

# DRUG POLICY ALLIANCE

Reason. Compassion. Justice.

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## Disparate Justice

### Crack/Powder Cocaine Disparity FAQ

#### What is the crack/powder cocaine sentencing disparity?

Pharmacologically the same drug, crack and powder cocaine are treated very differently within the walls of our justice system. Under the Anti-Drug Abuse Act of 1986 current federal policy generates a 100 to 1 penalty ratio for crack-related offenses. For instance, distribution of only 5 grams of crack cocaine (about a thimble full) yields a 5 year mandatory minimum sentence. It takes 500 grams of powder cocaine, however, to trigger the same sentence. Crack cocaine is also the only drug for which the first offense of simple possession can trigger a 5 year mandatory minimum sentence. Simple possession of *any quantity of any other substance* by a first time offender – including powder cocaine – is a misdemeanor offense punishable by a maximum of one year in prison. (21 U.S.C. 844)<sup>1</sup> The Drug Policy Alliance urges Congress to completely eliminate the sentencing disparity between crack and powder cocaine without increasing the penalties or penalty triggers for either drug.

#### Why do we need reform?

- The crack/powder disparity fuels racial disparities. In 2006, blacks constituted 82% of those sentenced under federal crack cocaine laws while whites constituted only 8.8% despite the fact that more than 66% of people who use crack cocaine are white.<sup>2</sup> In addition, in 2005 racial minorities comprised 85% of those receiving mandatory minimum sentences for powder cocaine. The U.S. Sentencing Commission (USSC) has found that, “sentences appear to be harsher and more severe for racial minorities than others as a result of this law. The current penalty structure results in a perception of unfairness and inconsistency.”<sup>3</sup>
- Current policies target low-level street dealers and users. Although mandatory minimum sentencing was intended to target high-level drug traffickers, members of organized crime rings, and the violence associated with the crack cocaine market, the USSC’s report found that 2/3 of crack cocaine defendants had low-level involvement in 2005 and only 1.8% of all crack defendants were high-level suppliers.<sup>4</sup> Reform is needed so that law enforcement can prioritize its efforts and resources to target kingpins, not merely low-level drug law offenders.

#### What is the position of the U.S. Sentencing Commission on the Crack/Powder Disparity?

- In 1995, the U.S. Sentencing Commission recommended equalizing penalties for crack and powder cocaine, without raising penalties for powder cocaine. Congress rejected the Commission’s recommendation, however. This marked the first occasion that Congress rejected a recommendation by the USSC.
- In 2002, the USSC released a report that urged Congress to:
  - increase the quantity of crack cocaine required to trigger an automatic mandatory minimum sentence;
  - repeal the mandatory minimum for simple possession of crack cocaine; and
  - reduce the crack / powder sentencing disparity without increasing trigger thresholds for powder cocaine.
- In May 2007, the USSC issued a report<sup>5</sup> imploring Congress to act quickly to eliminate the sentencing disparity between crack and powder cocaine. Although federal law still calls for mandatory minimums triggered by the net weight of illicit substance, the USSC has now amended their sentencing guidelines, and applied the change retroactively, to lessen the punishment range for crack cocaine cases by approximately one to two years. The Commission’s changes would reduce the average sentence from a little more than 10 years to a little under 9 years and would affect thousands of defendants in our criminal justice system.

<sup>1</sup> US Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy. (Washington, DC: US Sentencing Commission, February 1995).

<sup>2</sup> US Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy. (Washington, DC: US Sentencing Commission, May 2007).

<sup>3</sup> US Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy. (Washington, DC: US Sentencing Commission, April 1997).

<sup>4</sup> US Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy. (Washington, DC: US Sentencing Commission, May 2007).

<sup>5</sup> Ibid.

### US Senate

- **Drug Sentencing Reform Act of 2007 (S. 1383)**, introduced by Senator Sessions (R-AL)
  - This bill would reduce the disparity between crack and powder cocaine sentences to 20:1. It would take 20 and 200 grams of crack to trigger 5 and 10 year mandatory minimum sentences, respectively.
  - The legislation would also *decrease* the amount of powder cocaine necessary to trigger a mandatory minimum sentence to 400 grams for a 5 year sentence, and 4000 grams for a 10 year sentence.
  - The bill would also reduce the current mandatory minimum for simple possession of crack cocaine from 5 years to 1 year.
  - ***Analysis of the legislation:***
    - The positive aspect of this act is that it reduces the existing disparity of crack and cocaine sentences to 20:1. However, this is still a disparity between the amount of crack and powder cocaine that trigger the same mandatory minimum sentence, which will likely lead to more racial injustices. The amount of crack that would trigger a mandatory minimum sentence would still be so low that law enforcement would continue to waste federal resources on low-level drug law offenders instead of targeting major traffickers and crime syndicates.
    - This act would also decrease the amount of powder cocaine necessary to elicit a mandatory minimum. As Hispanics are disproportionately convicted of powder cocaine sentences, if this bill were passed, the probable result would be increases in the number of low-level, non-violent powder Hispanic offenders sentenced to prison or jail for longer periods of time.
- **Fairness in Drug Sentencing Act of 2007 (S. 1685)**, introduced by Senator Hatch (R-UT)
  - This bill would also reduce the crack-powder disparity to 20:1. The difference between this bill and the Drug Sentencing Reform Act is in the amount of crack necessary to trigger a mandatory minimum sentence: 25 grams and 250 grams for a 5 and 10 year sentence, respectively. This bill does not change the amount of powder cocaine that prompts a mandatory sentence.
  - The bill would also eliminate the current 5 year mandatory minimum for simple possession of crack cocaine.
  - ***Analysis of the legislation:***
    - This legislation is a step in the right direction as it would reduce the existing disparity between powder and crack sentences to 20:1. It is encouraging that the powder cocaine quantities are unchanged, however, a sentencing disparity would still exist, and the amount of crack cocaine that elicits a mandatory minimum sentence would still be so low that law enforcement would continue to waste federal resources on low-level drug law offenders instead of targeting major traffickers and crime syndicates. Any sentencing disparity would undoubtedly result in racial disparities in arrest and conviction.
- **Drug Sentencing Reform and Kingpin Trafficking Act of 2007 (S. 1711)**, introduced by Senator Biden (D-DE)
  - This bill would completely eliminate the existing crack-powder disparity by increasing the quantities of crack cocaine that generate a mandatory minimum sentence to equal current levels of powder cocaine.
  - It includes a treatment section that establishes a grant program to provide substance abuse treatment to people in prison.
  - It increases penalties for major traffickers.
  - Additional resources are allocated to three government agencies (Departments of Justice, Treasury, and Homeland Security) for the investigation and prosecution of major cocaine kingpins.
  - ***Analysis of the Legislation:***
    - Of the three bills proposed in the senate in 2007, this bill is the only one that would completely eliminate the disparity between crack and powder cocaine. Furthermore, it does so without reducing the current amount of powder cocaine that prompts a minimum sentence.
    - The treatment provision in this bill is extremely important – studies show a large percentage of those incarcerated who need drug treatment do not receive such services.<sup>6</sup> Receiving drug treatment is an important component of staying crime and drug free once an individual has been released from prison or jail.

<sup>6</sup> Petersilla, J. "From Cell to Society: Who is Returning Home?" Travis, J. and Visher, C. (eds.) *Prisoner Reentry and Crime in America*. New York: Cambridge University Press, 2005.

## US House of Representatives

- **Power-Crack Cocaine Penalty Equalization Act of 2007** (H.R. 79), introduced by Representative Bartlett (R-MD)
  - This bill would not decrease the penalties for crack cocaine offenses. Instead, it would decrease the current quantities of powder cocaine necessary to receive a mandatory minimum sentence to that of current crack cocaine quantities.
  - ***Analysis of the Legislation:***
    - Although this bill would reduce disparities between crack and powder cocaine sentences, it is different from the other bills in that it is the only one that decreases current powder cocaine quantities that trigger a minimum sentence to equal current levels for crack cocaine. It would result in enormous increases in the number of people incarcerated for powder cocaine, and further fuel racial disparities. In addition a vast amount of resources would still be spent on arresting, convicting, and incarcerating individuals for possessing or distributing small amounts of powder cocaine; those resources could be better spent on targeting major traffickers.
- **Crack-Cocaine Equitable Sentencing Act of 2007** (H.R. 460), introduced by Representative Rangel (D-NY)
  - Similar to the Drug Sentencing Reform and Kingpin Trafficking Act, this act would make the sentencing requirements for crack and powder cocaine equal without reducing the powder cocaine quantity. It would also make a first time offender exempt from the current sentencing structures.
  - ***Analysis of the Legislation:***
    - This completely eliminates the crack/powder cocaine disparity and it does it without increasing penalties for crack cocaine or powder cocaine offenses.
- **Drug Sentencing Reform and Kingpin Trafficking Act of 2007** (H.R. 4545), companion bill to S. 1711, introduced by Congresswoman Shelia Jackson-Lee (D-TX)
  - This bill would completely eliminate the existing crack-powder disparity by increasing the quantities of crack cocaine that generate a mandatory minimum sentence to equal current levels of powder cocaine.
  - It includes a treatment section that establishes a grant program to provide substance abuse treatment to people in prison.
  - It increases penalties for major traffickers.
  - Additional resources are allocated to three government agencies (Departments of Justice, Treasury, and Homeland Security) for the investigation and prosecution of major cocaine kingpins.
  - ***Analysis of the Legislation:***
    - Of the three bills proposed in the senate in 2007, this bill is the only one that would completely eliminate the disparity between crack and powder cocaine. Furthermore, it does so without reducing the current amount of powder cocaine that prompts a minimum sentence.
    - The treatment provision in this bill is extremely important – studies show a large percentage of those incarcerated who need drug treatment do not receive such services.<sup>7</sup> Receiving drug treatment is an important component of staying crime and drug free once an individual has been released from prison or jail.
- **Fairness in Cocaine Sentencing Act of 2008** (H.R. 5035), introduced by Congressman Bobby Scott (D-VA)
  - This bill would abolish mandatory minimum sentencing for cocaine offenses, both powder and crack, by eliminating the distinction between the two forms (powder and crack) of cocaine. Thus, cocaine offense, like other drugs, could be eligible for probationary sentences.
  - Resources, in the amount of \$10 million dollars for federal drug court programs and \$50 million for local drug court programs, are allotted from 2009-20013.

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<sup>7</sup> Petersilla, J. "From Cell to Society: Who is Returning Home?" Travis, J. and Visher, C. (eds.) Prisoner Reentry and Crime in America, New York: Cambridge University Press, 2005.