

# *Appendix D*

## SUMMARY OF WRITTEN PUBLIC COMMENT ON COCAINE SENTENCING POLICY

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

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

### **1. U.S. Department of Justice**

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

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

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

### **3. Probation Officers' Advisory Group (POAG)**

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

### **4. Practitioners' Advisory Group (PAG)**

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

According to PAG, decreasing the quantity-based penalties for crack cocaine offenders while targeting increased punishment for aggravating conduct is a better approach than increasing the quantity-based penalties for powder cocaine offenses. PAG contended that increasing powder cocaine penalties is unwarranted. PAG urged the Commission to establish a drug quantity ratio as close to 1-to-1 as possible.

PAG noted that the specific sentencing enhancements for violence, weapon possession, and weapon use should apply only to defendants who actually possess a weapon or injure another person, or to those who directly order such possession and/or injury. In other words, the enhancements should not be based on broad concepts of vicarious liability of conspiracy participants.

PAG sent a follow-up letter on March 25, 2002, responding to the March 19, 2002 testimony of the U.S. Department of Justice. In the letter, PAG contended that the Department of Justice's claim that crack cocaine is associated with greater dangers than powder cocaine can be adequately addressed by the other proposed guideline enhancements.

### **5. Families Against Mandatory Minimum (FAMM)**

FAMM supported the Commission in its efforts to revise the penalties for crack cocaine offenses. It urged the Commission to follow the approach originally intended by Congress – that the ten-year mandatory minimum penalty apply to major distributors and the five-year mandatory minimum penalty apply to serious distributors. FAMM urged sentencing policy makers to use the average quantity of crack cocaine handled by mid- and high-level dealers to determine the trigger drug quantities. FAMM opposed increasing powder cocaine penalties

because the problem lies with crack cocaine penalties. Any increase in powder cocaine penalties would send those offenders (50 percent of whom are Hispanic and 80 percent of whom are minorities) to prison longer for no discernible reason. It also opposed the proposed enhancements unless base offense levels for all the drug guidelines are lowered. FAMM further stated that any enhancement should be offender specific and not applied through vicarious liability.

FAMM, in conjunction with several other witnesses who testified before the Commission (*i.e.*, Leadership Conference on Civil Rights, National Council of La Raza, American Civil Liberties Union, National Association of Criminal Defense Attorneys, and Human Rights Watch), submitted a letter on April 4, 2002 responding to the U.S. Department of Justice's March 19, 2002 testimony. These groups argued against raising the powder cocaine mandatory minimum threshold quantities because there is no evidence that existing powder cocaine penalties are too low. It noted that in 1997, 27 federal judges who formerly served as U.S. Attorneys wrote Congress opposing an increase in powder cocaine sentences that they termed "severe." These organizations stated that the Department of Justice was endorsing an unfair system under which all crack cocaine defendants are presumed to be violent even when there is no evidence that a particular defendant was in fact violent.

#### **6. Mexican American Legal Defense and Education Fund (MALDEF)**

MALDEF stated that the disparity between crack cocaine and powder cocaine penalties has a discriminatory effect on minorities, including Latinos. MALDEF submitted nine pages of statistics and background concerning racial profiling and examples of other discrimination of Hispanics within the criminal justice system. MALDEF supported assigning a five-year penalty for serious drug offenders and a ten-year penalty for major drug traffickers but stated that this currently is not the sentencing structure for crack cocaine. It recommended that the crack cocaine mandatory minimum drug quantity threshold be increased and that the powder cocaine threshold be maintained. MALDEF urged against proposals that would reduce the powder cocaine mandatory minimum threshold quantity because this would exacerbate racial disparity and have a negative impact on the Latino community. MALDEF further stated that to the extent the Drug Quantity Table takes into account aggravating conduct, the base offense levels should be reduced and enhancements should be added to account for aggravating factors, such as violence and weapons.

#### **7. International Association of Chiefs of Police**

Chief William B. Berger, President of the International Association of Chiefs of Police, stated that both crack cocaine and powder cocaine are closely associated with crime, violence, death and destruction and, therefore, the existing penalties for crack cocaine offenses should not be decreased. Rather, he suggested that the mandatory minimum threshold quantities for powder cocaine offenses be decreased so that they more closely track those for crack cocaine offenses. In this fashion, the Commission would achieve the goal of reducing or eliminating any disparity between crack cocaine and powder cocaine offenses, while at the same time ensuring that those

who participate in the sale and use of these illegal narcotics are penalized in an appropriate manner.

#### **8. NAACP Legal Defense and Educational Fund, Inc. (LDF)**

LDF stated that the current sentencing scheme for crack cocaine is irrational because it treats every crack cocaine offender disproportionately severely, rather than distinguishing crack cocaine offenders who engage in aggravating or violent conduct. It recommended that the guidelines be amended to rely less upon the type or quantity of drugs and more upon aggravating or mitigating conduct. LDF maintained that the crack cocaine sentencing scheme has a disproportionate impact on African Americans, many of whom are serving excessively long sentences for minor, non-violent offenses. LDF stated that the injustice of the current scheme promotes a mistrust of the government and exacts enormous costs on the families and communities of those incarcerated. Because many people incarcerated for crack cocaine offenses have children, and children of prisoners run a higher risk of becoming prisoners themselves, LDF contended that the guidelines may contribute to higher crime rates in minority communities, instead of deterring crime. LDF recommended that the Commission close the ratio between crack cocaine and powder cocaine sentences without decreasing the powder cocaine mandatory minimum threshold quantities. According to LDF, decreasing powder cocaine thresholds is unjustified and would add to the racial disparity in sentencing by increasing the number of non-violent Hispanic and African Americans sentenced to prison.

#### **9. Citizen Letters**

The Commission received over 1,000 letters from individual citizens expressing their opinions on the proposed drug amendments. A significant portion consisted of form letters, many from inmates and their families. Although it is impossible to summarize accurately and concisely such a large volume of correspondence, numerous citizens expressed their disagreement with the current 100-to-1 drug quantity ratio, and suggested a variety of alternative ratios, including 10-to-1, 7-to-1, or 5-to-1. None of the letters suggested maintaining the status quo or increasing powder cocaine penalties in order to reduce the 100-to-1 drug quantity ratio.