cocaine sources. They will either package the cocaine into ounce quantities or convert it to crack and then divide into ounces for sale at the next level . . . . Crack distributors further divide the

ounce, and one gram quantities. These quantities correspond approximately to the "stratification of traffickers into wholesalers buying kilograms and selling ounces and dealers buying ounces and selling in grams." [125]

Considering the Reuter model further, while upward mobility in the drug trade is easy, it does represent a narrowing of the trafficking "pyramid," thereby providing a smaller number of targets for law enforcement.[126] In contrast, sellers at the retail level are the most exposed and easiest targets for law enforcement, provide an almost unlimited number of cases for prosecution, and easily are replaced. Another attractive target for law enforcement is the drug importer. Conceptualizing an hourglass structure between the source country and the destination country, Reuter indicates that the importer represents the pinch point where the removal of one importer may make an important difference in the drug's distribution and availability on the street. Reuter notes, however, that successful prosecution of major importers is difficult in part because they employ large numbers of "low-level, unskilled labor" such that the organization is not greatly affected by seizures and arrests.[127]

The Commission's data analysis, presented in Chapter 2, is consistent with the presence of a pyramidal structure in drug trafficking, with the largest numbers of federal cocaine offenders performing lower level functions. Among federal powder cocaine offenders the largest proportion are couriers and mules, consistent with the need for a large number of low-level, unskilled laborers required to transport the drug into the United States. Among federal crack cocaine offenders, the largest proportion of offenders also are classified in a low-level function – that of street-level dealer (as expected, there are very few couriers/mules in the federal crack cocaine data given that very little cocaine enters the country in that form). There are substantially fewer defendants of either form of cocaine prosecuted at higher level functions in large part because there are fewer individuals at this level of the pyramid, (*i.e.*, the smallest number of offenders is at the importer/supplier or high-level distributor level, the narrower portion of the pyramid). (*See* Figures 2-5 and 2-6 in Chapter 2).

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This difference between the federal powder cocaine and crack cocaine cases by function also is consistent with the reported trafficking structure of cocaine, in which virtually all cocaine is imported in powder form. The increase in 2005 in the proportion of federal cocaine defendants engaged in the wholesale function may indicate an enhanced effort to target these "middle market" functions identified by Reuter. The Commission's data also demonstrate, at

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ounces into dosage units for sale at the retail level . . . . Mid-level distributors can be either members of larger groups or independent operators.")

[125] Anthony & Fries, *supra* note 124.

[126] Statement of Joseph T. Rannazzisi, Deputy Assistant Administrator for the Office of Diversion Control, Drug Enforcement Administration, to the Commission, regarding Cocaine Sentencing Policy, November 14, 2006, at Tr. 32.

[127] Reuter, *supra* note 119.

least for the wholesale function, that upward mobility indeed is possible in cocaine markets. This is evidenced by the data indicating that some offenders whose most serious function is a wholesaler usually act in lower level functions such as a street-level dealer. *See* Figure 2-9 in Chapter 2.

C. DRUG TRAFFICKING RELATED VIOLENCE

The Commission heard testimony in November 2006 that violence committed by crack cocaine *users* is relatively rare.[128] Almost all crack cocaine related violence is of the "systemic" type, that is, violence that occurs within the drug distribution process.[129] In describing the long term trends in violence in the United States, Professor Alfred Blumstein reported a 25 percent increase in violence between 1985 and 1993 that could be attributed almost entirely to an increase in the number of "young people with handguns. . .recruited into the crack market starting in [19]85" [130] as replacements for older sellers, large numbers of whom were imprisoned.[131]

In contrast, the more recent trend in violence in the United States has been a steady decline, by approximately 40 percent, between 1993 and 2000. Since 2000, the trend has been rather stable.[132] According to Blumstein, the reduction in violence is attributable to a reduction in new users of crack cocaine and a consequent reduction in the crack cocaine street markets.[133]

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[128] Written statement by Bruce D. Johnson, Ph.D., Director, Institute for Special Populations Research, to the Commission, regarding Cocaine Sentencing Policy, November 14, 2006, at 4.

[129] Bruce D. Johnson, *Patterns of Drug Distribution: Implications and Issues*, 38 SUBSTANCE USE & MISUSE 1795 (2003). This is consistent with the findings in the 1995 Commission Report that "Crack cocaine is associated with systemic crime - crime related to its marketing and distribution - to a greater degree than powder cocaine. Researchers and law enforcement officials report that much of the violence associated with crack cocaine stems from attempts by competing factions to consolidate control of drug distribution in urban areas. Some portion of the distribution of powder cocaine, and the majority of the distribution of crack cocaine, is done on street corners or open-air markets, crack houses, or powder shooting galleries between anonymous buyers and sellers. These distribution environments, by their very nature, are highly susceptible to conflict and intense competition. As a result, individuals operating in these surroundings are prone to be involved in, as well as victimized by, increased levels of violence. "

[130] Oral testimony of Alfred Blumstein, Ph.D., to the Commission, regarding Cocaine Sentencing Policy, November 14, 2006, at Tr. 201.

[131] *Id.*

[132] *Id.*

[133] *Id.*

Dr. Bruce Johnson, testifying about trends in powder cocaine and crack cocaine usage among arrestees in New York City, also reported a substantial decline in the number of arrestees with "detected cocaine/crack use."[134] He attributed this trend to a decline in the number of new, young crack cocaine users, who have left these markets to be sustained by older crack cocaine users who tend to be less violent.

Analysis of the Commission's sentencing data in Chapter 2 tends to corroborate these findings. Although weapon involvement, by the broadest of definitions, has increased since 2002 in both powder cocaine and crack cocaine offenses, the rate of actual *violence* involved in the offense, already relatively low, has declined further during this period. The recent increase in the number of cocaine cases in which a weapon was involved, as found in the Commission's data, may reflect federal law enforcement investigative and prosecutorial priorities apart from drug trafficking priorities. For example, federal law enforcement programs targeting firearms possession, such as Project Safe Neighborhood and other similar programs have been greatly expanded since 2001.

The aging of the crack cocaine population, without replacement by younger users, also is consistent with data reported by the Substance Abuse and Mental Health Services Administration (SAMHSA), an agency within the National Institute of Health. Figure 4-1 presents trends in drug treatment admissions[135] for crack cocaine users between 1992 and 2005. During this period, treatment admissions for clients aged 31-45 steadily increased from 43.3 percent of all admissions in 1992 to 66.8 percent by 2001. Since 2001, the proportion of all treatment admissions for that age group declined slightly to 60.2 percent. The period between 1992 and 2005 saw a corresponding decline in the proportion of clients aged 18-30, from 52.8 percent to 19.7 percent of all drug treatment admissions. A smaller but growing percentage of drug treatment admissions over this period is accounted for by the 46-60 age group. The proportion accounted for by this group steadily rose from 2.1 percent to 18.9 percent of all treatment admissions for crack cocaine.

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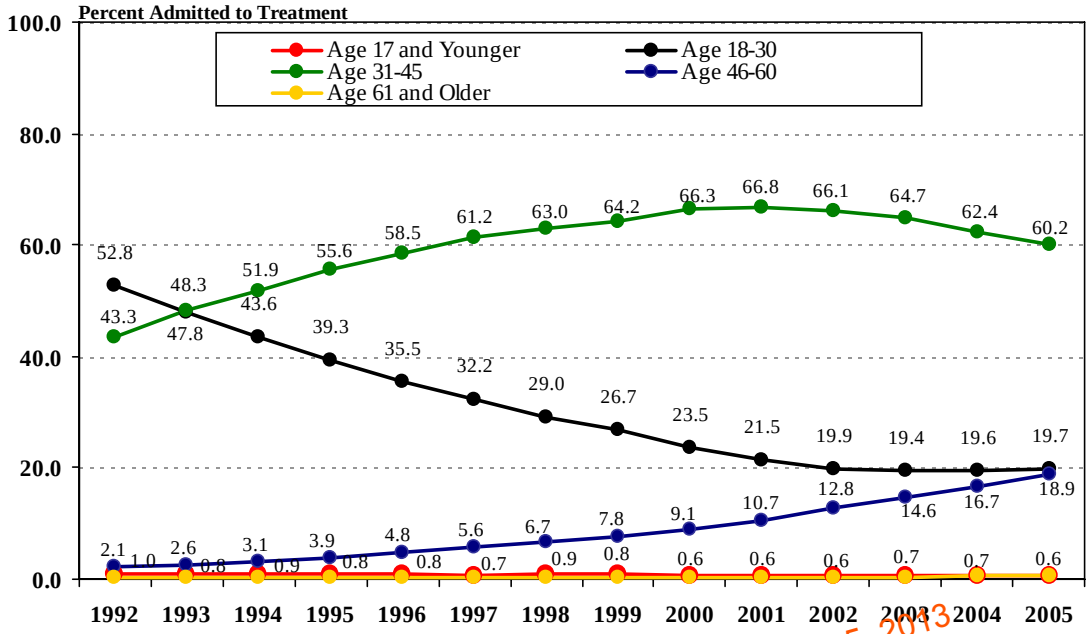
[134] Johnson, *supra* note 128.

[135] The TEDS series was designed to provide annual data on the number and characteristics of persons admitted to public and private substance abuse treatment programs receiving public funding. The unit of analysis is treatment admissions. A summary of the TEDS program is available at http://webapp.icpsr.umich.edu/cocoon/SAMHDA/STUDY/04626.xml.

Figure 4-1
Trends in Crack Cocaine Substance Abuse Treatment Admissions by Age Group
1992-2005



The percent of admissions for each year may not sum to 100 percent due to rounding. Admissions with unknown ages were excluded from this figure.
SOURCE: Substance Abuse & Mental Health Services Administration (SAMHSA): Quick Statistics from www.dasis.samhsa.gov.

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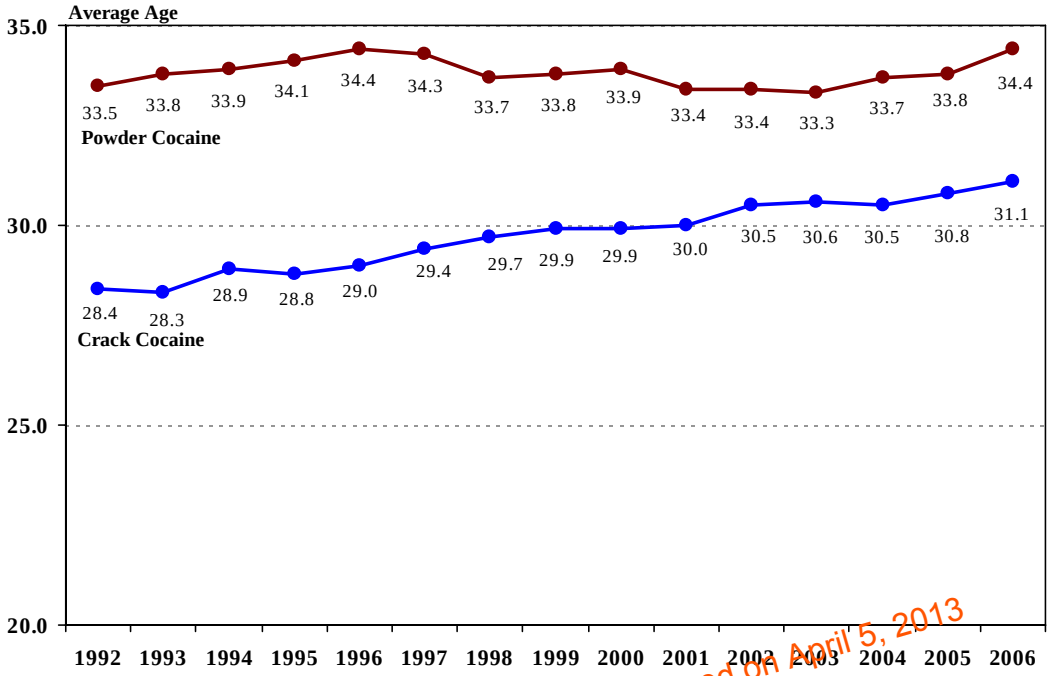
Figure 4-2
Trends in Average Age at Sentencing of
Powder Cocaine and Crack Cocaine Offenders
FY1992-FY2006



Only cases sentenced under USSG §2D1.1 (Drug Trafficking) with a primary drug type of powder cocaine or crack cocaine are included in this figure. This figure excludes cases with missing information for the variables required for analysis.

SOURCE: U.S. Sentencing Commission, 1992-2006 Datafiles, MONFY92 – USSCFY06.

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Likewise, in the Commission's data there is a clear, albeit slight, trend documenting the aging of the federal crack cocaine offender population. As can be seen in Figure 4-2, between 1992 and 2006, the average age of federal crack cocaine offenders steadily has risen from 28.4 years to 31.1 years. During this same period, the average age of powder cocaine offenders has remained steady, ranging between 33.5 years (1992) to 34.4 years (2006).

D. COCAINE PRICES AND PURITY[136]

The following analysis reviews data related to the purchase of illegal drugs in the United States collected and provided by the DEA. The information collected includes the type of drug, the quantity transacted, price, and the purity of powder cocaine. Although not collected in a manner that ensures that the information is fully representative of drug purity and price at the national level, DEA has the only national database containing this information, providing the best available measures of trends in cocaine prices,[137] and is the basis of numerous published research articles on drug trafficking trends.

1. Cocaine Prices

Figure 4-3 presents the trend from 1998 through 2005 in the average price of powder cocaine at purchase points of one kilogram, one ounce, and one gram. These are the quantity

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[136] Data on the price and purity of drugs is compiled by DEA from two sources. Price data is from DEA's *Traffic Reports*. Data on the purity of drugs is derived from the DEA's STRIDE dataset. Office of Domestic Intelligence, Drug Enforcement Administration, U.S. Department of Justice, *Illegal Drug Price and Purity Report* 3 (Feb. 8, 2007).

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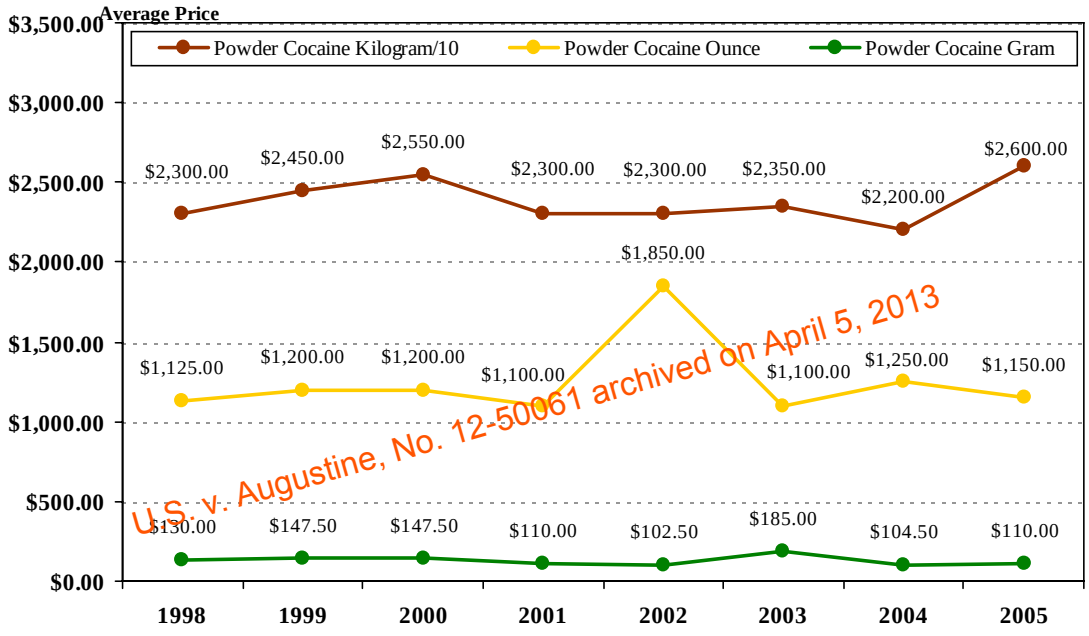
DEA price data is not presented as a single average price of the drug, but rather as a range of prices found within each of the 20 metropolitan areas from which this information is collected. The reported national range includes the lowest and highest prices from each of the metropolitan areas. For example, in 2002, the price range for a kilogram of cocaine in Miami was $8,000 - $30,000, and the price range for a kilogram of cocaine in Seattle was $10,000 - $38,000. Therefore the national range was presented as $8,000 - $38,000. Because one single point of reference was needed to analyze trends over time, a crude annual average value was calculated by adding the upper and lower values of the national range and dividing by two. In this example, the 2003 average price for a kilogram of cocaine is reported as $23,000. During some years, the national range included a price that was uncharacteristically high or low and substantially different than the other prices provided for that year. This method of calculating the average may introduce some variation that is not likely to be characteristic of purchase prices for that year. Other methods were explored, including dropping the outliers for each national range, or calculating the average of each of the 20 metropolitan areas, taking the sum and dividing by 20 to obtain a national average, but because of missing or reported data, these methods were abandoned in favor of the approach used to calculate the price data in each figure. Purity level data are presented in the STRIDE data by drug type and weight as national averages.

[137] The STRIDE data on drug purity are not randomly collected and thus are not necessarily representative of cocaine prices nationwide. Anthony and Fries point out that the STRIDE dataset is designed to record law enforcement purchases and priorities and does not attempt to create a balanced survey of drug transactions noting variations in the number of transactions of different drugs, the amounts purchased, and the geographic focus. Despite these limiting factors, the authors report that these "sampling distortions" have only "minimal impact on the utility of STRIDE for analyzing features and trends of relative prices." Anthony & Fries, *supra* note 124, at 8.

points at which most STRIDE purchases tightly cluster[138] and are the quantity levels reported by DEA in its publications. The average purchase price for each of these three quantities is presented in Figure 4-3 to compare trends in pricing over time. To facilitate this analysis, however, the price at the kilogram level was divided by ten. Overall, the price of cocaine at each of these three primary purchase levels has remained stable over the last several years, however, some fluctuations do occur.

Figure 4-3
Powder Cocaine Price Trends
Modified Average Powder Cocaine
1998-2005



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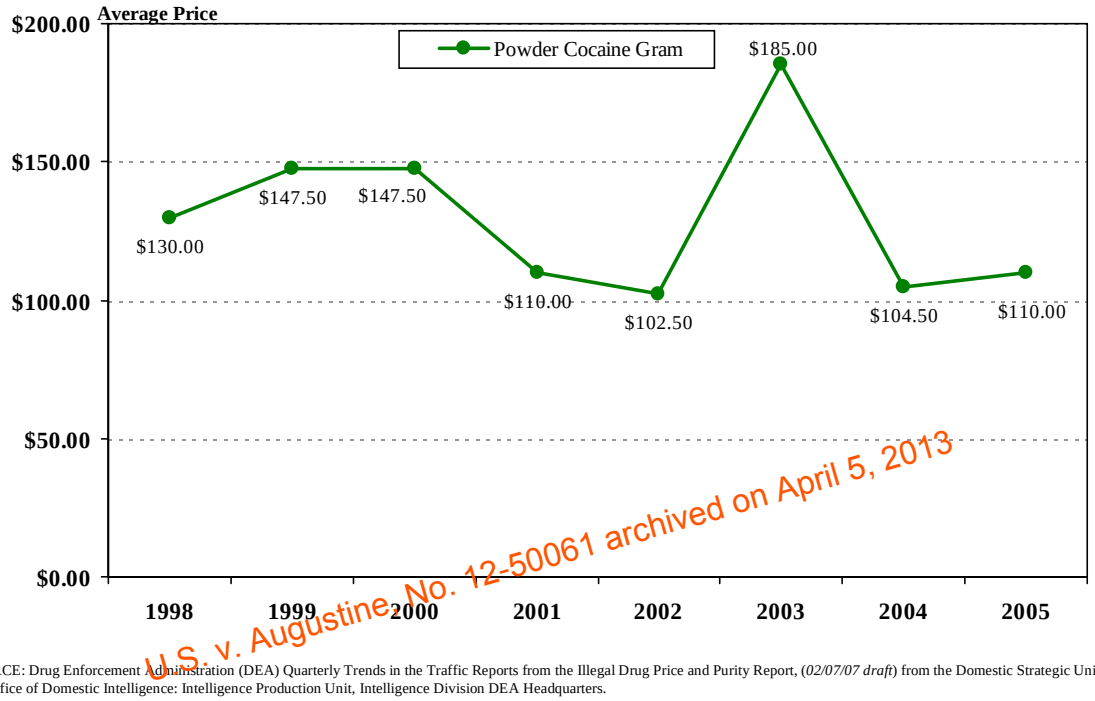
SOURCE: Drug Enforcement Administration (DEA) Quarterly Trends in the Traffic Reports from the Illegal Drug Price and Purity Report, (*02/07/07 draft*) from the Domestic Strategic Unit of the Office of Domestic Intelligence: Intelligence Production Unit, Intelligence Division DEA Headquarters.

From 1998 through 2005, the nationwide average kilogram price of powder cocaine has ranged between $22,000 and $26,000. Average ounce level prices also have been relatively stable, except for a one time jump in 2002. In 2002, the average ounce price reached $1,850, approximately 50 percent greater than the next highest average price during that period. For the other seven years depicted in Figure 4-3, the price ranged from $1,100 to $1,250. The greatest price variation is the trend of the average price per gram of powder cocaine, ranging between $102.50 and $185.

[138] *Id.*

To better demonstrate the fluctuation at the gram price of powder cocaine, Figure 4-4 presents those data alone.

Figure 4-4
Powder Cocaine Price Trends
Modified Average Powder Cocaine Gram
1998-2005

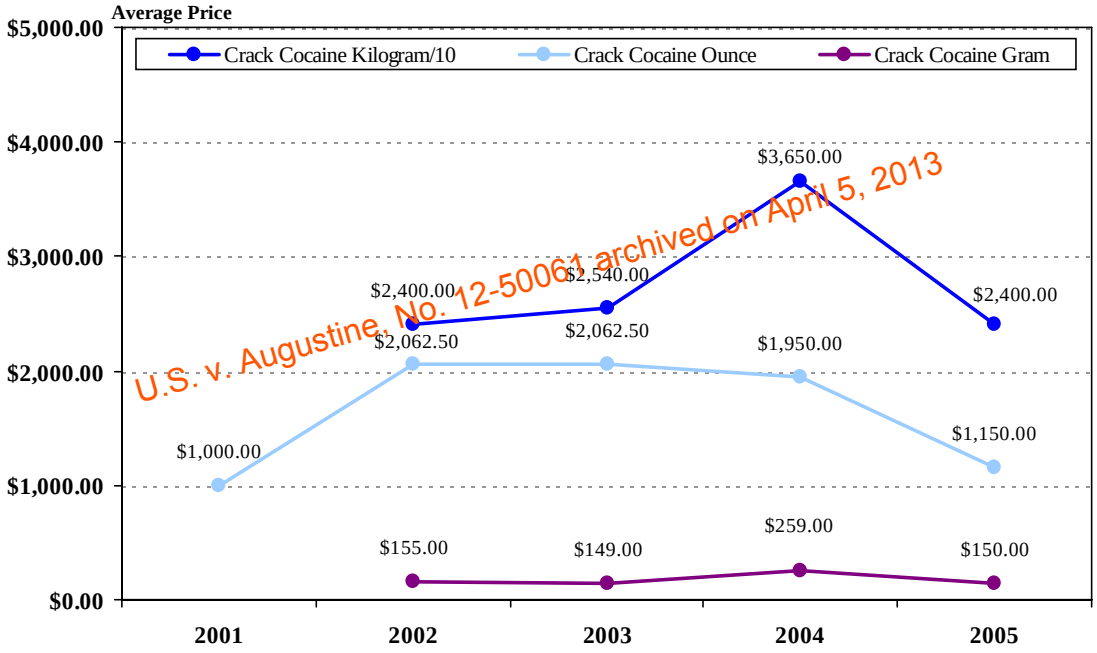


U.S. v. Augustine, No. 12-50061 archived on April 5, 2013

SOURCE: Drug Enforcement Administration (DEA) Quarterly Trends in the Traffic Reports from the Illegal Drug Price and Purity Report, (*02/07/07 draft*) from the Domestic Strategic Unit of the Office of Domestic Intelligence: Intelligence Production Unit, Intelligence Division DEA Headquarters.

The average price of crack cocaine at these quantity points is presented in Figure 4-5. Data on the average price per ounce of crack cocaine is available for the period between 2001 and 2005, although data on crack cocaine prices at the kilogram and gram level are only available since 2002. At the kilogram level, the nationwide average price spiked in 2004 to $36,500, substantially above the average prices in the other years, which ranged between $24,000 and $25,400. Average prices at the ounce level were $1,000 in 2001, rose to $2062.50 during 2002 and 2003, remained close to that price in 2004 ($1,950) and then dropped to $1,150 in 2005. Identical to the pattern displayed at the kilogram level, the average price per gram of crack cocaine peaked in 2004 at $259, substantially above the average price during the other years displayed (ranging from $149 to $155).

Figure 4-5
Crack Cocaine Price Trends
Modified Average Crack Cocaine
2001-2005



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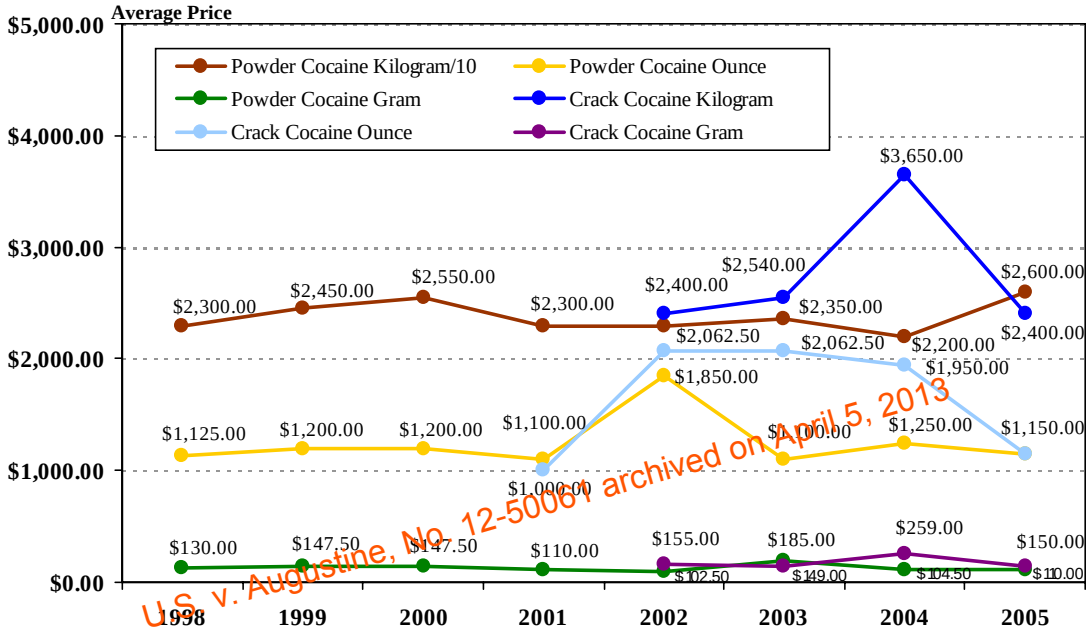
2001 data is unavailable for kilogram and gram quantities of crack cocaine.

SOURCE: Drug Enforcement Administration's (DEA) Quarterly Trends in the Traffic Reports from the Illegal Drug Price and Purity Report, (*02/07/07 draft*) from the Domestic Strategic Unit of the Office of Domestic Intelligence: Intelligence Production Unit, Intelligence Division DEA Headquarters.

Figure 4-6 displays average price data at these three quantity points for both powder cocaine and crack cocaine. Two conclusions may be drawn from these data: 1) the prices at each quantity point are much more similar than dissimilar regardless of the form of the cocaine; and 2) there seems to be little association between the price fluctuations in the two forms of the drug.

Figure 4-6
Powder Cocaine and Crack Cocaine Price Trends
Modified Average Powder Cocaine and Crack Cocaine
1998-2005



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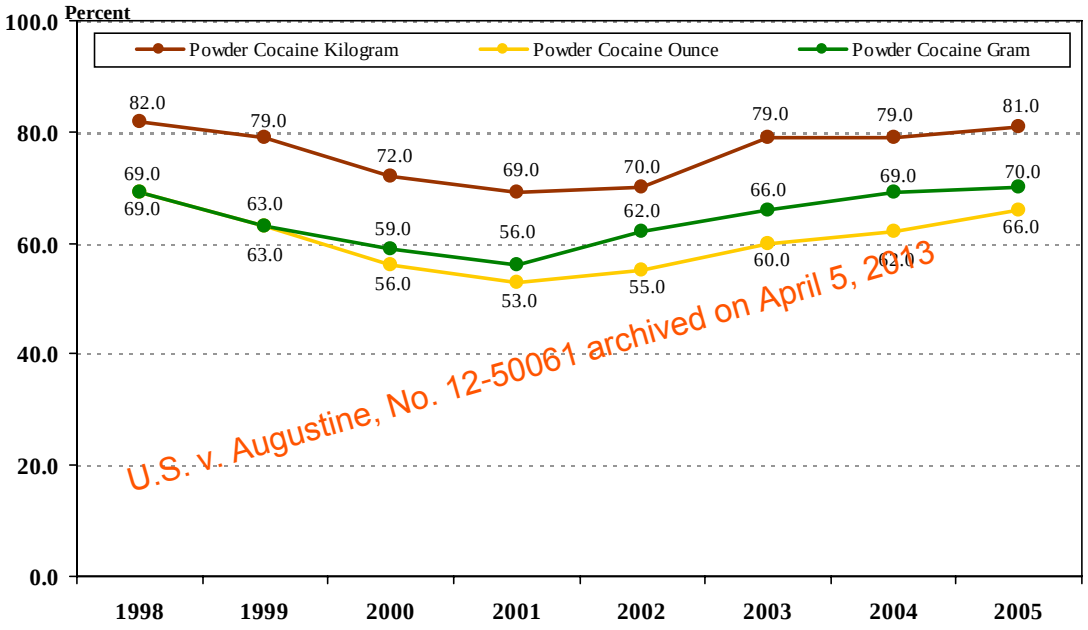
1998-2001 data is unavailable for crack cocaine. 2001 data is unavailable for kilogram and gram quantities of crack cocaine.

SOURCE: Drug Enforcement Administration (DEA) Quarterly Trends in the Traffic Reports from the Illegal Drug Price and Purity Report, (*02/07/07 draft*) from the Domestic Strategic Unit of the Office of Domestic Intelligence: Intelligence Production Unit, Intelligence Division DEA Headquarters.

2. Powder Cocaine Purity

Figure 4-7 presents data on the average purity of powder cocaine at the kilogram, ounce, and gram levels during the period between 1998 and 2005. The DEA does not maintain purity data for crack cocaine. The average purity of powder cocaine is highest at the kilogram level, with the drug ranging in average purity between 69 percent and 82 percent. Surprisingly, the average purity of powder cocaine at the ounce level is lower than the average purity of at the gram level during this period. The average purity of powder cocaine at the ounce level ranged from 53 to 69 percent pure; powder cocaine at the gram level ranged from 56 to 70 percent pure.

Figure 4-7
Powder Cocaine Average Purity Trends
1998-2005



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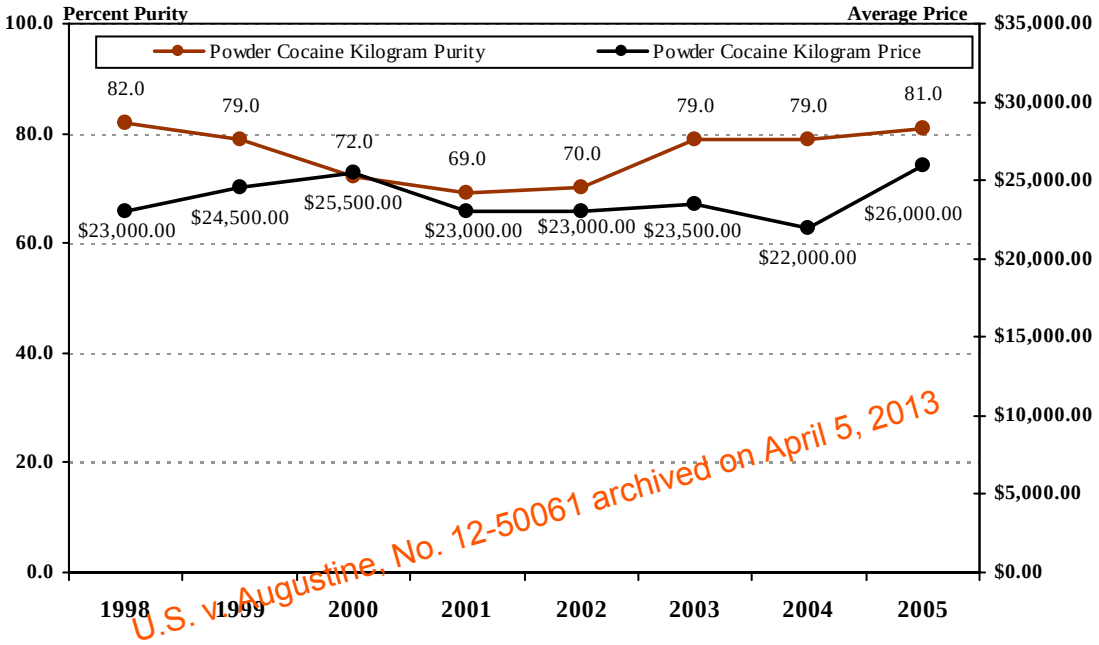
SOURCE: Drug Enforcement Administration (DEA) Quarterly Trends in the Traffic Reports from the Illegal Drug Price and Purity Report, (*02/07/07 draft*) from the Domestic Strategic Unit of the Office of Domestic Intelligence: Intelligence Production Unit, Intelligence Division DEA Headquarters.

Finally, Figures 4-8, 4-9, and 4-10 simultaneously present data on average price and average purity of powder cocaine purchases. The average purity is displayed on the left vertical axis and the average price is displayed on the right vertical axis. For example, in Figure 4-8, during 1999 the average purchase price for a kilogram of powder cocaine was $24,500 and the average purity that year was 79 percent.

Figure 4-8
Powder Cocaine
Average Purity and Price Per Kilogram
1998-2005

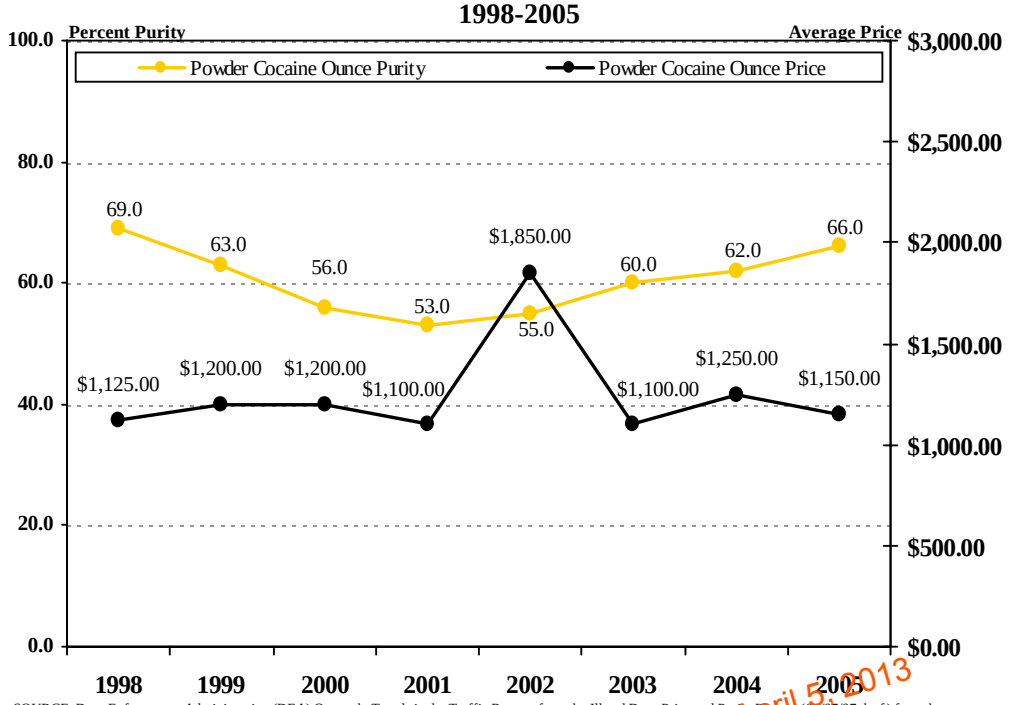


U.S. v. Augustine, No. 12-50061 archived on April 5, 2013

SOURCE: Drug Enforcement Administration (DEA) Quarterly Trends in the Traffic Reports from the Illegal Drug Price and Purity Report, (*02/07/07 draft*) from the Domestic Strategic Unit of the Office of Domestic Intelligence: Intelligence Production Unit, Intelligence Division DEA Headquarters.

It is difficult to see any strong correspondence between the average purchase price of powder cocaine and its average purity. Despite some annual variations between 1998 and 2005, the price and purity of powder cocaine in 1998 and in 2005 are remarkably similar.

Figure 4-9
Powder Cocaine
Average Purity and Price Per Ounce
1998-2005



SOURCE: Drug Enforcement Administration (DEA) Quarterly Trends in the Traffic Reports from the Illegal Drug Price and Purity Report) (*02/07/07 draft*) from the Domestic Strategic Unit of the Office of Domestic Intelligence: Intelligence Production Unit, Intelligence Division DEA Headquarters.

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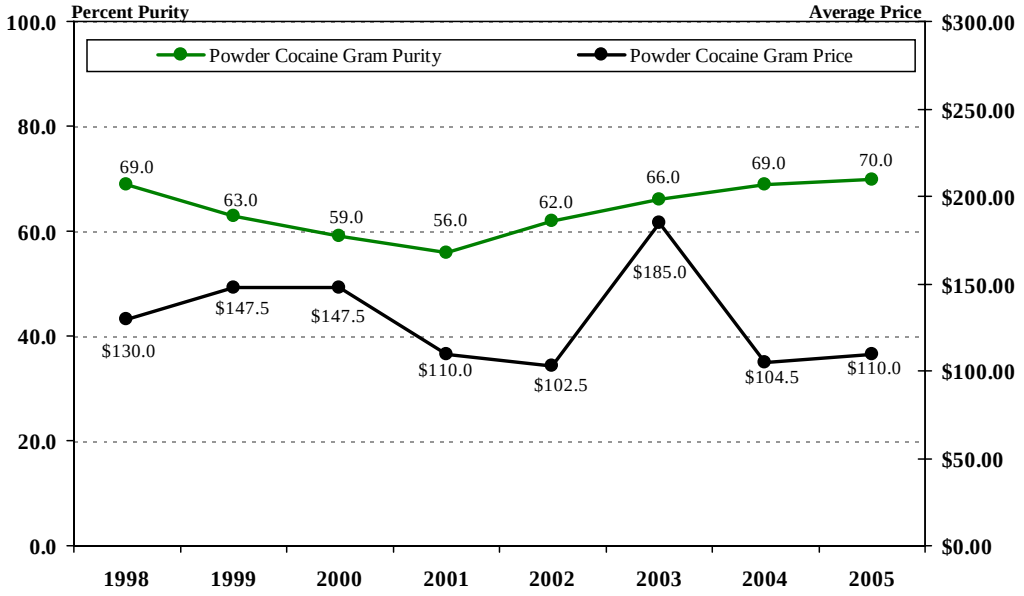
Figure 4-10
Powder Cocaine
Average Purity and Price Per Gram
1998-2005



SOURCE: Drug Enforcement Administration's (DEA) Quarterly Trends in the Traffic Reports from the Illegal Drug Price and Purity Report, (*02/07/07 draft*) from the Domestic Strategic Unit of the Office of Domestic Intelligence: Intelligence Production Unit, Intelligence Division DEA Headquarters.

Chapter 5

STATE SENTENCING POLICY AND POSSIBLE EFFECT ON FEDERAL PROSECUTORIAL DECISIONS

A. STATE COCAINE SENTENCING POLICIES

In order to provide some contextual framework in which to assess federal cocaine sentencing policy, the 1995 and 2002 Commission Reports included a survey of the state laws to determine whether and to what extent states distinguish between crack cocaine and powder cocaine penalties.[139] The Commission, in this report, updated its survey of relevant state laws in order to determine whether there have been any recent trends in state legislative action that might be relevant to evaluating federal cocaine sentencing policy.[140]

As a 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 the 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; and

(4) whether the state enacted or repealed statutes containing mandatory minimum penalties for drug offenses.

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The Commission reviewed relevant state statutes and guideline provisions. In addition, the Commission contacted each state sentencing commission, if such an agency existed within the state. Otherwise, the Commission surveyed the state agency responsible for collecting criminal justice data (*e.g.*, statistical analysis centers).

The overwhelming majority of states do not distinguish between powder cocaine and crack cocaine offenses. Only 13 states have some form of distinction between crack cocaine and powder cocaine in their penalty schemes, one less than in 2002. Connecticut previously distinguished between trafficking offenses involving crack cocaine and powder cocaine using a

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[139] 2002 COMMISSION REPORT, *supra* note 1, at 73-78; 1995 COMMISSION REPORT, *supra* note 1, at 129-138.

[140] Unless otherwise indicated, this chapter's use of the term "state" hereinafter signifies the states and territories contacted for the survey.

drug quantity ratio of 56.7-to-1.[141] A penalty of five years' to life imprisonment had been triggered by trafficking either in one ounce (28.5 grams) or more of powder cocaine or .5 grams or more of crack cocaine. In 2005, the Connecticut General Assembly eliminated the quantity disparity between crack cocaine and powder cocaine by raising the threshold quantity for crack cocaine to one-half ounce (approximately 14.25 grams) and reducing the threshold quantity for powder cocaine also to one-half ounce.

Iowa, the only state reported in the 2002 Commission Report as providing a 100-to-1 drug quantity ratio between powder cocaine and crack cocaine, has since reduced its drug quantity ratio to 10-to-1 for cocaine offenses in its statutory scheme.[142] Unlike the federal statutory scheme, however, Iowa distinguishes between crack cocaine and powder cocaine only for determining the statutory maximum penalties, not mandatory minimum penalties.

The Commission also examined whether states had sentencing guideline systems and whether imposed sentences were determinate (*i.e.*, sentence imposed as approximates 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). Twenty-seven states use some form of sentencing guidelines; and 40 states have determinate sentencing structures, some in combination with guidelines. Statutory mandatory minimum penalties exist in 41 states for certain drug offenses (*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).

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The penalties structures of the 13 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).[143] 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 of cocaine, 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

[141] Conn. Gen. Stat. Ann. § 21a-278(a) (West 2006).

[142] Iowa Code § 124.401 (2006).

[143] Ala. Code § 12-23-5(2)(b), (c) (2006).

15 years imprisonment; for ten kilograms or more, an offender is subject to a mandatory term of imprisonment of life without parole.[144]

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.[145] 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.[146] 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.[147]

3. California[148]

Offenders convicted of possession or possession with intent to sell crack cocaine or powder cocaine are sentenced to different terms under California law, depending on the threshold amount. A person convicted of possessing for sale a substance containing 14.25 grams or more of cocaine base or 57 grams or more of a substance containing at least five grams of cocaine base is subject to a sentenced of either a three, four, or five-year term of imprisonment, depending on whether aggravating or mitigating circumstances are present. Conversely, a person convicted of possessing for sale a substance containing 28.5 grams or more of powder cocaine or 57 grams or more of a substance containing cocaine is sentenced to either a two, three, or four-year term, depending on whether aggravating or mitigating circumstances are present.[149]

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[144] Ala. Code § 13A-12-231 (2006).

[145] Ariz. Rev. Stat. Ann. §§ 13-3408(A)(2), (B)(2), 13-701(C), 13-3401(36)(b), (c) (2006).

[146] Ariz. Rev. Stat. Ann. § 13-702(A)(1) (2006).

[147] Ariz. Rev. Stat. Ann. §§ 3401(36), 3408(D) (2006).

[148] The state of California currently does not have sentencing guidelines. A governor's proposal to create a sentencing commission, however, was included within the state budget proposed for 2007-2008 and is scheduled for a vote by the state legislature in July, 2007.

[149] Cal. Penal Code § 1203.073(b)(1) and (5) (West 2006); Cal. Health & Safety Code §§ 11351.5, 11351 (West 2006). Under California's Determinate Sentencing Law (DSL), the sentencing judge must sentence an offender to the middle statutory range absent a finding by the judge of certain aggravating or mitigating circumstances. In *Cunningham v. California*, 127 S.Ct. 856 (Jan. 22, 2007), the Supreme Court struck down California's DSL on grounds that it violated the Sixth Amendment's jury trial right, as interpreted by the Court in the *Apprendi* line of cases. Unlike the *Booker* opinion, the Court did not set forth a remedy. In response, the California legislature recently passed SB 40, which essentially makes the California DSL advisory in nature.

Possession with intent to sell still 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.

4. Iowa

Iowa distinguishes between trafficking offenses involving crack cocaine and powder cocaine using a 10-to-1 drug quantity ratio. In the 2002 Commission Report, Iowa was the only state reported as having a 100-to-1 drug quantity ratio for crack cocaine and powder cocaine similar to the federal statutes. In 2003, Iowa lowered its ratio from 100-to-1 to 10-to-1 by amending Iowa Code section 124.401 in order to "align, using a 10-to-1 ratio, the threshold amount for a conviction of a cocaine-related offense with a 'crack cocaine' offense."[150] The 10-to-1 ratio still is reflected only in the threshold amounts that determine the maximum statutory penalty, and not in the mandatory minimum penalty. For example, more than 500 grams of powder cocaine or more than 50 grams of cocaine base trigger a maximum penalty of 50 years' imprisonment. An offender with more than 50 grams of powder cocaine or more than five grams of cocaine base is subject to a maximum penalty of 25 years' imprisonment.[151] Essentially, an offender must have 10 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.[152]

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5. 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.[153] 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.[154]

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[150] 2003 Iowa Legis. Serv. P. 4, Senate File 422, by Committee on Judiciary (Thomson/West).

[151] Iowa Code § 124.401 (2006).

[152] Iowa Code § 124.401 (2006).

[153] Me. Rev. Stat. Ann. tit. 17, § 1103(3) (2007).

[154] Me. Rev. Stat. Ann. tit. 17, §§ 1105-A(D), 1252(5-A) (2007).

6. 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.[155]

7. Missouri

Missouri differentiates between offenses involving powder cocaine and crack cocaine using a 75-to-1 drug quantity ratio. Offenders who traffic 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 grams trigger the same penalty. Offenders who traffic 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. Class A felonies carry an imprisonment term of not less than ten years and not more than 30 years.[156]

8. 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 (142.5 grams) or more of powder cocaine. The same penalty applies for trafficking in five grams or more of cocaine base.[157]

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9. North Dakota

North Dakota differentiates between offenses involving powder cocaine and crack cocaine using a 10-to-1 ratio.[158] Mandatory minimums apply if an offender has prior offenses. An offender who is found guilty of a second 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 20 years imprisonment.[159] In North Dakota, however, a first time offender has an enhanced penalty that provides a maximum of life imprisonment with or without an opportunity for parole for trafficking 50 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

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[155] Md. Code Ann., Crim. Law § 5-612(a)(2), (4), -612(c)(1) (West 2006).

[156] Mo. Ann. Stat. § 195.222(2) (West 2006).

[157] N.H. Rev. Stat. Ann. § 318-B:26(I)(a)(1), (3) (2006).

[158] N.D. Cent. Code § 19-03.1-23.1(1)(c)(2), (3) (2005).

[159] N.D. Cent. Code § 19-03.1-23(1)(a)(1), (2) (2005).

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.[160]

10. 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.[161] 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.[162] 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 cocaine base) and prescribes a mandatory minimum term of ten years' imprisonment with an additional one to ten-year term subject to judicial discretion.[163]

11. 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.[164]

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12. 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

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[160] N.D. Cent. Code § 12.1-32-01(1), (2) (2005).

[161] Ohio Rev. Code Ann. § 2925.01(X), (GG) (West 2006).

[162] Ohio Rev. Code Ann. § 2925.11(C)(4)(b)-(f) (West 2006).

[163] Ohio Rev. Code Ann. § 2925.03(4)(a)-(g) (West 2006).

[164] Okla. Stat. Ann. tit. 63, §§ 2-415(C)(2), (7), 2-401 (West 2006).

imprisonment.[165] Offenses involving ten grams or more of powder cocaine 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).[166]

13. Virginia

Virginia's statutes generally do not distinguish between offenses involving powder cocaine and crack cocaine. 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 distribution statute, however, does distinguish between the two forms of cocaine using a 2-to-1 drug quantity ratio. Under this statute, an offender who traffics 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.

Table 5-1
State Cocaine Penalties

STATE	Crack/Powder Distinction	Guidelines System	Determinate Sentencing	Drug Mandatory Minimum
Total Affirmative Responses	**14**	**27**	**18**	**41**
Alabama	No	Yes	Yes	Yes
Alaska	No	Yes	No	Yes
Arizona	Yes	No	Yes	Yes
Arkansas	No	Yes	No	Yes
California	Yes	No	No	Yes
Colorado	No	No	Yes	Yes
Connecticut	No	No	No	Yes
Delaware	No	Yes	Yes	Yes
District of Columbia	No	Yes	Yes	No
Florida	No	Yes	No	Yes

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[165] S.C. Code Ann. §§ 44-53-370(d)(4), (e)(2), 44-53-375(B)(2) (2006).

[166] S.C. Code Ann. § 44-53-370(e)(2)(a)(2) (2006).

Table 5-1
State Cocaine Penalties

STATE	Crack/Powder Distinction	Guidelines System	Determinate Sentencing	Drug Mandatory Minimum
Georgia	No	No	Yes	Yes
Hawaii	No	No	No	No
Idaho	No	No	No	Yes
Illinois	No	Yes	Yes	Yes
Indiana	No	Yes	Yes	Yes
Iowa	Yes (10:1 ratio)	No	No	Yes
Kansas	No	Yes	Yes	No[167]
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	Yes	Yes
Massachusetts	No	Yes	No	Yes
Michigan	No	Yes	No	No[168]
Minnesota	No	Yes	No	No
Missouri	Yes (75:1 ratio)	Yes	No	Yes
Montana	No	No	No	Yes
Nebraska	No	No	No	Yes
Nevada	No	No	No	Yes
New Hampshire	Yes (28:1 ratio)	No	Yes	Yes
New Jersey	No	Yes	No	Yes
New Mexico	No	Yes	Yes	Yes
New York	No	No	Yes	Yes
North Carolina	No	Yes	Yes	Yes
North Dakota	Yes (10:1 ratio)	No	No	Yes

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[167] Kansas repealed the mandatory minimums for drug offenses in 2003. *See* 2003 Senate Bill 123, http://www.kansas.gov/ksc/goals.shtml.

[168] Michigan repealed the mandatory minimums for drug offenses in 2002. *See* MCLS § 333.7401 and Public Act 665.

Table 5-1
State Cocaine Penalties

STATE	Crack/Powder Distinction	Guidelines System	Determinate Sentencing	Drug Mandatory Minimum
Ohio	Yes (2:1 minimum ratio; 10:1 maximum ratio)	Yes	Yes	Yes
Oklahoma	Yes (6:1 ratio)	Yes	No	Yes
Oregon	No	Yes	Yes	No
Pennsylvania	No	Yes	No	Yes
Rhode Island	No	Yes	No	Yes
South Carolina	Yes	Yes	No	Yes
South Dakota	No	No	Yes	Yes
Tennessee	No	Yes	Yes	Yes
Texas	No	No	No	Yes
Utah	No	Yes	No	Yes
Vermont	Yes (5:1 ratio)	No	No	No
Virgin Islands	No	No	No	Yes
Virginia	Yes (2:1)	Yes	Yes	Yes
Washington	No	Yes	Yes	No
West Virginia	No	No	No	Yes
Wisconsin	No	Yes	Yes	No[169]
Wyoming	No	No	No	No

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[169] Wisconsin repealed the mandatory minimums for drug offenses on February 1, 2003 under the Uniform Controlled Substance Act.

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. Only a small minority of all drug offenses are prosecuted federally. During the last decade, there have been between one and one and one-half million arrests for drug violations annually, and state courts have imposed sentence for about one-third of a million drug convictions annually.[170] By contrast, 25,013 federal offenders were sentenced under the primary drug trafficking guideline in fiscal year 2006.[171] 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."[172]

Because the states generally have not adopted the federal penalty structure for cocaine offenders, the decision whether to prosecute at the federal or state level can have an especially significant effect on the ultimate sentence imposed on an individual crack cocaine offender. Differences in federal prosecutorial practices nationwide occur for a number of reasons. For example, federal resources in a specific jurisdiction may be prioritized toward a specific drug type that is particularly problematic for that jurisdiction. The Department of Justice reports that the comparative laws in a jurisdiction also play an important role in determining whether a particular case is brought in federal or state court.[173]

Table 5-2 suggests that there are significant differences in the types of cocaine cases brought in the various federal districts. For each district, Table 5-2 shows the number of crack cocaine and powder cocaine cases and the median drug quantity involved for each form of cocaine. The districts are listed in ascending order by the median quantity of crack cocaine. Among districts with at least 30 crack cocaine cases in Fiscal Year 2006, the five districts with the greatest median drug quantity were Northern Iowa (320.9 grams), Northern Florida (238.4 grams), Eastern North Carolina (176.4 grams), Central Illinois (101.7 grams), and Eastern Pennsylvania (98.3 grams). Among districts with at least 30 crack cocaine cases in Fiscal Year 2006, seven had a median drug quantity of less than 25 grams; the five districts with the smallest median drug quantity were New Hampshire (3.1 grams), Southern West Virginia (14.0 grams), Eastern Kentucky (15.4 grams), Nebraska (17.0 grams), and Eastern Missouri (21.3 grams).

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Even among some districts within the same state there are some significant variations in

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[170] Federal Bureau of Investigation, Uniform Crime Reports, *Crime in the United* States, 1995-2005; U.S. Department of Justice, Bureau of Justice Statistics, State *Court Sentencing of Convicted Felons*, 1992, 1994, 1996, 1998, 2000, 2002.

[171] USSC, *2006 Sourcebook of Federal Sentencing Statistics*, *supra* note 15, Table 17.

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

[173] R. Alexander Acosta, United States Attorney of the Southern District of Florida, testified that "much of what goes federal versus state is a function of comparative laws in any jurisdiction because, in any large operation, we sit down with our colleagues at the state and we divvy up cases based on who's likely to get the more appropriate or the stronger criminal sanctions." *Supra* note 38, at Tr. 38-9.

the types of crack cocaine cases prosecuted. For example, in Northern Florida the median quantity of crack cocaine is 238.4 grams, compared to 50.8 grams in Middle Florida. Similarly, in Central Illinois the median quantity of crack cocaine is 101.7 grams, compared to 54.1 grams in Southern Illinois.

Table 5-2
Median Drug Weight for Powder Cocaine and Crack Cocaine Cases in Each Federal District
Fiscal Year 2006

	Primary Drug Type			
	Crack Cocaine		Powder Cocaine	
District	Number of Cases	Median Weight (Grams)	Number of Cases	Median Weight (Grams)
All Districts	**4,262**	**51.0**	**4,140**	**6,000.0**
Guam	0	-	0	-
Northern Mariana Islands	0	-	0	-
Virgin Islands	0	-	6	18,200.0
North Dakota	0	-	4	989.0
Idaho	1	2.3	2	10,563.0
New Hampshire	41	3.1	10	200.5
West Virginia, Southern	62	14.0	18	63.4
Vermont	5	14.8	6	567.0
Kentucky, Eastern	49	15.4	45	283.5
Nebraska	61	17.0	18	5,950.0
Kansas	41	19.0	46	4,505.0
Missouri, Eastern	130	21.3	22	1,482.3
Kentucky, Western	28	21.7	21	986.9
New York, Western	49	25.0	15	520.0
Texas, Eastern	94	25.7	64	15,070.0
Indiana, Northern	50	26.1	24	657.3
New York, Northern	37	26.7	17	1,000.0
Texas, Western	127	27.3	295	4,900.0
Washington, Eastern	13	28.5	7	992.3
New Mexico	23	29.0	53	2,330.0
California, Northern	18	30.2	20	1,126.5
Florida, Southern	104	30.2	305	19,800.0
Ohio, Northern	80	30.4	43	2,988.8
Tennessee, Eastern	43	31.4	39	3,000.0
West Virginia, Northern	89	31.5	12	124.8
Rhode Island	20	31.9	18	4,003.8
Alabama, Northern	35	32.6	34	5,000.0
Texas, Southern	70	33.3	523	11,040.0
California, Southern	1	33.6	97	22,020.0
Michigan, Eastern	60	34.5	48	2,189.9
Georgia, Middle	76	34.9	20	761.9
Pennsylvania, Western	60	36.3	17	1,500.0

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Table 5-2
Median Drug Weight for Powder Cocaine and Crack Cocaine Cases in Each Federal District
Fiscal Year 2006

	Primary Drug Type			
	Crack Cocaine		Powder Cocaine	
District	Number of Cases	Median Weight (Grams)	Number of Cases	Median Weight (Grams)
Colorado	30	37.3	26	1,875.0
Alabama, Middle	17	38.5	10	1,979.5
Washington, Western	30	45.7	25	2,300.0
Mississippi, Northern	37	45.9	10	8,000.0
Tennessee, Western	35	46.0	16	12,675.0
Michigan, Western	48	47.1	21	2,020.0
District of Columbia	78	47.4	16	953.5
Tennessee, Middle	10	47.5	28	3,320.0
Alabama, Southern	64	49.3	25	500.0
Florida, Middle	180	50.8	326	550,000.0
Alaska	11	51.7	12	4,098.5
Ohio, Southern	81	52.9	64	13,500.0
Louisiana, Middle	17	53.1	2	8,079.4
Minnesota	38	53.9	25	1,400.7
Illinois, Southern	38	54.1	13	8,000.0
Massachusetts	53	54.9	50	2,720.0
Arkansas, Eastern	23	55.3	17	1,910.0
Virginia, Eastern	253	56.0	78	2,216.6
Virginia, Western	123	56.0	22	2,953.6
New York, Southern	78	56.3	121	20,000.0
Connecticut	55	56.5	14	1,000.0
Louisiana, Western	80	58.5	26	5,956.9
Texas, Northern	67	59.5	62	10,250.0
Georgia, Southern	35	60.6	14	1,793.2
Nevada	10	62.9	4	5,830.0
Utah	1	66.3	14	1,310.4
Arkansas, Western	5	67.1	1	2,010.8
Hawaii	7	67.5	10	1,706.0
North Carolina, Western	66	67.5	49	3,000.0
Pennsylvania, Middle	63	69.0	12	1,835.0
New York, Eastern	67	73.8	112	5,000.0
Oklahoma, Western	5	74.9	19	40,000.0
Maine	15	75.6	21	992.3
Illinois, Northern	79	76.3	131	4,500.0
Missouri, Western	61	76.4	40	991.3
North Carolina, Middle	60	76.8	42	7,900.0
Puerto Rico	12	77.5	48	332,350.0
California, Eastern	35	86.5	9	3,000.0
Wisconsin, Eastern	22	87.4	28	1,000.0
Oklahoma, Northern	20	88.1	6	5,900.0

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Table 5-2
Median Drug Weight for Powder Cocaine and Crack Cocaine Cases in Each Federal District
Fiscal Year 2006

	Primary Drug Type			
	Crack Cocaine		Powder Cocaine	
District	Number of Cases	Median Weight (Grams)	Number of Cases	Median Weight (Grams)
Wisconsin, Western	27	88.2	15	1,600.0
Delaware	15	90.5	6	613.8
Maryland	46	91.6	39	2,340.0
Mississippi, Southern	33	93.7	22	8,920.0
South Carolina	154	95.6	75	1,996.2
Georgia, Northern	25	96.6	43	30,000.0
New Jersey	48	97.0	57	5,000.0
Pennsylvania, Eastern	64	98.3	49	1,992.0
Illinois, Central	62	101.7	25	6,528.0
Louisiana, Eastern	21	107.9	10	997.0
South Dakota	6	109.5	9	1,500.0
Oregon	5	112.9	12	2,117.7
California, Central	27	120.0	30	5,050.0
Arizona	4	143.0	147	13,040.0
Iowa, Southern	12	147.1	7	12,730.0
North Carolina, Eastern	118	176.4	74	2,453.0
Indiana, Southern	24	182.4	16	4,285.0
Florida, Northern	51	238.4	57	5,000.0
Iowa, Northern	34	320.9	9	500.0
Oklahoma, Eastern	4	907.3	4	9,460.0
Montana	1	1,555.0	10	605.2
Wyoming	5	2,420.0	6	1,325.0

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Of the 23,701 cases with complete sentencing guideline information sentenced under the primary drug trafficking guideline, USSG §2D1.1, 5,164 had crack cocaine and 5,442 had powder cocaine as their primary drug type. Due to missing drug weight data, 902 of the 5,164 crack cocaine cases and 1,302 of the 5,442 powder cocaine cases were excluded from the table.

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

Table 5-3 shows the prevalence of federal crack cocaine cases involving relatively small drug quantities (less than 25 grams) in the various jurisdictions. Nationwide, 35.1 percent of crack cocaine cases in 2006 involved less than 25 grams of the drug, compared to 28.5 percent in 2000. Among districts with at least 30 crack cocaine cases, six districts prosecuted crack cocaine offenses involving less than 25 grams in over 50 percent of their crack cocaine caseload (New Hampshire, Eastern Kentucky, Southern West Virginia, Eastern Missouri, Kansas, and Nebraska). In contrast, among districts with at least 30 crack cocaine cases, the following districts had a relatively small proportion of cases involving less than 25 grams: Southern

Georgia (8.6%), Northern Iowa (8.8%), Southern Mississippi (12.1%), Northern Florida (13.7%), and Middle North Carolina (15.0%). Eight districts which had at least one crack cocaine case in 2006 did not have any case involving less than 25 grams (Western Arkansas, South Dakota, Southern California, Montana, Oregon, Eastern Oklahoma, Utah, and Wyoming), but these district each had six or fewer crack cocaine cases.

The prevalence of crack cocaine cases involving less than 25 grams in part can be attributable to the relatively low drug quantity threshold quantities for the mandatory minimum penalties for crack cocaine. Figure 2-10 from Chapter 2 shows drug quantities in federal cocaine cases tend to cluster around the mandatory minimum threshold quantities, and Department of Justice testimony confirms the role that the mandatory minimum threshold quantities might play in prosecutorial decision-making.[174]

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[174] *See* Acosta, *supra* note 38, at Tr. 50-51 ("[S]ome of the data may show that prosecutions do tend to focus around mandatory minima. In part that may be a function of the particular cases the United States Attorneys take; in part also that may be a function of what a prosecutor is willing to do. Often it is the case that if you have enough to go after someone at a particular level, rather than push the envelope, rather than spend more time gathering more evidence, rather than make a case more complex, a prosecutor will say this is enough to obtain the result that we believe is warranted.").

Table 5-3
Number of Crack Cocaine Cases With Less Than 25 Grams in Each Federal Judicial District
Fiscal Year 2006

District	Total Crack Cocaine Cases	Crack Cocaine Cases with Less than 25g: Number	Crack Cocaine Cases with Less than 25g: Percent
All Districts	**4,262**	**1,497**	**35.1**
Idaho	1	1	100.0
New Hampshire	41	37	90.2
Kentucky, Eastern	49	33	67.3
Vermont	5	3	60.0
West Virginia, Southern	62	37	59.7
Missouri, Eastern	130	75	57.7
Kentucky, Western	28	16	57.1
Kansas	41	22	53.7
Nebraska	61	32	52.5
New York, Western	49	24	49.0
New York, Northern	37	18	48.6
West Virginia, Northern	89	43	48.3
Texas, Western	127	61	48.0
Texas, Eastern	94	44	46.8
Tennessee, Eastern	43	20	46.5
Washington, Eastern	13	6	46.2
Indiana, Northern	50	23	46.0
Rhode Island	20	9	45.0
Michigan, Eastern	60	27	45.0
Ohio, Northern	80	36	45.0
California, Northern	18	8	44.4
Texas, Southern	70	31	44.3
New Mexico	23	10	43.5
Florida, Southern	104	45	43.3
Mississippi, Northern	37	16	43.2
Maine	15	6	40.0
Pennsylvania, Western	60	24	40.0
Alabama, Northern	35	14	40.0
Georgia, Middle	76	30	39.5
District of Columbia	78	30	38.5
Virginia, Eastern	253	95	37.5
Tennessee, Western	35	13	37.1
Illinois, Southern	38	14	36.8
Colorado	30	11	36.7
Florida, Middle	180	66	36.7

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Table 5-3
Number of Crack Cocaine Cases With Less Than 25 Grams in Each Federal Judicial District
Fiscal Year 2006

District	Total Crack Cocaine Cases	Crack Cocaine Cases with Less than 25g: Number	Crack Cocaine Cases with Less than 25g: Percent
Michigan, Western	48	17	35.4
Louisiana, Middle	17	6	35.3
Alabama, Middle	17	6	35.3
Alabama, Southern	64	22	34.4
Louisiana, Western	80	27	33.8
Puerto Rico	12	4	33.3
Massachusetts	53	17	32.1
Virginia, Western	123	39	31.7
California, Eastern	35	11	31.4
Texas, Northern	67	21	31.1
North Carolina, Western	66	20	30.3
Pennsylvania, Middle	63	19	30.2
Tennessee, Middle	10	3	30.0
Nevada	10	3	30.0
Washington, Western	30	9	30.0
Oklahoma, Northern	20	6	30.0
South Carolina	154	46	29.9
Ohio, Southern	81	23	28.4
New York, Southern	78	22	28.2
Illinois, Central	62	17	27.4
Alaska	11	3	27.3
Arkansas, Eastern	23	6	26.1
Connecticut	55	14	25.5
Pennsylvania, Eastern	64	16	25.0
Iowa, Southern	12	3	25.0
Arizona	4	1	25.0
Minnesota	38	9	23.7
Wisconsin, Eastern	22	5	22.7
Wisconsin, Western	27	6	22.2
New York, Eastern	67	14	20.9
Oklahoma, Western	5	1	20.0
Georgia, Northern	25	5	20.0
Maryland	46	9	19.6
New Jersey	48	8	16.7
Indiana, Southern	24	4	16.7
Illinois, Northern	79	13	16.5
Missouri, Western	61	10	16.4
North Carolina, Eastern	118	18	15.3
North Carolina, Middle	60	9	15.0

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Table 5-3
Number of Crack Cocaine Cases With Less Than 25 Grams in Each Federal Judicial District
Fiscal Year 2006

District	Total Crack Cocaine Cases	Crack Cocaine Cases with Less than 25g	
		Number	Percent
California, Central	27	4	14.8
Hawaii	7	1	14.3
Florida, Northern	51	7	13.7
Mississippi, Southern	33	4	12.1
Louisiana, Eastern	21	2	9.5
Iowa, Northern	34	3	8.8
Georgia, Southern	35	3	8.6
Delaware	15	1	6.7
Arkansas, Western	5	0	0.0
South Dakota	6	0	0.0
California, Southern	1	0	0.0
Montana	1	0	0.0
Oregon	5	0	0.0
Oklahoma, Eastern	4	0	0.0
Utah	1	0	0.0
Wyoming	5	0	0.0
North Dakota	0	-	-
Virgin Islands	0	-	-
Guam	0	-	-
Northern Mariana Islands	0	-	-

Of the 23,701 cases with complete sentencing guideline information sentenced under the primary drug trafficking guideline, USSG §2D1.1, 5,164 had crack cocaine as the primary drug type. Of these 5,164 crack cocaine cases, 902 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.

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

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Chapter 6

CASE LAW DEVELOPMENTS

A. INTRODUCTION

Since the 2002 Commission Report, case law has developed that has significantly altered the landscape of federal sentencing. In particular, in 2005 the Supreme Court in *United States v. Booker*[174] extended its holding in *Blakely v. Washington*[175] to federal sentencing and held that the imposition of an enhanced sentence under the federal sentencing guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) violated the Sixth Amendment right to jury trial. In the remedial portion of the decision, the Court severed and excised two statutory provisions, 18 U.S.C. § 3553(b)(1), which made the guidelines mandatory, and 18 U.S.C. § 3742(e), a related appeals provision, effectively rendering the guidelines advisory. Under the approach set forth by the Court, "district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing," subject to review by the courts of appeals for "unreasonableness."[176]

The *Booker* decision has given rise to litigation and resulted in a split among the circuits on the issue of whether, and how, sentencing courts should consider the 100-to-1 drug quantity ratio when sentencing federal cocaine offenders. Although sentencing courts generally are attempting to avoid perceived unwarranted sentencing disparity caused by the 100-to-1 drug quantity ratio, the very fact that sentencing courts are considering the ratio to varying degrees and in varying methods — and the circuit split that has ensued — itself may lead to unwarranted sentencing disparity.

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B. *United States v. Booker*

Prior to *Booker*, the issue arose whether the 100-to-1 drug quantity ratio may properly form the basis for a downward departure from the guideline sentencing range. This factor was typically asserted by defendants as "a … mitigating circumstance 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" provided by the applicable guideline sentencing range. This language governed both the statutory requirements for a departure, 18 U.S.C. § 3553(a)(2), and the guidelines' general policy statement regarding departures, U.S.S.G. §5K2.0 (Grounds for

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[174] 543 U.S. 220 (2005).

[175] 542 U.S. 296 (2004) (holding that any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt).

[176] 543 U.S. at 264.

Departure). Circuit courts uniformly held that, when sentencing crack cocaine offenders, district courts were not permitted to depart downward from the guideline sentencing range based on a policy disagreement with the 100-to-1 drug quantity ratio.[177]

Since the *Booker* decision excised the language governing departures from section 3553(a)(2), defendants have made similar arguments based on 18 U.S.C. § 3553(a)[178] findings in prior Commission reports on federal cocaine sentencing policy. Specifically, the issue has arisen whether, in considering the factors set forth in section 3553(a), the 100-to-1 drug quantity ratio may properly form the basis for a sentence below the guideline sentencing range. Post-*Booker*, defendants typically have asserted that the 100-to-1 drug quantity ratio creates unwarranted disparity in contravention of 18 U.S.C. § 3553(a)(6) ("The court, in determining the particular sentencing to be imposed, shall

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[177] *United States v. Sanchez*, 81 F.3d 9, 11 (1st Cir. 1996); *United States v. Haynes*, 985 F.2d 65, 70 (2d Cir. 1993); *United States v. Alton*, 60 F.3d 1065, 1070 (3d Cir. 1995); *United States v. Banks*, 130 F.3d 621, 624 (4th Cir. 1997); *United States v. Fonts*, 95 F.3d 372, 374 (5th Cir. 1996); *United States v. Gaines*, 122 F.3d 324, 329 (6th Cir. 1997); *United States v. Arrington*, 73 F.3d 144, 146 (7th Cir. 1996); *United States v. Maxwell*, 25 F.3d 1389, 1400-1401 (8th Cir. 1994); *United States v. Berger*, 103 F.3d 67, 71 (9th Cir. 1996); *United States v. Maples*, 95 F.3d 35, 37-38 (10th Cir. 1996); *United States v. Byse*, 28 F.3d 1165, 1171 n.9 (11th Cir. 1994); *United States v. Thompson*, 27 F.3d 671, 679 (D.C. Cir. 1994); *see also* USSC, 1995 Commission Report, *supra* note 1, at 220.

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[178] 18 U.S.C. § 3553(a) provides in pertinent part:

(a) Factors to be considered in imposing a sentence.–The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider–
  (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
  (2) the need for the sentence imposed–
    (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
    (B) to afford adequate deterrence to criminal conduct;
    (C) to protect the public from further crimes of the defendant; and
    (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
  (3) the kinds of sentences available;
  (4) the kinds of sentence and the sentencing range established for–
    (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission . . .
  (5) any pertinent policy statement issued by the Sentencing Commission . . .
  (6) the need to avoid unwarranted sentence disparity among defendants with similar records who have been found guilty of similar conduct; and
  (7) the need to provide restitution to any victims of the offense.

consider . . . the need to avoid unwarranted sentence disparity among defendants with similar records who have been found guilty of similar conduct. . .”).

District courts have largely declined to sentence below the guideline range based on this argument.[179] Those district courts that have sentenced below the guideline range on the basis of the 100-to-1 drug quantity,[180] frequently have been reversed by the appellate courts. Courts in the First, Second, Fourth, Fifth, Seventh and Eleventh Circuits have rejected such sentences, holding that the 100-to-1 drug quantity ratio does not create “unwarranted” sentencing disparity as contemplated by section 3553(a)(6) because it reflects congressional judgment that offenses involving powder cocaine and crack cocaine are not similar.[181] For example, in *United States v. Pho*,[182] the First Circuit said:

> [A sentencing court may not impose a sentence] outside the advisory guideline sentencing range based solely on its categorical rejection of the guidelines’ disparate treatment of offenses involving crack cocaine, on the one hand, and powdered cocaine, on the other hand. . . . The decision to employ a 100:1 crack-to-powder ratio rather than a 20:1 ratio, a 5:1 ratio, or a 1:1 ratio is a policy judgment, pure and simple. . . . Congress incorporated the 100:1 ratio in the statutory scheme, rejected the Sentencing Commission’s 1995 proposal to rid the guidelines of it, and failed to adopt any of the Commission’s subsequent recommendations for easing the differential between crack and powdered cocaine. It follows inexorably that the district court’s categorical rejection of the 100:1 ratio impermissibly usurps Congress’s judgment about the proper sentencing policy for cocaine offenses.

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The Eleventh Circuit similarly held that the disparity between crack cocaine and powder cocaine offenders is not “unwarranted” under Section 3553(a)(6), rejecting the defendant’s argument that the 100-to-1 drug quantity ratio reflects the policy position of the Commission rather than of Congress:

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[179] *See, e.g.*, *United States v. Tabor*, 365 F.Supp.2d 1052 (D. Neb. 2005); *United States v. Doe*, 412 F.Supp.2d 87 (D. D.C. 2006); *United States v. Valencia-Aguirre*, 409 F.Supp.2d 1358 (M.D. Fla. 2006).

[180] *See, e.g.*, *United States v. Smith*, 359 F.Supp.2d 771 (E.D. Wis. 2005); *United States v. Clay*, 2005 WL 1076243 (E.D. Tenn. 2005).

[181] *United States v. Pho*, 433 F.3d 53, 54 (1st Cir. 2006); *United States v. Castillo*, 460 F.3d 337, 361 (2d Cir. 2006); *United States v. Eura*, 440 F.3d 625, 633 (4th Cir. 2006); *United States v. Leatch*, __ F.3d __, 2007 WL 851323 (5th Cir. Mar. 22, 2007); *United States v. Jointer*, 457 F.3d 682, 687-88 (7th Cir. 2006); *United States v. Spears*, 469 F.3d 1166 (8th Cir. 2006); *United States v. Williams*, 456 F.3d 1353, 1367 (11th Cir. 2006).

[182] 433 F.3d at 62-63.

> Williams is incorrect in suggesting the 100-to-1 ratio embedded in the Guidelines is merely the Sentencing Commission's policy and not Congress's policy. In determining the threshold quantities for triggering the statutory sentencing ranges in § 841(b), Congress decided on a 100-to-1 differential, and the Sentencing Commission was left no choice but to employ the same ratio in crafting the various Guidelines ranges within those statutory ranges. … Indeed, Congress rejected the Commission's proposal that would have equated the drugs for Guidelines purposes . . . . Thus, the statutory minimums and maximums and the Guidelines reflect Congress's policy decision to punish crack offenses more severely than powder cocaine offenses by equating one gram of crack to 100 grams of cocaine.[183]

Furthermore, appellate courts have reversed sentences that utilized an alternative drug-quantity ratio, such as the 20-to-1 ratio proposed in the 2002 Commission Report, on similar grounds. For example, in *United States v. Jointer*, the Seventh Circuit overturned a sentence imposed by substituting a 20-to-1 drug quantity ratio and re-calculating the offense level. The Seventh Circuit said:

> In this case, the district court did not make a statement categorically rejecting the 100:1 ratio in sentencing all crack defendants in front of the court. Such a statement would have been a quintessential appropriation of legislative authority. On the other hand . . . it did not articulate a rationale for why 20:1 was more appropriate than any other ratio for Mr. Jointer. … It simply disagreed with the legislative facts upon which Congress had based its judgment and substituted other legislative facts for the congressional judgment. . . . In sum, although the district court did, at first, correctly calculate the applicable offense level and sentencing range, the court abandoned that correct calculation and inserted its own ratio, 20:1, and then recalculated the applicable offense level and sentencing range. … This recalculation was erroneous; it followed neither the statutory language set out by Congress nor the applicable guidelines sections.[184]

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Therefore, sentencing courts in these circuits may not vary from the guidelines solely on the basis of a policy disagreement with the 100-to-1 drug quantity ratio, even by utilizing another drug quantity ratio, such as the 20-to-1 drug quantity ratio recommended by the Commission in its 2002 Report. [185]

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[183] 456 F.3d at 1366 (internal citations omitted).

[184] 457 F.3d at 686-87. The Court added that a district court may consider the 100-to-1 drug quantity ratio, but in so doing it "must still tie the § 3553(a) factors to the individual characteristics of the defendant and the offense committed."

[185] *See, e.g., United States v. Duhon*, 440 F.3d 711 (5th Cir. 2006).

Other circuits, however, have endorsed a sentencing court's discretion to consider the 100-to-1 drug quantity ratio. In *United States v. Gunter*, the Third Circuit reversed a sentence after the district court had declined to issue a non-guideline sentence where the defendant had asked it to consider the drug quanity ratio as a basis for sentencing below the guideline sentencing range.[186] The Third Circuit vacated the sentence on grounds that it was procedurally unreasonable because "the District Court here believed that it had no discretion to impose a below-[g]uidelines sentence on the basis of the crack/powder cocaine differential and, thus, treated the [g]uidelines range difference as mandatory in deciding the ultimate sentence."[187] The *Gunter* court suggested that sentencing courts may be able to sentence below the guideline range based on crack/powder disparity, stating:

> [T]he District Court is under no obligation to impose a sentence below the applicable Guidelines range solely on the basis of the crack/powder cocaine differential. Furthermore, although the issue is not before us, we do not suggest (or even hint) that the Court categorically reject the 100:1 ratio and substitute its own, as this is *verboten*. The limited holding here is that district courts may consider the crack/powder cocaine differential in the Guidelines as a factor, but not a mandate, in the post-*Booker* sentencing process.[188]

In *United States v. Pickett*,[189] the Court of Appeals for the D.C. Circuit similarly reversed a crack defendant's sentence on the grounds that the district court refused to consider the 100-to-1 drug quantity ratio when determining the defendant's sentence. The D.C. Circuit said the proper approach "is to evaluate how well the applicable [g]uideline effectuates the purposes of sentencing enumerated in Section 3553(a)."[190] The D.C. Circuit discussed the Commission's various reports to Congress, noting especially the 2002 Report. The D.C. Circuit surmised that the Commission "believes that its [g]uideline for crack distributors generates sentences that are 'greater than necessary,' exaggerates 'the seriousness of the offense' of crack trafficking, does not 'promote respect for the law,' and does not 'provide just punishment for the offense,'"[191] and that the district court's refusal to consider whether sentencing the defendant in accordance with the 100-to-1 drug quantity ratio would comport with section 3553(a) constituted a legal error.

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[186] *United States v. Gunter*, 462 F.3d 237 (3d Cir. 2006).

[187] *Id*. at 246.

[188] *Id.*

[189] 475 F.3d 1347 (D.C. Cir. 2007).

[190] *Id. at *5.*

[191] *Id. at *6.*

Several of these cases are pending before the United States Supreme Court on petition for a writ of *certiorari*.[192]

Another case pending before the Supreme Court, *United States v. Claiborne*,[193] involves sentencing for a crack cocaine offense. Although *Claiborne* does not squarely present the question of whether the 100-to-1 drug quantity ratio may properly form the basis for a sentence below the guideline sentencing range, the disparate penalty structure may be addressed in the Court's reasonableness review of the sentence imposed.

The defendant in *Claiborne* pled guilty to a two-count indictment arising out of two separate incidents: a May, 2003 charge for distributing .23 grams of crack, and a November, 2003 charge of possessing 5.03 grams of crack. The district court calculated the applicable guideline sentencing range as 37-46 months, but imposed a sentence of 15 months' imprisonment. The defendant raised the crack cocaine-powder cocaine distinction at the sentencing hearing, but the district judge did not expressly mention the drug quantity ratio at sentencing. The factors cited by the court for the sentence imposed, however, did include the small quantity of drugs involved. At sentencing, the court said:

> . . . when I compare your situation to that of other individuals that I have seen in this court who have committed similar crimes but perhaps involving a larger – a much [larger] amount of drugs – and the sentences they receive, I don't believe that 37 months is commensurate in any way with that.

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Upon appeal by the government, the Eighth Circuit held that the sentence, which it calculated as a 60 percent downward variance, was an "extraordinary reduction" which was required to be "supported by extraordinary circumstances," and that such circumstances were not present in this case because, among other things, "[t]he small amount of crack cocaine seized during his two offenses was taken into account in determining his guidelines range."[194] The Eighth Circuit remanded the case for resentencing, and the district court granted the defendant's motion to stay sentencing pending resolution of the defendant's petition for *certiorari*.

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[192] *Eura*, *petition for cert. filed* June 20, 2006 (No. 05-11659); *Jointer*, *petition for cert. filed* October 27, 2006 (No. 06-7600); *Williams*, *petition for cert. filed* October 19, 2006 (No. 06-7352).

[193] 439 F.3d 479 (8th Cir. 2006), *cert. granted*, 127 S.Ct. 551 (U.S. Nov. 3, 2006).

[194] *Id.* at 481.

The Supreme Court granted review in that case on the following questions:

(1) Was the district court's choice of below-Guidelines sentence reasonable?

(2) In making that determination, is it consistent with *United States v. Booker*, 543 U.S. 220 (2005), to require that a sentence which constitutes a substantial variance from the Guidelines be justified by extraordinary circumstances?

Although the issue of the 100-to-1 drug quantity ratio is not squarely presented, the differential treatment of the two forms of cocaine has been raised in briefs and could provide a backdrop to the Court's review for reasonableness of the particular sentence imposed in *Claiborne*.[195]

Since the passage of the 1986 and 1988 Acts and implementation of the federal sentencing guidelines, defendants have raised various constitutional challenges to the federal cocaine penalty structure. In appealing the constitutionality of their sentences for crack cocaine offenses, defendants generally have argued that the 100-to-1 drug quantity ratio violates equal protection and due process guarantees, constitutes cruel and unusual punishment, and is based on a statute that is impermissibly vague. To date, none of these challenges has been successful in the federal appellate courts.[196]

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However, the Supreme Court has requested that the government respond to a petition for a writ of *certiorari* in a case arising out of the Ninth Circuit, *Jackson v. United States*,[197] which again presents the question for review of

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[195] *See*, e.g., Brief of Amici Curiae Senators Edward M. Kennedy, Orrin G. Hatch, and Dianne Feinstein in Support of Respondents, at 27-28 ("Amici do not foreclose the possibility that courts might cite the disproportionate emphasis assigned by the guidelines to the relevant quantity of crack cocaine as a principled reason for imposing a sentence below the applicable guideline range. . . . Congress has thus far failed to act on the Commission's recommendations. That failure, however, should not be interpreted as a license by courts to disregard the Commission's policy statements. . . . It is well-documented that the crack-powder disparity has a disproportionate impact on African-American defendants, their families, and their communities, and as a result has undermined public confidence in the criminal justice system. Such sentencing disparity is completely contrary to the goals of the Sentencing Reform Act, and § 3553(a) enables courts to consider this impact as they develop principled rules on sentencing.") (citations omitted).

[196] *See generally* USSC, 1995 COMMISSION REPORT, *supra* note 1, Appendix C (containing a detailed discussion and collection of cases raising constitutional challenges to federal cocaine sentencing policy). *See also United States v. Gaines*, 122 F.3d 324, 329 (6th Cir. 1997) (collecting cases).

[197] 201 F.App'x. 481 (9th Cir. 2006).

whether the statutory distinction between powder cocaine and crack cocaine results in penalties that are arbitrary and capricious in violation of due process, equal protection, and the Eighth Amendment. In the appellate court, the defendant acknowledged precedent repeatedly upholding the distinction between powder cocaine and crack cocaine against constitutional attacks, but argued that "[t]he rationale for upholding the statutory scheme has rested on findings that there was a rational basis for the disparity. That rational basis has been seriously undermined by factual studies that the difference in the effects and circumstances involved in crack as opposed to powder cocaine does not exist, or at least not to the extent believed at the time of the enactment of the studies. Congressional failure to act in light of these studies and recommendations, most notably by the Sentencing Commission itself, makes the disparity arbitrary and capricious in violation of due process, equal protection, and the Eighth Amendment . . .".[198]

The government countered that the "findings by the Commission are in keeping with the reasons attributable to the 1986 Congress and Congress in 1995 when it rejected the proposal for parity among crack and powder cocaine sentencing. Therefore, the legislative classification under 21 U.S.C. § 841 cannot be said to be irrational or unreasonable."[199] The government specifically cited findings that crack cocaine is more addictive than powder cocaine, crack cocaine offenses are more likely to involve weapons or bodily injury (although the majority of such offenses do not involve direct violence), and twice as likely to involve minors.[200]

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A three-judge Ninth Circuit panel unanimously affirmed the sentence imposed by the district court, citing circuit precedent that foreclosed review of these issues.[201] The government's response to the petition for writ of *certiorari* was filed April 18, 2007.

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[198] 2005 WL 4120999, at *5 (9th Cir Nov. 17, 2005).

[199] 2005 WL 4668634, at *15-16 (9th Cir. Jan. 3, 2005) (internal citations omitted).

[200] *Id.* at *15.

[201] *United States v. Jackson*, 201 F.App'x. 481 (9th Cir. 2006).

Appendix A

SENTENCING DATA SOURCES AND METHODOLOGY

A. INTRODUCTION

Data for this report are from three sources: 1) the Commission's Fiscal Year datafiles from 1992 through 2006, 2) the 2000 Drug Sample, and 3) the 2005 Drug Sample. The Fiscal Year datafiles allow comparisons over time of sentencing data regularly collected by the Commission. The 2000 and 2005 Drug Samples include supplemental information about drug offenders not routinely collected and reported by the Commission.

B. SENTENCING COMMISSION FISCAL YEAR DATAFILES

The Commission's Fiscal Year datafiles contain information reported in the five documents that sentencing courts are required to submit to the Commission for each criminal felony case. These five documents include: 1) the Judgement and Commitment Order, and 2) the Statement of Reasons), 3) any plea agreement, 4) the indictment or other charging document, 5) the Presentence Report. The Commission uses these documents routinely to collect case identifiers, demographic variables, statutory information, the guideline provisions applied to the case, and sentencing information.

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Analysis of the Fiscal Year datafiles for this report is for offenses sentenced under the primary drug trafficking guideline (USSG §2D1.1) with either powder cocaine or crack cocaine as the primary drug type. The primary drug type is the drug involved in the offense that primarily determines the offender's sentence, specifically, the drug that produces the highest base offense level under the guidelines and results in the longest sentence. Figure 2-1 in Chapter 2 displays the total number of powder cocaine and crack cocaine offenders for each Fiscal Year.

C. 2000 DRUG SAMPLE

The 2000 Drug Sample consists of a 20 percent random sample of powder cocaine (793) and crack cocaine (802) offenders sentenced under the primary drug trafficking guideline (USSG §2D1.1) in Fiscal Year 2000. Data from this sample supplement information in the Commission's Fiscal Year datafiles with information about offenders and offense conduct collected from the narrative offense conduct and criminal history sections of the Presentence Report. The conduct described may or may not be subject to existing guideline or statutory sentencing enhancements. Therefore, the reported data do not necessarily indicate court findings or ultimate guideline applications

(*e.g.*, offender function). Furthermore, the definitions used for collecting information do not, in some instances, match entirely the guideline definitions for identical terms (*e.g.*, manager/supervisor).

The individual offender data provide details both of the offender's prior substance use and criminal convictions (regardless of whether the convictions were included as part of the determination of the offender's Criminal History Category). Information about the instant offense includes the organization of and participants in the offense, the offender's most serious function, investigation techniques, evidence concerning drug amounts, and the operation of the criminal enterprise (*e.g.*, sophisticated means used to conceal criminal activity). The weapon information collected for each case includes extent, number and types of weapons involved in the instant drug offense. Victim data includes the number of victims, extent of injury, and perpetrator of the violence. Finally, information is included concerning protected individuals (such as minor children) and locations.

D. 2005 DRUG SAMPLE

The 2005 Drug Sample consists of a 25 percent random sample of powder cocaine (1,398 of the 5,744 cases) and crack cocaine (1,172 of the 5,397 cases) offenders sentenced under the primary drug trafficking guideline (USSG §2D1.1) in Fiscal Year 2005 after the date of the decision in *United States v. Booker* (*i.e.*, offenders sentenced from January 12, 2005 through September 30, 2005). Only offenses involving a single type of cocaine, either powder cocaine *or* crack cocaine, but not both, were selected for the sample. Because all of the data are collected from the Presentence Report, only case files containing this document were eligible for selection in the sample.[1]

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The 2005 Drug Sample, in large part, replicates the data in the 2000 Drug Sample. The Commission used the same coding definitions and decision-making criteria for the 2005 and 2000 Drug Samples to enable comparable trend data and analysis. As with the 2000 Drug Sample, the 2005 Drug Sample comes from the narrative offense conduct and criminal history sections of the Presentence Report so the data are not indicative of court findings or ultimate guideline applications.

1. Offender Function Definitions

Table A-1 provides definitions for all 21 offender function categories used for the coding project. Each cocaine offender was assigned to one of the 21 categories in the table based on the most *serious* conduct described in the offense conduct section of the Presentence Report. The assignment of offender function category solely is based on the description of the offender's conduct, not on court findings or guideline criteria for role in the offense. Terms used to describe offender function do not necessarily correlate with guideline definitions of similar terms. For example, the definition of manager/supervisor

[1] Cases were eligible with complete Presentence Reports, partial or alternative Presentence Reports, court order sealed Presentence Reports, and otherwise sealed Presentence reports.

used to assign offender function does not match the guideline definition of manager or supervisor in USSG §3B1.1. The categories are listed in descending order of culpability, importer/high-level supplier is considered the most serious offender function, and user is considered the least serious offender function.

The 21 offender function categories are aggregated into eight function categories for ease of analysis and presentation in the report (*See*, for example, Figure 2-4 in Chapter 2). The same offender function categories were used to determine the most *frequent* function for only offenders whose most serious function was wholesaler.

Table A-1
Offender Function Categories

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 aircraft or other vessel, requires special skill; does not include offenders who are sole participants directing a small boat (*e.g.*, a go-fast boat) onto which drugs have been loaded from a "mother ship" (*See* courier/mule below).
Wholesaler	Sells one ounce or more in a single transaction, sells any amount to another dealer, buys two ounces in a single transaction, possesses two ounces or more.
Manager	Serves as a lieutenant to assist one of the above functions; manages all or a significant portion of a drug manufacturing, importation, or distribution operation; takes instructions from one of the above functions 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.

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Table A-1
Offender Function Categories

Function	Definition
Chemist/cook/chemical supplier	Produces LSD, methamphetamine, crack, or other drugs, but is not the principal owner of the drugs and therefore does not qualify as a grower/manufacturer. Chemical suppliers do not handle the drugs, but engage in the unlawful diversion, sale, or furnishing of listed chemicals or equipment used in the synthesis or manufacturing of controlled substances.
Supervisor	Supervises at least one other co-participant but has limited authority and does not qualify as a manager.
Street-level dealer	Distributes retail quantities directly to the drug user. Sells less than one ounce in a single transaction.
Broker/steerer/go-between	Arranges for two parties to buy or sell drugs, or directs potential buyers to potential sellers.
Courier	Transports or carries drugs with the assistance of a vehicle or other equipment. Includes offenders, otherwise considered to be crew members, who are the sole participants directing a vessel (*e.g.*, a go-fast boat) onto which drugs have been loaded from a "mother ship."
Mule	Transports or carries drugs internally or on his/her person, often by airplane or crossing the border. Includes offenders who only transport or carry drugs in baggage, souvenirs, clothing, or otherwise.
Renter/storer	Provides, for profit or other compensation, a personal residence, structure (barn, building, storage facility), land, or equipment for use in the drug offense. Distinguished from enablers due to compensation received for services.
Money runner	Transports or 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 a mode of transportation.
Gopher/lookout/deckhand/ worker/employee	Performs very limited, low-level function in the offense (one time, or ongoing); including running errands, answering the telephone, receiving packages, packaging drugs, manual labor, acting as a lookout during meetings, exchanges, or off-loading, or acting as a deckhand/crew member on a vessel or aircraft used to transport large quantities of drugs.

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Table A-1
Offender Function Categories

Function	Definition
Enabler	Plays only a passive role in the offense, knowingly permitting certain unlawful activity to occur without affirmatively acting in any way to further the activity, may be coerced or unduly influenced to participate (*e.g.*, a parent or grandparent threatened with displacement from home unless they permit the activity to take place), or may do so as a favor without compensation.
User	Possesses a small quantity of drugs apparently for personal use only, performs no apparent function that furthers the overall drug trafficking offense.
Other	Offender does not clearly fit into any of the above function categories.
Missing/indeterminable	Not enough information provided to determine the offender's function.

2. Cocaine Wholesalers

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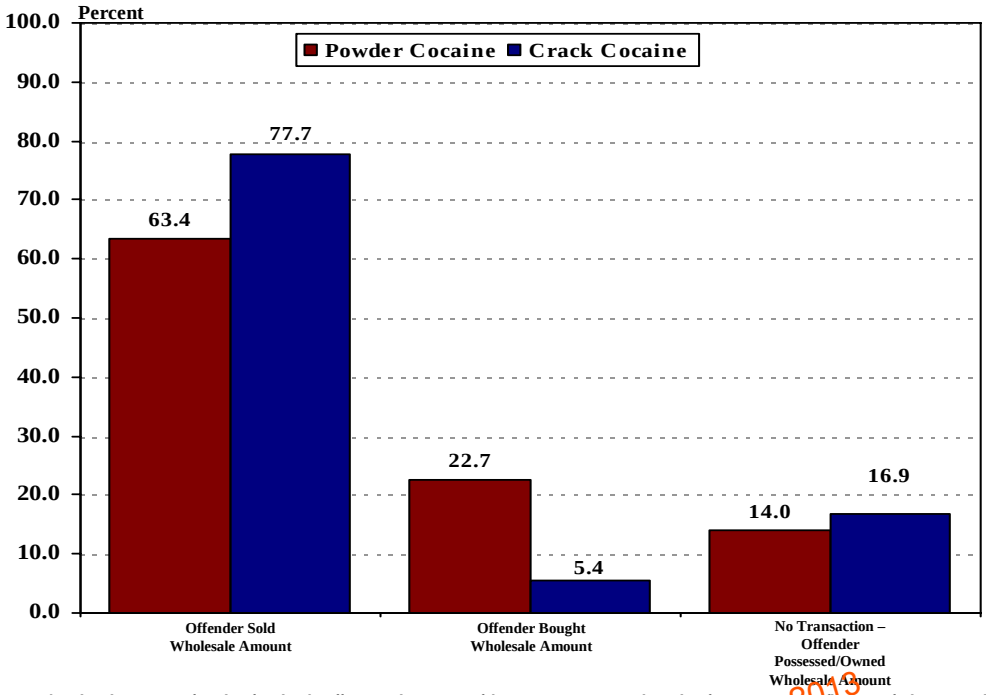
For those offenders whose most serious function was wholesaler, additional information was collected to further explain how they came to be classified as wholesalers. Specifically, the Commission examined who initiated the wholesale transaction (defendant, co-participant, or law enforcement), the drug quantity involved in the wholesaler's largest transaction, and the most *frequent* function performed by that offender (the most frequent function was not collected for any other offender function category).

Figure A-1
Offender Conduct for Wholesale Classification[1]

FY2005 Drug Sample



[1] Classifications were based on descriptions of conduct found in the offense conduct section of the Presentence Report. These classifications may not reflect court findings on application of specific guideline enhancements. This figure excludes cases with missing information for the variables required for analysis.

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

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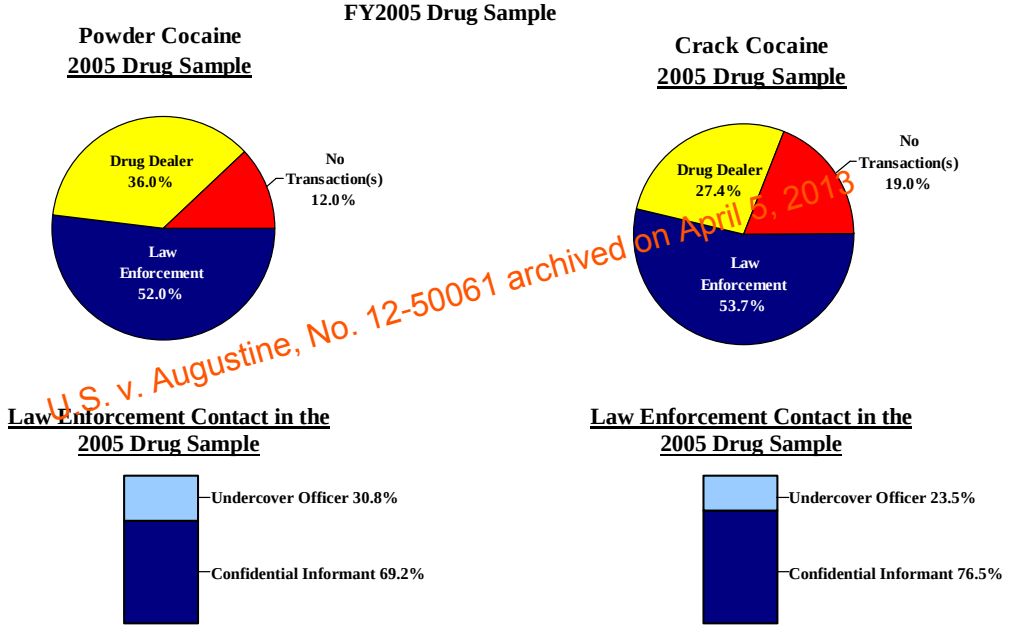
Figure A-1 demonstrates the offense conduct that led offenders to be categorized as wholesalers. Most powder cocaine and crack cocaine wholesalers *sold* wholesale quantities of one ounce or more in a single transaction.[2] Nearly two-thirds of powder cocaine (63.4%) and more than three-quarters (77.7%) of crack cocaine wholesalers were classified as such because their documented sale quantities exceeded one ounce on at least one occasion, or because they sold to another dealer. Far fewer wholesalers, 5.4% of crack cocaine and 22.7% of powder cocaine, were classified as such based on drug *purchases* of greater than two ounces in a single transaction. Finally, some powder cocaine (14.0%) and crack cocaine (16.9%) wholesalers were arrested with quantities indicative of a wholesaler status absent any reported transaction.

[2] The quantities involved in the wholesale transactions are those described in the offense conduct section of the Presentence Report and do not necessarily reflect the quantity used by the court to determine the base offense level under the guidelines.

Figure 2-9 in Chapter 2 demonstrates that 7.8 percent of powder cocaine wholesalers and 36.9 percent of crack cocaine wholesalers most frequently performed less serious functions. With respect to those offenders whose most *frequent* function was less serious than wholesaler, the Commission sought to determine the origin of the wholesale level transaction. Figure A-2 shows the basis for ascribing wholesaler status to those cocaine offenders who most frequently engaged in conduct less serious than wholesaler. Specifically, Figure A-2 identifies the parties who interacted with the offender during the drug offense (as described in the offense conduct section of the Presentence Report).

Figure A-2
Basis for Wholesale Classification When Most Common Function is Not Wholesaler[1]
FY2005 Drug Sample



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[1] Classifications were based on descriptions of conduct found in the offense conduct section of the Presentence Report. These classifications may not reflect court findings on application of specific guideline enhancements. This figure excludes cases with missing information for the variables required for analysis.

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

More than half of both powder cocaine and crack cocaine wholesalers who most frequently performed less serious functions engaged in wholesaler conduct due to interactions with law enforcement. Similar proportions of both powder cocaine (30.8%) and crack cocaine (23.5%) wholesalers interacting with law enforcement interacted with undercover officers. The wholesale conduct for approximately one-third of powder cocaine (36.0%) and crack cocaine (27.4%) wholesalers occurred in transactions with other drug dealers.

3. Geographic Scope

Table A-2 provides definitions for geographic scope used for the coding project. Each offense was assigned to one of the seven categories in the table based on the largest geographical area in which the drug trafficking organization operated.

Table A-2
Definitions of Geographic Scope

Scope	Definition
Neighborhood/ section of a city	Largest scope of offense conduct occurs at or around a street corner or the few blocks within that immediate area.
Local	Largest scope of offense conduct crosses multiple city blocks or extends from the city into a contiguous suburban area.
Regional	Largest scope of offense conduct extends throughout a multi-city area, within a state, or within a contiguous multi-state area (*e.g.*, Pennsylvania-to-Delaware).
Section of the country	Largest scope of offense conduct extends across multiple, non-contiguous states within a recognized region of the country (*e.g.*, the Midwest, the Northeast).
National	Largest scope of offense conduct spreads beyond a section of the country (*e.g.*, California-to-Florida)
International	Largest scope of offense conduct crosses the United States border.
Missing	Insufficient information in the offense conduct section of the Presentence Report to determine the geographic scope of the offense.

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Appendix B

SUMMARY OF PUBLIC HEARINGS ON COCAINE SENTENCING POLICY

A. INTRODUCTION

The Commission held an all-day public hearing on federal cocaine sentencing policy in Washington, D.C., on November 14, 2006, and heard additional testimony at another public hearing in Washington, D.C., on March 20, 2007. In total, over twenty witnesses, representing the federal judiciary, the Executive Branch, local law enforcement agencies, private practitioners, the scientific and medical communities, academics, community representatives, and other interested parties, testified before the Commission.[1]

B. FEDERAL JUDGES

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The Honorable Reggie Walton, United States District Court, District of Columbia, appeared on behalf of the Criminal Law Committee of the Judicial Conference of the United States. Judge Walton reported that at its September 19, 2006, session, the Judicial Conference expressed its opposition to "the existing sentencing differences between crack and powder cocaine and agreed to support the reduction of that difference." The remainder of his testimony expressed his personal views on the matter.

Judge Walton stated his belief that the current sentencing structure is unconscionable. Although he acknowledged that some degree of difference in punishment for crack cocaine and powder cocaine offenses might be warranted in the view of policy makers, no reasonable justifications exist for the 100-to-1 drug quantity ratio. He noted that the fact that crack cocaine has greater addictive potential than powder cocaine cannot be seriously challenged, particularly because of the manner in which it is used causes greater addiction. However, the level of violence associated with the crack cocaine trade is less than during the 1980s and early 1990s. According to Judge Walton, the discretion federal prosecutors have to decline prosecutions complicates the unfairness in the sentencing of crack cocaine and powder cocaine traffickers because it leaves two hypothetical defendants subject to the variables of the state laws if prosecutions are brought in state courts.

[1] Witness Statements and the full transcripts are available on the Commission's website, www.ussc.gov.

Judge Walton emphasized that not only must the punishment imposed be fair, it also must be perceived as fair. He noted that many believe that current sentencing differential is unfair to those at the lower end of the socioeconomic ladder and to people of color because they are disproportionately prosecuted for crack related trafficking offenses. In his opinion, the sentencing differential was not enacted with the conscious objective of targeting the poor and people of color, but the current state of affairs should cause the policy to be reexamined. Specifically, Judge Walton observed the tremendous increase in the number of inmates in federal prisons, noting that many, if not most, are comprised of people of color charged or convicted of crack cocaine distribution related offenses.

Judge Walton also observed that the perception of unfairness has had a negative impact on the respect of many for our nation's criminal justice system. According to Judge Walton, some people do not wish to serve on juries when crack cocaine is involved because of the crack cocaine/powder cocaine sentencing disparity, and jurors at times have refused to convict crack cocaine offenders because of it. He added that some may be unwilling to come forward and cooperate with the government for similar reasons. In short, Judge Walton concluded that the failure to address the sentencing disparity has left many to believe that there is an indifference to its real and perceived unfairness because of the population it disproportionately impacts. He also noted that it has a negative impact on the credibility of the sentencing guidelines, in part because this is an area where a greater number of judges are imposing non-guideline sentences, some even novel in nature.

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Judge Walton pointed out the devastating impact long sentences have on the community. According to Judge Walton, most kids in many poor black communities do not have fathers because they are imprisoned for such long periods, and some of these offenders could be contributing members of society if they were not imprisoned for so long.

C. LAW ENFORCEMENT

1. U.S. DEPARTMENT OF JUSTICE

R. Alexander Acosta, United States Attorney, Southern District of Florida, testified on behalf of the Department of Justice at the November 14, 2006, hearing. Mr. Acosta reiterated the position of the Department as articulated in 2002 by then-Deputy Attorney General Larry Thompson that the existing federal sentencing policy is an important part of the federal government's efforts to hold traffickers of both crack cocaine and powder cocaine accountable, including violent gangs and other organizations that traffic in open air crack cocaine markets that terrorize neighborhoods, especially minority neighborhoods.

Mr. Acosta acknowledged that many are concerned that the 100-to-1 drug quantity ratio is an example of unwarranted racial disparity in sentencing, and he stated that it may be appropriate to address the ratio in light of larger, systemic changes taking place in federal sentencing. Mr. Acosta stressed, however, that changes to federal cocaine sentencing policy must take place first and foremost in Congress.

Mr. Acosta emphasized that three matters have remained unchanged. First, the devastation cocaine has on individuals, families, and communities has not changed. Systemic violence, including murder, injury to and neglect of children, and HIV and STD transmission are common effects of cocaine use. Second, the route of administration continues to be a significant factor in the extent to which cocaine impacts the brain of the user. Third, there continue to be major differences in the trafficking patterns of powder cocaine and crack cocaine, resulting in very different effects on individual communities and requiring a range of law enforcement responses.

Mr. Acosta asserted that federal cocaine sentencing policy is properly calibrated and advances law enforcement responses to crack cocaine in a fair and just manner. He stated that the Department continues to believe that higher penalties for crack cocaine offenses appropriately reflect the greater harm posed by crack cocaine. While crack cocaine and powder cocaine are chemically similar, there are significant differences in the predominant way in which the two substances are ingested and marketed. Based on these differences and the resulting harms to society, Mr. Acosta said crack cocaine is an especially dangerous drug, and its traffickers should be subject to significantly higher penalties than traffickers of like amounts of powder cocaine.

Mr. Acosta elaborated by stating that the highest concentration of cocaine and the fastest entry to the central nervous system occur when cocaine is smoked. Smoking is one of the most efficient ways to take a psychoactive drug. The amount of cocaine that is absorbed through the large surface area of the lungs by smoking is greater than the amount absorbed by injecting a solution of cocaine. In addition, the ease of smoking allows a user to ingest extreme levels of the drug in the body without repeatedly filling a syringe, finding injection sites, and then injecting oneself. The intensity of the euphoria, the speed with which it is attained, and the ease of repeat administration are factors that explain the user's attraction to crack cocaine.

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According to Mr. Acosta, differences in distribution methods, age groups involved, and levels of violence flow from the fact that smaller amounts of crack cocaine are needed to produce the euphoria sought by the typical user. Crack cocaine can be distributed in smaller unit sizes than powder cocaine and is sold in single dose units at prices that are at first easily affordable by the young and the poor. Because crack cocaine is distributed in such relatively small amounts in transactions that often occur on street corners, control of small geographic areas by traffickers takes on great importance. He maintained that, as a result, crack cocaine offenders are more likely to possess a weapon and that crack cocaine is often associated with serious crime related to its marketing and distribution.

Mr. Acosta described his experience in South Florida and stated that strong penalties for trafficking cocaine must be part of any comprehensive attempt to reduce the harm caused by violent drug organizations. In his opinion, the sale of crack cocaine is particularly integral to violent drug organizations and is a major cause of urban violence. Unlike legitimate businesses, drug gangs maintain their positions through violence targeted at rival drug gangs or anyone else that threatens their profits. Mr. Acosta stated there is substantial proof that crack cocaine is associated with violence to a greater degree than other controlled substances, including powder

cocaine. According to the 2005 National Gang Threat Assessment, 38 percent of law enforcement respondents reported moderate to high involvement of gangs in the distribution of powder cocaine, while 47.3 percent reported moderate to high involvement of gangs in the distribution of crack cocaine.

Mr. Acosta added that deciding which cases to prosecute federally is a function of the comparative laws in any jurisdiction because, in any large operation, cases are divided by federal and local jurisdictions based on which jurisdiction is likely to get the more appropriate or stronger sanction. He also asserted that relying on sentencing enhancements as a method of addressing the sentencing differential is of concern because they often fail to capture all the indirect associated violence. For example, if there is a high correlation between guns and drug gangs that traffic in crack cocaine, whether or not a particular individual has a weapon at the time of arrest in not indicative of whether the gang with which he is associated is the cause of violence. He concluded that sentencing enhancements fail to capture the full impact of the violence gangs bring to particular community.

In sum, Mr. Acosta stated that federal cocaine sentencing policy is reasonable. In his view, it is not only appropriate but vital to maintain strong criminal sanctions for trafficking in crack cocaine. The strong federal sentencing guidelines are one of the best tools for law enforcement's efforts to stop violent crime, he said, and reducing those sentences would create a risk of increased drug violence.

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John C. Richter, United States Attorney, Western District of Oklahoma and Chair of the Attorney General's Advisory Subcommittee on Sentencing, submitted written testimony on behalf of the Department of Justice for the March 20, 2007 hearing. Mr. Richter's statement reiterated the Department's position as previously articulated by Mr. Acosta. Mr. Richter described his duty as a United States Attorney to not only prosecute large organizations but also to protect neighborhoods from the low level traffickers whose activities prevent law abiding residents from enjoying the quality of life they deserve. Mr. Richter acknowledged that it may be appropriate to address the drug quantity ratio but stressed that changes to federal cocaine sentencing policy must start with Congress.

2. FRATERNAL ORDER OF POLICE

Chuck Canterbury, National President, Fraternal Order of Police (FOP), testified at the November 2006 hearing in opposition to any proposal that would address the sentencing disparity between crack cocaine and powder cocaine by decreasing penalties for crack cocaine. Mr. Canterbury asserted that the tougher penalties enacted by the Anti-Drug Abuse Acts of 1986 and 1988 helped law enforcement counter the explosion of violence fueled by the emergence of crack cocaine, which he described as a cheaper, more dangerous form of the drug that has devastating psychological and physiological effects on users. He added that mandatory minimum sentences, especially those which take into consideration the type of drug, the presence and use of firearms, and the use or attempted use of violence, provide a mechanism for imposing longer sentences on the worst offenders.

Mr. Canterbury stated that the FOP believes that crack cocaine inflicts greater harm to the user and the communities in which it is available. For example, Mr. Canterbury stated that while crack cocaine users comprise only 22 percent of all cocaine users, they accounted for 72 percent of all primary admissions to hospitals for cocaine usage in the past year. He stated that crack cocaine is more often associated with systemic crime and produces more intense physiological and psychotropic effects than powder cocaine, and he asserted that federal sentencing policy must reflect correspondingly greater punishments. He encouraged including additional aggravating factors, such as the presence of firearms or children and the use or attempted use of violence, in the determination of a final sentence, but he indicated that any such enhancements should be in addition to the mandatory minimum sentence currently provided by law.

Mr. Canterbury stated that the FOP opposes any proposal to address the sentencing disparity between crack cocaine and powder cocaine by decreasing penalties that have proven to be effective. He disagreed with the position that mandatory minimum sentences should be targeted only at the most serious drug offenders. According to Mr. Canterbury, the low level dealer who traffics in small amounts is no less of a danger to the community than an individual at the manufacturing or wholesale level. The fact that they are at the bottom of the drug distribution chain does not decrease the risk of violence or the effect on quality of life associated with their activities.

Finally, Mr. Canterbury supported increasing the penalties for offenses involving powder cocaine by reducing the drug quantity thresholds necessary to trigger the five and ten year mandatory minimum penalties.

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D. CRIMINAL DEFENSE PRACTITIONERS

1. FEDERAL PUBLIC AND COMMUNITY DEFENDERS

A. J. Kramer, Federal Public Defender, District of Columbia, testified on behalf of the Federal Public and Community Defenders (FPCD). According to Mr. Kramer, crack cocaine cases comprised 58.8 percent of his district's drug cases in 2005, compared to the national average of 20.9 percent. He described the crack cocaine/powder cocaine sentencing disparity as unconscionable and stated that the FPDC supports the modification or elimination of the 100-to-1 drug quantity ratio.

Mr. Kramer urged the Commission to equalize the guideline penalties for crack cocaine and powder cocaine at the powder cocaine level. He stated that there is no scientific, medical, or law enforcement justification for any differential. He urged the Commission to recommend that Congress also equalize the mandatory minimum penalties at the powder cocaine levels. He opposed adding new enhancements because he believes existing guideline and statutory provisions address particular harms. Specifically, he noted that dangerous weapons are already covered by a two level enhancement in USSG §2D1.1(b)(1), a four level enhancement at §USSG 2K2.1(b)(6), and through a separate charge under 18 U.S.C. § 924(c). Similarly, use of a minor is covered by USSG §3B1.4, and sales to protected individuals and in protected locations are covered by USSG §2D1.2.

Mr. Kramer asserted that drug quantity manipulation and untrustworthy information provided by cooperators are problems in federal drug cases. According to Mr. Kramer, undercover agents and informants hold out for higher quantities in a single sale, come back repeatedly for additional sales, and insist that powder cocaine be cooked into crack cocaine before accepting it. These tactics produce more "bang for the buck" in crack cocaine cases than in any other kind of drug case because a very small quantity increase results in a very large sentence increase, and because the simple process of cooking powder cocaine into crack cocaine results in a drastic sentence increase. Mr. Kramer asserted that this dynamic is encouraged by the guidelines' relevant conduct rules. He believes that instead of focusing on major and serious drug traffickers as intended by the Anti-Drug Abuse Act of 1986, law enforcement agents and informants take advantage of the sentencing disparity, relevant conduct rules, and the lack of procedural safeguards to create more serious offenses for the sole purpose of obtaining longer sentences. He added this has a racially disparate impact and wastes taxpayer dollars.

With respect to the disparate impact on minorities, Mr. Kramer noted that there are more African American men in prison than in college. According to Mr. Kramer, one of every 14 African American children has a parent in prison, and 13 percent of all African American males are not permitted to vote because of felony convictions. Mr. Kramer asserted that the harsh treatment of federal crack cocaine offenders contributes to the destruction of families and communities.

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In Mr. Kramer's opinion, federal cocaine sentencing policy has not succeeded in reducing drug use or drug crime. He noted that John Walters, Director of the Office of National Drug Control Policy, told Congress in 2005 that the policy of focusing on small time dealers and users is ineffective in reducing crime. As an alternative, Mr. Kramer suggested that studies show that if a small portion of the budget currently dedicated to incarceration were used for drug treatment, intervention in at-risk families, and school completion programs, it would reduce drug consumption and save taxpayer dollars.

Mr. Kramer emphasized that the physiological and psychotropic effects of crack cocaine and powder cocaine are the same. He noted that the negative effects of prenatal crack cocaine exposure are identical to the negative effects of prenatal powder cocaine exposure, which are significantly less severe than previously believed, similar to prenatal tobacco exposure, and less severe than prenatal alcohol exposure.

Mr. Kramer cautioned that what constitutes a more or less culpable function is unavoidably imprecise and subjective because differences in quantity attributed to different functions are too small, and both quantity and the type of cocaine are subject to manipulation and happenstance. Mr. Kramer observed that crack cocaine always starts as powder cocaine and only as it moves down to lower levels of the distribution chain, down to the street level dealers, is it converted to crack cocaine. Thus, individuals on the lowest end of the chain face the highest sentences. Finally, Mr. Kramer reported that the public does not have confidence in the fairness of the disparity between crack cocaine and powder cocaine sentencing laws, which poses a serious problem for the criminal justice system.

2. PRACTITIONERS' ADVISORY GROUP

Mr. David Debold, Co-Chair of the Practitioners' Advisory Group (PAG), a standing advisory committee to the Commission, testified in support of reducing the crack cocaine penalties to those applicable to the same quantity of powder cocaine, a 1-to-1 drug quantity ratio. He asserted that the current penalty structure does not promote proportionality and runs counter to the goal of calibrating punishment to culpability. In Mr. Debold's opinion, the person who sells or handles crack cocaine at a retail level is no more responsible for the harms resulting from that form of drug than the persons who handled the drug higher up the distribution chain when it was still in powder form. He stated that as a general matter we should reserve the greater penalty for the persons higher in the distribution chain, at the wholesale level (rather than the retail level) who are responsible for more harm because of the higher quantity of drug they distribute.

Mr. Debold acknowledged that the crack cocaine defendant may be more likely to engage in violence or possess a firearm, but he believes there currently are ways in the guidelines to differentiate that defendant from other crack cocaine defendants.

3. AMERICAN BAR ASSOCIATION

Mr. Stephen Saltzburg, the Wallace and Beverly Woodbury University Professor at the George Washington University Law School, testified on behalf of the American Bar Association (ABA). Mr. Salzburg recalled that in 1995, the House of Delegates of the ABA approved a resolution endorsing a proposal submitted by the Commission to Congress which would have treated crack cocaine and powder cocaine offenses similarly and would have accounted for aggravating factors such as weapon use, violence, or injury to another person. Mr. Salzburg reported that the ABA continues to believe that Congress should amend federal statutes to eliminate the sentencing differential and that the Commission should promulgate guidelines that treat both types of cocaine similarly.

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Mr. Salzburg emphasized that not only does the ABA oppose the sentencing differential, it opposes mandatory minimum sentences for drug offenses generally. He referenced a resolution passed by the ABA House of Delegates on August 9, 2004, that adopted a recommendation submitted by the Kennedy Commission. The resolution called for all jurisdictions, including the federal government, to repeal mandatory minimum sentences and called upon Congress to minimize the statutory directives to the Commission to permit it to exercise its expertise independently.

4. NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

With respect to cocaine, Mr. Salzburg noted that the overwhelming majority of crack cocaine defendants are African American, while the overwhelming majority of powder cocaine defendants are white or Hispanic. He observed that the penalties for crack cocaine offenses obviously have a disproportionate impact on African American defendants.

Carmen D. Hernandez, President of the National Association of Criminal Defense Lawyers (NACDL), testified that NACDL urges modification of the 100-to-1 drug quantity ratio. She described the failure to correct the injustice of the sentencing disparity as a symbol of the flaws in the federal sentencing system and a symbol of racism in the criminal justice system. Ms. Hernandez observed that the average crack cocaine sentence exceeds the average sentence for robbery, sexual abuse, and other violent crimes, which she found especially disturbing considering that two-thirds of crack cocaine defendants are street-level dealers.

Ms. Hernandez stated that the way in which crack cocaine is prosecuted substantially impacts lower socioeconomic classes and black or Latino neighborhoods. Over-incarceration within black communities adversely impacts those communities by removing young women and men who could benefit from rehabilitation, educational and job training opportunities, and a second chance. She added that drug amounts consistent with state misdemeanors become federal felonies, resulting in disenfranchisement, disqualification for public benefits including student loans and public housing, and diminished economic opportunity.

Ms. Hernandez asserted there is no scientific basis to conclude that crack cocaine is 100 times worse than powder cocaine. According to Ms. Hernandez, there are fewer deaths as a result of either the violent conduct of crack cocaine users or from an overdose of the drug than result from alcohol, nicotine, or other illegal substances.

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Ms. Hernandez stated that the penalty scheme not only skews law enforcement resources toward lower level crack cocaine offenders, it punishes them more severely than their powder cocaine suppliers, creating an effect known as "inversion of penalties." The 500 grams of cocaine that can send one powder cocaine defendant to prison for five years can be distributed to 89 street level dealers who, if they convert it to crack cocaine, could make enough crack cocaine to trigger the five year mandatory minimum sentence for each defendant. This penalty inversion causes unwarranted sentencing disparity, as does the unequal number of mitigating role reductions granted to crack cocaine defendants.

Ms. Hernandez cautioned that any effort to distinguish between forms of cocaine based on a quantity-role correlation is bound to fail because agents and informants routinely manipulate drug quantities to obtain longer sentences. According to Ms. Hernandez, this practice, in combination with the relevant conduct rules, defeats the value of drug quantity as an indicator of role and culpability. She suggested equalizing the two forms of cocaine as a solution to this problem, which also would permit individualized sentencing based on criminal history and existing specific offense characteristics. Ms. Hernandez emphasized that existing guideline and statutory enhancements are sufficient to punish aggravating circumstances that occur in a minority of crack cocaine offenses, such as weapon involvement and violence.

Mr. Hernandez described crack cocaine and powder cocaine as part of the same supply chain. Anyone trafficking in powder cocaine therefore contributes to the potential supply of crack cocaine and any dangers which may be inherent in crack cocaine. Ms. Hernandez concluded by stating that NACDL opposes any proposal to reduce the disparity by increasing powder cocaine penalties. Ms. Hernandez asserted that raising already harsh powder cocaine

sentencing levels is no answer to the problem of disproportionate and discriminatory crack cocaine sentences. She added that there is no credible evidence that powder cocaine penalties are insufficient.

E. MEDICAL/SCIENTIFIC/TREATMENT COMMUNITIES

1. DISTRICT OF COLUMBIA DEPARTMENT OF HEALTH, ADDICTION, RECOVERY, AND PREVENTION ADMINISTRATION

Mr. Elmore Briggs, Director of Clinical Services, District of Columbia Department of Health, Addiction, Recovery, and Prevention Administration, testified that he looks at cocaine as a public health issue, and the relevant question to ask is whether we are talking about criminals or talking about patients. Mr. Briggs advocated finding a way to separate out violent offenders from those who suffer from addiction, which he characterized as a brain disease typified by obsession, compulsion, loss of control over use, and continued use despite consequences. Treatment can put the disease into remission and result in a productive member of society.

With respect to addicts, Mr. Briggs stated that some try to maximize their gains and minimize their losses by becoming dealers. They initially amass some money by buying some powder cocaine, converting it to crack cocaine, and convincing themselves they are going to sell it and make a lot of money. Mr. Briggs stated, however, that addicts often become their own best customers and generally do not make good dealers.

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According to Mr. Briggs, powder cocaine and crack cocaine users generally experience similar "symptomatology," with some nuanced differences. The withdrawal symptoms of both forms of cocaine are similar, but they vary depending on whether the use was a two to three day binge or chronic use of high doses. Withdrawal symptoms include dysphasia, irritability, difficulty in sleeping, and intense dreaming. He did not report seeing general differences in the way people come into treatment based on the form of cocaine abuse.

Mr. Briggs added that crack cocaine enters the brain quickly, with an instantaneous pleasurable effect on the reward pathway of the brain. However, the decline of the effect occurs quickly as well, producing a desire to experience the intense feeling of pleasure and intensifying cravings and compulsion for the drug. He described how this can lead to frantic behavior as the user begins to chase the same high as before. Mr. Briggs noted that because crack cocaine is cheaper, new users often perceive their resources as infinite. That perception changes as they become caught in a cycle of obsession, compulsion, loss of control over their use, and continued use despite adverse consequences. At that point, many crack cocaine users present for treatment in a state of despair, dejection, and destitution. An additional consideration raised by Mr. Briggs is that the conversion of powder cocaine to crack cocaine removes much of the impurities of the drug. Thus, the user is smoking a substance that is very close to pure, and because it hits the brain fast and then leaves as fast, the addictive nature of the drug and the drug-seeking behavior are magnified.

Although this scenario also applies to many users of powder cocaine, Mr. Briggs stated that given the route of administration and cost, the scenario is prolonged as many users of powder cocaine move from snorting to injecting and/or smoking crack cocaine. This pattern is indicative of a desire to achieve a more intense level of euphoria and a willingness to adapt behaviors to accomplish this goal. Snorting or injecting drugs has an effect of substance dilution that smoking the drug does not have. Thus, a cocaine-addicted person soon realizes that by using powder cocaine in some ways he is are wasting money on a diminishing effect and may start using crack cocaine.

Mr. Briggs concluded that trafficking sentencing should be equalized for cocaine regardless of the form of drug. He added it is important to consider that a significant number of those who sell drugs do so to support their addiction, and any federal sentencing policy that does not take into account the value of diversion and treatment will fail not only the individual but the community at large.

2. NATIONAL INSTITUTE ON DRUG ABUSE (NIDA)

Dr. Nora Volkow, Director of the National Institute on Drug Abuse (NIDA), testified that research supported by NIDA has found cocaine to be a powerfully addictive stimulant that directly affects the brain. Cocaine, like many other drugs of abuse, produces a feeling of euphoria or "high" by increasing the neurotransmitter dopamine in the brain's reward circuitry.

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Cocaine in any form produces similar physiological and psychological effects once it reaches the brain, but the onset, intensity, and duration of its effects are related directly to the route of administration and thus how rapidly cocaine enters the brain. Oral absorption is the slowest form of administration because cocaine has to pass through the digestive tract before it is absorbed into the bloodstream. Intranasal use, or snorting, is the process of inhaling powder cocaine through the nostrils, where it is absorbed into the blood stream through the nasal tissue. Intravenous (IV) use, or injection, introduces the drug directly into the bloodstream and heightens the intensity of its effects because it reaches the brain faster than oral or intranasal administration. Finally, the inhalation of cocaine vapor or smoke into the lungs, where absorption into the bloodstream is as rapid as by injection, produces the quickest and highest peak blood levels in the brain, without the risk attendant to IV use, such as exposure to HIV from contaminated needles.

Dr. Volkow emphasized that all forms of cocaine, regardless of the route of administration, result in a similar blockage of dopamine transporters in the reward center of the brain, which is why repeated use of any form of cocaine can lead to addiction and other health consequences.

Dr. Volkow reported that according to the 2005 Substance Abuse and Mental Health Service Administration's (SAMSHA) National Survey on Drug Use and Health (NSDUH), more than 5.5 million (2.3%) persons aged 12 years or older used cocaine in the year prior to the survey, and 2.4 million (1.0%) were current users. She further reported that 1.4 million persons 12 years or older (0.6%) used crack cocaine in the past year, and 682,000 (0.3%) were current

crack cocaine users. Current crack cocaine use has never been reported above 0.3 percent; however, crack cocaine use in 2005 among blacks 12 years or older was 0.8 percent, a prevalence more than four times as high as in the white (0.2%) or Hispanic (0.2%) populations. Dr. Volkow also cited studies indicating that cocaine use among high school students has remained essentially unchanged since 2003, with past year abuse rates for both forms of cocaine combined at 5.1 percent of 12th graders, 3.5 percent of 10th graders, and 2.2 percent of 8th graders. Rates for crack cocaine specifically were 1.9 percent, 1.7 percent, and 1.4 percent, respectively.

Dr. Volkow reported that there has been a decline in the number of people admitted for treatment for cocaine addiction, according to the Treatment Episode Data Set (TEDS). Primary cocaine admissions have decreased from approximately 297,000 in 1994 (18% of all admissions reported that year) to approximately 256,000 (14%) in 2004. Crack cocaine represented 72 percent of all primary cocaine admissions in 2004. Among crack cocaine admissions, 53 percent were black, 38 percent were white, and 7 percent where Hispanic. The reverse pattern was evident for non-smoked cocaine, with whites accounting for 51 percent, blacks 28 percent, and Hispanics 16 percent. Dr. Volkow added that three out of four who enter an addiction treatment program for cocaine addiction are crack cocaine users.

According to Dr. Volkow, it is widely accepted that the intranasal route of administration is often the first way that many cocaine-dependent individuals use cocaine. She stated that although there are no pharmacological differences between powder cocaine and crack cocaine, there are differences in the route of administration that determine a user's preference. It is much easier and more rewarding to smoke a drug than inject it, and a person may be afraid of contracting HIV, so one may favor smoking. She opined that is why we typically see a pattern in which use of a drug gravitates toward smoking once it becomes available in that form.

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Cocaine's acute effects as a stimulant appear almost immediately after a single dose, and disappear within a few minutes or hours, depending on the route of administration. The short-term physiological effects of cocaine include constricted blood vessels, dilated pupils, and increased temperature, heart rate, and blood pressure. Larger amounts may lead to erratic, psychotic, and even violent behavior. Dr. Volkow reports that there is no evidence that crack cocaine is more associated with violent behavior than IV drug use. Abusers of large amounts may experience tremors, vertigo, muscle twitches, paranoia, or a toxic reaction. In rare instances, sudden death can occur on the first use of cocaine or unexpectedly thereafter, often a result of cardiac arrest or seizures followed by respiratory arrest.

Dr. Volkow stated that there are significant medical complications associated with cocaine abuse. The most frequent complications stem from cardiovascular effects, including disturbances in heart rhythm and heart attacks; respiratory effects such as chest pain and respiratory failure; neurological effects, including strokes, seizures, and headaches; and gastrointestinal complications, including abdominal pain and nausea. Other health effects include increased risk of contracting infectious diseases such as HIV and hepatitis C. When people inject cocaine, there is a possibility of using contaminated material or paraphernalia. However, when they smoke or inject cocaine, the intoxication from cocaine produces changes

that increase risky sexual behaviors that put them at higher risk of contracting diseases such as HIV.

Dr. Volkow described cocaine as a powerfully addictive drug. She added that cocaine abusers often develop a rapid tolerance to the high. When this occurs, even while the blood levels of cocaine remain elevated, the pleasurable feelings begin to dissipate, causing the user to crave more. During this process, an individual may have difficulty controlling the extent to which he will want to use the drug. Dr. Volkow also cited a recent study indicating that about five percent of recent-onset cocaine abusers become addicted to cocaine within 24 months of starting use, but the risk of addiction is not randomly distributed. Females are three to four times more likely to become addicted within two years than males, and non-Hispanic black/African Americans are an estimated nine times more likely to become addicted to cocaine within two years than non-Hispanic whites. However, she emphasized that the excess risk is not attributable to crack cocaine smoking or injecting cocaine.

Dr. Volkow reported that several findings have recently emerged regarding the impact of *in-utero* exposure to cocaine – notably, these effects have not been as devastating as originally believed. There is a greater tendency for premature births in women who abuse cocaine. A neurologic examination at age six reveals no difference between gestational cocaine exposed and control subjects, but Dr. Volkow cautioned that the possibility of other underlying deficits cannot be excluded. She stated a recent follow-up study at age ten uncovered subtle problems in attention and impulse control, putting exposed children at higher risk of developing significant behavioral problems as cognitive demands increase. She concluded that estimating the full extent of the consequences of maternal cocaine, or any drug, abuse on the fetus and newborn remains very challenging and, therefore, caution should be used in searching for causal relationships.

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3. DR. HAROLYN BELCHER

Dr. Harolyn Belcher, Associate Professor of Pediatrics, Johns Hopkins University School of Medicine, testified regarding the prenatal effects of cocaine use. Dr. Belcher reported that according to the 2005 National Survey of Drug Use and Health, 3.9 percent of pregnant women ages 15 to 44 used illicit drugs in the past month prior to the survey, the same rates as 2002-2003. Marijuana was the most commonly used illicit drug, accounting for approximately 74.2 percent of current illicit drug use, and three times as many reported using powder cocaine as crack cocaine. These rates of fetal exposure accounted for approximately 159,000 with illicit drug exposure, versus 496,100 alcohol and 680,000 tobacco-exposed infants.

Dr. Belcher stated there are no scientific studies to date that compare the immediate and long term effects of intrauterine powder cocaine versus crack cocaine exposure on child development. Biologically, the rate of drug distribution varies depending on the method of administration, but the fetal effects of crack cocaine and powder cocaine, once they pass through the placenta, should be identical.

According to Dr. Belcher, the physical and neurotoxic effects of alcohol exposure are significantly more devastating than cocaine exposure to the fetus. She reported that recent studies indicate that intrauterine cocaine exposure is associated with less risk of adverse health and neurodevelopmental outcomes in the child compared to fetal alcohol and cigarette (tobacco) exposure. Dr. Belcher added that fetal alcohol syndrome (FAS) is one of the leading identifiable and preventable causes of mental retardation and birth defects, occurring in 30 to 40 percent of pregnancies in which women drink heavily (greater than one drink of 1.5 ounces of distilled spirits, five ounces of wine, or 12 ounces of beer per day).

Dr. Belcher noted that children with intrauterine cocaine/polydrug exposure have similar cognitive outcomes as their socio-economically matched peers. Although subtle effects of cocaine exposure have been noted in language development at six and seven years of age, those effects were not observed at nine and one-half years of age. Similarly, some researchers have reported increased risk of developing externalizing behaviors among boys with intrauterine cocaine exposure, but other researchers have failed to observe such adverse outcomes.

In sum, Dr. Belcher stated that there is no evidence that one form of cocaine is biologically more harmful than the other to the fetus or developing child. Dr. Belcher emphasized that children with intrauterine cocaine exposure benefit from interventions that provide support, education, and medical surveillance and treatment services.

F. ACADEMIC AND RESEARCH COMMUNITIES

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1. DR. ALFRED BLUMSTEIN

Dr. Alfred Blumstein, Professor of Urban System and Operations Research, Carnegie-Mellon University, testified regarding violence associated with cocaine. According to Dr. Blumstein, violence associated with the crack cocaine market rose appreciably between 1985-1993. He pointed to a 25 percent increase in homicide and robbery during that period and attributed the increase to gun use by young people who were recruited into the crack cocaine markets, largely as replacements for the large number of older sellers who were incarcerated. He asserted that the increase in the incarceration rate between 1980 and 2000 likely did not avert many drug transactions because of the recruitment of younger people as replacements. He added that, since crack cocaine typically is sold in street markets, sellers are inherently vulnerable to street robberies, and so they carry weapons for self defense.

Dr. Blumstein reported that the maturation and stabilization of the crack cocaine market has had an important effect in reducing the level of violence. He described a significant reduction in violence between 1993 and 2000, citing more than a 40 percent reduction in both homicide and robbery. Dr. Blumstein believed that a major contributor to that drop in violence is the decline in the demand for crack cocaine by new users, which in turn led to the dismissal of the young sellers that had previously been recruited. While the demand for cocaine in both its forms has continued, he stated that the violence associated with these markets decreased because the persistent demand is driven by longer-term users who can personally meet their demand rather than turn to violence-prone streets.

Dr. Blumstein acknowledged that the initial intent of introducing the sentencing differential was understandable as a political response to the violence associated with the introduction of crack cocaine, but the violence was associated with the intense competition associated with the introduction of a new drug market. He stated the competitive violence has certainly abated, and in his view any difference that might appear between the powder cocaine and crack cocaine markets has nothing to do with the difference in the drugs themselves. Those differences can be attributed to differences in the venue of the market (*e.g.*, street crack cocaine markets versus closed powder cocaine markets) or to the dispute resolution culture of the communities in which the market is located.

Dr. Blumstein pointed out that one of the attractive features of the federal sentencing guidelines is the ability to increase basic guideline sentences for aggravating features of the basic crime, such as carrying a gun or using a gun. This opportunity, according to Dr. Blumstein, obviates the need to differentiate between powder cocaine and crack cocaine in the drug guideline, which is important because of the perception that the sentencing differential is racially discriminatory.

2. DR. BRUCE JOHNSON

Dr. Bruce Johnson, Director, Institute for Special Populations Research, National Development and Research Institutes, testified regarding the changing trends of crack cocaine use and cocaine powder usage among arrestees in Manhattan since 1980. Dr. Johnson reported that the crack cocaine "epidemic" peaked between 1987 and 1989 in New York City, when about 70 percent of all arrestees were detected as positive for use of either powder cocaine or crack cocaine. He added that there has been a substantial decline in detected cocaine, from about two-thirds in 1987 through 1985 to about two-fifths in 2000 through 2003. Dr. Johnson attributed the decline primarily to the changing mix of birth cohorts among ethnic groups among New York City arrestees.

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Dr. Johnson summarized data that show that older cohorts, those aged 35 and older in 2003, comprise a diminishing proportion of arrestees in New York City, and this is the group that continues to have high rates of detected crack cocaine use. Conversely, among younger cohorts, those born after 1970, there was a considerable diminution in crack cocaine use. Thus, the overall decline is in great part because the younger generation, particularly of African-American males, has greatly diminished its use of crack cocaine.

Dr. Johnson reported that crack cocaine users appear to limit their criminal activities so as to bring about limited harm to others. Since 2000, only a small minority of crack cocaine users in New York City have carried guns or used weapons, engaged in aggravated assault, or otherwise harmed others. He concluded that violence is relatively rare among current cocaine users. Dr. Johnson stated that retail sales of powder cocaine occur mainly in private settings and primarily involve consumers who hold otherwise legal jobs and who typically avoid the crack cocaine market. Most low-level drug distributors added crack cocaine to their product line in the 1990s. According to Dr. Johnson, most retail sales and low-level support roles, especially by

young women, are done to support one's own crack cocaine consumption. He added that most crack cocaine distributors live at or below poverty levels, and very few are able to establish households or maintain a working class standard of living.

Dr. Johnson cited studies concluding that almost all violence associated with crack cocaine is "systemic violence," that is violence that occurs within the drug distribution apparatus and among people who are engaged in drug selling and distribution. There is very little "pharmacological violence" that was caused by people being high on crack cocaine or coming down from a crack cocaine high. However, robbery of other drug distributors still is a significant problem and typically not reported to the police.

Dr. Johnson asserted that it is nearly impossible to document any deterrent effect of the 100-to-1 drug quantity ratio because crack cocaine distributors rarely mention awareness of it or report changing business activities due to its existence. Moreover, he stated that the average crack cocaine distributor does not know with precision how much he possesses, but often believes it to be under five grams. Repeat purchases of bundles of vials or bags, each valued at $10, may exceed five grams, however.

Many persons in New York City were arrested from 2001 to 2003 for felony controlled substance possession (about 60,000 annually) and sale (about 20,000 annually), and Dr. Johnson believed that the majority of the arrests for controlled substance sale were for crack cocaine. Yet, he noted, very few face federal prosecution. Rather, the vast majority are prosecuted and sentenced under New York state law, which treats powder cocaine and crack cocaine equally and does not require a mandatory minimum sentence.

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Dr. Johnson reported that among New York City arrestees, 26 percent self-report crack cocaine use in the past 72 hours, compared to 17 percent who self-report powder cocaine use. He cited recent studies that document that almost 90 percent of ADAM arrestees whose urine specimens tested positive for cocaine also had detectable metabolites for crack cocaine. He asserted these data suggest either a 10-to-1 or a 2-to-1 drug quantity ratio would be more appropriate than the current 100-to-1 drug quantity ratio.

3. DR. PETER REUTER

Dr. Peter Reuter, Professor in the School of Public Policy and in the Department of Criminology, University of Maryland, testified that the inherent properties of the drug should guide the sentencing policy decision, not the contingent differences, *i.e.*, those associated with its actual use.

Dr. Reuter explained that relatively safe powder cocaine can be converted to "more dangerous" crack cocaine simply by dissolving it with baking soda and boiling. Crack cocaine is converted from powder cocaine primarily at the lower market levels and at a cost that is trivial compared to the value of the cocaine itself. Thus, the same atoms that merit only a modest sentence when part of a wholesale dealer's one pound bag of powder can elicit a five year

mandatory minimum sentence several layers down the distribution chain when they are part of a low-level seller's five gram stash of crack cocaine.

Dr. Reuter acknowledged that route of administration matters to the user, and one generally expects faster and shorter acting routes of administration to be more reinforcing. However, Dr. Reuter asserted that the rapid course or action is not the primary motivation for the differential sentencing since smoking nicotine and injecting powder cocaine also act very fast. Rather, it is crack cocaine's association with violence and the birth of drug-addicted infants that drove the fear of crack cocaine and resulted in the sentencing differential. However, he stated there is nothing intrinsic about crack cocaine being the base and not the alkaloid form of the molecule that made its retail markets so violent in the 1980s or that made it any more harmful *in utero.*

Dr. Reuter cited studies indicating that, as compared to powder cocaine, crack cocaine is much more heavily used by poor, African American males than by other groups. He added there is little evidence of substantial white or Asian middle class crack cocaine dependence or abuse.

Dr. Reuter reported that the violence associated with crack cocaine has declined. In the mid-1980s, crack cocaine was used primarily by the young. Now, because rates of initiation and escalation into frequent use have been lower for a long time, the population of users has aged. For example, in 2004, among treatment admission for which crack cocaine is the primary drug of abuse, two-thirds of admissions were age 35 or older, a much higher age than for powder cocaine. He explained that relationships between any specific drug and behaviors such as crime and violence are subject to change over the course of a drug epidemic.

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Dr. Reuter observed that crack cocaine historically has been associated with high levels of violence, but he questioned whether it is the drug itself or the interaction between the drug and the population that is the cause. Some might argue that crack cocaine is more dangerous precisely because it is more attractive to those for whom stimulants engender particularly harmful behavior: young, poorly-educated males in high-crime neighborhoods. Thus, if the goal of sentencing is in part retributive, it can be argued that selling crack cocaine has resulted in greater harm to society than selling cocaine powder and, therefore, longer sentences are appropriate.

Dr. Reuter cautioned, however, that this approach ignores the social and racial consequences of the interaction. Dr. Reuter stated that the disparity in sentences produced a tragic disproportion in the share of crack cocaine prison time served by African Americans. In his experience, a sentencing structure that is based solely on the damage inflicted during the early stages becomes increasingly arbitrary over time. This is because the sentencing regime typically is enacted when the drug is in its early phase of popularity, but each new drug becomes associated with an aging cohort of users over time, which reduces the level of violence associated with the drug. He asserted his belief that this is what has occurred with crack cocaine penalties.

Dr. Reuter added that there is little evidence that increasing sentence lengths reduce drug use either by raising prices or reducing availability, citing a tripling of incarceration between 1986 and 1997 that raised prices by only five to 15 percent, which he termed a modest accomplishment given the financial and human costs associated with incarceration.

G. COMMUNITY REPRESENTATIVES AND INTERESTED PARTIES

1. FAMILIES AGAINST MANDATORY MINIMUMS

Ms. Julie Stewart, President and Founder of the Families Against Mandatory Minimums (FAMM), testified that the same organizing principle that applied 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. She stated that FAMM agrees with the Commission's prior conclusions that the harm associated with crack cocaine does not justify substantially harsher treatment compared to powder cocaine.

Ms. Stewart endorsed the recommendations put forward by the Federal Public and Community Defenders, specifically:

(1) Equalize guideline penalties for crack cocaine and powder cocaine at the powder cocaine level.

(2) Recommend to Congress that it do the same.

(3) Refrain from adding new enhancements because existing guideline enhancements and statutory penalties can be applied if appropriate.

(4) Recommend that Congress repeal the mandatory minimum for simple possession of crack cocaine.

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2. ACLU

Ms. Jesslyn McCurdy, Legislative Counsel of the National Office American Civil Liberties Union (ACLU), testified that the ACLU opposes the disparity in sentencing for equal amounts of crack cocaine and powder cocaine. She urged the Commission to support amendments to federal law that would equalize crack cocaine and powder cocaine sentences at the current level of sentences for powder cocaine. She described the mandatory minimum of five years for simple possession of more than five grams of crack cocaine as "extraordinarily harsh."

Ms. McCurdy delineated three principle areas of concern regarding the crack cocaine-powder cocaine ratio. First, the 100-to-1 drug quantity ratio has a racially discriminatory impact and has had a devastating impact on communities of color. Second, it created many myths associated with crack cocaine without supporting facts. Third, it does not reflect the original intent of Congress to focus on high-level drug traffickers.

Ms. McCurdy cited data showing that the vast majority of offenders sentenced under the federal crack cocaine laws are Hispanic and African American, despite her belief that whites and Hispanics form the majority of crack cocaine users. According to Ms. McCurdy, in 2003, whites constituted 7.8 percent and African Americans constituted more than 80 percent of the defendants sentenced under the federal crack cocaine laws, while 66 percent of crack cocaine users are white or Hispanic. She noted that African Americans now serve virtually as much time in prison for a drug offense – 58.7 months – as whites do for a violent offense at 61.7 months.

She cited data indicating that African Americans make up 15 percent of the nation's drug users, yet they comprise 37 percent of those arrested for drug violations, 59 percent of those convicted, and 74 percent of those sentenced to prison for a drug offense. In 1986, before the enactment of the federal mandatory minimum sentencing for crack cocaine offenses, the average federal drug sentence for African Americans was 11 percent higher than for whites. Four years later, the average federal drug sentence for African Americans was 49 percent higher than for whites. Ms. McCurdy concluded that a dramatic shift occurred in the overall incarceration trends for African Americans, relative to the rest of the nation, transforming federal prisons into institutions increasingly dedicated to the African American community.

Ms. McCurdy explained that the collateral consequences of the nation's drug policies, racially targeted prosecutions, mandatory minimums, and crack cocaine sentencing disparities have had a devastating effect on African American men, women, and families. Mandatory minimums not only contribute to the disproportionately high incarceration rates, but also separate fathers from families, separate mothers with sentences for minor possession crimes from their children, leave children behind in the child welfare system, create disfranchisement of those with felony convictions, and prohibit previously incarcerated people from receiving social services.

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Ms. McCurdy asserted that the rapid increase in the use of crack cocaine between 1984 and 1986 created many myths about the effects of the drug in popular culture that were used to justify treating crack cocaine differently. For example, crack cocaine was said to destroy the maternal instinct and cause unique dangers to fetuses, which recent studies dispute. Similarly, crack cocaine was said to cause especially violent behavior in users, but most violence associated with crack cocaine results from the nature of the illegal market and is similar to violence associated with trafficking of other drugs. In addition, crack cocaine was thought to be instantly addictive, but the propensity for dependence depends on the method of ingestion, amount used, and frequency, not the form of the drug. She concluded there is no scientific or penological justification for the 100-to-1 drug quantity ratio.

Ms. McCurdy also asserted that the sentencing structure does not target high-level drug traffickers as originally intended by Congress. She cited the fact that the purity of cocaine has increased while the price has declined as evidence that the National Drug Control Strategy has not made progress in cutting off supply and that the country's drug control policy has not properly focused on prosecuting high-level traffickers.

Ms. McCurdy reported that the ACLU recommends that the quantities of crack cocaine that trigger federal prosecution and sentencing must be equalized with and increased to the current levels of powder cocaine. The ACLU believes that federal prosecutors must be properly focused on high level traffickers of both crack cocaine and powder cocaine. In addition, the mandatory minimum for simple possession of crack cocaine should be repealed.

3. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP)

Mr. Hillary Shelton, Director of the Washington Bureau of the National Association for the Advancement of Colored People (NAACP), testified and described the crack cocaine penalties as discriminatory, unfair, and immoral policy. He observed that despite the fact that cocaine use is roughly equal among the different populations of the nation, the vast majority of offenders who are tried, convicted, and sentenced under federal crack cocaine mandatory minimum sentences are African Americans. He asserted that because the law governing federal crack cocaine offenders has remained unaltered, so has the discriminatory impact.

Mr. Shelton acknowledged that policy makers could not have foreseen twenty years ago the vastly disparate impact that the 1986 law would have on communities of color. However, African Americans, especially low income African Americans, continue to be severely penalized at much greater rates than white Americans for drug use, and the policy is having a devastating effect on their communities. Mr. Shelton stated this reflects a callous disregard for the people of the African American communities.

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Mr. Shelton stated that ongoing research has eroded the myths that crack cocaine is more addictive than powder cocaine, that crack cocaine users are, because of their choice in drug use, more violent than powder cocaine users, or that maternity wards are full of "crack babies." He noted that medical authorities have found that crack cocaine is no more addictive than powder cocaine.

Mr. Shelton reported that the NAACP opposes increasing the penalties for powder cocaine so that they are more in line with those of crack cocaine. Such an approach, in his view, would not take into consideration the more even-handed, informed and balanced approach that went into the development of powder cocaine sentencing ranges and would only fill more prison cells with low-level offenders serving mandatory minimum sentences. He testified that the NAACP supports a 1-to-1 drug quantity ratio at current powder cocaine levels.

4. SENTENCING PROJECT

Mr. Ryan King, Policy Analyst at the Sentencing Project, testified that the Commission should recommend that Congress reform federal cocaine sentencing policy for four reasons. First, the current sentencing structure, with its reliance on quantity as the primary determinant for sentence length, is flawed by design and calibrated to target low-level crack cocaine users with five year mandatory minimum sentences. Second, the rationale that more severe crack cocaine penalties are necessary because of heightened correlations with more serious offenses amounts to

either a "double counting" of offense characteristics in cases with a serious concurrent offense or an unwarranted sentence enhancement in the remainder of cases. Third, the current federal cocaine sentencing policy has failed to produce any appreciable impact on the crack cocaine market. Fourth, the national consensus regarding demand reduction versus law enforcement has evolved over the last two decades to support a more treatment-oriented agenda.

Mr. King observed that the differential penalty threshold has been particularly controversial for two reasons. First, crack cocaine and powder cocaine are manufactured from the same compound of origin and their pharmacological roots are identical. Second, and most important, the weight level necessary to warrant a five year mandatory sentence for crack cocaine is set so low that it is likely to impact low-level users. He stated that it is entirely plausible that someone possessing five grams of crack cocaine, the equivalent of slightly less than two packets of sugar, could be holding that quantity for personal consumption. He estimated that five grams of crack cocaine translates to between 10 and 50 doses. By comparison, the 500 grams of powder cocaine necessary to trigger the five year mandatory minimum yields between 2,500 and 5,000 doses. Mr. King asserted that it is reasonable to consider than an individual might consume between 10 and 50 doses of crack cocaine during the course of a week, but nobody could consume 2,500 to 5,000 doses of powder cocaine.

Mr. King concluded that this improper calibration of weight threshold triggers has resulted in a disproportionate number of low-level offenders being convicted for crack cocaine offenses. According to Mr. King, the crack cocaine weight triggers bears no resemblance to the seriousness of the conduct. He added that reliance on this single factor to determine sentence exacerbates the aforementioned problems by exposing defendants who have played peripheral roles in the drug trade to sentences far out of proportion to their conduct in spite of potentially mitigating evidence.

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Mr. King also observed that the fear that crack cocaine created a proclivity to engage in other serious criminal behavior led Congress to embed an assumption in favor of a defendant having committed a concurrent serious crime in the structure of the statutory penalty. Congress essentially codified the unsubstantiated, and subsequently refuted, belief that all crack cocaine defendants manifest a tendency toward more serious criminal offending. According to Mr. King, this is problematic for two reasons. First, for those who have not engaged in a lesser included or more serious offense, the enhanced penalty scheme categorically subjects crack cocaine defendants to a punishment based on uncommitted behavior. Second, for those who have been charged with a concurrent offense, the penalty differential double counts the charged conduct relative to a powder cocaine defendant.

Mr. King also concluded that federal cocaine sentencing policy has failed to disrupt drug markets, citing statistics that the number of users has remained stable for the last two decades; the number of annual new initiates during the 1990s remained level; and the average price per gram of a purchase between one and 15 grams actually declined by 57 percent from 1986 to 2003. Mr. King suggested that if law enforcement or stiffer sentences were effective in deterring market entry, one would expect supply to decline and prices to increase, but the data show the opposite. He added that the fact that prices for powder cocaine, with its lower penalty structure,

have the same pattern further demonstrates that the federal crack cocaine penalty structure has not disrupted drug markets. He attributed this observation to the elasticity of drug markets in which there is generally a strong replacement effect of former sellers lost to prison.

Mr. King concluded that if Congress is unwilling to repeal mandatory minimum sentencing, the Commission should recommend increasing the crack cocaine mandatory minimum thresholds to the levels currently in place for powder cocaine.

5. JUSTICE ROUNDTABLE

Ms. Nkechi Taifi, Senior Policy Analyst for the Open Society Institute, testified on behalf of the Justice Roundtable. She related that on February 16, 2006, an open letter to Congress was sent by over 50 organizations regarding cocaine sentencing. They asserted that the 100-to-1 drug quantity ratio is too great and results in penalties that sweep too broadly, apply too frequently to lower level offenders, overstate the seriousness of the offenses, and produce insupportable racial disparity in sentencing. The groups stressed that justice necessitates that crack cocaine sentences have the same quantity triggers as those currently required for powder cocaine, as two decades of stringent crack cocaine sentencing have neither reduced cocaine trafficking nor improved the quality of life in deteriorating neighborhoods. Ms. Taifi strongly recommended that the Commission adhere to its original 1995 recommendation, which would begin to place the focus of federal cocaine drug enforcement on major drug traffickers.

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6. NATIONAL COUNCIL OF LA RAZA (NCLR)

Angela Arboleda, Associate Director for Criminal Justice Policy, National Council of La Raza (NCLR), testified that NCLR shares the concerns of other groups regarding the discriminatory effect of the 100-to-1 drug quantity ratio. Ms. Arbodela stated that NCLR relied on numerous studies over the past decade documenting severe racial and ethnic disparities against the Latino community in the criminal justice system.

Ms. Arboleda stated that in 2000 Latinos constituted 12.5 percent of the United States population but accounted for 43.4 percent of the total drug offenders that year (50.8% were convicted for a powder cocaine offense and 9% for a crack cocaine offense). Ms. Arboleda attributed the disproportionate number of Latino drug offenders to a combination of factors, but most particularly, racial profiling. She stated that Latinos are no more likely than other groups to use illegal drugs, but they are more likely to be arrested and charged with drug offenses and less likely to be released before trial.

Ms. Arboleda stated that NCLR believes the Hispanic community often is targeted by law enforcement for drug offenses based on their ethnicity. As evidence, she cited, among other statistics, the fact that Hispanics accounted for 30.3 percent of federal inmates in 1998, a rate twice as high as the group's percentage of the population that year. Furthermore, Hispanics constituted 43.5 percent of those convicted of federal drug defendants in 2003.

Ms. Arboleda observed that, contrary to popular stereotype, the overwhelming majority of incarcerated Latinos have been convicted of relatively minor nonviolent offenses, are first time offenders, or both. The cost of excessive incarceration to the groups affected, and to the broader society, in terms of reduced current economic productivity, barriers to future employment, inhibited civic participation, and growing racial/ethnic societal inequalities, is extremely high.

Ms. Arboleda reported that NCLR recommends the elimination of the sentencing differential by increasing the crack cocaine threshold quantities to the current powder cocaine threshold quantities. She urged the Commission to resist proposals that would lower the powder cocaine thresholds in order to achieve equalization between crack cocaine and powder cocaine and advocated making alternative methods of punishment for low-level, nonviolent drug offenders more widely available. She also suggested that DEA agents and federal prosecutors concentrate on solving the real problem – deterring the importation of millions of tons of powder cocaine – and prosecuting ring leaders with the fullest weight of law.

7. CRIMINAL JUSTICE POLICY FOUNDATION

Mr. Eric E. Sterling, President, Criminal Justice Policy Foundation, testified that the goal of the Anti-Drug Abuse Act of 1986 was to give greater direction to the DEA and United States Attorneys on how to focus scarce law enforcement resources, specifically by focusing on major traffickers, the manufacturers, and heads of organizations who are responsible for creating and delivering very large quantities of drugs. He described state and local enforcement agencies as having an enormous capacity to effectively police neighborhood, local, and city-wide retail drug trafficking. According to Mr. Sterling, they have made between one and 1-1/2 million arrests for drug abuse violations annually for the last decade, and state courts impose about one-third of a million felony convictions annually. By contrast, the number of federal drug cases that can be brought is dramatically smaller, in the range of 20 to 30 thousand cases per year. Thus, Congress's stated goal made sense. According to Mr. Sterling, however, Congress made a mistake by choosing quantities, particularly for cocaine, that have pointed the federal effort in the wrong direction, the lowest level of retail trade.

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Mr. Sterling discussed the widely held belief that crack cocaine leads to more violence than powder cocaine and is more destructive to the communities in which it is used. He asserted the problem with this analysis is its pharmacological bias. Since the analysis attempts to find differences between crack cocaine and powder cocaine to justify the sentencing difference, it attributes any differences to the form of drug rather than other factors that cause or contribute to the problems, independent of the form of the drug. In short, attributing the plight of the most impoverished neighborhoods to crack cocaine ignores too many other real phenomena and other cultural problems. Although he acknowledged that crack cocaine no doubt contributes, so does alcohol abuse.

Mr. Sterling also stated that claims about crack cocaine's unique addictiveness and its unique *in utero* devastation of fetal development have been discredited. Furthermore, pharmacologically there is no difference in the violence propensity of crack cocaine users versus

powder cocaine users. Mr. Sterling observed that when illegal drug markets are unstable and immature, violence is more common than when the markets are matured and stabilized. Violence is an inherent tool of all illegal drug markets, as disputes among market participants cannot be resolved to by resort to the courts. In addition, drug markets deal exclusively in cash, which creates robbery targets. As the markets mature, these risks diminish. Mr. Sterling asserted that nothing in the crack cocaine market is intrinsically more prone to violence than another busy illegal market.

Mr. Sterling concluded that the federal government should no longer be involved in retail drug cases and should focus on the international production and trafficking in cocaine, the highest level traffickers. He argued there should be no federal crack cocaine cases because such a case, by definition, is a retail case.

8. BREAK THE CHAIN

Ms. Deborah Peterson Small, Executive Director, Break the Chain, testified and recounted the growing criticism regarding the impact of the 100-to-1 drug quantity ratio. She stated that federal sentencing laws punish not only those who sell drugs, but also a wide range of people who help or merely associate with those who sell drugs and have a minimal or no involvement whatsoever in the drug trade. She added that the impact on women has been dramatic as they now constitute the fastest growing segment of the prison population. Women are now six times as likely to spend time in prison that they were prior to the passage of the mandatory minimum laws.

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Ms. Small asserted that crack cocaine sentences are grossly disproportionate compared with sentences for other crimes. For example, a sale of five grams of crack cocaine for $400 results in a five year sentence compared to the national average time served for homicide of about five years and four months. She cited evidence that the punitive sentencing structure has not produced benefits commensurate with the harms it is inflicting. For example, despite increased law enforcement focus on cocaine, the street prices of crack cocaine and powder cocaine have remained the same over the past decade, and cocaine purity is as high as it was at the height of the crack cocaine era. She concluded this shows that the strenuous efforts to target street level crack cocaine dealing has had little impact on supply and overall distribution.

Ms. Small stated that government surveys consistently show that drug use rates are similar across racial and ethnic groups and that two-thirds of crack cocaine users are white or Hispanic. Furthermore, studies show that the majority of drug users purchase their drugs from people who are the same racial or ethnic background as they are, which suggests that the majority of crack cocaine sellers are white. Nonetheless, African Americans comprised 82.3 percent of federal crack cocaine defendants in 2005.

Ms. Small also rebutted claims by law enforcement that stronger penalties against crack cocaine are warranted because higher levels of violence are associated with the crack cocaine trade, citing two recent studies. She added that the disparate focus on drug law enforcement on poor inner-city neighborhoods, and particularly on young men in those communities, exacerbates

the endemic problems of poor performing schools, high unemployment, dysfunctional families, and persistent poverty.

Ms. Small urged the Commission to recommend eliminating the sentencing disparity by raising the threshold quantities that trigger the mandatory minimum penalties for crack cocaine to the threshold quantities that current exist for powder cocaine offenses. In addition, she urged repeal of the mandatory minimum for simple possession of crack cocaine.

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Appendix C

SUMMARY OF WRITTEN PUBLIC COMMENT ON COCAINE SENTENCING POLICY

On January 30, 2007, the Commission published in the *Federal Register* a notice requesting comment on any suggestions at the November 14, 2006, public hearing or any other suggestions (such as possible changes in the Drug Quantity Table) for addressing federal cocaine penalties. The Commission received written comment from several groups, including the United States Department of Justice; the Federal Public and Community Defenders, the Practitioners' Advisory Group, National Council of La Raza, the Mexican American Legal Defense and Education Fund, the Sentencing Project, Human Rights Watch, members of the academic community, and concerned citizens.

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1. U.S. DEPARTMENT OF JUSTICE

The Department of Justice emphasized that the existing penalties for crack cocaine offenses – including statutory mandatory minimum penalties and sentencing guidelines – have been an important part of the Federal government's efforts to hold crack cocaine and powder cocaine traffickers accountable for their actions. The Department acknowledged that many view the 100-to-1 drug quantity ratio as an example of unwarranted racial disparity in sentencing and that it may be appropriate to address the ratio. The Department stated its desire to work with the Commission, the Administration, and the Congress to determine whether any changes are necessary in the drug weight triggers for mandatory minimums and guidelines sentences for crack cocaine and powder cocaine trafficking.

The Department emphasized that only Congress can definitively alter federal cocaine sentencing policy, by modifying the existing statutes that define the federal penalty structure. The Department suggested that the Commission continue to fill its critical role by providing Congress, the Department, and the general public with updated research and data that will assist in the development of Federal cocaine sentencing policy, including updated information on the current sentencing environment, and on crack cocaine and powder cocaine sentences being imposed in Federal district courts. The Department reiterated it would oppose any sentencing guideline amendments that do not adhere to the statutes that currently set forth the penalty structures for federal cocaine offenses.

2. FEDERAL PUBLIC AND COMMUNITY DEFENDERS

The Federal Public and Community Defenders (FPCD) urged the Commission to amend the federal sentencing guidelines to eliminate the 100-to-1 drug quantity ratio. Specifically, the FPDC endorsed reducing the threshold quantities for crack cocaine to the current threshold quantities for powder cocaine. In addition, FPDC suggested that the Commission add a downward departure provision for cases in which the offender successfully completes a drug treatment program. The FPDC stated that the disparity in existing federal cocaine sentencing policy lacks justification and causes detrimental effects to families, communities, and the entire federal criminal justice system.

3. PRACTITIONERS' ADVISORY GROUP

The Practitioners' Advisory Group (PAG) recommended that the Commission equalize crack cocaine and powder cocaine penalty levels at the existing powder cocaine penalty levels. In PAG's view, the November 14, 2006, hearing testimony confirmed that equalization is appropriate and that the current federal cocaine penalty structure lacks supporting evidence. The PAG emphasized the testimony by many witnesses that the current crack cocaine penalty structure creates racial disparity in sentencing, which undermines confidence in the federal criminal justice system.

PAG stated that the various justifications cited for the Anti-Drug Abuse Act of 1986 have been shown to have been or are no longer true. PAG added that additional aggravating harms can be addressed through appropriate sentencing enhancements and adjustments.

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4. NATIONAL COUNCIL OF LA RAZA AND MEXICAN LEGAL DEFENSE AND EDUCATIONAL FUND

The National Council of La Raza (NCLR) and the Mexican American Legal Defense and Educational Fund (MALDEF) recommended eliminating the sentencing differential between crack cocaine and powder cocaine by increasing the crack cocaine quantity thresholds to the existing powder cocaine quantity thresholds. Further, they urged the Commission to resist proposals to lower the powder cocaine threshold quantities in order to equalize the drug quantity ratio.

NCLR and MALDEF stated that the 100-to-1 drug quantity ratio disproportionately impacts communities of color and low income communities. They added that the racial imbalances in the justice system, while primarily affecting African Americans, increasingly are affecting Latinos.

NCLR and MALDEF observed that the majority of drug offenders are low-level, mostly nonviolent offenders. They also pointed out that drug use rates per capita among whites and minorities are similar. According to United States Census data, Latinos constituted 12.5 percent of the United States population, but Latinos comprised 43.4 percent of federal offenders sentenced in Fiscal Year 2000. In addition, the proportion of Hispanic drug offenders convicted

of powder cocaine and crack cocaine offenses has increased, from 39.8 percent of powder cocaine cases in 1992 to 50.8 percent in 2000, and from 5.3 percent to 9.0 percent for crack cocaine. NCLR and MALDEF attributed the increasing proportion of Latino offenders to significant inequalities in the United States criminal justice system.

NCLR and MALDEF also supported wider availability of alternative penalties, including substance abuse treatment for low-level, nonviolent offenders. They also suggested a renewed emphasis on prosecuting high level drug kingpins and halting importation of large quantities of powder cocaine into the United States.

5. THE SENTENCING PROJECT

The Sentencing Project stated that the Commission should recommend that Congress repeal the 100-to-1 drug quantity ratio and should modify the guidelines to reflect an equalization of crack cocaine and powder cocaine penalties at the current powder cocaine levels. The Sentencing Project stated that defendants charged with crack cocaine offenses receive disproportionately severe sentences because of an incorrect perception of a high association between crack cocaine and violence. The Sentencing Project pointed to data indicating that the majority of both crack cocaine and powder cocaine defendants did not involve weapons in their offense, and when they do, statutory penalty enhancements are available under 18 U.S.C. § 924(c).

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The Sentencing Project stated that the current federal cocaine sentencing policy has a disparate impact on the African American community, noting that eight out of ten persons convicted in federal court annually for crack offenses are African American. The Sentencing Project suggested that the harsh crack cocaine penalties have created distrust of law enforcement within African American communities, may result in the deliberate obstruction of investigations of other crimes, and may hinder jury selection. The Sentencing Project also asserted that the crack cocaine penalties are diverting resources from important social services to the prison system.

6. HUMAN RIGHTS WATCH

Human Rights Watch recommended that the Commission eliminate the sentencing disparity between crack cocaine and powder cocaine, stating that the crack cocaine sentences are disproportionately severe and have a racially discriminatory impact. Human Rights Watch observed that federal crack cocaine penalties are more severe than state crack cocaine penalties and more severe than drug trafficking penalties in European countries, where the average sentence is 33 months. Human Rights Watch asserted that there is much empirical data showing that the inherent pharmacological dangers of crack cocaine are not dramatically different from those of powder cocaine, that many of the alleged dangers of crack cocaine are myths, and that the harsh federal sentences have had little impact on the demand for or the availability of the drug.

Human Rights Watch stated its belief that the historical concerns about violence and the increased use of crack cocaine that may have warranted sentencing differentials twenty years ago are outdated, and there is no justification for a sentencing differential. Thus, they supported elimination of the 100-to-1 drug current quantity ratio by increasing the crack cocaine threshold quantities to those currently in place for powder cocaine offenses. Further, they urged the Commission to recommend that Congress do the same.

7. AMERICAN CIVIL LIBERTIES UNION

The American Civil Liberties Union (ACLU) urged the Commission to recommend that Congress amend federal law to equalize the penalties for crack cocaine and powder cocaine at the current penalty levels for powder cocaine offenses. The ACLU emphasized support for this change among its members, academics, federal judges, prosecutors, and President Bush. In the ACLU's view, the disparate sentencing regime has serious implications for due process and equal protection and raises concerns regarding freedom of association and freedom from disproportionate sentencing.

The ACLU stated that the 100-to-1 drug quantity ratio promotes unwarranted sentencing disparities based on race, citing studies that show that African Americans are more likely to be convicted of crack cocaine offenses and serve more time in prison for drug offenses than any other racial group. The ACLU stated this is disturbing because most crack cocaine users are not African American. The ACLU described the effects of cocaine sentencing policy on African American families and communities as including unemployment, broken families, and poverty.

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The ACLU criticized the perceived relationship between crack cocaine use and violence as being unsupported by evidence. Furthermore, the ACLU maintained that the violence once associated with the intense competition in the crack cocaine market has abated. The ACLU also pointed out that there is double counting in cases in which an offender does possess both crack cocaine and a weapon because of the presumption of violence built into the drug quantity ratio for crack cocaine offenses and the separate penalties for weapons.

The ACLU also asserted that the goal of targeting high-level drug traffickers has failed in the context of crack cocaine because such low-level quantities trigger lengthy mandatory minimum penalties for crack cocaine offenders. In sum, the ACLU urged the Commission to recommend that Congress (1) equalize the quantities of crack cocaine that trigger federal prosecution and sentencing at the current levels for powder cocaine offenses (2) eliminate mandatory minimums for all cocaine offenses, and (3) focus federal prosecutions on high-level traffickers.

8. MAINE CIVIL LIBERTIES UNION

The Maine Civil Liberties Union (MCLU) recommended eliminating the sentencing disparity between crack cocaine and powder cocaine offenses by reducing the crack cocaine penalties to the existing powder cocaine penalties. MCLU asserted that the current disparity is inconsistent with the goals of sentencing set forth in 18 U.S.C. § 3553(a) and is at odds with the principles of the guidelines. MCLU suggested that crack cocaine penalties perhaps introduce a racial bias in sentencing that is the type of personal characteristic that is impermissible to consider in sentencing.

MCLU added that the sentencing disparity fails to reflect a difference in the seriousness of the two crimes, provide greater deterrence, or enhance public safety, and has caused both social and economic harm. MCLU stated that the 100-to-1 drug quantity ratio was based on incorrect factual assumptions and has proven counterproductive. Specifically, both forms of cocaine have identical effects, and the increased violence associated with crack cocaine's appearance on the drug market was not associated with inherent properties of the drug. The existing policy results in unacceptable and perverse racial effects and squanders limited federal resources by failing to target major traffickers, as intended by Congress.

9. DRUG POLICY ALLIANCE

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The Drug Policy Alliance requested that the Commission take action to equalize the guideline penalties for crack cocaine and powder cocaine at the current levels for powder cocaine offenses. The Drug Policy Alliance stated that crack cocaine and powder cocaine are made from the same substance. In addition, the Drug Policy Alliance stated that the existing sentencing policy has had an overwhelming disparate effect on people of color and the poor and disproportionately affects nonviolent drug offenders. According to the Drug Policy Alliance, federal sentencing law should focus on large scale distribution networks instead.

10. NATIONAL AFRICAN AMERICAN DRUG POLICY COALITION

The National African American Drug Policy Coalition (NAADPC) urged the Commission to reaffirm its 1995 recommendation to repeal the mandatory five year sentence for simple possession of crack cocaine and eliminate the disparity between crack cocaine and powder cocaine by raising the threshold quantities for crack cocaine offenses to the existing threshold quantities for powder cocaine offenses. The NAADPC asserted that for Congress to maintain the existing crack cocaine sentencing disparity in the face of overwhelming evidence of its ineffectiveness and unfairness in application would have to be viewed as racist.

The NAADPC compared the pharmacological characteristics of crack cocaine to methamphetamine and noted that while methamphetamine is generally accepted to be more addictive and more devastating in its effects on users and society, Congress has not responded in the same punitive fashion as it did for crack cocaine. Rather, the response has been to offer treatment for methamphetamine addiction. The NAAPDC lamented that this more compassionate response has not carried over to people addicted to crack cocaine.

11. FAMILIES AGAINST MANDATORY MINIMUMS

Families Against Mandatory Minimums (FAMM) stated that the 100-to-1 drug quantity ratio punishes low-level crack cocaine offenders far more severely than the wholesale drug suppliers who provide the low level offenders with the powder cocaine needed to produce the crack cocaine. FAMM added that among all drug defendants, crack cocaine offenders are most likely to receive a sentence of imprisonment and receive longer periods of incarceration.

FAMM asserts that the current sentencing policy has not resulted in any appreciable impact on the cocaine trade, and the harms associated with crack cocaine do not justify its substantially harsher treatment compared to powder cocaine. FAMM believes the new Congress provides a fresh opportunity to develop bipartisan support for amending the crack cocaine penalties and urges the Commission to propose a guideline amendment that ends the sentencing disparities between crack cocaine and powder cocaine by applying the existing penalty levels for powder cocaine offenses to crack cocaine offenses as well.

12. 108 LAW SCHOOL PROFESSORS

One hundred eight law school professors from various law schools around the nation urged the Commission to make a formal recommendation to Congress to equalize the threshold quantities for crack cocaine offenses at the current threshold quantities for powder cocaine offenses. The professors stated that the 100-to-1 drug quantity ratio promotes unwarranted racial disparity in sentencing. According to the professors, African Americans comprise the overwhelming majority of those convicted of crack cocaine offenses, but the majority of crack cocaine users are white and Hispanic. They added that the drug quantity ratio results in African Americans serving considerably longer person terms than whites for drug offenses.

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13. 308 UNIVERSITY PROFESSORS AND SCHOLARS

Three hundred eight professors from various universities expressed concern about the sentencing disparity between crack cocaine and powder cocaine offenses and supported equalization of the penalties at the existing penalty levels for powder cocaine offenses. The professors stated their belief that the 100-to-1 drug quantity ratio creates a false impression that crack cocaine is 100 times more dangerous and destructive than powder cocaine, when two decades of research shows the effects of the two forms of the drug are the same. They noted the myths of crack cocaine babies, instant addiction, super-violent users and traffickers have been dispelled.

The professors stated that the current sentencing policy has resulted in alarmingly disproportionate incarceration rates for African Americans, which is disturbing given that whites and Hispanics account for the majority of crack cocaine users in the country. They also noted the dramatic increase in the number of women in federal prison as a result of the penalty scheme. According to the professors, the incarceration rate for African American women, driven by drug convictions, has increased by 800 percent since 1986, compared to an increase of 400 percent for women of all races during the same period.

The professors also expressed that mandatory minimum penalties generally result in the deterioration of communities by incarcerating parents for minor possession crimes, preventing some from receiving social services, and causing massive disenfranchisement.

14. STUDENTS FOR SENSIBLE DRUG POLICY

Students for Sensible Drug Policy (SSDP) urged the Commission to eliminate the sentencing disparity between crack cocaine and powder cocaine offenses by conforming crack cocaine penalties to the existing penalties for powder cocaine offenses. SSDP emphasized the effect that the disparity has on students' eligibility for certain scholarships that are conditioned upon the students' lack of a felony conviction. According to SSDP, students who leave school are more likely to develop serious drug problems, commit crimes, and rely on social programs instead of becoming law abiding, productive members of society. SSDP also stated its concern with the racial implications of the sentencing disparity between crack cocaine and powder cocaine offenses.

15. CITIZEN LETTERS

The Commission received several letters from individual citizens expressing their opinions regarding federal cocaine sentencing policy. The general consensus of these citizens is that the current federal cocaine sentencing policy creates racial disparity in sentencing. They generally stated that the 100-to-1 drug quantity ratio is flawed because scientific and medical experts have determined the pharmacological effects of cocaine are the same regardless of the substance's form. Many requested that the Commission support an equalization of the penalty structure for crack cocaine offenses and powder cocaine offenses at the levels currently used to sentence powder cocaine offenses. Some urged that greater emphasis be placed on high-level traffickers and distributors rather than users. Some of the citizens also advocated for the elimination of the mandatory minimum sentences for both crack cocaine and powder cocaine offenses to provide judges more discretion at sentencing. Finally, one citizen suggested sentences should include more treatment options for drug addicts.

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Appendix D

SENTENCING IMPACT AND PRISON IMPACT ANALYSIS

The following analyses present sentencing impact and prison impact information on a variety of models of possible modifications to the crack cocaine penalty levels. Each model presumes a modification to the existing quantity-based statutory mandatory minimum penalties and implements changes to the Drug Equivalency Table in USSG §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) that correspond to the modified mandatory minimum threshold quantities.[1]

The effects of each possible modification are reported in two tables. The first table presents the proportion of cases affected by the modification,[2] the current average sentence of all crack cocaine cases, and the estimated new average sentence. The second table presents the estimated change in the number of prison beds required should the modification be adopted. Each analysis applies the Commission's prison impact model to the 2006 Fiscal Year datafiles.[3]

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[1] These models modify USSG §2D1.1 to adjust the statutory mandatory minimum quantity thresholds for crack cocaine and apply the changes throughout the Drug Quantity Table. The models only revise the Drug Quantity Table for crack cocaine offenses.

[2] Not all cases are affected by any single modification presented in this analysis because of four possible scenarios:

1) drug quantity involved in the offense is sufficiently low that, regardless of the new quantity at base offense level 12 (the lowest level in the Drug Quantity Table for crack cocaine cases), the base offense level does not change;

2) drug quantity involved in the offense is sufficiently great at base offense level 38 (the highest offense level in the Drug Quantity Table) that it continues to exceed the new threshold;

3) the new quantity thresholds overlap at some point with current quantity levels in the Drug Quantity Table, resulting in no change to the base offense level; and

4) cases with multiple counts may be controlled, for sentencing purposes, by a guideline other than USSG §2D1.1.

[3] 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 outside the range sentences that currently exist in each case. Finally, the model "respots" the new sentence in the new guideline range to a location equivalent to the location in the guideline range of the current sentence.

For example, the first series of tables reports the effect of changing the existing quantity thresholds for crack cocaine offenses to provide that 20 grams of crack cocaine would trigger a mandatory term of imprisonment of five years, and 200 grams of crack cocaine would trigger a mandatory term of imprisonment of ten years. The model incorporates these changes into the Drug Quantity Table in USSG §2D1.1. In this example, 85.1 percent of crack cocaine offenders sentenced in 2006 are estimated to be affected by this modification. The current average sentence of crack cocaine offenders is 121 months. The average sentence for all crack cocaine offenders is estimated to change to 90 months, a 25.6 percent decrease. The corresponding estimated changes to the prison population is presented in the accompanying table. Under this modification (as with all modifications presented in this analysis), fewer prison beds are necessary because offenders are released sooner than they otherwise would be under the current statutory and guideline penalty structure for federal crack cocaine offenders. The reduction in prison beds for crack cocaine offenders one year after this modification takes effect is 115 beds, after two years, 476 beds, and so on. The remaining tables present this information in the same format.

A summary of the results of all of the models follows the individual analyses.

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The prison impact model estimates the change to an hypothetical "steady-state" prison population resulting from changes that affect prison sentence length. The concept of a "steady-state" population envisions a prison system in homeostasis. That is, the number of new, in-coming inmates is assumed to be equal to the number of out-going (released) inmates and all beds are assumed to be occupied. In order to isolate the changes to the system caused by the specific policy under review, a number of factors are artificially held constant in the model. For example, arrest rates, charging practices, conviction rates, other sentencing policies, *etc*. are assumed to remain constant over time.

Assumptions incorporated into the prison impact model include: 1) defendants are re-sentenced to a position in the estimated new guideline range that is equivalent to the position of the sentence in the original guideline range; 2) defendants earn the maximum allowable good-time (currently 54 days per year served for imposed sentences greater than one year but not life imprisonment); and 3) defendants serve the minimum of A) the sentence imposed less the maximum allowable good conduct time, or B) their estimated remaining life expectancy, based upon an actuary table incorporating age, race, and sex.

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.

SENTENCING IMPACT AND PRISON IMPACT MODEL OF
CRACK COCAINE FIVE YEAR MANDATORY MINIMUM THRESHOLD AT 20 GRAMS
CRACK COCAINE-POWDER COCAINE RATIO 25-TO-1

Estimated Sentence Change

Five Year Mandatory Minimum Penalty Threshold	Percent of Cases Affected	All Cases: Current Average Sentence (months)	All Cases: Estimated New Average Sentence (in months)	Percent Change
Crack Cocaine = 20g	85.1%	121	90	25.6%

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Estimated Reduction in Prison Beds

Five Year Mandatory Minimum Penalty Threshold	1 Year	2 Years	3 Years	4 Years	5 Years	10 Years	15 Years
Crack Cocaine = 20g	-115	-476	-1,077	-1,747	-2,538	-6,598	-8,544

This model assumes no change to the current mandatory minimum sentencing threshold for powder cocaine offenses.

SOURCE: U.S. Sentencing Commission. Prison Impact Model. FY2006 datafile.

SENTENCING IMPACT AND PRISON IMPACT MODEL OF
CRACK COCAINE FIVE YEAR MANDATORY MINIMUM THRESHOLD AT 25 GRAMS
CRACK COCAINE-POWDER COCAINE RATIO 20-TO-1

Estimated Sentence Change

Five Year Mandatory Minimum Penalty Threshold	Percent of Cases Affected	All Cases: Current Average Sentence (months)	All Cases: Estimated New Average Sentence (in months)	Percent Change
Crack Cocaine = 25g	86.4%	121	86	28.9%

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Estimated Reduction in Prison Beds

Five Year Mandatory Minimum Penalty Threshold	1 Year	2 Years	3 Years	4 Years	5 Years	10 Years	15 Years
Crack Cocaine = 25g	-143	-566	-1,294	-2,075	-3,018	-7,568	-9,734

This model assumes no change to the current mandatory minimum sentencing threshold for powder cocaine offenses.

SOURCE: U.S. Sentencing Commission. Prison Impact Model. FY2006 datafile.

SENTENCING IMPACT AND PRISON IMPACT MODEL OF
CRACK COCAINE FIVE YEAR MANDATORY MINIMUM THRESHOLD AT 33.3 GRAMS
CRACK COCAINE-POWDER COCAINE RATIO 15-TO-1

Estimated Sentence Change

Five Year Mandatory Minimum Penalty Threshold	Percent of Cases Affected	All Cases: Current Average Sentence (months)	All Cases: Estimated New Average Sentence (in months)	Percent Change
Crack Cocaine = 33.3g	87.41%	121	81	33.1%

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Estimated Reduction in Prison Beds

Five Year Mandatory Minimum Penalty Threshold	1 Year	2 Years	3 Years	4 Years	5 Years	10 Years	15 Years
Crack Cocaine = 33.3g	-196	-727	-1,616	-2,582	-3,707	-8,883	-11,263

This model assumes no change to the current mandatory minimum sentencing threshold for powder cocaine offenses.

SOURCE: U.S. Sentencing Commission. Prison Impact Model. FY2006 datafile.

SENTENCING IMPACT AND PRISON IMPACT MODEL OF
CRACK COCAINE FIVE YEAR MANDATORY MINIMUM THRESHOLD AT 50 GRAMS
CRACK COCAINE-POWDER COCAINE RATIO 10-TO-1

Estimated Sentence Change

Five Year Mandatory Minimum Penalty Threshold	Percent of Cases Affected	All Cases: Current Average Sentence (months)	All Cases: Estimated New Average Sentence (in months)	Percent Change
Crack Cocaine = 50g	88.6%	121	75	38.0%

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Estimated Reduction in Prison Beds

Five Year Mandatory Minimum Penalty Threshold	1 Year	2 Years	3 Years	4 Years	5 Years	10 Years	15 Years
Crack Cocaine = 50g	-274	-978	-2,084	-3,295	-4,658	-10,517	-13,141

This model assumes no change to the current mandatory minimum sentencing threshold for powder cocaine offenses.

SOURCE: U.S. Sentencing Commission. Prison Impact Model. FY2006 datafile.

SENTENCING IMPACT AND PRISON IMPACT MODEL OF
CRACK COCAINE FIVE YEAR MANDATORY MINIMUM THRESHOLD AT 100 GRAMS
CRACK COCAINE-POWDER COCAINE RATIO 5-TO-1

Estimated Sentence Change

Five Year Mandatory Minimum Penalty Threshold	Percent of Cases Affected	All Cases: Current Average Sentence (months)	All Cases: Estimated New Average Sentence (in months)	Percent Change
Crack Cocaine = 100g	89.5%	121	66	45.5%

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Estimated Reduction in Prison Beds

Five Year Mandatory Minimum Penalty Threshold	1 Year	2 Years	3 Years	4 Years	5 Years	10 Years	15 Years
Crack Cocaine = 100g	-416	-1,553	-3,044	-4,734	-6,477	-13,343	-16,180

This model assumes no change to the current mandatory minimum sentencing threshold for powder cocaine offenses.

SOURCE: U.S. Sentencing Commission. Prison Impact Model. FY2006 datafile.

SENTENCING IMPACT AND PRISON IMPACT MODEL OF
CRACK COCAINE FIVE YEAR MANDATORY MINIMUM THRESHOLD AT 250 GRAMS
CRACK COCAINE-POWDER COCAINE RATIO 2-TO-1

Estimated Sentence Change

Five Year Mandatory Minimum Penalty Threshold	Percent of Cases Affected	All Cases: Current Average Sentence (months)	All Cases: Estimated New Average Sentence (in months)	Percent Change
Crack Cocaine = 250g	90.2%	121	55	54.5%

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Estimated Reduction in Prison Beds

Five Year Mandatory Minimum Penalty Threshold	1 Year	2 Years	3 Years	4 Years	5 Years	10 Years	15 Years
Crack Cocaine = 250g	-767	-2,337	-4,443	-6,570	-8,723	-16,474	-19,573

This model assumes no change to the current mandatory minimum sentencing threshold for powder cocaine offenses.

SOURCE: U.S. Sentencing Commission. Prison Impact Model. FY2006 datafile.

SENTENCING IMPACT AND PRISON IMPACT MODEL OF
CRACK COCAINE FIVE YEAR MANDATORY MINIMUM THRESHOLD AT 500 GRAMS
CRACK COCAINE-POWDER COCAINE RATIO 1-TO-1

Estimated Sentence Change

Five Year Mandatory Minimum Penalty Threshold	Percent of Cases Affected	All Cases: Current Average Sentence (months)	All Cases: Estimated New Average Sentence (in months)	Percent Change
Crack Cocaine = 500g	90.4%	121	50	58.7%

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Estimated Reduction in Prison Beds

Five Year Mandatory Minimum Penalty Threshold	1 Year	2 Years	3 Years	4 Years	5 Years	10 Years	15 Years
Crack Cocaine = 500g	-1,049	-2,992	-5,404	-7,750	-10,010	-18,065	-21,259

This model assumes no change to the current mandatory minimum sentencing threshold for powder cocaine offenses.

SOURCE: U.S. Sentencing Commission. Prison Impact Model. FY2006 datafile.

Summary of Sentencing Impact and Prison Impact Estimates

Five Year Mandatory Minimum Penalty Threshold Model	Percent of Cases Affected	All Cases: Current Average Sentence (months)	All Cases: Estimated New Average Sentence (months)	Prison Beds Five Years
Crack Cocaine = 20g (ratio 25-to-1)[4]	85.1%	121	90	-2,538
Crack Cocaine = 25g (ratio 20-to-1)	86.4%	121	86	-3,018
Crack Cocaine = 33.3g (ratio 15-to-1)	87.4%	121	81	-3,707
Crack Cocaine = 50g (ratio 10-to-1)	88.6%	121	75	-4,658
Crack Cocaine = 100g (ratio 5-to-1)	89.5%	121	66	-6,477
Crack Cocaine = 250g (ratio 2-to-1)	90.2%	121	55	- 8,723
Crack Cocaine = 500g (ratio 1-to-1)	90.4%	121	50	-10,010

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These models assume no change to the current mandatory minimum sentencing threshold for powder cocaine offenses.

SOURCE: U.S. Sentencing Commission. Prison Impact Model. FY2006 datafile.

[4] The ratio refers to the relationship between the statutory quantity thresholds triggering a five year mandatory minimum sentence between powder cocaine and crack cocaine. In this model, the five year crack cocaine quantity threshold is set at 20 grams and the powder cocaine quantity threshold remains at 500 grams (as it does in all of the models). This results in a ratio such that it requires 25 times more powder cocaine than crack cocaine to achieve the same statutory and guideline sentence.

Appendix E

SENTENCING IMPACT AND PRISON IMPACT ANALYSIS FOR CRACK COCAINE AMENDMENT

A. CRACK COCAINE GUIDELINE AMENDMENT

On April 27, 2007, the Commission promulgated an amendment to USSG §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to adjust the quantity thresholds for crack cocaine ("cocaine base") so that the base offense level for cocaine base, as determined by the Drug Quantity Table, will be reduced by two levels. The amendment results in the base offense level corresponding to a guideline range that includes the five-year and ten-year mandatory minimum terms of imprisonment for five and 50 grams of crack cocaine, respectively. Prior to the amendment, at least five grams but less than 20 grams of cocaine base were assigned a base offense level of 26 (63 to 78 months at Criminal History Category I), and at least 50 grams but less than 150 grams of cocaine base were assigned a base offense level of 32 (121 to 151 months at Criminal History Category I). Pursuant to the amendment, those same quantities of cocaine base will be assigned a base offense level of 24 (51 to 63 months at Criminal History Category I) and 30 (97 to 121 months at Criminal History Category I), respectively.

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The amendment also addresses how to determine the base offense level in a case involving cocaine base and other controlled substances. Prior to the amendment, there was a mathematical relationship among all drug types that was used to structure both the Drug Quantity Table and the Drug Equivalency Tables. As a result, the marihuana equivalencies set forth in Drug Equivalency Tables could be used to determine the base offense level in any case involving differing controlled substances. By restructuring the Drug Quantity Table for cocaine base offenses only, the amendment will alter the mathematical relationship between cocaine base and other drug types to varying degrees throughout the Drug Quantity Table. The amendment, therefore, provides an alternative method for determining the combined offense level in an offense involving cocaine base and other drugs.

The amendment, which absent congressional action to the contrary becomes effective November 1, 2007, is set forth below, followed by a sentencing and prison impact analysis.

Amendment:

§2D1.1. **<u>Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy</u>**

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

(1) **43**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or

(2) **38**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(3) the offense level specified in the Drug Quantity Table set forth in subsection (c), except that if (A) the defendant receives an adjustment under §3B1.2 (Mitigating Role); and (B) the base offense level under subsection (c) is (i) level **32**, decrease by **2** levels; (ii) level **34** or level **36**, decrease by **3** levels; or (iii) level **38**, decrease by **4** levels.

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(b) Specific Offense Characteristics

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

(2) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, or (B) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by **2** levels. If the resulting offense level is less than level **26**, increase to level **26**.

(3) If the object of the offense was the distribution of a controlled substance in a prison, correctional facility, or detention facility, increase by **2** levels.

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

(5) If the defendant, or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct), distributed a controlled substance through mass-marketing by means of an interactive computer service, increase by **2** levels.

(6) If the offense involved the distribution of an anabolic steroid and a masking agent, increase by **2** levels.

(7) If the defendant distributed an anabolic steroid to an athlete, increase by **2** levels.

(8) (Apply the greater):

(A) If the offense involved (i) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (ii) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by **2** levels.

(B) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to (I) human life other than a life described in subdivision (C); or (II) the environment, increase by **3** levels. If the resulting offense level is less than level **27**, increase to level **27**.

(C) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to the life of a minor or an incompetent, increase by **6** levels. If the resulting offense level is less than level **30**, increase to level **30**.

(9) If the defendant meets the criteria set forth in subdivisions (1)-(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by **2** levels.

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[Subsection (c) (Drug Quantity Table) is set forth on the following pages.]

(d) Cross References

(1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder) or §2A1.2 (Second Degree Murder), as appropriate, if the resulting offense level is greater than that determined under this guideline.

(2) If the defendant was convicted under 21 U.S.C. § 841(b)(7) (of distributing a controlled substance with intent to commit a crime of violence), apply §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to the crime of violence that the defendant committed, or attempted or intended to commit, if the resulting offense level is greater than that determined above.

(e) Special Instruction

(1) If (A) subsection (d)(2) does not apply; and (B) the defendant committed, or attempted to commit, a sexual offense against another individual by distributing, with or without that individual's knowledge, a controlled substance to that individual, an adjustment under §3A1.1(b)(1) shall apply.

(c) DRUG QUANTITY TABLE

Controlled Substances and Quantity*	Base Offense Level
(1) ● 30 KG or more of Heroin; ● 150 KG or more of Cocaine; ● ~~1.5~~4.5 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"; ● 15 KG or more of Amphetamine, or 1.5 KG or more of Amphetamine (actual); ● 300 G or more of LSD; ● 12 KG or more of Fentanyl; ● 3 KG or more of a Fentanyl Analogue; ● 30,000 KG or more of Marihuana; ● 6,000 KG or more of Hashish; ● 600 KG or more of Hashish Oil; ● 30,000,000 units or more of Schedule I or II Depressants; ● 1,875,000 units or more of Flunitrazepam.	**Level 38**
(2) ● At least 10 KG but less than 30 KG of Heroin; ● At least 50 KG but less than 150 KG of Cocaine; ● At least ~~500 G~~1.5 KG but less than ~~1.5~~4.5 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"; ● At least 5 KG but less than 15 KG of Amphetamine, or at least 500 G but less than 1.5 KG of Amphetamine (actual); ● At least 100 G but less than 300 G of LSD; ● At least 4 KG but less than 12 KG of Fentanyl; ● At least 1 KG but less than 3 KG of a Fentanyl Analogue; ● At least 10,000 KG but less than 30,000 KG of Marihuana; ● At least 2,000 KG but less than 6,000 KG of Hashish; ● At least 200 KG but less than 600 KG of Hashish Oil; ● At least 10,000,000 but less than 30,000,000 units of Schedule I or II Depressants; ● At least 625,000 but less than 1,875,000 units of Flunitrazepam.	**Level 36**
(3) ● At least 3 KG but less than 10 KG of Heroin; ● At least 15 KG but less than 50 KG of Cocaine; ● At least ~~150~~500 G but less than ~~500 G~~1.5 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"; ● At least 1.5 KG but less than 5 KG of Amphetamine, or at least 150 G but less than 500 G of Amphetamine (actual); ● At least 30 G but less than 100 G of LSD; ● At least 1.2 KG but less than 4 KG of Fentanyl;	**Level 34**

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● At least 300 G but less than 1 KG of a Fentanyl Analogue;
● At least 3,000 KG but less than 10,000 KG of Marihuana;
● At least 600 KG but less than 2,000 KG of Hashish;
● At least 60 KG but less than 200 KG of Hashish Oil;
● At least 3,000,000 but less than 10,000,000 units of Schedule I or II Depressants;
● At least 187,500 but less than 625,000 units of Flunitrazepam.

(4) **Level 32**

● At least 1 KG but less than 3 KG of Heroin;
● At least 5 KG but less than 15 KG of Cocaine;
● At least ~~50~~150 G but less than ~~150~~500 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 less than 150 G of Methamphetamine (actual), or at least 50 G but less than 150 G of "Ice";
● At least 500 G but less than 1.5 KG of Amphetamine, or at least 50 G but less than 150 G of Amphetamine (actual);
● At least 10 G but less than 30 G of LSD;
● At least 400 G but less than 1.2 KG of Fentanyl;
● At least 100 G but less than 300 G of a Fentanyl Analogue;
● At least 1,000 KG but less than 3,000 KG of Marihuana;
● At least 200 KG but less than 600 KG of Hashish;
● At least 20 KG but less than 60 KG of Hashish Oil;
● At least 1,000,000 but less than 3,000,000 units of Schedule I or II Depressants;
● At least 62,500 but less than 187,500 units of Flunitrazepam.

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(5) **Level 30**

● At least 700 G but less than 1 KG of Heroin;
● At least 3.5 KG but less than 5 KG of Cocaine;
● At least ~~35~~50 G but less than ~~50~~150 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";
● At least 350 G but less than 500 G of Amphetamine, or at least 35 G but less than 50 G of Amphetamine (actual);
● At least 7 G but less than 10 G of LSD;
● At least 280 G but less than 400 G of Fentanyl;
● At least 70 G but less than 100 G of a Fentanyl Analogue;
● At least 700 KG but less than 1,000 KG of Marihuana;
● At least 140 KG but less than 200 KG of Hashish;
● At least 14 KG but less than 20 KG of Hashish Oil;
● At least 700,000 but less than 1,000,000 units of Schedule I or II Depressants;
● At least 43,750 but less than 62,500 units of Flunitrazepam.

(6) **Level 28**

● At least 400 G but less than 700 G of Heroin;
● At least 2 KG but less than 3.5 KG of Cocaine;
● At least ~~20~~35 G but less than ~~35~~50 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";
● At least 200 G but less than 350 G of Amphetamine, or at least 20 G but less than 35 G of Amphetamine (actual);
● At least 4 G but less than 7 G of LSD;
● At least 160 G but less than 280 G of Fentanyl;
● At least 40 G but less than 70 G of a Fentanyl Analogue;
● At least 400 KG but less than 700 KG of Marihuana;
● At least 80 KG but less than 140 KG of Hashish;
● At least 8 KG but less than 14 KG of Hashish Oil;
● At least 400,000 but less than 700,000 units of Schedule I or II Depressants;
● At least 25,000 but less than 43,750 units of Flunitrazepam.

(7) **Level 26**

● At least 100 G but less than 400 G of Heroin;
● At least 500 G but less than 2 KG of Cocaine;
● At least ~~5~~20 G but less than ~~20~~35 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";
● At least 50 G but less than 200 G of Amphetamine, or at least 5 G but less than 20 G of Amphetamine (actual);
● At least 1 G but less than 4 G of LSD;
● At least 40 G but less than 160 G of Fentanyl;
● At least 10 G but less than 40 G of a Fentanyl Analogue;
● At least 100 KG but less than 400 KG of Marihuana;
● At least 20 KG but less than 80 KG of Hashish;
● At least 2 KG but less than 8 KG of Hashish Oil;
● At least 100,000 but less than 400,000 units of Schedule I or II Depressants;
● At least 6,250 but less than 25,000 units of Flunitrazepam.

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(8) **Level 24**

● At least 80 G but less than 100 G of Heroin;
● At least 400 G but less than 500 G of Cocaine;
● At least ~~4~~5 G but less than ~~5~~20 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 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";
● At least 40 G but less than 50 G of Amphetamine, or at least 4 G but less than 5 G of Amphetamine (actual);
● At least 800 MG but less than 1 G of LSD;
● At least 32 G but less than 40 G of Fentanyl;
● At least 8 G but less than 10 G of a Fentanyl Analogue;
● At least 80 KG but less than 100 KG of Marihuana;
● At least 16 KG but less than 20 KG of Hashish;
● At least 1.6 KG but less than 2 KG of Hashish Oil;
● At least 80,000 but less than 100,000 units of Schedule I or II Depressants;
● At least 5,000 but less than 6,250 units of Flunitrazepam.

(9) **Level 22**

● At least 60 G but less than 80 G of Heroin;

● At least 300 G but less than 400 G of Cocaine;
● At least ~~3~~4 G but less than ~~4~~5 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";
● At least 30 G but less than 40 G of Amphetamine, or at least 3 G but less than 4 G of Amphetamine (actual);
● At least 600 MG but less than 800 MG of LSD;
● At least 24 G but less than 32 G of Fentanyl;
● At least 6 G but less than 8 G of a Fentanyl Analogue;
● At least 60 KG but less than 80 KG of Marihuana;
● At least 12 KG but less than 16 KG of Hashish;
● At least 1.2 KG but less than 1.6 KG of Hashish Oil;
● At least 60,000 but less than 80,000 units of Schedule I or II Depressants;
● At least 3,750 but less than 5,000 units of Flunitrazepam.

(10) ● At least 40 G but less than 60 G of Heroin; **Level 20**
● At least 200 G but less than 300 G of Cocaine;
● At least ~~2~~3 G but less than ~~3~~4 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";
● At least 20 G but less than 30 G of Amphetamine, or at least 2 G but less than 3 G of Amphetamine (actual);
● At least 400 MG but less than 600 MG of LSD;
● At least 16 G but less than 24 G of Fentanyl;
● At least 4 G but less than 6 G of a Fentanyl Analogue;
● At least 40 KG but less than 60 KG of Marihuana;
● At least 8 KG but less than 12 KG of Hashish;
● At least 800 G but less than 1.2 KG of Hashish Oil;
● At least 40,000 but less than 60,000 units of Schedule I or II Depressants;
● 40,000 or more units of Schedule III substances;
● At least 2,500 but less than 3,750 units of Flunitrazepam.

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(11) ● At least 20 G but less than 40 G of Heroin; **Level 18**
● At least 100 G but less than 200 G of Cocaine;
● At least ~~1~~2 G but less than ~~2~~3 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";
● At least 10 G but less than 20 G of Amphetamine, or at least 1 G but less than 2 G of Amphetamine (actual);
● At least 200 MG but less than 400 MG of LSD;
● At least 8 G but less than 16 G of Fentanyl;
● At least 2 G but less than 4 G of a Fentanyl Analogue;
● At least 20 KG but less than 40 KG of Marihuana;
● At least 5 KG but less than 8 KG of Hashish;

● At least 500 G but less than 800 G of Hashish Oil;
● At least 20,000 but less than 40,000 units of Schedule I or II Depressants;
● At least 20,000 but less than 40,000 units of Schedule III substances;
● At least 1,250 but less than 2,500 units of Flunitrazepam.

(12) ● At least 10 G but less than 20 G of Heroin; **Level 16**
● At least 50 G but less than 100 G of Cocaine;
● At least ~~500 MG~~1 G but less than ~~1~~2 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";
● At least 5 G but less than 10 G of Amphetamine, or at least 500 MG but less than 1 G of Amphetamine (actual);
● At least 100 MG but less than 200 MG of LSD;
● At least 4 G but less than 8 G of Fentanyl;
● At least 1 G but less than 2 G of a Fentanyl Analogue;
● At least 10 KG but less than 20 KG of Marihuana;
● At least 2 KG but less than 5 KG of Hashish;
● At least 200 G but less than 500 G of Hashish Oil;
● At least 10,000 but less than 20,000 units of Schedule I or II Depressants;
● At least 10,000 but less than 20,000 units of Schedule III substances;
● At least 625 but less than 1,250 units of Flunitrazepam.

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(13) ● At least 5 G but less than 10 G of Heroin; **Level 14**
● At least 25 G but less than 50 G of Cocaine;
● At least ~~250~~500 MG but less than ~~500 MG~~1 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";
● At least 2.5 G but less than 5 G of Amphetamine, or at least 250 MG but less than 500 MG of Amphetamine (actual);
● At least 50 MG but less than 100 MG of LSD;
● At least 2 G but less than 4 G of Fentanyl;
● At least 500 MG but less than 1 G of a Fentanyl Analogue;
● At least 5 KG but less than 10 KG of Marihuana;
● At least 1 KG but less than 2 KG of Hashish;
● At least 100 G but less than 200 G of Hashish Oil;
● At least 5,000 but less than 10,000 units of Schedule I or II Depressants;
● At least 5,000 but less than 10,000 units of Schedule III substances;
● At least 312 but less than 625 units of Flunitrazepam.

(14) ● Less than 5 G of Heroin; **Level 12**
● Less than 25 G of Cocaine;
● Less than ~~250~~500 MG 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";
● Less than 2.5 G of Amphetamine, or less than 250 MG of Amphetamine (actual);

- Less than 50 MG of LSD;
- Less than 2 G of Fentanyl;
- Less than 500 MG of a Fentanyl Analogue;
- At least 2.5 KG but less than 5 KG of Marihuana;
- At least 500 G but less than 1 KG of Hashish;
- At least 50 G but less than 100 G of Hashish Oil;
- At least 2,500 but less than 5,000 units of Schedule I or II Depressants;
- At least 2,500 but less than 5,000 units of Schedule III substances;
- At least 156 but less than 312 units of Flunitrazepam;
- 40,000 or more units of Schedule IV substances (except Flunitrazepam).

(15) **Level 10**

- At least 1 KG but less than 2.5 KG of Marihuana;
- At least 200 G but less than 500 G of Hashish;
- At least 20 G but less than 50 G of Hashish Oil;
- At least 1,000 but less than 2,500 units of Schedule I or II Depressants;
- At least 1,000 but less than 2,500 units of Schedule III substances;
- At least 62 but less than 156 units of Flunitrazepam;
- At least 16,000 but less than 40,000 units of Schedule IV substances (except Flunitrazepam).

(16) **Level 8**

- At least 250 G but less than 1 KG of Marihuana;
- At least 50 G but less than 200 G of Hashish;
- At least 5 G but less than 20 G of Hashish Oil;
- At least 250 but less than 1,000 units of Schedule I or II Depressants;
- At least 250 but less than 1,000 units of Schedule III substances;
- Less than 62 units of Flunitrazepam;
- At least 4,000 but less than 16,000 units of Schedule IV substances (except Flunitrazepam);
- 40,000 or more units of Schedule V substances.

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(17) **Level 6**

- Less than 250 G of Marihuana;
- Less than 50 G of Hashish;
- Less than 5 G of Hashish Oil;
- Less than 250 units of Schedule I or II Depressants;
- Less than 250 units of Schedule III substances;
- Less than 4,000 units of Schedule IV substances (except Flunitrazepam);
- Less than 40,000 units of Schedule V substances.

*Notes to Drug Quantity Table:

(A) Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. If a mixture or substance contains more than one controlled substance, the weight of the entire mixture or substance is assigned to the controlled substance that results in the greater offense level.

(B) The terms "PCP (actual)", "Amphetamine (actual)", and "Methamphetamine (actual)" refer to the weight of the controlled substance, itself, contained in the mixture or substance. For example, a mixture weighing 10 grams containing PCP at 50% purity contains 5 grams of PCP (actual). In the case of a mixture or substance containing PCP, amphetamine, or methamphetamine, use the offense level determined by the entire weight of the mixture or substance, or the offense level determined by the weight of the PCP (actual), amphetamine (actual), or methamphetamine (actual), whichever is greater.

The term "Oxycodone (actual)" refers to the weight of the controlled substance, itself, contained in the pill, capsule, or mixture.

(C) "Ice," for the purposes of this guideline, means a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity.

(D) "Cocaine base," for the 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.

(E) In the case of an offense involving marihuana plants, treat each plant, regardless of sex, as equivalent to 100 G of marihuana. *Provided*, however, that if the actual weight of the marihuana is greater, use the actual weight of the marihuana.

(F) In the case of Schedule I or II Depressants (except gamma-hydroxybutyric acid), Schedule III substances, Schedule IV substances, and Schedule V substances, one "unit" means one pill, capsule, or tablet. If the substance (except gamma-hydroxybutyric acid) is in liquid form, one "unit" means 0.5 ml. For an anabolic steroid that is not in a pill, capsule, tablet, or liquid form (e.g., patch, topical cream, aerosol), the court shall determine the base offense level using a reasonable estimate of the quantity of anabolic steroid involved in the offense. In making a reasonable estimate, the court shall consider that each 25 mg of an anabolic steroid is one "unit".

(G) In the case of LSD on a carrier medium (e.g., a sheet of blotter paper), do not use the weight of the LSD/carrier medium. Instead, treat each dose of LSD on the carrier medium as equal to 0.4 mg of LSD for the purposes of the Drug Quantity Table.

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(H) Hashish, for the purposes of this guideline, means a resinous substance of cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(25)), (ii) at least two of the following: cannabinol, cannabidiol, or cannabichromene, and (iii) fragments of plant material (such as cystolith fibers).

(I) Hashish oil, for the purposes of this guideline, means a preparation of the soluble cannabinoids derived from cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(25)), (ii) at least two of the following: cannabinol, cannabidiol, or cannabichromene, and (iii) is essentially free of plant material (e.g., plant fragments). Typically, hashish oil is a viscous, dark colored oil, but it can vary from a dry resin to a colorless liquid.

Commentary

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

Application Notes:

* * *

10. Use of Drug Equivalency Tables.—

(A) Controlled Substances Not Referenced in Drug Quantity Table.—The Commission has used the sentences provided in, and equivalences derived from, the statute (21 U.S.C. § 841(b)(1)), as the primary basis for the guideline sentences. The statute, however, provides direction only for the

more common controlled substances, i.e., heroin, cocaine, PCP, methamphetamine, fentanyl, LSD and marihuana. In the case of a controlled substance that is not specifically referenced in the Drug Quantity Table, determine the base offense level as follows:

~~(A)~~(i) Use the Drug Equivalency Tables to convert the quantity of the controlled substance involved in the offense to its equivalent quantity of marihuana.

~~(B)~~(ii) Find the equivalent quantity of marihuana in the Drug Quantity Table.

~~(C)~~(iii) Use the offense level that corresponds to the equivalent quantity of marihuana as the base offense level for the controlled substance involved in the offense.

(See also Application Note 5.) For example, in the Drug Equivalency Tables set forth in this Note, 1 gm of a substance containing oxymorphone, a Schedule I opiate, converts to an equivalent quantity of 5 kg of marihuana. In a case involving 100 gm of oxymorphone, the equivalent quantity of marihuana would be 500 kg, which corresponds to a base offense level of 28 in the Drug Quantity Table.

(B) Combining Differing Controlled Substances (Except Cocaine Base).— The Drug Equivalency Tables also provide a means for combining differing controlled substances to obtain a single offense level. In each case, convert each of the drugs to its marihuana equivalent, add the quantities, and look up the total in the Drug Quantity Table to obtain the combined offense level. To determine a single offense level in a case involving cocaine base and other controlled substances, see subdivision (D) of this note.

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For certain types of controlled substances, the marihuana equivalencies in the Drug Equivalency Tables are "capped" at specified amounts (e.g., the combined equivalent weight of all Schedule V controlled substances shall not exceed 999 grams of marihuana). Where there are controlled substances from more than one schedule (e.g., a quantity of a Schedule IV substance and a quantity of a Schedule V substance), determine the marihuana equivalency for each schedule separately (subject to the cap, if any, applicable to that schedule). Then add the marihuana equivalencies to determine the combined marihuana equivalency (subject to the cap, if any, applicable to the combined amounts).

Note: Because of the statutory equivalences, the ratios in the Drug Equivalency Tables do not necessarily reflect dosages based on pharmacological equivalents.

(C) Examples for Combining Differing Controlled Substances (Except Cocaine Base) .—~~:~~

~~a.~~(i) The defendant is convicted of selling 70 grams of a substance containing PCP (Level 22) and 250 milligrams of a substance containing LSD (Level 18). The PCP converts to 70 kilograms of marihuana; the LSD converts to 25 kilograms of marihuana. The total is therefore equivalent to 95 kilograms of marihuana, for which the Drug Quantity Table provides an offense level of 24.

~~b.~~(ii) The defendant is convicted of selling 500 grams of marihuana (Level 8) and five kilograms of diazepam (Level 8). The diazepam, a Schedule IV drug, is equivalent to 625 grams of marihuana. The total, 1.125 kilograms of marihuana, has an offense level of 10 in the Drug Quantity Table.

~~c.~~*(iii)* *The defendant is convicted of selling 80 grams of cocaine (Level 16) and five kilograms of marihuana (Level 14). The cocaine is equivalent to 16 kilograms of marihuana. The total is therefore equivalent to 21 kilograms of marihuana, which has an offense level of 18 in the Drug Quantity Table.*

~~d.~~*(iv)* *The defendant is convicted of selling 56,000 units of a Schedule III substance, 100,000 units of a Schedule IV substance, and 200,000 units of a Schedule V substance. The marihuana equivalency for the Schedule III substance is 56 kilograms of marihuana (below the cap of 59.99 kilograms of marihuana set forth as the maximum equivalent weight for Schedule III substances). The marihuana equivalency for the Schedule IV substance is subject to a cap of 4.99 kilograms of marihuana set forth as the maximum equivalent weight for Schedule IV substances (without the cap it would have been 6.25 kilograms). The marihuana equivalency for the Schedule V substance is subject to the cap of 999 grams of marihuana set forth as the maximum equivalent weight for Schedule V substances (without the cap it would have been 1.25 kilograms). The combined equivalent weight, determined by adding together the above amounts, is subject to the cap of 59.99 kilograms of marihuana set forth as the maximum combined equivalent weight for Schedule III, IV, and V substances. Without the cap, the combined equivalent weight would have been 61.99 (56 + 4.99 + .999) kilograms.*

(D) *Determining Base Offense Level in Offenses Involving Cocaine Base and Other Controlled Substances.—*

(i) *In General.—If the offense involves cocaine base ("crack") and one or more other controlled substance, determine the base offense level as follows:*

(I) *Determine the combined base offense level for the other controlled substance or controlled substances as provided in subdivision (B) of this note.*

(II) *Use the combined base offense level determined under subdivision (B) of this note to obtain the appropriate marihuana equivalency for the cocaine base involved in the offense using the following table:*

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Base Offense Level	*Marihuana Equivalency*
38	*6.7 kg of marihuana*
36	*6.7 kg of marihuana*
34	*6 kg of marihuana*
32	*6.7 kg of marihuana*
30	*14 kg of marihuana*
28	*11.4 kg of marihuana*
26	*5 kg of marihuana*
24	*16 kg of marihuana*
22	*15 kg of marihuana*
20	*13.3 kg of marihuana*
18	*10 kg of marihuana*
16	*10 kg of marihuana*
14	*10 kg of marihuana*
12	*10 kg of marihuana.*

(III) Using the marihuana equivalency obtained from the table in subdivision (II), convert the quantity of cocaine base involved in the offense to its equivalent quantity of marihuana.

(IV) Add the quantity of marihuana determined under subdivisions (I) and (III), and look up the total in the Drug Quantity Table to obtain the combined base offense level for all the controlled substances involved in the offense.

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(ii) Example.—The case involves 10 kg of cocaine, 10 kg of marihuana, and 20 g of cocaine base. Pursuant to subdivision (B), the equivalent quantity of marihuana for the cocaine and the marihuana is 310 kg. (The cocaine converts to an equivalent of 300 kg of marihuana (1.5 kg x 200 g = 300 kg), which when added to the quantity of marihuana involved in the offense, results in an equivalent quantity of 310 kg of marihuana.) This corresponds to a base offense level 26. Pursuant to the table in subdivision (II), the base offense level of 26 results in a marihuana equivalency of 5 kg for the cocaine base. Using this marihuana equivalency for the cocaine base results in a marihuana equivalency of 100 kg (20 g x 5 kg = 100 kg). Adding the quantities of marihuana of all three drug types results in a combined quantity of 410 kg of marihuana, which corresponds to a combined base offense level of 28 in the Drug Quantity Table.

~~*DRUG EQUIVALENCY TABLES*~~

(E) Drug Equivalency Tables.—

Schedule I or II Opiates*

1 gm of Heroin =	1 kg of marihuana
1 gm of Alpha-Methylfentanyl =	10 kg of marihuana
1 gm of Dextromoramide =	670 gm of marihuana
1 gm of Dipipanone =	250 gm of marihuana
1 gm of 3-Methylfentanyl =	10 kg of marihuana

1 gm of 1-Methyl-4-phenyl-4-propionoxypiperidine/MPPP =	700 gm of marihuana
1 gm of 1-(2-Phenylethyl)-4-phenyl-4-acetyloxypiperidine/ PEPAP =	700 gm of marihuana
1 gm of Alphaprodine =	100 gm of marihuana
1 gm of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide) =	2.5 kg of marihuana
1 gm of Hydromorphone/Dihydromorphinone =	2.5 kg of marihuana
1 gm of Levorphanol =	2.5 kg of marihuana
1 gm of Meperidine/Pethidine =	50 gm of marihuana
1 gm of Methadone =	500 gm of marihuana
1 gm of 6-Monoacetylmorphine =	1 kg of marihuana
1 gm of Morphine =	500 gm of marihuana
1 gm of Oxycodone (actual) =	6700 gm of marihuana
1 gm of Oxymorphone =	5 kg of marihuana
1 gm of Racemorphan =	800 gm of marihuana
1 gm of Codeine =	80 gm of marihuana
1 gm of Dextropropoxyphene/Propoxyphene-Bulk =	50 gm of marihuana
1 gm of Ethylmorphine =	165 gm of marihuana
1 gm of Hydrocodone/Dihydrocodeinone =	500 gm of marihuana
1 gm of Mixed Alkaloids of Opium/Papaveretum =	250 gm of marihuana
1 gm of Opium =	50 gm of marihuana
1 gm of Levo-alpha-acetylmethadol (LAAM)=	3 kg of marihuana

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**Provided*, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.

<u>Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)</u>*

1 gm of Cocaine =	200 gm of marihuana
1 gm of N-Ethylamphetamine =	80 gm of marihuana
1 gm of Fenethylline =	40 gm of marihuana
1 gm of Amphetamine =	2 kg of marihuana
1 gm of Amphetamine (Actual) =	20 kg of marihuana

1 gm of Methamphetamine =	2 kg of marihuana
1 gm of Methamphetamine (Actual) =	20 kg of marihuana
1 gm of "Ice" =	20 kg of marihuana
1 gm of Khat =	.01 gm of marihuana
1 gm of 4-Methylaminorex ("Euphoria")=	100 gm of marihuana
1 gm of Methylphenidate (Ritalin)=	100 gm of marihuana
1 gm of Phenmetrazine =	80 gm of marihuana
1 gm Phenylacetone/P_2P (when possessed for the purpose of manufacturing methamphetamine) =	416 gm of marihuana
1 gm Phenylacetone/P_2P (in any other case) =	75 gm of marihuana
~~1 gm of Cocaine Base ("Crack") =~~	~~20 kg of marihuana~~
1 gm of Aminorex =	100 gm of marihuana
1 gm of Methcathinone =	380 gm of marihuana
1 gm of N-N-Dimethylamphetamine =	40 gm of marihuana

**Provided*, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.

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LSD, PCP, and Other Schedule I and II Hallucinogens (and their immediate precursors)*

1 gm of Bufotenine =	70 gm of marihuana
1 gm of D-Lysergic Acid Diethylamide/Lysergide/LSD =	100 kg of marihuana
1 gm of Diethyltryptamine/DET =	80 gm of marihuana
1 gm of Dimethyltryptamine/DMT =	100 gm of marihuana
1 gm of Mescaline =	10 gm of marihuana
1 gm of Mushrooms containing Psilocin and/or Psilocybin (Dry) =	1 gm of marihuana
1 gm of Mushrooms containing Psilocin and/or Psilocybin (Wet) =	0.1 gm of marihuana
1 gm of Peyote (Dry) =	0.5 gm of marihuana
1 gm of Peyote (Wet) =	0.05 gm of marihuana
1 gm of Phencyclidine/PCP =	1 kg of marihuana
1 gm of Phencyclidine (actual) /PCP (actual) =	10 kg of marihuana
1 gm of Psilocin =	500 gm of marihuana

1 gm of Psilocybin =	500 gm of marihuana
1 gm of Pyrrolidine Analog of Phencyclidine/PHP =	1 kg of marihuana
1 gm of Thiophene Analog of Phencyclidine/TCP =	1 kg of marihuana
1 gm of 4-Bromo-2,5-Dimethoxyamphetamine/DOB =	2.5 kg of marihuana
1 gm of 2,5-Dimethoxy-4-methylamphetamine/DOM =	1.67 kg of marihuana
1 gm of 3,4-Methylenedioxyamphetamine/MDA =	500 gm of marihuana
1 gm of 3,4-Methylenedioxymethamphetamine/MDMA =	500 gm of marihuana
1 gm of 3,4-Methylenedioxy-N-ethylamphetamine/MDEA=	500 gm of marihuana
1 gm of Paramethoxymethamphetamine/PMA =	500 gm of marihuana
1 gm of 1-Piperidinocyclohexanecarbonitrile/PCC =	680 gm of marihuana
1 gm of N-ethyl-1-phenylcyclohexylamine (PCE) =	1 kg of marihuana

**Provided*, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.

<u>Schedule I Marihuana</u>

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1 gm of Marihuana/Cannabis, granulated, powdered, etc. =	1 gm of marihuana
1 gm of Hashish Oil =	50 gm of marihuana
1 gm of Cannabis Resin or Hashish =	5 gm of marihuana
1 gm of Tetrahydrocannabinol, Organic =	167 gm of marihuana
1 gm of Tetrahydrocannabinol, Synthetic =	167 gm of marihuana

<u>Flunitrazepam</u> **

1 unit of Flunitrazepam =	16 gm of marihuana

***Provided*, that the minimum offense level from the Drug Quantity Table for flunitrazepam individually, or in combination with any Schedule I or II depressants, Schedule III substances, Schedule IV substances, and Schedule V substances is level 8.

<u>Schedule I or II Depressants (except gamma-hydroxybutyric acid)</u>

1 unit of a Schedule I or II Depressant

(except gamma-hydroxybutyric acid) = 1 gm of marihuana

Gamma-hydroxybutyric Acid

1 ml of gamma-hydroxybutyric acid = 8.8 gm of marihuana

Schedule III Substances***

1 unit of a Schedule III Substance = 1 gm of marihuana

****Provided*, that the combined equivalent weight of all Schedule III substances, Schedule IV substances (except flunitrazepam), and Schedule V substances shall not exceed 59.99 kilograms of marihuana.

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Schedule IV Substances (except flunitrazepam)*****

1 unit of a Schedule IV Substance
(except Flunitrazepam)= 0.0625 gm of marihuana

******Provided*, that the combined equivalent weight of all Schedule IV (except flunitrazepam) and V substances shall not exceed 4.99 kilograms of marihuana.

Schedule V Substances******

1 unit of a Schedule V Substance = 0.00625 gm of marihuana

*******Provided*, that the combined equivalent weight of Schedule V substances shall not exceed 999 grams of marihuana.

List I Chemicals (relating to the manufacture of amphetamine or methamphetamine)*******

1 gm of Ephedrine =	10 kg of marihuana
1 gm of Phenylpropanolamine =	10 kg of marihuana
1 gm of Pseudoephedrine =	10 kg of marihuana

******Provided*, that in a case involving ephedrine, pseudoephedrine, or phenylpropanolamine tablets, use the weight of the ephedrine, pseudoephedrine, or phenylpropanolamine contained in the tablets, not the weight of the entire tablets, in calculating the base offense level.

To facilitate conversions to drug equivalencies, the following table is provided:

MEASUREMENT CONVERSION TABLE

1 oz = 28.35 gm
1 lb = 453.6 gm
1 lb = 0.4536 kg
1 gal = 3.785 liters
1 qt = 0.946 liters
1 gm = 1 ml (liquid)
1 liter = 1,000 ml
1 kg = 1,000 gm
1 gm = 1,000 mg

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B. IMPACT ANALYSIS

The following analysis presents sentencing impact and prison impact information for the amendment to USSG §2D1.1 that was promulgated April 27, 2007. The Commission's impact model incorporates the changes to the quantity thresholds in the Drug Quantity Table and the restructured Drug Equivalency Table for cocaine base offenses, and the model assumes no change to the existing statutory mandatory minimum threshold quantities for cocaine base offenses.

The effect of this amendment is reported in two tables. The first table presents the proportion of cases affected by the amendment, the current average sentence of all crack cocaine cases, and the estimated new average sentence. The second table presents the estimated reduction in the number of federal prison beds based on this change. This analysis applies the Commission's prison impact model to the 2006 Fiscal Year datafile.[1]

[1] The U.S. Sentencing Commission's prison impact computer model identifies and re-sentences cases in Commission datafiles. The model recalculates the relevant guideline range based on the amendment to the Drug Quantity Table and Drug Equivalency Table in USSG §2D1.1 and compares the recalculated offense levels to existing offense levels. The model then reassigns any Chapter Three adjustments and outside the range sentences that currently exist in each case. Finally, the model "respots" the new sentence in the new guideline range to a location equivalent to the location in the guideline range of the current sentence.

The prison impact model estimates the change to an hypothetical "steady-state" prison population resulting from changes that affect prison sentence length. The concept of a "steady-state" population envisions a

In this estimate, 69.7 percent of crack cocaine offenders are estimated to be affected by the amendment. Not all cases are affected by this amendment primarily because of one of seven possible reasons:

1) the drug quantity involved in the offense is sufficiently low that, regardless of the new quantity threshold at base offense level 12 (the lowest level in the Drug Quantity Table for crack cocaine cases), the base offense level does not change (0.7 percent of all crack cocaine cases);

2) the drug quantity involved in the offense is sufficiently great at base offense level 38 (the highest offense level in the Drug Quantity Table) that it continues to exceed the new threshold for that level (1.5 percent of all crack cocaine cases);

3) the guideline range for the case did not change because the offender's final offense level exceeds the maximum of the table (level 43), even with the two-level reduction from the amendment (0.2 percent of all crack cocaine cases);

4) the defendant received a departure to zero months of imprisonment under the existing sentencing structure and, therefore, the sentence cannot be reduced further (0.7 percent of all crack cocaine cases);

5) the two-level reduction in the Drug Quantity Table is offset by the offender no longer being eligible for the "mitigating role cap" in USSG §2D1.1(a)(3) because the resulting base offense level will be below the threshold requirements in subsection (a)(3) (1.7 percent of all crack cocaine cases);

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6) the offense involved crack cocaine and another controlled substance or substances and the reduction in the marijuana equivalency for cocaine base for determining the base offense level in

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prison system in homeostasis. That is, the number of new, in-coming inmates is assumed to be equal to the number of out-going (released) inmates and all beds are assumed to be occupied. In order to isolate the changes to the system caused by the specific policy under review, a number of factors are artificially held constant in the model. For example, arrest rates, charging practices, conviction rates, other sentencing policies, *etc*. are assumed to remain constant over time.

Assumptions incorporated into the prison impact model include: 1) defendants are re-sentenced to a position in the estimated new guideline range that is equivalent to the position of the sentence in the original guideline range; 2) defendants earn the maximum allowable good-time (currently 54 days per year served for imposed sentences greater than one year but not life imprisonment); and 3) defendants serve the minimum of A) the sentence imposed less the maximum allowable good conduct time, or B) their estimated remaining life expectancy, based upon an actuary table incorporating age, race, and sex.

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.

revised Application Note 10 is not of sufficient magnitude to result in a lower combined base offense level (11.2 percent of all crack cocaine cases); and

7) the offender's current guideline range was below the existing statutory mandatory minimum prior to operation of USSG §5G1.1(b),[2] and, therefore, lowering the guideline range further will have no effect (14.0 percent of all crack cocaine cases).[3]

The current average sentence of crack cocaine offenders is 121 months. The average sentence for all crack cocaine offenders is estimated to change to 106 months, a 12.4 percent decrease. The corresponding estimated changes to the prison population are presented in the accompanying table. Fewer prison beds are needed because offenders are released sooner than they otherwise would be under the guideline penalty structure existing prior to the amendment. The reduction in prison beds for crack cocaine offenders one year after this modification takes effect is 20 beds, after two years, 101 beds, and so on.

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[2] USSG §5G1.1(b) (Sentencing on a Single Count of Conviction) provides that "[w]here a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence."

[3] An additional 0.3 percent of the cases are counted as not affected because of missing data or logical inconsistencies within the data that prevented calculating the impact.

SENTENCING IMPACT AND PRISON IMPACT MODEL OF
APRIL 27, 2007 CRACK COCAINE AMENDMENT
(Amends the Drug Quantity Table and Drug Equivalency Table in USSG §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy)

Estimated Sentence Change

CRACK COCAINE AMENDMENT	Percent of Cases Affected	All Cases: Current Average Sentence (months)	All Cases: Estimated New Average Sentence (in months)	Percent Change
	69.7%	121	106	12.4%

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Estimated Reduction in Prison Beds

CRACK COCAINE AMENDMENT	1 Year	2 Years	3 Years	4 Years	5 Years	10 Years	15 Years
	- 20	- 101	- 307	- 542	- 894	- 2,623	- 3,808

This model assumes no change to the current statutory mandatory minimum sentencing thresholds for crack cocaine offenses.

SOURCE: U.S. Sentencing Commission. Prison Impact Model. FY2006 datafile.