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FOR JUSTICE**

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**United States Senate  
The Senate Committee on the Judiciary  
Subcommittee on Crime and Drugs**

**Testimony of Nicole M. Austin-Hillery<sup>1</sup>  
Director and Counsel- Washington Office  
The Brennan Center for Justice  
At New York University School of Law  
Wednesday, April 29, 2009**

Mr. Chairman, the Brennan Center is greatly appreciative for your leadership in the effort to eliminate the disparities in federal law between crack and powder cocaine sentences. We thank you and members of the subcommittee for holding this hearing in an effort to help end the overarching problem of racial disparities in the criminal justice system.

**Introduction**

The Brennan Center for Justice at New York University School of Law was founded in 1995 as a living tribute to the late Supreme Court Associate Justice, William J. Brennan, Jr. The Center is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. The Justice Project at the Brennan Center works on issues of equal justice particularly as they relate to ensuring fairness in the criminal justice system.

In 2007, the Brennan Center issued a report entitled *Prosecutorial Discretion and Racial Disparities in Federal Sentencing: Some Views of Former U.S. Attorneys* (the “racial disparities report”).<sup>2</sup> This report was the product of a convening hosted

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<sup>1</sup> Nicole M. Austin-Hillery is Director and Counsel of the Washington, D.C. Office of the Brennan Center for Justice at New York University School of Law where she oversees the Washington, D.C. operations, advocacy efforts and issue focus.

<sup>2</sup> *Federal Sentencing Reporter*, Vol. 19, No. 33, pp.192-201 (2007).

by the Brennan Center and the National Institute for Law and Equity (“NILE”), at which 12 former United States Attorneys discussed the “effects of racial disparities in sentencing on communities devastated by mass, long-term incarceration and on public confidence in federal law enforcement.”<sup>3</sup> In the report, we describe the impact that disparate drug sentencing laws have on communities of color. More pointedly, the report describes the role of prosecutors in criminal sentencing and examines specific opportunities and duties that prosecutors have to promote equal justice.

As a result of our work on this report, and as part of our broader work to eliminate racial disparities in the criminal justice system, the Brennan Center strongly supports the effort to end disparities between crack and powder cocaine sentences. We know that eliminating these sentencing disparities is the first step in addressing the array of racial disparities that exist in the criminal justice system. We hope that our comments here will help to bring attention not only to the need for sentencing reform with respect to crack and powder cocaine but also to the need to examine other areas of the criminal justice system where such disparities exist.

### **The Crack-Cocaine Sentencing Disparities are Racial Disparities**

As the Preamble to the Brennan Center’s racial disparities report articulates:

“[o]ur country was founded on the principle that all are created equal. We are a nation of laws that promote liberty and justice for all without regard to race, ethnic origin, religion, creed or gender. We are mindful that our nation’s racial history has sorely tested those beliefs of equality, liberty, and justice and that there should be no room for the vestiges of racial or ethnic discrimination in our criminal justice system.”<sup>4</sup>

The enactment of the *Anti-Drug Abuse Act of 1986*<sup>5</sup> resulted in “mandatory penalties for crack cocaine offenses which were the harshest ever adopted for low-level drug offenses and established drastically different penalty structures for crack and powder cocaine.”<sup>6</sup> Federal law establishes a 100 to 1 difference between sentences for the two categories of crimes.<sup>7</sup> The mandatory sentencing structure created by this law—which remains in effect today—results in average sentences for crack cocaine offenses that are 3 years longer than for offenses involving powder cocaine.<sup>8</sup> The effect of these uneven punishments has resulted in extremely severe prison terms for very low-level crack cocaine

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<sup>3</sup> *Id.* at 192.

<sup>4</sup> *Id.* at 198.

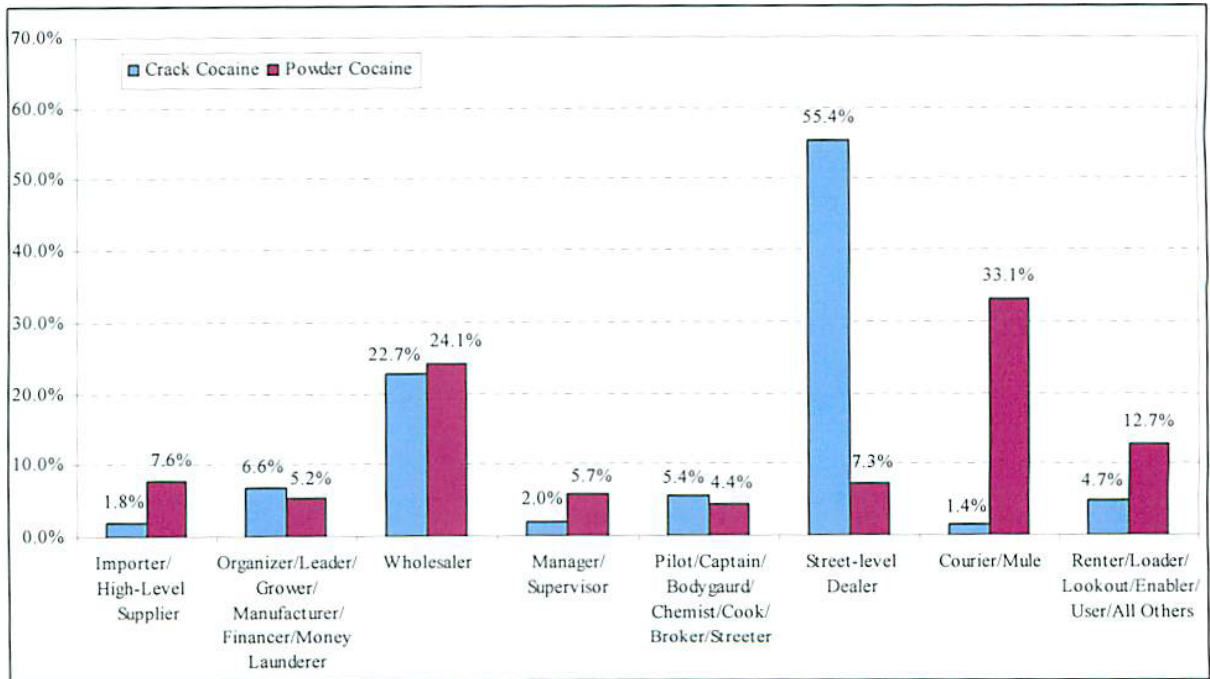
<sup>5</sup> Pub. L. 99-570, Oct. 27, 1986, 100 Stat. 3207.

<sup>6</sup> *Federal Crack Cocaine Sentencing*, the Sentencing Project, pp. 1-2, January, 2009.

<sup>7</sup> The Drug Policy Alliance, *Crack/Cocaine Sentencing Disparity* (Nov. 2007) available at <http://www.drugpolicy.org/drugwar/mandatorymin/crackpowder.cfm>.

<sup>8</sup> *Federal Crack Cocaine Sentencing*, The Sentencing Project, p. 2, January, 2009.

offenses, which represent more than 60% of federal crack defendants. (See Figure 2 from Sentencing Project report).<sup>9</sup>



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

The racial impact of the crack cocaine sentencing laws is plain. The vast majority of low-level offenders most affected by these laws are African-American.<sup>10</sup> “In 2006, 82% of those sentenced under federal crack cocaine laws were black and only 8.8% were white—even though more than two-thirds of people who use crack cocaine are white.”<sup>11</sup> Research by the U.S. Sentencing Commission (“the Commission”) found that “sentences appear to be harsher and more severe for racial minorities than others as a result of [these] laws.”<sup>12</sup> In the

<sup>9</sup> *Federal Crack Cocaine Sentencing*, The Sentencing Project, pp. 3, January, 2009 (citing U.S. Sentencing Commission, 2005 Drug Sample).

<sup>10</sup> See generally, *Where are All the Young Men and Women of Color*, Melvin Delgado (Oct. 2001).

<sup>11</sup> The Drug Policy Alliance, *Crack/Cocaine Sentencing Disparity* (Nov. 2007) (citing to U.S. Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy (Washington, D.C.: U.S. Sentencing Commission, May 2007) available at <http://www.drugpolicy.org/drugwar/mandatorymin/crackpowder.cfm>).

<sup>12</sup> The Drug Policy Alliance, *Crack/Cocaine Sentencing Disparity* (Nov. 2007) (citing to U.S. Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy (Washington, D.C.: U.S. Sentencing Commission, April 1997 at p.8) available at <http://www.drugpolicy.org/drugwar/mandatorymin/crackpowder.cfm>).

year 2000, the Commissions data show[ed] that of all federal crack defendants, 84% were black.<sup>13</sup>

These numbers portray a startling difference in the treatment that offenders of crack cocaine laws receive as contrasted with offenders of powder cocaine laws. A close examination of all cocaine offenders (including crack) shows that African American drug defendants have a 20% greater chance of being sentenced to prison than white drug defendants.<sup>14</sup> Statistics compiled by the Department of Justice indicate that as a result of the sentencing requirements for crack cocaine offenses, African Americans serve virtually as much time in prison for a drug offense as whites do for violent offenses.<sup>15</sup>

At this juncture in the fight to end sentencing disparities between crack and powder cocaine, the statistical data has been thoroughly and frequently discussed. Many respected experts have come before Congress in a series of legislative sessions and recounted the data, and the numbers are clear—crack cocaine offenders, who are disproportionately African American, serve time in prison at a much higher rate and for much longer periods of time than do powder cocaine offenders, most of whom are not African American.<sup>16</sup>

The stark reality of these numbers has impressed Senators on both sides of the aisle. In 2001, Senator, Jeff Sessions (R-AL) introduced the *Drug Sentencing Reform Act* which would have raised the threshold possession amount for a five year mandatory minimum in the case of crack offenses.<sup>17</sup> During the 110<sup>th</sup> Congress, Senators Orrin Hatch (R-UT) and Joseph Biden (D-DE) introduced bills that would either reduce or eliminate the sentencing disparity between crack and powder cocaine.<sup>18</sup> Additionally, Representatives Sheila Jackson Lee (D-TX), Charles Rangel (D-NY) and Robert Scott (D-VA) introduced their own versions of bills seeking to end this disparity. It is clear that many members of Congress understand that “the uneven treatment [of these sentencing laws] strikes at the heart of the justice system.”<sup>19</sup>

With this hearing today, the 111<sup>th</sup> Congress is primed to right this ongoing wrong. The President himself declared earlier this year that “the

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<sup>13</sup> *Race and Class Penalties in Crack Cocaine Sentencing*, Michael Coyle, The Sentencing Project, ( ) available at

[http://www.sentencingproject.org/Admin/Documents/publications/rd\\_raceandclass\\_penalties.pdf](http://www.sentencingproject.org/Admin/Documents/publications/rd_raceandclass_penalties.pdf).

<sup>14</sup> United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing* (Nov. 2004), p.122.

<sup>15</sup> Bureau of Justice Statistics, *Compendium of Federal Justice Statistics*, 2003 (Washington, D.C.: Oct. 2004), referencing Table 7.16, p. 112.

<sup>16</sup> See, *ABA Testimony on Crack Disparity, February 12, 2008*, available at [www.abanet.org/poladv/letters/crimlaw/2008feb12\\_crackdisparity\\_t.pdf](http://www.abanet.org/poladv/letters/crimlaw/2008feb12_crackdisparity_t.pdf); *ACLU Testimony*, February 12, 2008, available at [www.aclu.org/drugpolicy/sentencing/index.html](http://www.aclu.org/drugpolicy/sentencing/index.html) - 36k; *Report to Congress: Cocaine and Federal Sentencing Policy*, United States Sentencing Commission, May 2007.

<sup>17</sup> *Federal Crack Cocaine Sentencing*, The Sentencing Project, p. 7, January 2009.

<sup>18</sup> *Id.*

<sup>19</sup> *Time to End the Crack Disparity*, editorial, The Philadelphia Inquirer, April 27, 2009, available at <http://www.philly.com/inquirer/opinion/43758552.html>.

disparity between sentencing [for] crack and powder-based cocaine is wrong and should be completely eliminated.”<sup>20</sup> The 111<sup>th</sup> Congress has the best opportunity to put an end to this uneven meting out of justice that has been pervasive in the criminal justice system for over 20 years.

### **Racial Disparities in the Criminal Justice System Go Beyond the Crack-Powder Cocaine Issue**

Racial disparities, so troubling in crack and powder cocaine sentencing, impose an additional cost in many other contexts within the criminal justice system. The Sentencing Commission has observed that, beyond the direct impact on individuals, “[p]erceived improper racial disparity fosters disrespect for and lack of confidence in the criminal justice system...”<sup>21</sup> The current moment, in which our society is considering eliminating disparities in crack and powder cocaine sentencing, thus provides us with an important opportunity to step up our national efforts to eliminate racial disparities in all aspects of the criminal justice system.

The prosecutors who we called upon in producing the Brennan Center’s report on racial disparities in the criminal justice system developed a set of “Guiding Principles of Equal Justice” which they designed to serve as the foundation for reform efforts focused on racial justice. These guiding principles are the following:

- 1) The pursuit of justice requires the fair application of the law to ensure public confidence and trust in the criminal justice system;
- 2) Justice means observing the highest ethical standards by ensuring that racial bias and stereotyping do not play a role in federal prosecutions;
- 3) Fairness and equality demand that similarly situated defendants be treated equally and that unwarranted racially disparate impact be eliminated; and
- 4) Prosecutorial decision-making should be well-reasoned and transparent.<sup>22</sup>

These principles were developed with the recognition that racial disparities in the criminal justice system, are at least in part, a product of

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<sup>20</sup> *Federal Crack Cocaine Sentencing*, The Sentencing Project, p.1, January 2009.

<sup>21</sup> United States Sentencing Commission, *Report to Congress: Cocaine and Federal Sentencing Policy*, May 2002, p.103.

<sup>22</sup> *Prosecutorial Discretion and Racial Disparities in Federal Sentencing: Some Views of Former U.S. Attorneys*, Federal Sentencing Reporter, Vol. 19, No. 33, pp.198-199 (2007).

decisions made by prosecutors and other law enforcement officials. The report therefore builds from the premise that those who work in the frontlines of our criminal justice system are among the best positioned to help end the racial disparities in the criminal justice system. In the report, the participating prosecutors concluded that “conscious attention to the role of race in prosecutorial decision-making, as well as concerted efforts to monitor and improve the decision-making process, is essential for mitigating unwarranted racial disparities in the outcomes of federal criminal prosecutions.”<sup>23</sup>

In addition to fixing crack-powder cocaine disparities, new legislation to promote such “conscious attention to the role of race” and to “monitor and improve the decision-making process” can serve as an essential tool with which to respond to the problem. The Justice Integrity Act embodies this approach. In the 110<sup>th</sup> Congress, then-Senator Biden (D-DE) introduced the Justice Integrity Act of 2008, a bill that would establish pilot programs in 10 selected U.S. Attorney districts, enabling an advisory group in each district to gather data with respect to racial and ethnic disparities in prosecutions. The bill would also provide for analysis of that data to determine the root causes of any such disparities. The legislation has been bi-camerally introduced in the 111<sup>th</sup> Congress by Senators Benjamin Cardin (D-MD) and Arlen Specter (R-PA) and Representative James Cohen (D-TN).

In addition to the Justice Integrity Act, the following additional initiatives are also important and currently, or soon to be, pending: the National Criminal Justice Act of 2009, S.714, sponsored by Senator James Webb (D-VA) and the End Racial Profiling Act, which will hopefully be introduced during the first term of this legislative session. We are confident that the Justice Integrity Act, and similar legislation, will help our nation gain more insight into the additional racial disparities that exist in the criminal justice system.

While we applaud the Committee’s commitment to end the divisive disparities that are inherent in federal cocaine sentencing laws, we also recognize that there is more to do to make our system fair and strong and to renew our nations commitment to ensuring that race is not a factor in how individuals are treated in our criminal justice system. The time is ripe for Congress to take bold steps to reduce race-based criminal justice disparities. We encourage support for reforms that will help achieve this goal.

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<sup>23</sup> Id. at 194.