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THE WHITE HOUSE

WASHINGTON

March 13, 1998

MEMORANDUM FOR THE PRESIDENT

FROM BRUCE REED

RE: Proposal on Sentencing Certain Drug Offenders

Attached is a proposal from U.S. District Judge Oberdorfer for you to issue an Executive Order creating a "blue ribbon" panel empowered to commute the sentences of certain drug offenders in the Federal Bureau of Prisons. He specifically suggests that such a panel consider the cases of individuals convicted of being crack "couriers" or "cookers" (those who convert powder cocaine to crack) and grant them clemency after serving the powder equivalent of their sentences if they hold the promise of living crime- and drug-free lives. Taking such action, Judge Oberdorfer believes, would go a long way towards addressing the disparity between federal crack and powder cocaine sentences.

Although we share Judge Oberdorfer's concerns about the unfairness of federal crack penalties, we would recommend against his proposal for several reasons. First, we believe much of what Judge Oberdorfer wants to accomplish overlaps with the mandatory minimum "safety valve" that passed as part of the 1994 Crime Act. This provision allowed federal judges to exempt certain drug offenders from mandatory minimum penalties if: (1) they did not have a significant criminal history; (2) they did not use violence, possess a firearm or commit serious injury; (3) they did not play a lead or organizing role; and (4) they provided information about the offense to the government. At the time of passage, the U.S. Sentencing Commission estimated that about 600 drug offenders would be immediately eligible for this exemption.

Second, we believe his proposal is too broad. Our crack sentencing proposal increases the trigger for mandatory minimum sentences for crack from 5 to 25 grams, so that lower-end dealers are not subject to mandatory minimums. By contrast, Judge Oberdorfer's recommendation is not limited to offenders within the lower-end range. We would recommend against any proposal that changes sentencing for mid- and upper-level dealers.

Third, Members of Congress would undoubtedly contest any executive action you take to reduce sentences for crack defendants. Already, key Republicans (Senators Lott, Hatch, Abraham, and Speaker Gingrich) have strongly criticized the Administration's proposal to reduce the disparity between crack and powder cocaine sentences by increasing the trigger for crack. Instead, Republicans are threatening to pass legislation, for which they have bipartisan support, that simply reduces the trigger for powder cocaine. We believe then that any Executive Order you sign on this controversial subject will be overturned by legislation -- either a stand-alone bill or an amendment to juvenile crime legislation or ONDCP's reauthorization bill.

We recommend instead that you ask Judge Oberdorfer to help build support in Congress for the Administration's crack sentencing proposal.

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We recommend instead that you ask Judge Oberdorfer to help build support in Congress for the Administration's crack sentencing proposal.



Washington, D.C. 20530

MAR 28 1997

EXECUTIVE SUMMARY

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

FROM: Eric H. Holder, Jr.
Chair, Racial Disparity Working Group
United States Attorney
District of Columbia

Carol DiBattiste
Director
Executive Office of United States Attorneys

SUBJECT: Report of the Racial Disparity Working Group

PURPOSE: To present, with the endorsement of the Attorney General's Advisory Committee (AGAC), the findings and recommendations of the Racial Disparity Working Group and to provide information on cocaine sentencing ratios.

TIMETABLE: At the Attorney General's earliest convenience.

SYNOPSIS: Although there is no clear evidence indicating that similarly situated defendants are treated differently, the attached action memorandum provides nine recommendations for the Attorney General's consideration to avoid even the appearance of bias.

DISCUSSION: The Working Group focused on three areas where disparity has been alleged: (1) crack prosecutions; (2) substantial assistance motions; and (3) gun charging practices. Differences among districts on crack prosecutions are generally explicable by the varying ability of state and local officials to deal with the crack problem. In

Subject: Report of the Racial Disparity Working Group

those districts where there appeared to be a racial difference in the use of substantial assistance motions, the disparity was explained by the districts in terms of the types of crimes committed (some being less amenable in the district to receive substantial assistance reductions) and the different attitude of groups toward working with the Government (e.g. white supremists who refuse to cooperate). The few districts that appeared to have racial disparity in filing § 924(c) charges explained the disparity by the likelihood of one group or the other to commit certain crimes common in their district (e.g. whites more likely to be involved in bank robberies, blacks more likely to be involved in violent crime).

The findings and recommendations of the Racial Disparity Working Group were presented to and approved by the AGAC.

RECOMMENDATION:

It is recommended that the Attorney General approve the Racial Disparity Working Group's nine recommendations detailed in the attached action memorandum and sign the attached memorandum (TAB A) to the United States Attorneys implementing recommendations 1 - 4.

Attachments



U.S. Department of Justice

Washington, D.C. 20530

MAR 28 1997

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

FROM: Eric H. Holder, Jr.
Chair, Racial Disparity Working Group
United States Attorney
District of Columbia

Carol DiBattiste
Director
Executive Office of United States Attorneys

SUBJECT: Report of the Racial Disparity Working Group

PURPOSE: To present the findings and recommendations of the Racial Disparity Working Group, which have the endorsement of the Attorney General's Advisory Committee (AGAC) and to provide information on cocaine sentencing ratios.

TIMETABLE: At the Attorney General's earliest convenience.

SYNOPSIS: Although there is no clear evidence indicating a serious problem of racial disparity in the Federal system, because it is important to avoid even the appearance of racial bias, we recommend you approve the recommendations included below.

DISCUSSION: At a meeting convened by the Deputy Attorney General on October 19, 1995, the Deputy Attorney General asked United States Attorney Eric Holder (DC) to chair a working group of United States Attorneys and representatives of the Criminal Division to examine racial issues in the criminal justice system and recommend what additional steps, if any, United States Attorneys should take to ensure that race plays no role in prosecution

practices. Working Group members included Zachary W. Carter (EDNY), Jon E. DeGuilio (NDIN), Gregory M. Sleet (DE), Ron Cheng (CDCA), Monty Wilkinson (DC), Robert S. Litt, Mary F. Harkenrider, Julie E. Samuels, and Steven G. Shandy (Criminal Division), and Charysse L. Alexander (EOUSA).¹

Recent studies and court decisions addressing the apparent racial disparity in state and Federal criminal justice systems have spawned renewed interest in examining this issue. For example, the Sentencing Project reported that one out of three black males in his twenties is presently under some form of criminal justice supervision -- either in prison or jail, or on probation or parole. Data published by the Bureau of Justice Statistics show that in 1994 there were more blacks than whites in the nation's prisons. (Of all Federal defendants in Bureau of Prisons custody at the end of fiscal year 1995, however, 59% were white, 38% were black, and 3% were American Indian, Asian or "other".) The United States Sentencing Commission (USSC), in yet unpublished work, has found some differences by race in the Federal system in both rates of substantial assistance motions made on behalf of defendants and charging practices relating to firearms.

Of all Federal defendants sentenced under the guidelines in FY 1994, 42% were white, 30% were black, 25% were hispanic, and 4% were identified as "other" (American Indian, Alaskan native, or Pacific Islander). The racial distribution of Federal defendants varies by offense. In 1994, of all defendants sentenced for Federal drug offenses 30% were white, 33% black, 35% hispanic, and 2% other. Of all Federal defendants sentenced for crack cocaine offenses, 90% were black, 6% hispanic, 4% white, and fewer than 1% other.

The Working Group focused on three points in the Federal system where "disparity" has been alleged: 1) crack prosecutions; 2) substantial assistance motions; and 3) gun charging practices.² Although the term disparity is often used, it is

¹ The Group is grateful for technical assistance and analysis provided by the Bureau of Justice Statistics.

² The Group identified other practices that may have differing impacts on the races in the federal system, including death penalty prosecutions and enforcement practices, especially those which focus on gangs or violence. Although there was consensus that enforcement practices (both in terms of priorities set by agencies and at the individual investigator level) may greatly affect the racial composition of the defendants in a

rarely defined. Some commentators, for example, have concluded that disparity exists when the racial composition of Federal drug defendants does not match the composition of all drug users or of all drug arrestees. We believe that to assess whether disparity exists, one needs to determine whether "similarly situated offenders" are treated the same. For such an assessment to be valid, individuals with similar offense and offender characteristics must be compared.³ Thus, aggregate data without knowing more about specific offenders can be very misleading. In considering the issue of disparity in the Federal system, we have attempted to differentiate between racial disparity and differences in treatment caused by different district policies that are unrelated to race. We have reported on differences in district practices at the Deputy Attorney General's request even though they may not be the cause of racial disparity.

The Working Group reviewed Federal crack prosecution statistics, preliminary findings from two USSC studies addressing substantial assistance departures and gun charging practices, and follow-up analyses by the Bureau of Justice Statistics on these practices. We also examined district statistics on substantial assistance motions and gun charging practices. Following this examination, we contacted a number of United States Attorneys' offices (USAOs) that had large numbers of "under 5 gram" crack cocaine cases or whose statistics reflected sizable percentage differences by race for either substantial assistance or 924(c) charges among defendants sentenced in 1994. We also contacted numerous USAOs that had unusually high or low rates of

district, it was agreed that the Group should begin by reviewing practices more directly controlled by prosecutors.

Issues relating to death penalty prosecutions have been addressed by the protocol and the requirement for centralized review of all decisions regarding whether or not to seek the death penalty. The Group found that it was premature to evaluate whether this protocol has resolved any actual or perceived racial disparity in the imposition of the federal death penalty.

³ As stated by the Supreme Court in United States v. Armstrong, May 13, 1996, "To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted."

substantial assistance or 924(c) charges. In total, we contacted about 40 districts to learn more about their practices in one or more of these areas.⁴

This memorandum provides an overview of the Group's work and findings, discusses possible explanations for and significance of the findings and concludes with a number of recommendations to prevent any and all racial bias from influencing prosecutorial actions. The AGAC has reviewed and approved all the findings and recommendations in this report.

CRACK COCAINE PROSECUTIONS

As noted above, over 90% of defendants prosecuted for crack offenses in the Federal system are black. We have no reason to believe that this anomaly qualifies as unwarranted "disparity." Indeed, to the extent that comparison is possible, it appears that persons arrested for crack cocaine offenses in both the state and Federal systems are overwhelmingly black. See Tab C. Even though we have no reason to believe that our crack prosecutions are racially biased, we acknowledge that, due to the more severe sentences for crack offenses based on the 100-to-1 quantity ratio in the Federal system, we should be especially sensitive to the proper use of our Federal resources in this area.

Current Department Policy and Practice

United States Attorneys tailor their prosecutive priorities and corresponding declination policies on crack cocaine cases, as well as on other types of cases, to the needs of their districts. Two factors which United States Attorneys may consider when setting district declination policies are: the severity of the drug problem in the district and the ability of the state to address the drug problem effectively (state law enforcement resources, the effectiveness of the state court system, expected sentence length). A review of the United States Attorneys' policies for crack prosecutions revealed substantial variations among districts' declination guidelines and patterns of

⁴ We provided each district with data comparing its practices to those of other United States Attorneys' offices but, because the identifying case information was not available to us, the United States Attorneys could not pull specific files for the cases in question. Therefore, in response to our inquiries, we received anecdotal information and relevant documentation of office policies pertaining to the specific issue(s) discussed.

prosecutions. As a result, whether a person committing a given crack offense is prosecuted in the Federal system often depends on where the crime is committed. Regardless of these different declination levels, however, the vast majority of crack defendants in all districts are black.⁵

Of the 93 USAOs that responded to a 1995 EOUSA survey, 69 reported having quantity-based declination policies for crack, ranging from 0 to 500 grams. The most common quantity-based thresholds were 5 grams, which carries a five year minimum mandatory sentence (29 districts), and 50 grams, which carries a ten year minimum mandatory sentence (19 districts). An additional 10 districts have declination policies above 50 grams.⁶ Virtually all districts with quantity-based guidelines made exceptions to the thresholds under certain circumstances, such as for the presence of a weapon or violence, prior criminal record, or gang affiliation.

Of the 2,971 defendants sentenced in 1994 for crack only offenses, approximately 40% involved amounts less than 50 grams. Nearly 80% of crack defendants who were sentenced for less than 50 grams, however, also possessed a weapon or had a Criminal History score above Level I. Tab B displays the distribution by amount of all 1994 defendants sentenced for crack only offenses.

The 11 districts with the largest number of crack defendants collectively accounted for over 43% of all crack defendants sentenced in 1994: MDFL (195); DC (145); NDFL (129); EDVA (128); SDWV (116); EDNC (111); WDNC (108); SC (105); SDIL (90); WDTX (85); and WDVA (85).

Approximately 15% of all crack only defendants (n=438) were sentenced for offenses involving less than 5 grams. About 70% of these defendants were either in Criminal History Category II or

⁵ Tab C provides background data on crack use and drug arrests by race.

⁶ The declination policies of the other 21 districts with quantity-based guidelines for crack specify the following minimum thresholds for federal prosecution: any amount (five districts); 0.25 grams (one district); 10 grams (two districts); 20 grams (one district); 25 grams (two districts); 75 grams (one district); 100 grams (six districts); 250 grams (two districts); and 500 grams (one district). The remaining 24 districts did not report any specific quantity-based declination threshold for crack prosecutions.

higher or had a weapon. Ten districts accounted for just over half of all crack defendants involving less than 5 grams:

DISTRICT	DEFENDANTS CHARGED WITH LESS THAN 5 GRAMS CRACK	TOTAL CRACK DEFENDANTS CHARGED IN DISTRICT
SD WV	61	116
WD TX	37	85
SC	35	105
ED TX	20	54
CD IL	18	38
SD TX	16	48
ED MI	16	57
WD VA	16	85
SD MS	13	43
WD TN	12	46

The Working Group contacted these 10 districts to discuss their crack problems and crack prosecution policies. A few of these districts indicated that the statistics reflected the policies of the previous United States Attorneys to bring smaller cases, and that they had since implemented new higher declination policies. Most districts associated their crack problems with gang infiltration and/or gang activity. A few districts noted an increase in Jamaican gang activity.

The ability of state and local officials to deal with the crack problems seemed to be a major problem. Most districts noted deficiencies with the sentences meted out for crack offenses in their state systems; several districts are concerned that crack offenders often receive probationary sentences. We were told that state prosecutors are often overwhelmed with the sheer volume of cases coming into the system and do not have enough resources to handle them. One district explained that some of its state prosecutors serve on a part-time basis and lack adequate training to handle drug cases.

Four of these districts now have 50 gram thresholds. Of those, three indicated that there is room for flexibility if a prosecution involving less than that quantity will further a significant Federal interest and/or aggravating factors are present. A few districts still have 5 gram thresholds but will consider smaller amounts in situations such as those mentioned above. Two districts stated that they have no strict guidelines

and that quantity is just one of many factors considered. One of these districts did state, however, that its primary focus is on organizations, drug pipelines and high-level dealers.

In response to a question about whether there should be a nationwide minimum threshold amount, the United States Attorneys we contacted expressed a resounding, "no." Most districts indicated that problems are unique in each jurisdiction, requiring discretion in the field. Nonetheless, some of the districts suggested that the Department provide better drug prosecution policy guidance.

Although changing prosecution strategies cannot totally resolve any inequities caused by the 100-to-1 sentencing ratio between powder and crack cocaine, the Group recommends that the Department give guidance to United States Attorneys on the appropriate Federal law enforcement role in crack prosecutions. The Group recognizes the need for individual districts to set prosecution policies in light of state and local capabilities. However, Federal prosecutors should be particularly cognizant of the unique role that Federal law enforcement can play in dismantling crack distribution organizations and networks and should not assume responsibility for cases that could be prosecuted effectively by state and local authorities. Toward that end, defendants prosecuted under Federal law should either be major traffickers within the context of the crack distribution system or significant threats to the local community, or potential witnesses against major traffickers or crack distribution enterprises. To the extent that the Federal focus is consistent and properly directed, there is less concern that defendants will be unfairly affected by the sentencing ratio.

Proposed guidance to United States Attorneys is provided in Tab A. Although the guidance contained in Tab A may not differ from the current practice in most districts, the Department has not formally issued written guidance on this issue in the past.

SUBSTANTIAL ASSISTANCE MOTIONS

Relevant Law

Several provisions of law address the issue of substantial assistance by a defendant in the investigation or prosecution of another person. First, the USSC's enabling statute includes a statutory direction to that body to assure:

that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

28 U.S.C. § 994(n).

In addition, section 3553(e) of title 18, United States Code, authorizes a court to impose a sentence below a statutory minimum on this same basis. However, it authorizes such a reduction only upon motion of the Government and only in accordance with guidelines and policy statements issued by the USSC. Finally, Rule 35(b) of the Federal Rules of Criminal Procedure similarly provides for reduction of sentence (even below a mandatory minimum) on the basis of a defendant's substantial assistance provided after sentencing.

The USSC has issued a policy statement regarding substantial assistance that incorporates the standard set forth in the above statutes and rule and requires a motion of the Government. USSG § 5K1.1. The policy statement provides guidance for the court in determining how much to depart, but no definition of the term "substantial assistance."

Current Department Policy and Practice

On February 7, 1992, a "bluesheet" addition to the United States Attorneys' Manual (affecting section 9-27.451) was issued regarding substantial assistance motions. The bluesheet sought to ensure more procedural consistency across USAOs. Authority to approve a substantial assistance motion was limited to the United States Attorney, the Chief Assistant United States Attorney, supervisory criminal Assistant United States Attorneys, or a committee including at least one of these individuals. In addition, the bluesheet required that each office maintain documentation of the facts behind and justification for substantial assistance pleadings. These requirements were carried forward in the Revised Principles of Federal Prosecution of January 14, 1993. United States Attorneys' Manual § 9-27.410.

The Department has not issued substantive guidance detailing criteria for filing substantial assistance motions. Although some have expressed concern that this lack of specific substantive guidance has produced unwarranted disparity among the

districts, others believe that this decentralization allows for the individualized assessment of each case and the appropriate use of prosecutorial discretion.

Substantial assistance departures have steadily increased from 5.8% of all defendants sentenced in 1989 to 19.5% of all defendants sentenced in 1994. About two-thirds of the 7,507 defendants who received substantial assistance departures in 1994 were convicted for drug trafficking offenses. These 5,065 defendants represented about one-third of all drug trafficking defendants.

Use of substantial assistance motions varies greatly among the districts, from the Eastern District of Virginia with only 3.9% of its defendants receiving substantial assistance departures, to the Eastern District of Pennsylvania with 49.3% of its defendants receiving substantial assistance departures in 1994.⁷ The Working Group contacted 11 districts that had unusually high or low rates of substantial assistance to explore why their districts' practices varied greatly from the national average in FY 1994. The responses identified a number of factors that help explain the widely varying substantial assistance rates, although these factors were not relevant in every district. They include differences in charging practices; views about what type of cooperation warrants substantial assistance motions; and the nature of the caseload, particularly the volume or type of drug cases.

For example, in contrast to at least one of the districts with low substantial assistance rates, several of the districts with high rates reported that they avoid charge bargaining. With respect to rewarding substantial assistance, one high-rate district stated that, "[w]here there has arguably been an articulable benefit to the Government, an AUSA should err in favor of a cooperating defendant and file a motion." Low-rate districts seemed to apply a tougher standard in determining whether to file a substantial assistance motion. The size and type of drug caseload is linked to an office's rate of substantial assistance motions, since most substantial assistance motions are granted in drug cases. One low-rate district, for example, noted that it has a much smaller proportion of drug cases than the national average. Other United States Attorneys

⁷ Our analysis indicated that the difference in substantial assistance rates among districts explains only some of the aggregate racial differences. More important are the comparative rates of substantial assistance between whites and blacks within each district.

explained that they had numerous drug conspiracy/organization cases, resulting in high rates of substantial assistance, while one district explained that it had a high proportion of drug cases involving low-level drug couriers apprehended at the border, who could provide little substantial assistance.

Only one district reported using Rule 35 as an alternative to 5K1.1 substantial assistance motions. This occurred because of the district's fast pace to trial and sentencing. When the Rule 35 motions were added to the 5K1.1 motions, the district's combined rate of sentence reductions for substantial assistance increased from about 4% to 11%, which was still below the national average of 20% for 5K1.1 motions only.

Internal office review procedures seemed to have little to do with whether a district has high or low rates of substantial assistance.

USSC Study of Substantial Assistance

The Sentencing Commission and many commentators have criticized the lack of uniformity in the Department's substantial assistance practice. In fact, the disparity in district rates and the increasing use of substantial assistance departures in sentencing prompted the USSC to pursue a study of substantial assistance practice. We summarize here only those findings relevant to the issue of race.⁸

In the aggregate, when no statistical controls for variations in offense or defendant characteristics were applied, the USSC found that 21.1% of white, 20.3% of black, 16.9% of hispanic, and 14.9% of defendants in the "other" racial category received § 5K1.1 departures in 1994. In other words, overall, about 1% more whites compared to blacks, and about 4% more whites compared to hispanics received substantial assistance departures. (The USSC's previous Race and Ethnicity Study (also unpublished) found a similar pattern: 16.7% of white, 14.8% of black, and 13.2% of hispanic defendants received § 5K1.1 departures in 1992.) When looking only at drug defendants, the category of defendants most likely to benefit from substantial assistance motions, the racial difference was more pronounced: the probability for blacks to receive the benefit of a substantial assistance motion was almost nine percentage points lower than that for whites (21% of black vs. 30% of white drug defendants received substantial assistance motions).

⁸ The apparent racial disparity is not a major focus of the Commission's report.

The USSC also conducted a multivariate statistical analysis, designed to measure the impact of each potential "explanatory" variable on the probability of receiving substantial assistance, while controlling for these other possible explanatory variables). This analysis found that race was a "statistically significant" variable in explaining whether or not a defendant received substantial assistance. Moreover, it showed that the disparity in receiving substantial assistance based on race was generally greater than in the aggregate (uncontrolled) analysis. Based on this multivariate analysis, for all defendants, the likelihood of receiving a substantial assistance departure was about 4.4% more for whites compared to blacks and 7.5% more for whites than for hispanics. These disparities were even more severe when the USSC examined only drug trafficking defendants: about 9% higher for whites than for blacks and 10.7% higher for whites than hispanics.

Possible Explanations for USSC Findings

Rather than having a series of hypotheses it wanted to test, the USSC conducted its statistical study as an exploratory exercise, where it included lots of variables and tried to discern the relationships among them. The USSC acknowledged that several variables were not available for inclusion in its study, and that these variables "may account for many of the results found." Most notably, the USSC did not consider the effects of a defendant's willingness to provide assistance to the Government, the degree and type of cooperation, and usefulness of information to the prosecution. Other potentially relevant but unavailable data included district charging practices and plea bargaining practices. Additionally, there is no viable method to account for the caliber of the defense attorney, another factor which could affect a defendant's ability or willingness to provide substantial assistance. Finally, it has been hypothesized that cultural or attitudinal differences may lead certain groups to place less trust in the system and thus be less willing to cooperate with the Government. To the extent that any of these variables correlate with the defendant's race, it would explain some of the racial difference found.

While many of these variables are non-quantifiable, and could not have been incorporated into the Commission's model, others could have been included. Indeed, a review of the USSC data revealed that differences among racial groups in their respective rates of pleading guilty, accepting responsibility, and U.S. citizenship influenced the results substantially. Defendants who refuse to plead guilty and/or accept responsibility for the offense presumably would not have been willing to provide assistance to the Government. When

considering in the aggregate only those defendants who pleaded guilty, 22.9% of whites, 23.0% of blacks, and 18.3% of hispanics received substantial assistance departures.⁹ Similarly, when considering in the aggregate only those defendants who received a sentencing adjustment for acceptance of responsibility, 23.6% of whites, 24.1% of blacks, and 18.8% of hispanics received substantial assistance departures.

Nonetheless, even with this re-analysis, not all of the difference in substantial assistance rates disappeared when considering only drug defendants. According to BJS, about 8 percent of white drug defendants and 18 percent of black drug defendants went to trial. For the remaining drug defendants who pleaded guilty, nearly 40 percent of blacks and 45 percent of whites received substantial assistance departures. In other words, controlling for mode of disposition eliminated some but not all of the 9 percent disparity between white and black drug defendants estimated in the USSC's multivariate analysis.

Regarding the disparity for hispanics, when considering only U.S. citizens, the disparity in the aggregate between whites (21.1%) and hispanics disappears (22.0%, instead of 16.9%). Citizenship does not help explain any of the difference for black defendants.

District Findings on Substantial Assistance Rates by Race

The Working Group obtained special reports on substantial assistance rates in each district by race. These reports did not control statistically for variations in defendant characteristics. The district-based comparisons do not suggest that a few "outlier" districts account for the disparities reported in the USSC's aggregate results. Rather, the district-based comparisons suggest the pattern is mixed: a higher percentage of whites than blacks received substantial assistance departures in 53 districts and a higher percentage of black defendants received substantial assistance departures in 37

⁹ Of course, it could be argued that the racial difference in the guilty plea rate itself may merit further exploration. A prosecutor's decisions and actions in charging and bargaining may greatly influence a defendant's willingness to plead guilty. It is also possible that a lack of trust in defense counsel could lead a defendant to turn down a plea agreement and take his chances at trial.

districts.¹⁰ Among drug defendants only, whites had a higher rate of receiving substantial assistance than blacks in 59 districts.¹¹

The Working Group contacted nine districts to discuss the differences in their rates of substantial assistance for whites and blacks. The districts were generally perplexed by the data and, since we could not identify specific cases, they offered impressionistic views. Their answers did not suggest any general explanation for the apparent differences. A number of districts noted different offending patterns by race and differences by race in the willingness to cooperate. For example, in two districts in which whites received substantial assistance more frequently, the United States Attorneys reported that blacks commit offenses that are less likely to receive substantial assistance. In two districts where blacks receive substantial assistance more frequently than whites, the United States Attorneys reported that the black defendants are largely prosecuted for crack, and have an incentive to cooperate because of crack sentences, while the white drug defendants were unwilling to cooperate either because they were anti-Government or because their co-defendants were family members.

¹⁰ While simple comparisons by district of white-black substantial assistance departure rates are informative, they can also can be misleading. Fewer than 25 black defendants were sentenced in 19 of the 93 judicial districts in 1994, and no more than 4 black defendants received substantial assistance departures in any of these 19 districts. It is difficult to draw accurate conclusions about the use of substantial assistance departures in these districts because they had so few black defendants.

When these 19 districts are excluded, the split between whites and blacks is nearly equal: a higher percentage of white defendants received substantial assistance departures in 36 districts and a higher percentage of black defendants received substantial assistance departures in 35 districts (rates were equal in 3 districts).

¹¹ Of the total 5,395 black drug defendants, 31.9% (1,721) received substantial assistance departures. If black drug defendants had received substantial assistance departures at the same rate as whites (39%), 383 more black defendants would have received substantial assistance departures. Alternatively, had the 4,948 white drug defendants received substantial assistance departures at the lower rate for blacks (31.9%), 352 fewer whites would have received substantial assistance departures.

GUN CHARGING PRACTICES

Relevant Law

When a defendant uses or carries a firearm in connection with drug trafficking or a crime of violence, he can be charged with a violation of Title 18 United States Code § 924(c), which makes him subject to a 5-year mandatory minimum sentence in addition to the sentence for the underlying charge. The sentencing guidelines also provide for sentencing enhancements for possession of or use of a firearm in connection with crimes of violence and drug trafficking crimes. Thus, if a defendant is not charged with § 924(c) (or is acquitted of § 924(c)), he may still be subject to an enhanced guidelines penalty if the court finds at sentencing, by a preponderance of evidence, that a firearm was possessed or used in the offense. The sentencing guidelines enhancement generally would add less than a 5-year consecutive sentence to the underlying sentence for most defendants. The enhancement would not apply if § 924(c) were charged and proved.

Current Department Policy and Practice

Current Department policy regarding charging practices under 18 U.S.C. § 924(c) is the basic charging policy that applies to offenses generally. It is set forth in the "Revised Principles of Federal Prosecution," dated January 14, 1993, United States Attorneys' Manual, § 9-27.000 et seq., as clarified by a bluesheet addition to the Manual dated October 12, 1993. Under the Revised Principles, the attorney for the Government should charge "the most serious offense that is consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction." § 9-27.310. The same section reminds prosecutors that "when a defendant commits an armed bank robbery or other crime of violence or drug trafficking crime, appropriate charges include Title 18, United States Code § 924(c)." The Revised Principles also address plea bargaining, including charge bargaining, and provide, "As with the indictment decision, the prosecutor should seek a plea to the most serious readily provable offense charged." § 9-27.410.

A refinement of charging policy is contained in the October 12, 1993, bluesheet. It recognizes that prosecutors may select charges or enter into plea agreements "on the basis of an individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purposes of the Federal criminal code, and maximize the impact of Federal resources on crime." In determining the most serious readily provable offense, the

bluesheet states that it is appropriate for prosecutors to consider such factors as the sentencing guideline range yielded by the charge and whether the penalty is proportional to the seriousness of the defendant's conduct, along with other law enforcement factors. This general approach applies to gun charges as well as other offenses.

There is wide variation in the practices of various districts as to whether they are more likely to charge § 924(c) or seek a sentencing enhancement when a firearm is present. The percentage of such defendants¹² charged with § 924(c) ranged from a low of 4% in the WDNY up to 76% in the WDPA and SDIA. Of the 92 districts with such defendants sentenced in 1994, nearly two-thirds (59) were more likely to use the sentencing enhancement than to charge a defendant with § 924(c). This general variation in § 924(c) charging practices does not appear to account for the racial differences discussed below.

The Group contacted five districts that had high rates and five districts that had low rates of charging § 924(c) violations in FY 1994. All high-rate districts indicated that they follow DOJ's policy on charging § 924(c) offenses, which they interpret as requiring them to charge a § 924(c) violation whenever it is readily provable. Some will negotiate the § 924(c) charge away in plea agreements, while others are successful in getting pleas to the § 924(c) charge. Other reasons given for their high § 924(c) rate include the following:

- Active United States Attorney involvement in reviewing indictments and requiring § 924(c) charges if supported by the evidence.
- Inadequate state penalties for gun charges.
- Aggressive investigation and prosecution of drug cases. Many drug defendants carry guns and are charged with § 924(c) violations.
- Aggressive Triggerlock programs.

Although districts with low rates of charging § 924(c) violations also indicated that they follow the Department's policy on charging § 924(c) violations, they seem to be more

¹² For each district, we compared the number of defendants charged under § 924(c) with the total number of defendants who were either charged under § 924(c) or who received a sentencing enhancement for the presence of a weapon.

conservative about charging § 924(c) violations. No single factor emerged as the common cause of the low § 924(c) rate. There did appear to be more of a willingness among the low-rate districts to dismiss § 924(c) charges in return for cooperation. One district made it very clear that they generally use § 924(c) as a plea bargaining tool. Reasons provided for the low § 924(c) rate include the following:

- A thorough indictment review process which eliminates borderline § 924(c) cases. (Note: The indictment review process was also cited by one high-rate district, but with a different result: § 924(c) charges are added.)
- District makes a concerted effort to maximize the sentence in violent crime cases. (Charging decisions may be different in drug cases.) Cases are analyzed very carefully to determine which avenue will provide the higher sentence. If a § 924(c) charge will bring a higher sentence, it is charged. However, in many violent crime cases, especially those with aggravating circumstances, the sentencing guidelines bring the potential of a much higher sentence. In those cases, a § 924(c) violation will not be charged.
- Judges do not like charges that carry mandatory sentences.

USSC Findings on Gun Charging Practices

The USSC's study on Race and Ethnicity in the Federal Criminal System (unpublished study analyzing 1992 data) found that in sentenced cases involving firearms or dangerous weapons for bank robbery and drug trafficking, black defendants were more likely to have been charged with § 924(c) (45%) than white defendants (37%). BJS reached similar findings using 1994 data: 48.4% of black, 37.5% of white, and 30.1% of hispanic defendants were charged with § 924(c) out of their respective total numbers of defendants who were either charged with § 924(c) or received weapons-related sentencing enhancements.

Problems With Findings

It is problematic to compare the universe of cases in which § 924(c) charges have been brought against the universe of cases in which a weapon enhancement under the sentencing guidelines¹³

¹³ Weapons enhancements are found in the drug guideline, USSG § 2D1.1; robbery guideline, USSG § 2B1.3; aggravated assault guideline, USSG § 2A2.2; and kidnapping guideline, USSG § 2A4.1(b)(3).

applies. The criteria simply are not the same. For example, while § 924(c) applies to someone who "uses or carries a firearm,"¹⁴ the drug guideline enhancement applies if a "dangerous weapon (including a firearm) was possessed." USSG § 2D1.1(b)(1). It would appear that the drug guideline standard is broader than the statutory one -- because it covers possession of weapons other than firearms. In addition, the relevant conduct guidelines address the issue of liability for the acts of others and may also result in a different standard of coverage than under statutory law. Finally, § 924(c) charges do not always disadvantage a defendant as compared to guidelines enhancements.¹⁵

District Findings on Gun Charging Practices by Race

Pursuant to the Group's request, BJS conducted a supplementary examination by district of all sentenced defendants who were either charged with § 924(c) or received a weapons-related sentencing enhancement. This analysis found that a higher percentage of black than white defendants were charged with § 924(c) violations (as opposed to receiving sentencing enhancements) in 57 districts.¹⁶

¹⁴ Prior to the Supreme Court's decision in United States v. Bailey, "use or carry" often was construed to include possession.

¹⁵ For example, the robbery guideline provides differing enhancements (varying from a 5 to 7 level upward adjustment) depending on the use made of the firearm. USSG § 2B3.1(b)(2)(A)-(C). Depending on other aggravating factors, these enhancements could increase a sentence by more than the 5 years pursuant to 924(c). This is also potentially true in narcotics cases, but to a much lesser extent. In total, BJS estimated that 125 to 228 robbery and drug trafficking defendants -- depending on whether sentenced at the guideline minimum or maximum -- out of approximately 3,800 sentenced in FY 1994 could have received guideline enhancements exceeding 5 additional years.

¹⁶ Of the total 2,434 black firearms defendants, 48.4% (1,178) were charged with 924(c). If black defendants had been charged with 924(c) at the same rate as whites (37.5%), 265 fewer black defendants would have received 924(c) charges. Alternatively, had the 1,348 white firearms defendants been charged with 924(c) at the same rate as blacks (48.4%), an additional 146 whites would have received 924(c) charges.

The Group contacted eight districts that charged blacks with § 924(c) at a higher rate than they charged whites, and five districts that charged whites with § 924(c) violations at a higher rate than they charged blacks. Generally, all the districts indicated that they followed Department policy in charging the most serious, readily provable offense; some districts expressed more of a willingness to dismiss the § 924(c) charge in return for cooperation than others. There did not appear to be any clear reason for the difference in rates.

As one possible explanation for the difference in rates, some districts reported that defendants from one particular racial group were more likely to commit offenses for which they would receive § 924(c) charges:

- In a couple of districts with higher rates of charging blacks with § 924(c) violations, black defendants are more likely to be involved in violent crime cases in which § 924(c) would always be charged.
- Conversely, in a couple of districts with higher rates of charging whites with § 924(c), whites were more likely to be involved in bank robberies or other crimes of violence, in which § 924(c) is almost a certain charge.

More than one district questioned the reliability of the statistics.

WORKING GROUP CONCLUSIONS AND RECOMMENDATIONS

We have no definitive conclusions to draw from the Sentencing Commission's work or our own study. We believe there are gaps in the Commission's methodology and analysis and that the studies do not prove "disparity" exists in the Federal system. Another major shortcoming of the USSC's work is that the Commission never attempts to quantify the effect of its finding that race is a "statistically significant" variable in explaining either substantial assistance rates or gun charging practices. Just because race is found to be "statistically significant" does not mean it has a practical impact on sentencing policy requiring action by policy makers. Our own attempts at quantifying the effects (see footnotes 11 and 16) are rudimentary at best.

While we have not seen evidence indicating a serious problem of racial disparity in the Federal system, we also cannot explain all of the statistical differences that have been identified in the various studies. Thus, although the practical significance of the findings relating to substantial assistance motions and

gun charging practices remains unclear, the Group recommends Departmental action aimed at eliminating even the appearance of racial bias. In addition, the actions recommended below could uncover whether there are practices that, while race neutral on their face, have a disparate racial impact not justified by the law enforcement objectives in question.

Finally, totally aside from the race issue, we are compelled to conclude that districts do have differing practices that may affect how defendants are treated in the Federal system. Because of different crack declination policies, a defendant may be charged with a crack offense in one district and not charged in another. In one district, a defendant might receive the benefit of a substantial assistance motion for specified cooperation, which cooperation may be deemed insufficient for a motion in another district. And, in one district, a defendant may be charged with § 924(c) mandating an additional 5-year penalty, while in another, the same defendant might receive a 2-level sentencing enhancement for use of a firearm. These differing practices may be an inevitable result of the decentralized United States Attorney system. However, the Group believes that its recommendations may aid in decreasing the district differences without mandating absolute uniformity.

The Group makes the following recommendations for your consideration:

RECOMMENDATION #1 - Examine Prosecution Practices.

Within a District. Direct all United States Attorneys to examine their office practices and procedures and take all necessary measures to ensure the use of race neutral policies in the exercise of prosecutorial discretion within a district. Absent compelling, specific law enforcement imperatives there is ordinarily no justification for differing policies and practices within a district, with respect to similarly situated defendants. Any race neutral policy that has a disparate racial impact should be carefully reviewed to determine whether the disparity is justified by law enforcement necessity and not the product of conscious or unconscious racial bias. A directive to this effect is contained in the proposed memorandum to United States Attorneys at Tab A.

Among Districts. At this time, we do not recommend setting additional nationwide standards, given the great diversity among the districts in community size, crime problems, and state and local law enforcement systems and resources. The Attorney General's priorities, the United States Attorneys'

Manual, (especially the Principles of Federal Prosecution), and other Departmental directives, can ensure, to the extent possible, that the districts are consistent in their approaches to Federal prosecutions. There are, however, several steps that can be taken to increase consistency among the districts, and to create a less individualized and more national perspective:

The Group recommends that the Attorney General issue written guidance (attached at Tab A) to the United States Attorneys on the prosecution of crack cocaine.

APPROVE: _____

Concurring Components:
None

Nonconcurring Components:
None

DISAPPROVE: _____

OTHER: _____

RECOMMENDATION #2 - Review Substantial Assistance Motions.

The Group recommends that the Attorney General ensure that the districts are following the directives in USAM 9-27.410 on substantial assistance, by reminding the districts that the Principles of Federal Prosecution require supervisory approval of substantial assistance and Rule 35 motions, and documentation of the underlying facts justifying such motions. USAM 9-27.410. Such a reminder is contained in the proposed memorandum to United States Attorneys at Tab A.

APPROVE: _____

Concurring Components:
None

Nonconcurring Components:
None

DISAPPROVE: _____

OTHER: _____

RECOMMENDATION #3 - Review Dropped §924(c) Charges.

The Group recommends that the Attorney General remind the districts that the Principles of Federal Prosecution require appropriate supervisory approval and an appropriate written record with respect to a decision to drop readily provable charges, including readily provable § 924(c) charges. USAM 9-27.410(B). Such a reminder is contained in the proposed memorandum from the Attorney General to United States Attorneys at Tab A.

APPROVE: _____

Concurring Components:
None

Nonconcurring Components:
None

DISAPPROVE: _____

OTHER: _____

RECOMMENDATION #4 - Have United States Attorneys Discuss Racial Disparity Issues with District Law Enforcement Personnel.

As the chief Federal law enforcement officer, United States Attorneys should take a leadership role in making all law enforcement in their districts aware of issues of racial disparity and in implementing race neutral policies. United States Attorneys should meet with the agency heads in their district to discuss these issues. A directive to this effect is included in the proposed memorandum to United States Attorneys at Tab A.

APPROVE: _____

Concurring Components:
None

Nonconcurring Components:
None

DISAPPROVE: _____

OTHER: _____

RECOMMENDATION #5 - Consider Revision of Principles of Federal Prosecution.

The Group recommends that by copy of this memorandum, the AGAC and the Criminal Division be asked to give careful consideration to revising the Principles of Federal Prosecution to make it clear that appropriate supervisory approval, and an appropriate written record, is required for any decision not to charge readily provable § 924(c) violations.

APPROVE: _____

Concurring Components:
None

Nonconcurring Components:
None

DISAPPROVE: _____

OTHER: _____

RECOMMENDATION #6 - Discuss Disparity Issues with Investigative Agencies.

The Group recommends that the Deputy Attorney General meet with investigative agencies to discuss issues relating to disparity.

APPROVE: _____

Concurring Components:
None

Nonconcurring Components:
None

DISAPPROVE: _____

OTHER: _____

RECOMMENDATION #7 - Provide Additional Information to United States Attorneys.

Provide statistical information to United States Attorneys so that they can review the overall effects of their

prosecution practices, compare their practices to other USAOs and determine whether any changes are warranted. This information would include tabulations of district crack declination policies, rates of substantial assistance motions, and use of § 924(c) charges versus use of sentencing enhancements for gun possession.

The USSC collects detailed information on sentenced defendants, including demographic data. This information, in relevant areas, could be provided to United States Attorneys at the end of each year. United States Attorneys do not maintain demographic information on defendants.

The Group recommends that the Executive Office for United States Attorneys (EOUSA) provide select statistical information of the type contained at Tab D to each United States Attorney on an annual basis.

APPROVE: _____

Concurring Components:
None

Nonconcurring Components:
None

DISAPPROVE: _____

OTHER: _____

RECOMMENDATION #8 - Enlist the Assistance of EOUSA's Evaluation and Review Staff.

The Group recommends that EOUSA's Evaluation and Review Staff be tasked with examining the issues discussed in this memorandum whenever they conduct United States Attorney's office evaluations.

APPROVE: _____

Concurring Components:
None

Nonconcurring Components:
None

DISAPPROVE: _____

OTHER: _____

RECOMMENDATION #9 - Expand Education and Training.

The Group recommends that EOUSA ensure that these issues are discussed at appropriate training seminars and conferences (e.g., May 1997 United States Attorneys' conference, Criminal Chief seminars, First Assistant United States Attorney seminars).

APPROVE: _____

Concurring Components:

None

Nonconcurring Comments:

None

DISAPPROVE: _____

OTHER: _____



Office of the Attorney General
Washington, D. C. 20530

MEMORANDUM TO ALL UNITED STATES ATTORNEYS

FROM: THE ATTORNEY GENERAL

SUBJECT: Crack Prosecution Strategy and Perceived Racial
Disparity in Prosecutions

In October 1995, at my request, a working group of United States Attorneys and representatives of the Criminal Division began reviewing allegations of prosecutorial racial disparity. The working group focused on three areas: crack prosecutions, substantial assistance motions, and gun charging practices. I am pleased to report that the group found no clear evidence of racial disparity in any of these areas. Nonetheless, because racial disparity is an issue of significant importance and ongoing concern, I am taking this opportunity to make clear the Department's policy and priorities in each of the areas reviewed.

CRACK PROSECUTION STRATEGY

Consistent with the Department's overall law enforcement strategy against drug trafficking, agents and prosecutors should direct their efforts toward the elimination of organizations involved in large-scale crack cocaine distribution or organizations that engage in violence in connection with their drug trafficking activities. Many such groups have spread across state boundaries and often recruit, train and employ young teenagers and other vulnerable individuals. Although these groups or gangs may deal in a volume of drugs lower than that seen in typical federal cases, the multi-state nature of their operations and the threat to local communities posed by their violence and exploitation of youth makes appropriate federal participation in investigation and prosecution.

Appropriate Uses Of Federal Resources

Federal agents and prosecutors are best equipped to prosecute manufacturing and distribution organizations. To eliminate these dangerous organizations, we should attack their

operational components including leadership, production facilities and sources of supply, distribution networks, and financial and other assets.

Federal prosecution of individual (and replaceable) retail-level dealers, without additional action, may result in only a short-term fix with no lasting impact on the overall crack distribution activity in a given jurisdiction. Cases involving street-level dealers are generally best handled by state and local prosecutors, although there are certain exceptions. Federal prosecutors should emphasize prosecutions that will reasonably aid in the elimination of a significant organization or those individuals engaged in violence in connection with their distribution activities. I do not suggest, however, that federal resources should be directed at street-level dealers merely because they possess a firearm.

Some districts already decline to prosecute cases involving quantities of crack too small to trigger the 10-year mandatory minimum penalty. In theory, such policies minimize the isolated prosecutions of street-level retail dealers. Often, though, street-level dealers distribute significant quantities of crack over a short period of time and the presence of couriers, runners or steerers during those transactions permits a conspiracy charge enabling aggregation of the quantities distributed. Prosecutors should take steps after identifying and prosecuting the courier, runner or steerer, to continue "working up the chain" toward the elimination of higher-level participants. However, aggregation of the quantities of crack involved in a series of small transactions to achieve a mandatory minimum sentence may not promote federal law enforcement goals. More useful investigations will take advantage of traditional tools such as the use of informants, consensually monitored conversations, pen registers and wiretaps to identify and prosecute higher level distributors.

The quantity of crack involved in a single transaction does not always accurately reflect an individual's position in the hierarchy of a drug trafficking organization. Proactive investigative initiatives therefore should envision making such a determination and should not merely rely on the possibility of the individual's cooperation after arrest with a significant quantity of crack. Where cooperation exists, every effort should be made to "work up the chain" with the goal of prosecuting the suppliers, managers, and other participants of these organizations.

Cocaine Powder Suppliers

Crack trafficking patterns vary across the Nation and within each judicial district. At one extreme, users themselves convert powder to crack just prior to consumption. At the other extreme, trafficking organizations transport kilogram quantities of crack across state lines for further distribution to other wholesale distributors and, ultimately, to users who purchase retail quantities on street-corners or in crack houses. In some cases, couriers transport smaller quantities between jurisdictions for further wholesale or retail distribution. In other cases, local organizations or individuals purchase varying amounts of powder in order to manufacture crack for further distribution.

Cocaine powder distributors who supply individual crack distributors or crack distribution organizations while knowing of the impending conversion to crack should be held accountable. Investigators and prosecutors should vigorously pursue leads and use the panoply of investigative tools available to federal law enforcement to establish the requisite knowledge. The federal interest exists in these cases even though the cocaine powder supplier might not otherwise be a target based only upon his powder traffic.

When consistent with the principles of federal prosecution, prosecutors should charge these cocaine powder distributors as part of the crack conspiracy or enterprise or as aiders and abettors of particular transactions. In some cases, there may be a longstanding relationship between the cocaine powder supplier and the crack distributor. Other cases may involve a single transaction. In either scenario, the cocaine powder distributor who agrees to supply the crack distributor shares responsibility for the subsequent distribution of crack. This is true even though the cocaine powder dealer may be indifferent as to whether customers convert the product into crack.

Sentencing

Prosecutors must remain cognizant of the numerous statutory and Sentencing Guidelines provisions for enhanced penalties and employ those provisions where applicable. Such provisions include enhanced penalties for engaging in a continuing criminal enterprise, using weapons in connection with drug trafficking offenses, trafficking near protected locations, using minors in

trafficking, distributing drugs to minors or to pregnant persons, distributing controlled substances the use of which results in death, and distributing controlled substances as a recidivist.

Coordination Of Federal, State, And Local Enforcement Efforts

Generally, federal, state and local governments have concurrent jurisdiction over the prosecution of drug trafficking offenses. To achieve the goal of disrupting significant crack trafficking organizations, we must have an integrated strategy that effectively distributes responsibility among federal, state, and local institutions. There are some assignments that only the federal authorities can fulfill and others in which federal authorities can assist their state and local counterparts in responding to the more immediate needs of the region or locality.

Task forces such as those in the Organized Crime Drug Enforcement Task Force (OCDETF), High Intensity Drug Trafficking Area (HIDTA), and Anti-Violent Crime Initiative programs, for example, utilize the range of federal investigative and prosecutive tools, as well as seizure and forfeiture laws, while facilitating cooperation and bridging gaps between efforts that are uniquely federal and those most successfully undertaken on a local level. These cooperative efforts and others extend the reach of the federal agencies into local communities in need. Federal investigative and prosecutive resources, however, should not be directed to tasks that will not significantly impact a crack trafficking organization or otherwise result in a long-term solution for a particular community or region affected by such trafficking. Considerations relevant to the decision to invoke federal jurisdiction generally are set forth at USAM 9-27.220 - 9-27.240.

REVIEW OVERALL PROSECUTION PRACTICES

Each United States Attorney should examine his or her office practices and procedures and take all necessary measures to ensure the use of race neutral policies in the exercise of prosecutorial discretion within a district. Absent compelling, specific law enforcement imperatives there is ordinarily no justification for differing policies and practices within a district, with respect to similarly situated defendants. Any race neutral policy that has a disparate racial impact should be

carefully reviewed to determine whether the disparity is justified by law enforcement necessity and not the product of conscious or unconscious racial bias.

SUBSTANTIAL ASSISTANCE

Care must be taken to assure that race plays no part in the Government's decision whether to file a substantial assistance motion. Review within the office of such motions helps assure uniformity and fairness within the district.

As set forth in the Comment to U.S.A.M. 9-27.410, the filing of a 5K1.1 pleading must be approved by the United States Attorney, the Chief Assistant, supervisory criminal AUSAs or a committee including at least one of these individuals. Each office must have in place a procedure for such approvals. In addition, every office must maintain documentation of the facts behind and justification for each substantial assistance pleading.

GUN CHARGING PRACTICES

Again, in order to avoid racial disparity, or the appearance thereof, prosecutors are reminded to abide by the strictures of U.S.A.M. 9-27.410 concerning the dropping of readily provable charges, including §924(c). As set forth in the Comment to U.S.A.M. 9-27.410, prosecutors may drop readily provable charges only with the specific approval of the United States Attorney or designated supervisory level officials for reasons set forth in the file of the case. Every office should have in place procedures implementing this policy.

RACIAL DISPARITY AWARENESS

As the chief federal law enforcement officer in the district, the United States Attorney should take a leadership role in ensuring that all agencies within the district are aware of issues of racial disparity. The United States Attorney should also be alert to the implementation of race neutral policies by all law enforcement within the district. These concerns should be raised by the United States Attorney in meetings with the agency heads.

Memorandum from the Attorney General
Subject: Crack Prosecution Strategy and Perceived
Racial Disparity in Prosecutions

Page 6

I am proud of the Department's record of race neutral prosecutorial decisions. Nonetheless, I believe constant vigilance in this area is essential. Sensitivity to the issue, and implementation of the measures outlined in this memorandum, will preserve and enhance the Department's record of race neutral prosecutions. In addition, and as importantly, it will ensure that there is no perception of racial disparity in the discharge of our duties. The public recognition that our policies are administered in a race-neutral fashion is as important as the reality that we do so administer them. I look forward to working with you in the pursuit of these goals.

TAB C

CRACK USE DATA*

- According to NIDA data, most reported crack users--those who had ever used as well as those who had used during the last month--were white.
- Nonetheless, blacks as a group had a higher rate of crack use than other ethnic groups. Moreover, as the frequency of use increased, blacks made up a larger proportion of users.
- **Ever Used.** For 1994, of the estimated 4,042,000 persons who had ever used crack, about 19% were black, 70% were white, and 9% were hispanic. This translates to population estimates of 782,000 blacks, 2,816,000 whites, and 354,000 hispanics who had ever used crack.

Rates of use. 3.3% of blacks surveyed reported ever having used crack, compared to 1.8% of whites and 1.9% of hispanics.

- **Current Use/Past Month.** For 1994, of the estimated 520,000 persons who had used crack in the past month, about 31% were black, 56% were white, 13% were hispanic. This translates to population estimates of 161,000 blacks, 292,000 whites, and 68,000 hispanics who were current crack users.

Rates of use. 0.7% of blacks, 0.2% of whites, and 0.4% of hispanics reported having used crack in the past month.

- **Emergency Room Admissions (1992).** As part of its Drug Intelligence Report on Crack Cocaine, the DEA analyzed 1992 DAWN data and found that 71.5% of emergency room admissions for crack involved blacks.
- **Treatment Data (1993).** According to the Substance Abuse and Mental Health Services Administration (SAMSHA), over 69% of the admissions for treatment for crack abuse in 1993 were accounted for by blacks.

* Note that the "users" reported are population estimates based on NIDA's survey to a sample of specially selected households, and thus are approximations. Each estimate has an upper and lower confidence limit.

TAB C

1994 DRUG ARRESTS
UCR DATA

- o Cocaine is not listed as a separate category in the Uniform Crime Reports system; it is grouped with opiates.

All Drug Arrests (1,061,563). 61% of those arrested for drugs were white and 38% were black.

Arrests for Drug Possession - All drugs (777,555). 65% were white, 34% were black.

Arrests for Possession of Opiates, Cocaine or derivatives (321,607). 52% were white, 48% were black.

Arrests for Drug Sales/Manufacture - All drugs (284,008). 50% were white, 50% were black.

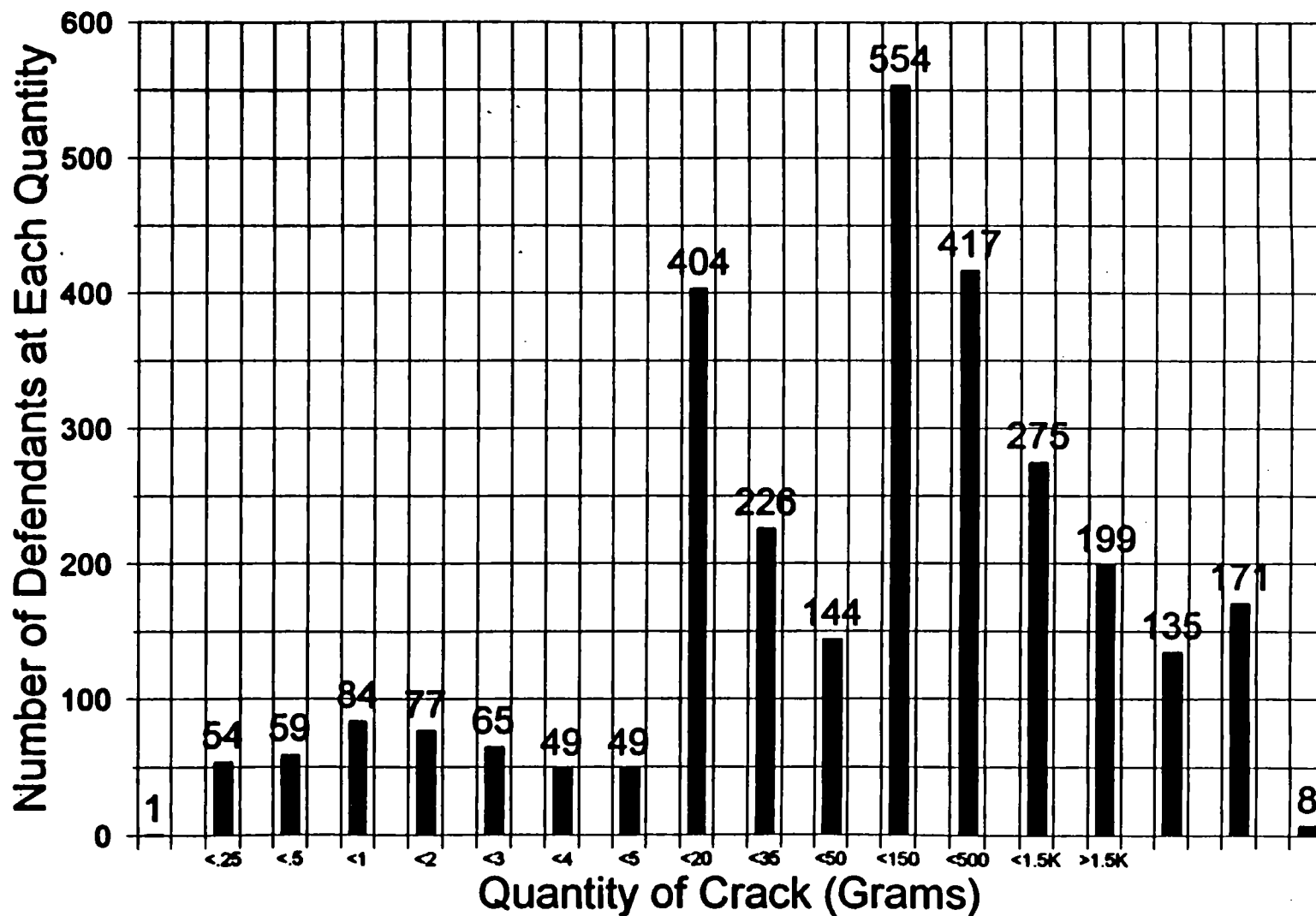
Arrests for Drug Sales/Manufacture - Opiates, Cocaine and derivatives. (178,297). 60% were black, 40% were white.

- o Although the 60/40 ratio of white to black drug arrests is often cited, when we look only at trafficking arrests, the ratio changes to 50/50. Further, when we look at drug trafficking arrests for opiates or cocaine, the ratio becomes 60/40 black to white.
- o Possession arrests account for almost 75% of all drug arrests, with an almost equal number of opium/cocaine arrests (321,607) and marijuana arrests (316,107).
- o The National Incident Based Reporting System (NIBRS), which is being phased in, separates cocaine from heroin and has a distinct category for crack. It includes both offense and arrest data, including the race of those arrested. Unfortunately, NIBRS is currently being implemented in only nine states, and is still incomplete and not validated for many of these states.

Available NIBRS data for 1994 show that 85% of those arrested for crack cocaine were black and 15% were white. Of the arrests reported by NIBRS in 1993, 88% of those arrested for crack were black.

Crack Only Defendants by Quantity

FY 1994 Sentenced Defendants (USSC)



The 5 and 10 year mandatory minimums are at 5 and 50 grams. Crack was the only drug for 2971 defendants sentenced under 2D1.1.

UNITED STATES ATTORNEYS' OFFICES
FISCAL YEAR 1994 SENTENCING DATA:

- TABLE 1: Crack/powder cocaine quantity-based declination policies; number of crack defendants sentenced for offenses involving less than 5 grams and less than 50 grams; and total crack defendants sentenced.
- TABLE 2: Total white, black, and hispanic defendants sentenced and the percentage who received substantial assistance departures and other downward departures.
- TABLE 3: White, black, and hispanic drug defendants sentenced and the percentage who received substantial assistance departures and other downward departures.
- TABLE 4: White, black, and hispanic sentenced defendants charged with 924(c) or who received firearms-related sentencing enhancements.

TABLE 1

CRACK/POWDER DECLINATION POLICIES AND CRACK SENTENCES BY DISTRICT, 1994

District	Minimum Quantity (gr)		Crack Def <5g	Pct <5g of Total	Crack Def <50g	Pct <50g of Total	Total Crack Def
	Crack	Powder					
1 ALABAMA, M	75	75	2	6.1%	7	21.2%	33
2 ALABAMA, N	5	500	9	17.3%	30	57.7%	52
3 ALABAMA, S	5	50	4	5.3%	14	18.7%	75
4 ALASKA			0	0.0%	0	0.0%	1
5 ARIZONA	50	5000	0	n/a	0	n/a	0
6 ARKANSAS, E			5	13.9%	27	75.0%	38
7 ARKANSAS, W	5	125	0	0.0%	4	100.0%	4
8 CALIFORNIA, C	100	1000	0	0.0%	2	8.3%	24
9 CALIFORNIA, E	100	5000	0	0.0%	1	16.7%	6
10 CALIFORNIA, N	100	1000	0	0.0%	0	0.0%	3
11 CALIFORNIA, S			11	26.8%	30	73.2%	41
12 COLORADO	5	500	2	8.0%	18	72.0%	25
13 CONNECTICUT	10	1000	0	0.0%	0	0.0%	6
14 DELAWARE	50	250	4	40.0%	8	80.0%	10
15 DIS OF COLUMBIA	50	500	11	7.6%	65	44.8%	145
16 FLORIDA, M	500	5000	3	1.5%	52	26.7%	195
17 FLORIDA, N	250	1000	1	0.8%	8	6.2%	129
18 FLORIDA, S	50	5000	1	2.6%	6	15.8%	38
19 GEORGIA, M			5	9.6%	15	28.8%	52
20 GEORGIA, N			3	5.9%	11	21.6%	51
21 GEORGIA, S	100	1000	1	1.9%	9	17.3%	52
22 GUAM & NMI			0	n/a	0	n/a	0
23 HAWAII	50	1000	0	n/a	0	n/a	0
24 IDAHO			0	n/a	0	n/a	0
25 ILLINOIS, C			18	47.4%	31	81.6%	38
26 ILLINOIS, N	5	500	0	0.0%	1	8.3%	12
27 ILLINOIS, S			8	8.9%	29	32.2%	90
28 INDIANA, N	5	500	1	14.3%	2	28.6%	7
29 INDIANA, S	5	500	0	0.0%	0	0.0%	2
30 IOWA, N	5	500	2	7.7%	16	61.5%	26
31 IOWA, S			0	0.0%	1	33.3%	3
32 KANSAS	5	500	1	5.3%	10	52.6%	19
33 KENTUCKY, E			0	0.0%	0	0.0%	1
34 KENTUCKY, W	5	500	1	12.5%	4	50.0%	8
35 LOUISIANA, E	50	500	4	22.2%	9	50.0%	18
36 LOUISIANA, M	5	500	6	100.0%	6	100.0%	6
37 LOUISIANA, W	100	1000	0	0.0%	2	25.0%	8
38 MAINE	5		1	100.0%	1	100.0%	1
39 MARYLAND			1	5.0%	4	20.0%	20
40 MASSACHUSETTS	50	2000	0	0.0%	3	50.0%	6
41 MICHIGAN, E	50	200	16	28.1%	35	61.4%	57
42 MICHIGAN, W	5	113	0	0.0%	1	100.0%	1
43 MINNESOTA	50	500	1	2.8%	13	36.1%	36
44 MISSISSIPPI, N			8	17.4%	16	34.8%	46
45 MISSISSIPPI, S	50	1000	13	30.2%	22	51.2%	43
46 MISSOURI, E	50	1000	4	28.6%	6	42.9%	14
47 MISSOURI, W	20	250	4	11.8%	14	41.2%	34
48 MONTANA		57	0	n/a	0	n/a	0
49 NEBRASKA	5	500	1	3.7%	12	44.4%	27
50 NEVADA		5000	2	14.3%	4	28.6%	14
51 NEW HAMPSHIRE	0		0	0.0%	0	0.0%	1

Note: 2D1.1 was the guideline with the highest offense level and crack was the only drug involved for all 2,971 defendants.

TABLE 1

CRACK/POWDER DECLINATION POLICIES AND CRACK SENTENCES BY DISTRICT, 1994

District	Minimum Crack	Quantity (gr) Powder	Crack Def <5g	Pct <5g of Total	Crack Def <50g	Pct <50g of Total	Total Crack Def
52 NEW JERSEY		1000	0	0.0%	4	50.0%	8
53 NEW MEXICO	25	500	2	40.0%	4	80.0%	5
54 NEW YORK, E	50	1000	1	11.1%	2	22.2%	9
55 NEW YORK, N			4	40.0%	8	80.0%	10
56 NEW YORK, S	5	500	5	12.5%	15	37.5%	40
57 NEW YORK, W	5	28	2	33.3%	4	66.7%	6
58 NO CAROLINA, E	50	500	12	10.8%	23	20.7%	111
59 NO CAROLINA, M	100	1000	2	3.0%	6	9.1%	66
60 NO CAROLINA, W			1	0.9%	23	21.3%	108
61 NORTH DAKOTA	0	0	0	n/a	0	n/a	0
62 OHIO, N			3	9.7%	9	29.0%	31
63 OHIO, S			6	13.3%	23	51.1%	45
64 OKLAHOMA, E	5	500	0	0.0%	1	100.0%	1
65 OKLAHOMA, N			1	14.3%	1	14.3%	7
66 OKLAHOMA, W	50	1000	0	0.0%	4	11.8%	34
67 OREGON	5	500	2	15.4%	11	84.6%	13
68 PENNSYLVANIA, E	50	1000	6	7.2%	28	33.7%	83
69 PENNSYLVANIA, M			4	40.0%	6	60.0%	10
70 PENNSYLVANIA, W	50	5000	3	9.7%	14	45.2%	31
71 PUERTO RICO	0	5000	0	0.0%	0	0.0%	1
72 RHODE ISLAND	5	200	0	0.0%	5	100.0%	5
73 SOUTH CAROLINA	50	300	35	33.3%	76	72.4%	105
74 SOUTH DAKOTA	5	28	3	75.0%	4	100.0%	4
75 TENNESSEE, E	5	200	3	17.6%	9	52.9%	17
76 TENNESSEE, M	10	1000	0	0.0%	1	50.0%	2
77 TENNESSEE, W	50	500	12	26.1%	29	63.0%	46
78 TEXAS, E	5	500	20	37.0%	30	55.6%	54
79 TEXAS, N			11	13.9%	23	29.1%	79
80 TEXAS, S	25	10000	16	33.3%	24	50.0%	48
81 TEXAS, W	5	500	37	43.5%	56	65.9%	85
82 UTAH	5	500	0	0.0%	1	20.0%	5
83 VERMONT	0	85	0	n/a	0	n/a	0
84 VIRGIN ISLANDS	5	50	0	0.0%	2	66.7%	3
85 VIRGINIA, E		500	4	3.1%	31	24.2%	128
86 VIRGINIA, W	5	500	16	18.8%	54	63.5%	85
87 WASHINGTON, E	5	500	3	30.0%	8	80.0%	10
88 WASHINGTON, W	250	1000	1	9.1%	1	9.1%	11
89 WEST VA, N	0.25	25	8	33.3%	20	83.3%	24
90 WEST VA, S	5	500	61	52.6%	99	85.3%	116
91 WISCONSIN, E	50	3000	0	0.0%	2	66.7%	3
92 WISCONSIN, W	5	500	0	0.0%	0	0.0%	4
93 WYOMING	0	57	0	0.0%	2	100.0%	2
TOTAL			438	14.7%	1212	40.8%	2971
Average: 41			1149				
Median: 5			500				
TOTAL 71			69				

file: crackup4.wb2

Note: 2D1.1 was the guideline with the highest offense level and crack was the only drug involved for all 2,971 defendants.

TABLE 2

Percentage of Total Defendants Sentenced Who Received Substantial Assistance Departures (SAD) and Other Downward Departures (ODD) in Fiscal Year 1994, by District and Race of Defendant

District / USAO	Total Def. Sent.	Total Pct. SAD	Total Pct. ODD	White Def. Sent.	White Pct. SAD	White Pct. ODD	Black Def. Sent.	Black Pct. SAD	Black Pct. ODD	Hispanic Def. Sent.	Hispanic Pct. SAD	Hispanic Pct. ODD
Total	36,931	19.8%	7.6%	15,914	21.1%	8.3%	11,626	20.3%	5.3%	9,391	16.9%	9.3%
Alabama Middle	229	19.2%	2.6%	102	18.6%	4.9%	112	17.0%	0.9%	16	40.0%	0.0%
Alabama Northern	399	19.5%	2.5%	181	23.8%	4.4%	212	16.0%	0.9%	6	16.7%	0.0%
Alabama Southern	290	29.0%	4.1%	98	22.4%	5.1%	117	27.5%	4.1%	21	71.4%	0.0%
Alaska	90	10.0%	12.2%	57	14.0%	12.3%	24	4.2%	8.3%	9	0.0%	22.2%
Arizona	1,030	15.5%	35.7%	269	25.3%	20.1%	34	23.5%	20.6%	727	11.6%	42.2%
Arkansas Eastern	246	13.4%	4.9%	117	12.0%	6.8%	111	14.4%	2.7%	18	16.7%	5.6%
Arkansas Western	110	4.5%	1.8%	74	6.8%	2.7%	16	0.0%	0.0%	20	0.0%	0.0%
California Central	861	6.3%	5.5%	294	7.1%	5.1%	197	8.1%	6.1%	370	4.6%	5.4%
California Eastern	538	9.7%	9.9%	255	12.9%	8.2%	95	11.6%	12.6%	188	4.3%	10.6%
California Northern	367	15.5%	8.7%	177	20.9%	8.5%	127	7.9%	9.4%	63	15.9%	7.9%
California Southern	1,737	22.7%	13.4%	512	28.1%	17.4%	119	24.4%	20.2%	1,108	20.0%	10.8%
Colorado	346	21.1%	11.0%	196	24.5%	11.7%	68	13.2%	16.2%	82	19.5%	4.9%
Connecticut	244	8.6%	35.7%	143	4.9%	39.2%	64	12.5%	34.4%	37	16.2%	24.3%
Delaware	85	15.3%	1.2%	38	7.9%	2.6%	42	21.4%	0.0%	5	20.0%	0.0%
District of Columbia	460	13.3%	8.3%	53	15.1%	11.3%	384	12.0%	7.3%	23	30.4%	17.4%
Florida Middle	1,141	33.8%	4.5%	566	32.2%	4.9%	374	35.3%	5.3%	201	35.8%	1.5%
Florida Northern	393	41.0%	1.0%	159	29.6%	1.3%	198	46.5%	1.0%	36	61.1%	0.0%
Florida Southern	1,298	15.1%	5.2%	443	17.6%	6.5%	240	8.8%	2.9%	613	15.8%	5.1%
Georgia Middle	369	17.9%	2.4%	159	15.1%	2.5%	202	19.8%	2.5%	8	25.0%	0.0%
Georgia Northern	607	21.3%	5.9%	230	21.3%	9.1%	355	21.1%	3.9%	22	22.7%	4.5%
Georgia Southern	259	32.4%	5.8%	111	17.1%	8.1%	132	45.5%	4.5%	16	31.3%	0.0%
Guam	11	9.1%	0.0%	8	12.5%	0.0%	1	0.0%	0.0%	2	0.0%	0.0%
Hawaii	81	29.6%	8.6%	61	32.8%	8.2%	8	12.5%	12.5%	12	25.0%	8.3%
Idaho	85	8.2%	4.7%	52	11.5%	7.7%	3	0.0%	0.0%	30	3.3%	0.0%
Illinois Central	236	25.8%	1.3%	131	23.7%	2.3%	91	29.7%	0.0%	14	21.4%	0.0%
Illinois Northern	583	14.1%	5.1%	249	15.3%	7.2%	243	15.2%	3.3%	91	7.7%	4.4%
Illinois Southern	233	24.9%	3.0%	91	26.4%	4.4%	134	22.4%	2.2%	8	50.0%	0.0%
Indiana Northern	174	6.3%	4.6%	94	3.2%	3.2%	73	8.2%	6.8%	7	28.6%	0.0%
Indiana Southern	212	26.4%	1.9%	120	25.8%	2.5%	75	24.0%	1.3%	17	41.2%	0.0%
Iowa Northern	152	23.0%	7.2%	93	23.7%	7.5%	42	28.6%	7.1%	17	5.9%	5.9%
Iowa Southern	137	34.3%	3.6%	98	41.8%	4.1%	25	16.0%	4.0%	14	14.3%	0.0%
Kansas	294	15.0%	5.8%	167	16.8%	5.4%	96	11.5%	6.3%	31	16.1%	6.5%
Kentucky Eastern	322	25.2%	3.4%	254	23.6%	3.9%	55	25.5%	1.8%	13	53.8%	0.0%
Kentucky Western	282	8.2%	4.3%	165	6.7%	4.8%	105	10.5%	2.9%	12	8.3%	8.3%
Louisiana Eastern	378	7.7%	5.3%	165	10.3%	8.5%	175	5.7%	2.9%	38	5.3%	2.6%
Louisiana Middle	45	8.9%	2.2%	19	15.8%	5.3%	23	4.3%	0.0%	3	0.0%	0.0%
Louisiana Western	280	16.4%	2.9%	116	22.4%	0.9%	133	13.5%	3.0%	31	6.5%	9.7%

Source: U.S. Sentencing Commission data for white, black, and hispanic defendants sentenced in 1994 (excludes all other races).

TABLE 2

**Percentage of Total Defendants Sentenced Who Received Substantial Assistance Departures (SAD) and Other Downward Departures (ODD)
in Fiscal Year 1994, by District and Race of Defendant**

District / USAO	Total Def. Sent.	Total Pct. SAD	Total Pct. ODD	White Def. Sent.	White Pct. SAD	White Pct. ODD	Black Def. Sent.	Black Pct. SAD	Black Pct. ODD	Hispanic Def. Sent.	Hispanic Pct. SAD	Hispanic Pct. ODD
Total	36,931	19.8%	7.6%	15,914	21.1%	8.3%	11,626	20.3%	5.3%	9,391	16.9%	9.3%
Maine	133	21.8%	0.8%	121	22.3%	0.8%	4	0.0%	0.0%	8	25.0%	0.0%
Maryland	353	23.5%	11.0%	133	20.3%	12.8%	210	26.2%	10.0%	10	10.0%	10.0%
Massachusetts	362	26.6%	12.2%	259	25.9%	12.7%	59	28.8%	8.5%	44	29.5%	13.6%
Michigan Eastern	607	20.7%	4.3%	344	18.6%	5.5%	375	19.7%	3.7%	88	33.0%	2.3%
Michigan Western	271	23.6%	3.3%	169	27.0%	3.7%	34	14.7%	5.9%	48	16.7%	0.0%
Minnesota	358	23.5%	10.1%	216	22.2%	13.0%	103	27.2%	6.8%	39	20.5%	2.6%
Mississippi Northern	183	13.1%	13.1%	58	6.9%	12.1%	119	16.0%	14.3%	6	16.7%	0.0%
Mississippi Southern	217	13.8%	4.6%	94	9.6%	4.3%	104	17.3%	5.6%	19	15.8%	0.0%
Missouri Eastern	383	27.7%	5.0%	190	30.5%	6.8%	176	23.9%	3.4%	17	35.3%	0.0%
Missouri Western	369	39.8%	4.6%	252	38.1%	4.8%	89	42.7%	4.5%	28	46.4%	3.6%
Montana	126	16.7%	15.9%	107	18.7%	18.7%	6	0.0%	0.0%	13	7.7%	0.0%
Nebraska	224	33.9%	7.6%	130	36.2%	7.7%	58	39.7%	10.3%	36	16.7%	2.8%
Nevada	364	11.0%	9.9%	222	12.2%	13.5%	85	12.9%	5.9%	57	3.5%	1.8%
New Hampshire	87	34.5%	8.0%	77	32.5%	9.1%	1	0.0%	0.0%	9	55.6%	0.0%
New Jersey	478	27.0%	3.3%	241	28.2%	4.6%	120	23.3%	0.0%	117	28.2%	4.3%
New Mexico	548	6.6%	15.1%	144	13.2%	22.2%	27	7.4%	14.8%	377	4.0%	12.5%
New York Eastern	1,127	18.9%	15.6%	375	20.8%	12.0%	349	18.9%	16.0%	403	17.1%	18.6%
New York Northern	289	23.2%	10.4%	172	22.7%	10.5%	56	35.7%	7.1%	61	13.1%	13.1%
New York Southern	1,097	17.0%	9.2%	377	18.3%	10.1%	285	14.4%	7.4%	435	17.7%	9.7%
New York Western	367	21.0%	12.0%	192	25.5%	12.5%	133	15.0%	11.3%	42	19.0%	11.9%
North Carolina Eastern	463	21.4%	3.7%	127	22.0%	3.9%	317	20.8%	3.5%	19	26.3%	5.3%
North Carolina Middle	288	24.3%	3.8%	93	24.7%	6.5%	189	23.3%	2.6%	6	50.0%	0.0%
North Carolina Western	707	44.4%	2.5%	332	40.1%	3.6%	316	48.4%	1.3%	59	47.5%	3.4%
North Dakota	88	12.5%	14.8%	70	15.7%	14.3%	4	0.0%	50.0%	14	0.0%	7.1%
Ohio Northern	546	19.4%	7.3%	229	11.8%	8.3%	255	14.5%	8.2%	62	67.7%	0.0%
Ohio Southern	399	28.8%	6.0%	167	20.4%	7.8%	205	36.1%	3.9%	27	25.9%	11.1%
Oklahoma Eastern	44	4.5%	0.0%	32	6.3%	0.0%	9	0.0%	0.0%	3	0.0%	0.0%
Oklahoma Northern	160	16.3%	6.3%	96	22.9%	8.3%	50	6.0%	2.0%	14	7.1%	7.1%
Oklahoma Western	242	11.2%	6.6%	148	8.8%	6.8%	66	18.2%	4.5%	28	7.1%	10.7%
Oregon	471	9.6%	14.6%	291	14.1%	17.9%	34	5.9%	26.5%	146	1.4%	5.5%
Pennsylvania Eastern	815	49.6%	3.7%	351	49.0%	4.6%	326	45.1%	3.1%	138	61.6%	2.9%
Pennsylvania Middle	281	23.3%	8.5%	170	27.1%	11.2%	77	22.1%	3.9%	34	23.5%	5.9%
Pennsylvania Western	278	11.5%	10.8%	142	12.7%	16.2%	132	9.8%	5.3%	4	25.0%	0.0%
Puerto Rico	430	17.2%	5.8%	21	38.1%	19.0%	19	15.8%	5.3%	390	16.2%	5.1%
Rhode Island	121	9.1%	6.6%	61	18.0%	8.2%	20	0.0%	5.0%	40	0.0%	5.0%
South Carolina	662	19.9%	2.7%	286	24.8%	4.2%	354	15.8%	1.4%	22	22.7%	4.5%
South Dakota	80	5.0%	5.0%	65	4.6%	6.2%	5	0.0%	0.0%	10	10.0%	0.0%

Source: U. S. Sentencing Commission data for white, black, and hispanic defendants sentenced in 1994 (excludes all other races).

TABLE 2

**Percentage of Total Defendants Sentenced Who Received Substantial Assistance Departures (SAD) and Other Downward Departures (ODD)
in Fiscal Year 1994, by District and Race of Defendant**

District / USAO	Total Def. Sent.	Total Pct. SAD	Total Pct. ODD	White Def. Sent.	White Pct. SAD	White Pct. ODD	Black Def. Sent.	Black Pct. SAD	Black Pct. ODD	Hispanic Def. Sent.	Hispanic Pct. SAD	Hispanic Pct. ODD
Total	36,931	19.8%	7.6%	15,914	21.1%	8.3%	11,626	20.3%	8.3%	9,391	16.9%	9.3%
Tennessee Eastern	334	22.8%	3.3%	238	21.4%	3.8%	90	24.4%	1.1%	6	50.0%	16.7%
Tennessee Middle	217	13.4%	3.7%	110	11.8%	4.5%	101	12.9%	3.0%	6	50.0%	0.0%
Tennessee Western	405	23.0%	3.7%	178	23.0%	2.8%	209	22.5%	4.8%	18	27.8%	0.0%
Texas Eastern	387	10.1%	5.7%	209	12.4%	6.2%	151	8.6%	6.0%	27	0.0%	0.0%
Texas Northern	841	19.3%	4.3%	352	22.2%	7.1%	282	23.4%	1.8%	207	8.7%	2.9%
Texas Southern	1,451	18.1%	5.0%	238	27.3%	9.7%	128	20.3%	5.5%	1,085	15.8%	4.0%
Texas Western	1,383	17.5%	4.1%	329	21.0%	7.3%	215	14.4%	5.1%	839	16.9%	2.6%
Utah	249	9.2%	18.1%	179	8.4%	19.6%	13	15.4%	30.8%	57	10.5%	10.5%
Vermont	93	22.6%	10.8%	76	26.3%	13.2%	11	0.0%	0.0%	6	16.7%	0.0%
Virgin Islands	85	5.9%	0.0%	4	0.0%	0.0%	50	10.0%	0.0%	31	0.0%	0.0%
Virginia Eastern	857	4.1%	2.8%	308	2.3%	3.9%	479	5.8%	2.5%	70	0.0%	0.0%
Virginia Western	382	25.8%	5.2%	184	23.8%	4.9%	181	28.7%	5.5%	17	17.6%	5.9%
Washington Eastern	221	7.7%	5.9%	110	11.8%	10.0%	17	5.9%	5.9%	94	3.2%	1.1%
Washington Western	341	24.6%	10.9%	214	23.8%	10.3%	60	25.0%	11.7%	67	26.9%	11.9%
West Virginia Northern	136	14.7%	4.4%	91	18.7%	5.5%	40	7.5%	2.5%	5	0.0%	0.0%
West Virginia Southern	313	6.7%	5.8%	152	7.9%	5.3%	157	5.7%	6.4%	4	0.0%	0.0%
Wisconsin Eastern	228	14.9%	1.8%	103	18.4%	1.0%	91	11.0%	1.1%	34	14.7%	5.9%
Wisconsin Western	99	8.1%	2.0%	80	5.0%	2.5%	13	15.4%	0.0%	6	33.3%	0.0%
Wyoming	89	26.1%	10.1%	68	29.4%	8.8%	8	12.5%	25.0%	13	30.8%	7.7%

Note: The following example interprets the data for a specific district.

In the E.D. of Tennessee, a total of 334 defendants were sentenced for all offenses in FY 1994. Of these 334 defendants:

- o 22.8% (76 defendants) received substantial assistance departures and 3.3% (11 defendants) received other downward departures;
- o 238 defendants were white, of whom 21.4% (51 defendants) received substantial assistance departures and 3.8% (9 defendants) received other downward departures;
- o 90 defendants were black, of whom 24.4% (22 defendants) received substantial assistance departures and 1.1% (1 defendant) received a downward departure; and
- o 6 defendants were hispanic, of whom 50.0% (3 defendants) received substantial assistance departures and 16.7% (1 defendant) received a downward departure.

file: rdwg1.wb2[b]

TABLE 3

**Percentage of Drug Defendants Who Received Substantial Assistance Departures (SAD) and Other Downward Departures (ODD)
in Fiscal Year 1994, by District and Race of Defendant**

District / USAO	Total Def. Sent.	Total Pct. SAD	Total Pct. ODD	White Def. Sent.	White Pct. SAD	White Pct. ODD	Black Def. Sent.	Black Pct. SAD	Black Pct. ODD	Hispanic Def. Sent.	Hispanic Pct. SAD	Hispanic Pct. ODD
Total	15,964	31.4%	7.2%	4,948	39.0%	6.0%	5,395	31.9%	5.3%	5,621	24.4%	10.1%
Alabama Middle	78	39.7%	1.3%	17	52.9%	5.9%	54	33.3%	0.0%	7	57.1%	0.0%
Alabama Northern	155	38.7%	1.3%	56	55.4%	1.8%	95	29.5%	1.1%	4	25.0%	0.0%
Alabama Southern	140	50.0%	4.3%	39	46.2%	2.6%	81	45.7%	6.2%	20	75.0%	0.0%
Alaska	31	25.8%	12.9%	23	34.8%	13.0%	3	0.0%	0.0%	5	0.0%	20.0%
Arizona	512	23.2%	49.0%	81	46.9%	32.1%	6	66.7%	16.7%	425	16.1%	52.7%
Arkansas Eastern	138	17.4%	2.9%	56	14.3%	5.4%	69	20.3%	0.0%	13	15.4%	0.0%
Arkansas Western	19	5.3%	0.0%	13	7.7%	0.0%	6	0.0%	0.0%	0	0.0%	0.0%
California Central	178	15.7%	7.9%	42	28.6%	4.8%	29	20.7%	17.2%	107	9.3%	6.5%
California Eastern	142	23.9%	13.4%	74	27.0%	6.8%	18	33.3%	27.8%	50	16.0%	18.0%
California Northern	73	38.4%	12.3%	32	43.8%	9.4%	14	35.7%	7.1%	27	33.3%	18.5%
California Southern	1,028	31.7%	12.0%	282	37.2%	12.1%	54	27.8%	16.7%	692	29.8%	11.6%
Colorado	122	38.5%	9.8%	57	58.6%	0.0%	30	23.3%	20.0%	35	37.1%	11.4%
Connecticut	42	23.8%	35.7%	11	9.1%	27.3%	20	20.0%	60.0%	11	45.5%	0.0%
Delaware	26	42.3%	0.0%	4	25.0%	0.0%	19	47.4%	0.0%	3	33.3%	0.0%
District of Columbia	214	20.6%	9.3%	4	75.0%	0.0%	195	18.5%	8.7%	15	33.3%	20.0%
Florida Middle	635	47.4%	3.1%	214	55.1%	2.3%	261	45.6%	5.7%	160	40.0%	0.0%
Florida Northern	259	54.1%	0.8%	70	44.3%	1.4%	156	56.4%	0.6%	33	63.6%	0.0%
Florida Southern	667	24.1%	5.2%	182	33.0%	5.5%	101	17.8%	5.0%	384	21.6%	5.2%
Georgia Middle	94	39.4%	0.0%	22	36.4%	0.0%	70	38.6%	0.0%	2	100.0%	0.0%
Georgia Northern	294	33.7%	4.1%	102	36.3%	8.8%	177	32.2%	1.7%	15	33.3%	0.0%
Georgia Southern	138	47.8%	2.9%	47	23.4%	4.3%	83	63.9%	2.4%	8	25.0%	0.0%
Guam	6	0.0%	0.0%	4	0.0%	0.0%	1	0.0%	0.0%	1	0.0%	0.0%
Hawaii	29	48.3%	3.4%	23	47.8%	0.0%	2	50.0%	0.0%	4	50.0%	25.0%
Idaho	29	13.8%	0.0%	12	25.0%	0.0%	1	0.0%	0.0%	16	6.3%	0.0%
Illinois Central	106	48.1%	0.0%	34	70.6%	0.0%	63	39.7%	0.0%	9	22.2%	0.0%
Illinois Northern	177	21.5%	4.0%	28	42.9%	7.1%	81	25.9%	2.5%	68	7.4%	4.4%
Illinois Southern	155	28.4%	1.9%	40	32.5%	2.5%	108	25.0%	1.9%	7	57.1%	0.0%
Indiana Northern	49	18.4%	6.1%	14	21.4%	7.1%	30	13.3%	6.7%	5	40.0%	0.0%
Indiana Southern	65	50.8%	0.0%	34	50.0%	0.0%	18	55.6%	0.0%	13	48.2%	0.0%
Iowa Northern	93	33.3%	6.5%	56	33.9%	3.6%	32	34.4%	9.4%	5	20.0%	20.0%
Iowa Southern	74	48.6%	2.7%	49	63.3%	2.0%	14	21.4%	7.1%	11	18.2%	0.0%
Kansas	101	28.7%	3.0%	46	39.1%	4.3%	37	18.9%	2.7%	18	22.2%	0.0%
Kentucky Eastern	120	39.2%	1.7%	92	37.0%	2.2%	20	30.0%	0.0%	8	87.5%	0.0%
Kentucky Western	40	25.0%	5.0%	19	5.3%	5.3%	20	40.0%	5.0%	1	100.0%	0.0%
Louisiana Eastern	126	15.1%	3.2%	32	25.0%	3.1%	68	13.2%	2.9%	26	7.7%	15.4%
Louisiana Middle	21	14.3%	4.8%	6	33.3%	16.7%	13	7.7%	0.0%	2	0.0%	0.0%
Louisiana Western	77	16.9%	2.6%	23	13.0%	0.0%	41	19.5%	2.4%	13	15.4%	7.7%

Source: Data prepared by the U.S. Department of Justice from data provided by the U.S. Sentencing Commission.

TABLE 3

Percentage of Drug Defendants Who Received Substantial Assistance Departures (SAD) and Other Downward Departures (ODD)
In Fiscal Year 1994, by District and Race of Defendant

District / USAO	Total Def. Sent.	Total Pct. SAD	Total Pct. ODD	White Def. Sent.	White Pct. SAD	White Pct. ODD	Black Def. Sent.	Black Pct. SAD	Black Pct. ODD	Hispanic Def. Sent.	Hispanic Pct. SAD	Hispanic Pct. ODD
Total	15,964	31.4%	7.2%	4,948	39.0%	6.0%	5,395	31.8%	5.3%	5,621	24.4%	10.1%
Maine	58	41.4%	0.0%	52	42.3%	0.0%	2	0.0%	0.0%	4	50.0%	0.0%
Maryland	102	39.2%	7.8%	26	50.0%	7.7%	71	36.6%	7.0%	5	20.0%	20.0%
Massachusetts	120	47.5%	5.8%	65	52.3%	4.6%	24	54.2%	8.3%	31	32.3%	6.5%
Michigan Eastern	328	36.3%	3.0%	100	33.0%	3.0%	160	38.1%	3.1%	68	36.8%	2.9%
Michigan Western	125	39.2%	1.6%	83	48.2%	2.4%	10	30.0%	0.0%	32	18.8%	0.0%
Minnesota	153	43.8%	7.2%	65	53.8%	9.2%	63	38.1%	7.9%	25	32.0%	0.0%
Mississippi Northern	76	30.3%	17.1%	13	30.8%	7.7%	59	30.5%	20.3%	4	25.0%	0.0%
Mississippi Southern	90	21.1%	3.3%	29	6.9%	0.0%	51	31.4%	5.9%	10	10.0%	0.0%
Missouri Eastern	164	39.0%	3.0%	74	52.7%	1.4%	76	25.0%	5.3%	14	42.9%	0.0%
Missouri Western	196	51.0%	4.1%	106	53.8%	3.8%	66	48.5%	6.1%	24	45.8%	0.0%
Montana	56	26.6%	1.8%	44	34.1%	2.3%	5	0.0%	0.0%	7	14.3%	0.0%
Nebraska	119	52.1%	8.4%	69	58.0%	7.2%	38	50.0%	10.5%	12	25.0%	8.3%
Nevada	889	18.0%	15.7%	38	21.1%	31.6%	20	30.0%	5.0%	31	6.5%	3.2%
New Hampshire	38	60.5%	5.3%	29	62.1%	6.9%	0	0.0%	0.0%	9	55.6%	0.0%
New Jersey	109	48.6%	2.8%	23	69.6%	0.0%	36	44.4%	0.0%	50	42.0%	6.0%
New Mexico	381	6.8%	15.0%	76	15.8%	21.1%	11	9.1%	27.3%	294	4.4%	12.9%
New York Eastern	573	21.1%	22.2%	77	27.3%	24.7%	196	20.4%	20.4%	300	20.0%	22.7%
New York Northern	95	49.5%	6.3%	45	53.3%	2.2%	33	51.5%	9.1%	17	35.3%	11.8%
New York Southern	340	32.2%	6.5%	57	31.6%	5.3%	49	32.7%	2.0%	234	19.2%	7.7%
New York Western	147	32.0%	6.8%	68	32.4%	11.8%	56	32.1%	3.6%	23	30.4%	0.0%
North Carolina Eastern	232	29.7%	3.4%	45	42.2%	0.0%	173	26.0%	4.0%	14	35.7%	7.1%
North Carolina Middle	115	37.4%	0.9%	20	55.0%	0.0%	89	32.6%	1.1%	6	50.0%	0.0%
North Carolina Western	435	61.6%	1.8%	198	56.6%	3.0%	190	67.4%	0.5%	47	59.6%	2.1%
North Dakota	21	47.6%	14.3%	17	58.8%	5.9%	1	0.0%	100.0%	3	0.0%	33.3%
Ohio Northern	159	47.2%	5.0%	26	38.5%	3.8%	80	30.0%	8.8%	53	77.7%	0.0%
Ohio Southern	129	54.0%	3.9%	30	56.7%	6.7%	84	57.1%	2.4%	15	33.3%	6.7%
Oklahoma Eastern	8	0.0%	0.0%	6	0.0%	0.0%	1	0.0%	0.0%	1	0.0%	0.0%
Oklahoma Northern	36	36.1%	0.0%	17	58.8%	0.0%	7	28.6%	0.0%	12	8.3%	0.0%
Oklahoma Western	93	24.7%	0.0%	41	26.8%	0.0%	42	26.2%	0.0%	10	10.0%	0.0%
Oregon	148	17.6%	8.9%	97	23.7%	19.6%	15	13.3%	40.0%	36	2.8%	8.3%
Pennsylvania Middle	75	46.7%	5.3%	33	63.6%	3.0%	31	32.3%	6.5%	11	36.4%	9.1%
Pennsylvania Eastern	399	61.4%	2.5%	142	59.9%	3.5%	141	58.2%	2.1%	116	67.2%	1.7%
Pennsylvania Western	93	20.4%	6.5%	30	30.0%	6.7%	60	15.0%	6.7%	3	33.3%	0.0%
Puerto Rico	279	22.6%	6.1%	14	42.9%	21.4%	16	18.8%	6.3%	249	21.7%	5.2%
Rhode Island	46	8.7%	2.2%	21	19.0%	4.8%	7	0.0%	0.0%	18	0.0%	0.0%
South Carolina	286	27.3%	2.4%	89	40.4%	3.4%	186	21.5%	2.2%	11	18.2%	0.0%
South Dakota	39	5.1%	2.6%	30	3.3%	3.3%	4	0.0%	0.0%	5	20.0%	0.0%

TABLE 3

**Percentage of Drug Defendants Who Received Substantial Assistance Departures (SAD) and Other Downward Departures (ODD)
In Fiscal Year 1994, by District and Race of Defendant**

District / USAO	Total Def. Sent.	Total Pct. SAD	Total Pct. ODD	White Def. Sent.	White Pct. SAD	White Pct. ODD	Black Def. Sent.	Black Pct. SAD	Black Pct. ODD	Hispanic Def. Sent.	Hispanic Pct. SAD	Hispanic Pct. ODD
Total	15,984	31.4%	7.2%	4,948	39.0%	6.0%	5,395	31.9%	6.3%	5,621	24.4%	10.1%
Tennessee Eastern	136	41.2%	2.2%	80	40.0%	2.5%	50	42.0%	0.0%	6	50.0%	16.7%
Tennessee Middle	40	35.0%	0.0%	17	23.5%	0.0%	19	36.8%	0.0%	4	75.0%	0.0%
Tennessee Western	157	40.1%	3.2%	40	55.0%	0.0%	102	35.3%	4.9%	15	33.3%	0.0%
Texas Eastern	173	9.2%	2.9%	60	11.7%	0.0%	92	9.8%	5.4%	21	0.0%	0.0%
Texas Northern	289	23.9%	3.1%	54	25.9%	5.6%	129	31.8%	2.3%	106	13.2%	2.8%
Texas Southern	853	24.4%	3.3%	75	45.3%	5.3%	69	31.9%	5.6%	709	21.4%	2.8%
Texas Western	759	24.2%	3.4%	129	36.4%	4.7%	103	16.5%	9.7%	527	22.8%	1.9%
Utah	99	15.2%	15.2%	52	15.4%	13.5%	9	22.2%	22.2%	38	13.2%	13.2%
Vermont	41	22.0%	4.9%	26	30.8%	7.7%	10	0.0%	0.0%	5	20.0%	0.0%
Virgin Islands	16	12.5%	0.0%	0	0.0%	0.0%	0	0.0%	0.0%	0	0.0%	0.0%
Virginia Eastern	322	8.4%	1.6%	75	5.3%	2.7%	212	10.8%	1.4%	35	0.0%	0.0%
Virginia Western	216	36.6%	4.6%	89	39.3%	3.4%	111	36.9%	5.4%	16	18.8%	6.3%
Washington Eastern	75	20.0%	2.7%	48	22.9%	2.1%	13	7.7%	7.7%	14	21.4%	0.0%
Washington Western	144	50.0%	3.5%	70	58.6%	0.0%	24	54.2%	8.3%	50	36.0%	6.0%
West Virginia Northern	82	13.4%	2.4%	47	21.3%	4.3%	31	3.2%	0.0%	4	0.0%	0.0%
West Virginia Southern	210	6.7%	5.7%	71	7.0%	4.2%	136	6.6%	6.6%	3	0.0%	0.0%
Wisconsin Eastern	74	24.3%	2.7%	26	34.6%	0.0%	23	17.4%	4.3%	25	20.0%	4.0%
Wisconsin Western	29	27.6%	0.0%	19	21.1%	0.0%	6	33.3%	0.0%	4	50.0%	0.0%
Wyoming	44	40.9%	4.5%	35	42.9%	2.9%	2	0.0%	0.0%	7	42.9%	14.3%

Note: The following example interprets the data for a specific district.

In the E.D. of Tennessee, a total of 136 defendants were sentenced for drug offenses in FY 1994. Of these 136 drug defendants:

- o 41.2% (56 defendants) received substantial assistance departures and 2.2% (3 defendants) received other downward departures;
- o 80 were white, of whom 40.0% (32 defendants) received substantial assistance departures and 2.5% (2 defendants) received other downward departures;
- o 50 were black, of whom 42.0% (21 defendants) received substantial assistance departures; and
- o 6 were hispanic, of whom 50.0% (3 defendants) received substantial assistance departures and 16.7% (1 defendant) received a downward departure.

file: rdwg2.wb2[a]

TABLE 4

Percentage of Defendants Who Were Charged With 924(c) or Received Firearms-Related Sentencing Enhancements
in Fiscal Year 1994, by District and Race of Defendant

District / USAO	Total Gun Def. Sent.	Gun Pct 924c	Gun Pct S.E.	White Def. Sent.	White Pct 924c	White Pct S.E.	Black Def. Sent.	Black Pct 924c	Black Pct S.E.	Hispanic Def. Sent.	Hispanic Pct 924c	Hispanic Pct S.E.
Total	4,564	42.1%	57.9%	1,348	37.5%	62.5%	2,434	48.4%	51.6%	782	30.1%	69.9%
Alabama Middle	34	35.3%	64.7%	9	33.3%	66.7%	24	37.5%	62.5%	1	0.0%	100.0%
Alabama Northern	49	55.1%	44.9%	16	25.0%	75.0%	33	69.7%	30.3%	0	0.0%	0.0%
Alabama Southern	35	57.1%	42.9%	5	40.0%	60.0%	29	62.1%	37.9%	1	0.0%	100.0%
Alaska	19	57.9%	42.1%	14	60.0%	50.0%	5	80.0%	20.0%	0	0.0%	0.0%
Arizona	76	30.3%	69.7%	27	22.2%	77.8%	6	33.3%	66.7%	43	34.9%	65.1%
Arkansas Eastern	39	30.8%	69.2%	11	36.4%	63.6%	26	30.8%	69.2%	2	0.0%	100.0%
Arkansas Western	8	37.5%	62.5%	6	33.3%	66.7%	2	50.0%	50.0%	0	0.0%	0.0%
California Central	179	50.8%	49.2%	33	33.3%	66.7%	100	59.0%	41.0%	46	45.7%	54.3%
California Eastern	100	41.0%	59.0%	29	51.7%	48.3%	43	39.5%	60.5%	28	32.1%	67.9%
California Northern	38	28.9%	71.1%	15	40.0%	60.0%	19	26.3%	73.7%	4	0.0%	100.0%
California Southern	109	26.6%	73.4%	49	20.4%	79.6%	21	47.6%	52.4%	39	23.1%	76.9%
Colorado	47	42.6%	57.4%	15	60.0%	40.0%	21	42.9%	57.1%	11	18.2%	81.8%
Connecticut	28	25.0%	75.0%	9	0.0%	100.0%	10	60.0%	40.0%	9	11.1%	88.9%
Delaware	7	42.9%	57.1%	0	0.0%	0.0%	6	50.0%	50.0%	1	0.0%	100.0%
District of Columbia	50	38.0%	62.0%	0	0.0%	0.0%	49	38.8%	61.2%	1	0.0%	100.0%
Florida Middle	155	24.5%	75.5%	46	26.1%	73.9%	84	27.4%	72.6%	25	12.0%	88.0%
Florida Northern	100	29.0%	71.0%	15	60.0%	40.0%	73	24.7%	75.3%	12	16.7%	83.3%
Florida Southern	96	49.0%	51.0%	34	50.0%	50.0%	41	53.7%	46.3%	21	38.1%	61.9%
Georgia Middle	55	43.6%	56.4%	10	40.0%	60.0%	44	45.5%	54.5%	1	0.0%	100.0%
Georgia Northern	106	39.6%	60.4%	29	44.8%	55.2%	76	38.2%	61.8%	1	0.0%	100.0%
Georgia Southern	28	42.9%	57.1%	5	60.0%	40.0%	21	33.3%	66.7%	2	100.0%	0.0%
Guam	2	0.0%	100.0%	2	0.0%	100.0%	0	0.0%	0.0%	0	0.0%	0.0%
Hawaii	4	25.0%	75.0%	0	0.0%	0.0%	2	0.0%	100.0%	2	50.0%	50.0%
Idaho	8	62.5%	37.5%	6	66.7%	33.3%	0	0.0%	0.0%	2	50.0%	50.0%
Illinois Central	25	52.0%	48.0%	11	45.5%	54.5%	13	61.5%	38.5%	1	0.0%	100.0%
Illinois Northern	61	37.7%	62.3%	13	23.1%	76.9%	38	42.1%	57.9%	10	40.0%	60.0%
Illinois Southern	35	51.4%	48.6%	6	16.7%	83.3%	29	58.6%	41.4%	0	0.0%	0.0%
Indiana Northern	29	51.7%	48.3%	15	40.0%	60.0%	13	61.5%	38.5%	1	100.0%	0.0%
Indiana Southern	28	60.7%	39.3%	7	57.1%	42.9%	20	60.0%	40.0%	1	100.0%	0.0%
Iowa Northern	33	36.4%	63.6%	18	33.3%	66.7%	13	46.2%	53.8%	2	0.0%	100.0%
Iowa Southern	19	73.7%	26.3%	11	63.6%	36.4%	6	83.3%	16.7%	2	100.0%	0.0%
Kansas	46	47.8%	52.2%	15	60.0%	40.0%	30	40.0%	60.0%	1	100.0%	0.0%
Kentucky Eastern	39	56.4%	43.6%	33	51.5%	48.5%	6	83.3%	16.7%	0	0.0%	0.0%
Kentucky Western	19	63.2%	36.8%	8	62.5%	37.5%	11	63.6%	36.4%	0	0.0%	0.0%
Louisiana Eastern	30	53.3%	46.7%	10	30.0%	70.0%	17	64.7%	35.3%	3	66.7%	33.3%
Louisiana Middle	2	0.0%	100.0%	1	0.0%	100.0%	1	0.0%	100.0%	0	0.0%	0.0%
Louisiana Western	36	41.7%	58.3%	5	40.0%	60.0%	26	46.2%	53.8%	5	20.0%	80.0%

TABLE 4

**Percentage of Defendants Who Were Charged With 924(c) or Received Firearms-Related Sentencing Enhancements
in Fiscal Year 1994, by District and Race of Defendant**

District / USAO	Total Gun Def. Sent.	Gun Pct 924c	Gun Pct S.E.	White Def. Sent.	White Pct 924c	White Pct S.E.	Black Def. Sent.	Black Pct 924c	Black Pct S.E.	Hispanic Def. Sent.	Hispanic Pct 924c	Hispanic Pct S.E.
Total	4,564	42.1%	57.9%	1,348	37.5%	62.5%	2,434	48.4%	51.6%	782	30.1%	69.9%
Maine	18	50.0%	50.0%	17	47.1%	52.9%	1	100.0%	0.0%	0	0.0%	0.0%
Maryland	45	51.1%	48.9%	7	28.6%	71.4%	38	55.3%	44.7%	0	0.0%	0.0%
Massachusetts	22	9.1%	90.9%	12	16.7%	83.3%	7	0.0%	100.0%	3	0.0%	100.0%
Michigan Eastern	78	35.9%	64.1%	19	31.6%	68.4%	53	39.6%	60.4%	6	16.7%	83.3%
Michigan Western	20	20.0%	80.0%	10	10.0%	90.0%	4	75.0%	25.0%	6	0.0%	100.0%
Minnesota	41	61.0%	39.0%	15	53.3%	46.7%	24	66.7%	33.3%	2	50.0%	50.0%
Mississippi Northern	24	66.7%	33.3%	6	66.7%	33.3%	18	66.7%	33.3%	0	0.0%	0.0%
Mississippi Southern	22	54.5%	45.5%	5	20.0%	80.0%	15	60.0%	40.0%	2	100.0%	0.0%
Missouri Eastern	68	44.1%	55.9%	18	33.3%	66.7%	47	48.9%	51.1%	3	33.3%	66.7%
Missouri Western	64	64.1%	35.9%	35	57.1%	42.9%	26	69.2%	30.8%	3	100.0%	0.0%
Montana	21	47.6%	52.4%	17	52.9%	47.1%	2	50.0%	50.0%	2	0.0%	100.0%
Nebraska	32	37.5%	62.5%	12	41.7%	58.3%	17	23.5%	76.5%	3	100.0%	0.0%
Nevada	59	39.0%	61.0%	20	55.0%	45.0%	27	29.6%	70.4%	12	33.3%	66.7%
New Hampshire	9	22.2%	77.8%	9	22.2%	77.8%	0	0.0%	0.0%	0	0.0%	0.0%
New Jersey	34	26.5%	73.5%	15	6.7%	93.3%	13	61.5%	38.5%	6	0.0%	100.0%
New Mexico	25	36.0%	64.0%	11	18.2%	81.8%	2	50.0%	50.0%	12	50.0%	50.0%
New York Eastern	86	37.2%	62.8%	27	11.1%	88.9%	36	66.7%	33.3%	23	21.7%	78.3%
New York Northern	13	53.8%	46.2%	9	55.6%	44.4%	4	50.0%	50.0%	0	0.0%	0.0%
New York Southern	141	34.0%	66.0%	28	25.0%	75.0%	33	36.4%	63.6%	80	36.3%	63.7%
New York Western	27	14.8%	85.2%	6	0.0%	100.0%	18	22.2%	77.8%	3	0.0%	100.0%
North Carolina Eastern	90	62.2%	37.8%	14	42.9%	57.1%	73	65.6%	34.2%	3	66.7%	33.3%
North Carolina Middle	48	56.3%	43.7%	5	80.0%	20.0%	43	53.5%	46.5%	0	0.0%	0.0%
North Carolina Western	133	66.2%	33.8%	39	64.1%	35.9%	90	70.0%	30.0%	4	0.0%	100.0%
North Dakota	1	0.0%	100.0%	0	0.0%	0.0%	0	0.0%	0.0%	1	0.0%	100.0%
Ohio Northern	65	50.8%	49.2%	11	36.4%	63.6%	49	57.1%	42.9%	5	20.0%	80.0%
Ohio Southern	56	39.3%	60.7%	6	50.0%	50.0%	47	40.4%	59.6%	3	0.0%	100.0%
Oklahoma Eastern	8	37.5%	62.5%	4	25.0%	75.0%	3	66.7%	33.3%	1	0.0%	100.0%
Oklahoma Northern	24	66.7%	33.3%	6	66.7%	33.3%	17	64.7%	35.3%	1	100.0%	0.0%
Oklahoma Western	43	32.6%	67.4%	24	37.5%	62.5%	14	35.7%	64.3%	5	0.0%	100.0%
Oregon	66	18.2%	81.8%	48	14.6%	85.4%	6	50.0%	50.0%	12	16.7%	83.3%
Pennsylvania Middle	40	32.5%	67.5%	18	27.8%	72.2%	19	31.6%	68.4%	3	66.7%	33.3%
Pennsylvania Eastern	139	48.2%	51.8%	25	28.0%	72.0%	97	54.6%	45.4%	17	41.2%	58.8%
Pennsylvania Western	27	70.4%	29.6%	7	57.1%	42.9%	19	73.7%	26.3%	1	100.0%	0.0%
Puerto Rico	30	46.7%	53.3%	2	50.0%	50.0%	1	100.0%	0.0%	27	44.4%	55.6%
Rhode Island	16	31.3%	68.7%	5	20.0%	80.0%	5	40.0%	60.0%	6	33.3%	66.7%
South Carolina	91	40.7%	59.3%	22	36.4%	63.6%	69	42.0%	58.0%	0	0.0%	0.0%
South Dakota	10	30.0%	70.0%	7	28.6%	71.4%	2	0.0%	100.0%	1	100.0%	0.0%

Source: Data prepared by the U.S. Department of Justice from data provided by the U.S. Sentencing Commission.

TABLE 4

**Percentage of Defendants Who Were Charged With 924(c) or Received Firearms-Related Sentencing Enhancements
in Fiscal Year 1994, by District and Race of Defendant**

District / USAO	Total Gun Def. Sent.	Gun Pct 924c	Gun Pct S.E.	White Def. Sent.	White Pct 924c	White Pct S.E.	Black Def. Sent.	Black Pct 924c	Black Pct S.E.	Hispanic Def. Sent.	Hispanic Pct 924c	Hispanic Pct S.E.
Total	4,564	42.1%	57.9%	1,348	37.5%	62.5%	2,434	48.4%	51.6%	782	30.1%	69.9%
Tennessee Eastern	42	61.9%	38.1%	21	61.9%	38.1%	21	61.9%	38.1%	0	0.0%	0.0%
Tennessee Middle	36	52.8%	47.2%	13	53.8%	46.2%	21	52.4%	47.6%	2	50.0%	50.0%
Tennessee Western	75	52.0%	48.0%	19	26.3%	73.7%	55	60.0%	40.0%	1	100.0%	0.0%
Texas Eastern	83	54.2%	45.8%	22	36.4%	63.6%	56	58.9%	41.1%	5	80.0%	20.0%
Texas Northern	168	31.0%	69.0%	33	39.4%	60.6%	75	33.3%	66.7%	60	23.3%	76.7%
Texas Southern	112	24.1%	75.9%	9	44.4%	55.6%	27	22.2%	77.8%	76	22.4%	77.6%
Texas Western	153	30.1%	69.9%	44	38.6%	61.4%	40	42.5%	57.5%	69	17.4%	82.6%
Utah	19	57.9%	42.1%	9	33.3%	66.7%	4	100.0%	0.0%	6	66.7%	33.3%
Vermont	14	21.4%	78.6%	8	25.0%	75.0%	4	0.0%	100.0%	2	50.0%	50.0%
Virgin Islands	8	25.0%	75.0%	0	0.0%	0.0%	6	16.7%	83.3%	2	50.0%	50.0%
Virginia Eastern	154	44.2%	55.8%	29	44.8%	55.2%	123	43.9%	56.1%	2	50.0%	50.0%
Virginia Western	49	51.0%	49.0%	16	31.3%	68.7%	30	66.7%	33.3%	3	0.0%	100.0%
Washington Eastern	8	50.0%	50.0%	2	100.0%	0.0%	2	0.0%	100.0%	4	50.0%	50.0%
Washington Western	40	30.0%	70.0%	16	37.5%	62.5%	13	23.1%	76.9%	11	27.3%	72.7%
West Virginia Northern	14	42.9%	57.1%	2	0.0%	100.0%	12	50.0%	50.0%	0	0.0%	0.0%
West Virginia Southern	33	39.4%	60.6%	12	25.0%	75.0%	21	47.6%	52.4%	0	0.0%	0.0%
Wisconsin Eastern	30	56.7%	43.3%	6	0.0%	100.0%	22	68.2%	31.8%	2	100.0%	0.0%
Wisconsin Western	12	25.0%	75.0%	5	20.0%	80.0%	5	40.0%	60.0%	2	0.0%	100.0%
Wyoming	4	25.0%	75.0%	3	33.3%	66.7%	0	0.0%	0.0%	1	0.0%	100.0%

Notes:

(1) Table 4 differs from Tables 2 and 3 because all defendants were charged with 924(c) or received firearms-related sentencing enhancements. In contrast, only proportions of total defendants (or drug defendants) received substantial assistance or other downward departures.

(2) In the M.D. of Tennessee, a total of 36 defendants received 924(c) charges or firearms-related sentencing enhancements in FY 1994. Of the 36 total:

- o 52.8% (19 defendants) were charged with 924(c) and 47.2% (17 defendants) received firearms-related sentencing enhancements;
- o 13 defendants were white, of whom 53.8% (7 defendants) were charged with 924(c) and 46.2% (6 defendants) received sentencing enhancements;
- o 21 defendants were black, of whom 52.4% (11 defendants) were charged with 924(c) and 47.6% (10 defendants) received sentencing enhancements;
- o 2 defendants were hispanic, one of whom was charged with 924(c) (50.0%) and the other received a sentencing enhancement (50.0%).

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BACKGROUND MATERIAL

1. Crack Statistics

Tab A: FY 1994 Crack Defendants in the Federal System

Tab B: 1994 Crack Use

Tab C: 1994 Drug Arrests

Tab D: Drug Trafficking and Crack Defendants in the States

Tab E: Race of Users Versus Race of Traffickers:
Understanding Crack Markets

Tab F: FY 1995 Crack Defendants Sentenced in the Federal System

2. March 1996 Memorandum to the Attorney General Regarding Sentencing Options for Cocaine Offenses

ATTACHMENT 2
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A. FY 1994 CRACK DEFENDANTS SENTENCED IN THE FEDERAL SYSTEM

PROFILE OF FY 1994 SENTENCED DEFENDANTS U.S. Sentencing Commission (USSC) Data

- o In FY 1994, there were approximately 3,500 defendants sentenced for crack offenses in the federal system.
- o The seriousness of these offenders can be measured in a number of ways: amount of drug involved; criminal history of the offender; and whether the offender had a weapon. All of these can be gleaned from USSC data.¹

Drug Amount - Chart 1 shows the distribution of crack defendants by the amount of the drug: less than 5 grams, 5 grams up to 50 grams, and 50 grams and above. Keep in mind that 5 grams represents the 5 year mandatory minimum and 50 grams represents the 10 year mandatory minimum. About 60% of defendants had 50 grams or more and about 40% had less than 50 grams -- 26% had at least 5 grams but less than 50 grams, and 13% had less than 5 grams. There were 415 defendants with less than 5 grams.

Criminal History - Chart 2 shows the distribution of crack defendants by criminal history category. Note that crack defendants are generally in higher criminal history categories than powder defendants. For example, while 39% of crack defendants were in criminal history category I, 63% of powder defendants were in this category.

Weapon Involvement - Chart 3 displays the proportion of crack defendants who had a weapon and those who did not. Note that 30% of crack defendants as compared to 16% of powder defendants had a weapon.

The proportion of defendants who had a gun was fairly constant across criminal history categories.

- o **Sentences** - Chart 4 displays the distribution of final sentences for all crack defendants. About 72% of crack defendants received sentences exceeding 5 years. Crack defendants received downward departures 38% of the time (33% were substantial assistance departures), whereas 42% of powder defendants received downward departures.

¹ Note that when we analyzed specific offense or offender characteristics (e.g., criminal history category, weapon involvement) and drug amounts the total number of defendants ("N") varied.

- o **Defendants with Less than 50 Grams** - About 40% of crack defendants had less than 50 grams of crack.

Nearly 70% of these defendants either had a gun or were in a criminal history category greater than I.

About 30% were in criminal history category I and had no gun. Chart 5 displays these "lower end" crack defendants by length of sentence. More than one-third of them received sentences of 5 years or more.

- o **Defendants with Less than 5 Grams** - About 15% of crack defendants had less than 5 grams of crack.

About 70% of these defendants either had a gun or were in a criminal history category greater than I. Consequently, about 30% were in criminal history category I and had no gun.

- o **District Declination Policies and Prosecution Practices** - Chart 6 summarizes the crack declination policies of the U.S. Attorneys' offices. In 29 districts, the declination threshold is 50 grams or more, while 34 districts have thresholds of 5 grams up to 50 grams (29 are at 5 grams). In addition, six districts have thresholds of less than 5 grams and 24 have no quantity thresholds. Most U.S. Attorneys with quantity-based policies will depart from these policies for aggravating factors such as presence of a weapon, prior criminal record, or gang affiliation.

Chart 7 displays districts in which 20 or more crack defendants were sentenced for having less than 50 grams. (The percentage above each bar indicates the proportion of the district's crack caseload represented by under-50 gram defendants.)

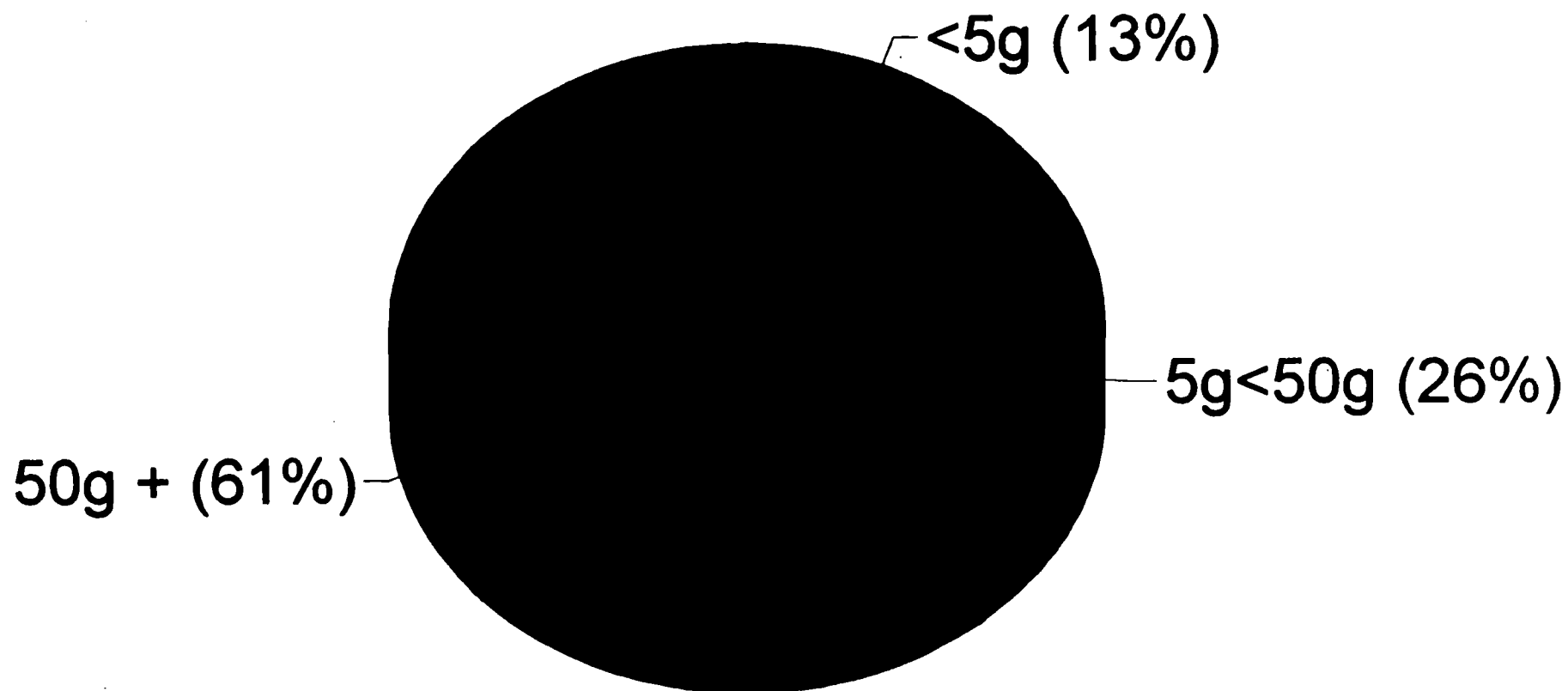
Chart 8 displays districts in which 5 or more crack defendants were sentenced for under 5 grams. (The percentage above each bar indicates the proportion of the district's crack caseload represented by under-5 gram defendants.)

F. FY 1995 CRACK DEFENDANTS SENTENCED IN THE FEDERAL SYSTEM

- o The total number of sentenced defendants has declined for the second year in a row. The change, from 39,971 to 38,500, represents a 3.7% reduction. Drugs still represent about 40% of sentenced defendants. The number of drug defendants is down about 8.5%, to 15,288.
- o The total number of crack defendants, 3,744, is up from 3,546. The proportion of all cocaine defendants sentenced for crack has increased. The number of powder cases is down -- from 5,100 to 4,480. If present trends continue, the numbers of crack and powder defendants will be about the same in the next year or so.
- o Comparing FY 1994 to FY 1995, crack cases involved larger drug amounts, with proportional declines in both lower and mid-level quantities and a corresponding increase in the high-level quantities. In addition, crack defendants had higher criminal history scores, and were more likely to have weapons and to receive aggravating role adjustments.
- o Nonetheless, sentences have decreased. There has been an increase in the plea rate, an increase in 5K1.1 departures, and an increase in acceptance of responsibility. We do not yet have data on the number of safety valve cases, which could also be partially responsible for this reduction in sentence length.

CHART 1

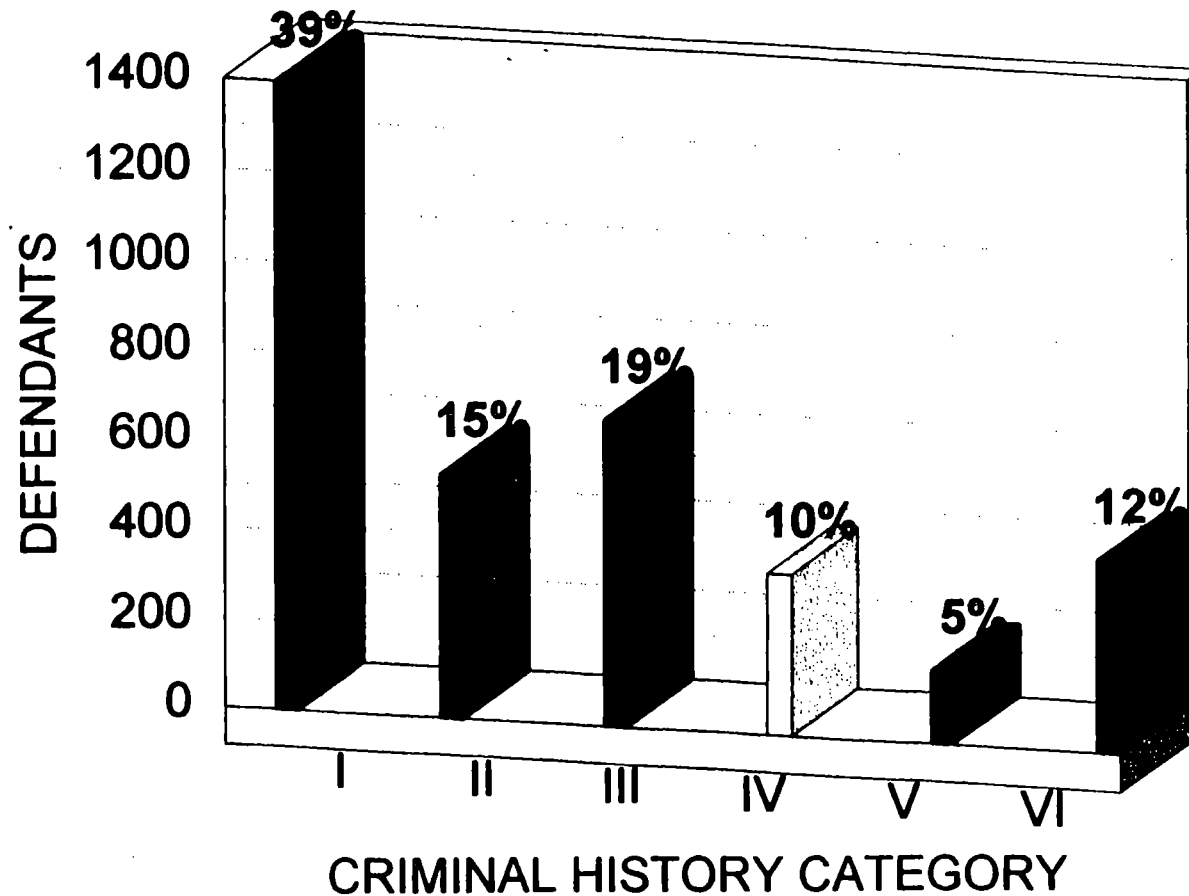
CRACK DEFENDANTS BY DRUG AMOUNT



SOURCE: USSC 1994 Annual Report, Table 56
N=3,299 Defendants

CHART 2

CRACK DEFENDANTS BY CRIMINAL HISTORY



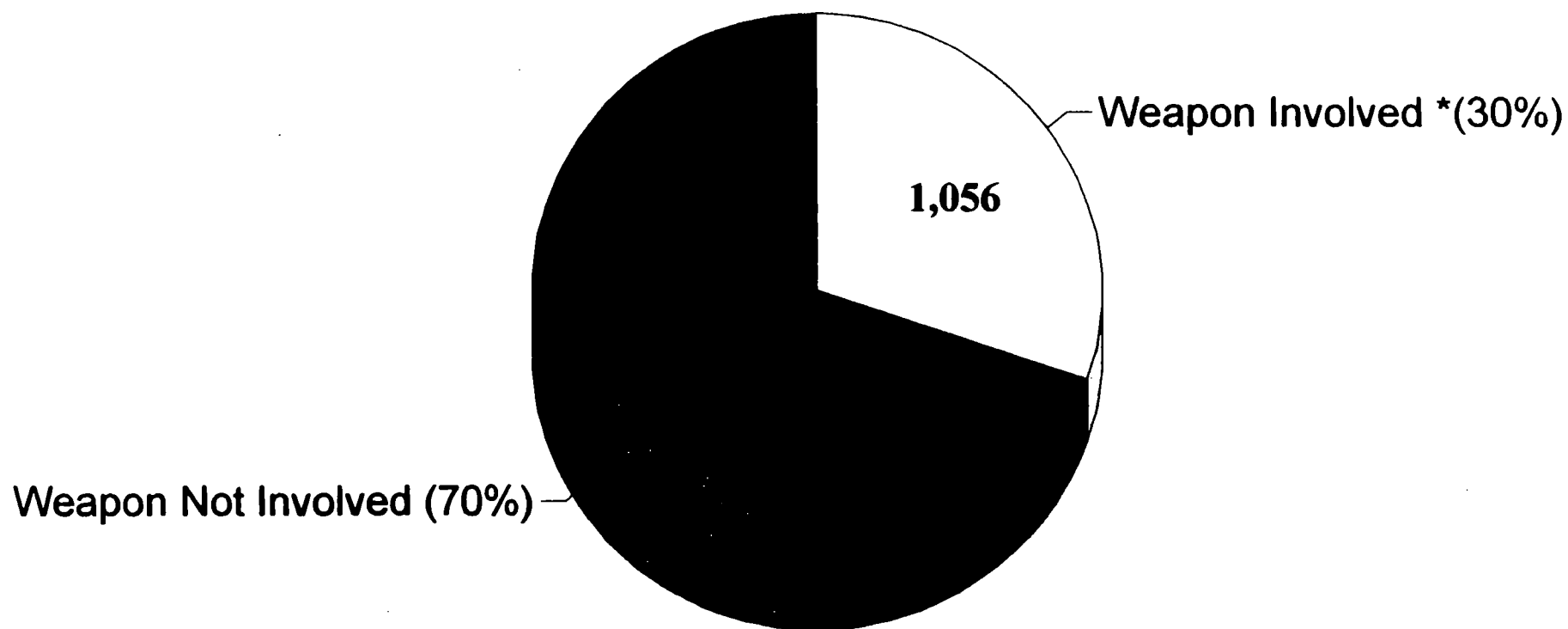
SOURCE: BOP Run from 1994 USSC MONFY94

NOTE: 63% of powder cocaine defendants were in CHC I.

N=3,585 Defendants

CHART 3

CRACK DEFENDANTS BY WEAPON INVOLVEMENT



SOURCE: BOP Run from 1994 USSC MONFY94

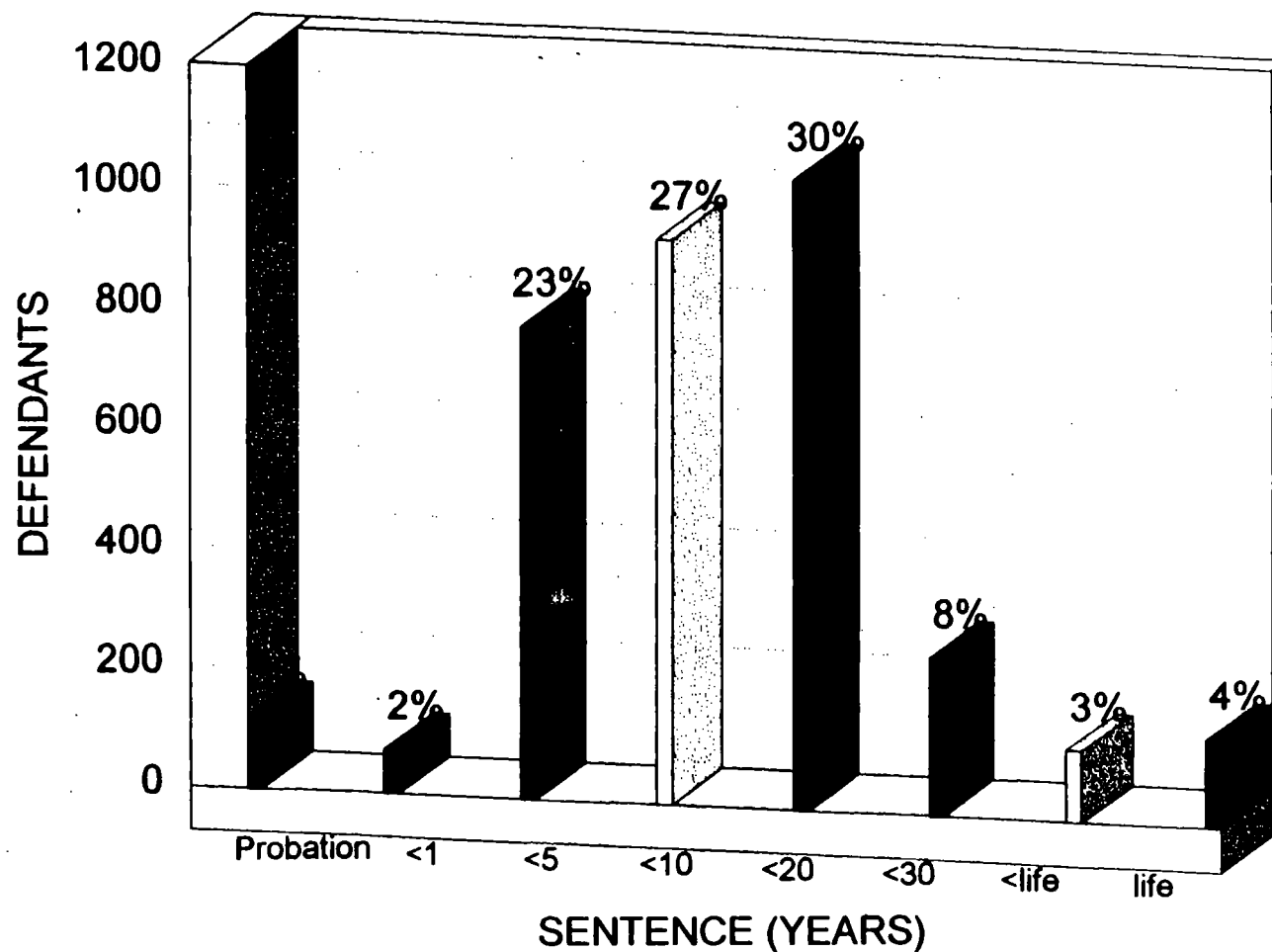
NOTE: Includes defendants with a sentencing enhancement for weapon possession (under section 2D1.1(b)(1) of the guidelines) or a conviction under 18 U.S.C. 924(c).

*16% of powder cocaine defendants had a weapon involved.

N=3,497 Defendants

CHART 4

CRACK DEFENDANTS BY SENTENCE LENGTH

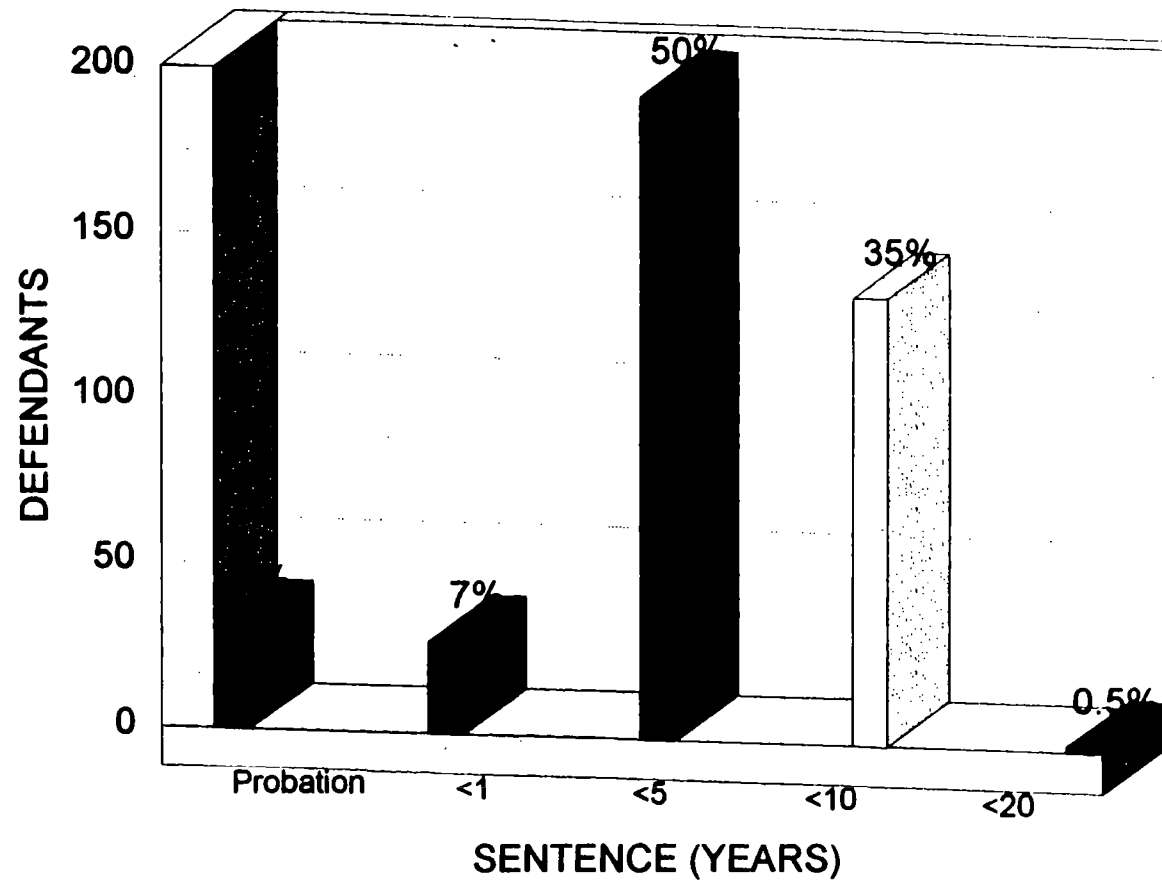


SOURCE: BOP Run from 1994 USSC MONFY 94
N=3,490 Defendants

CHART 5

LOWER-END CRACK DEFENDANTS BY SENTENCE

(CHC=1, NO WEAPON, <50g)



SOURCE: BOP Run from 1994 USSC MONFY94
N=392 Defendants

CHART 6

CRACK DECLINATION POLICIES: 95 SURVEY

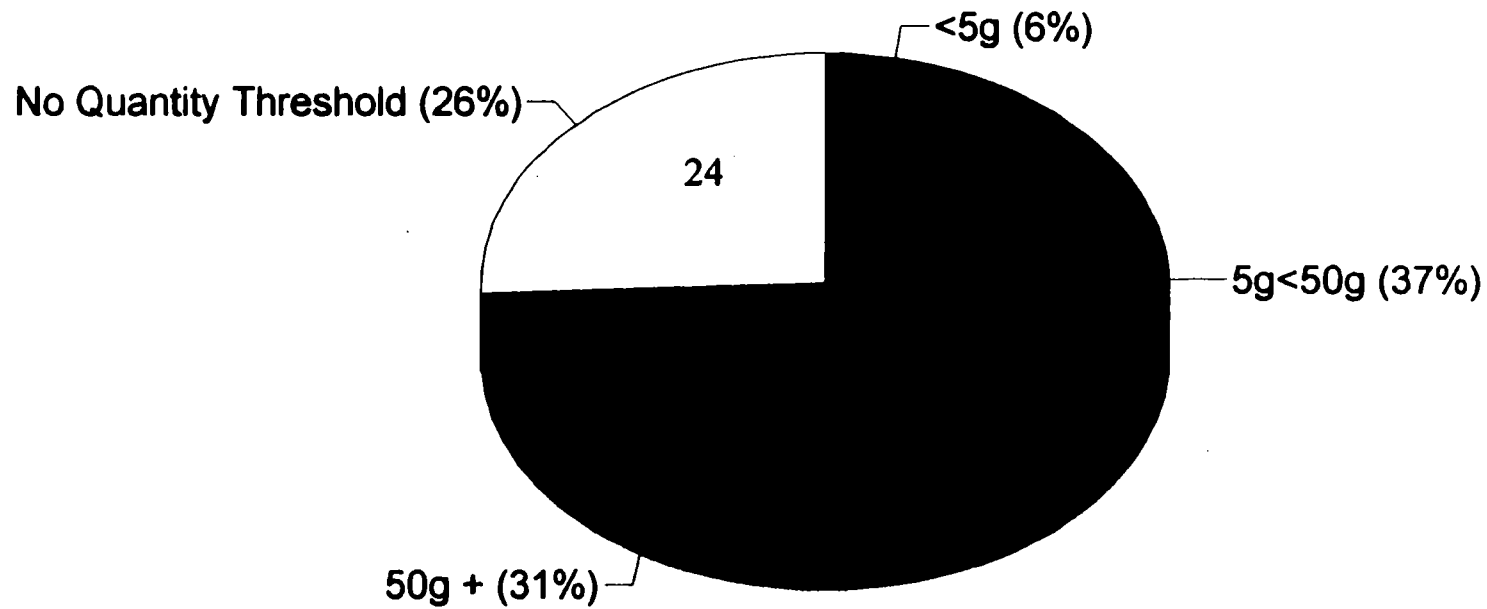
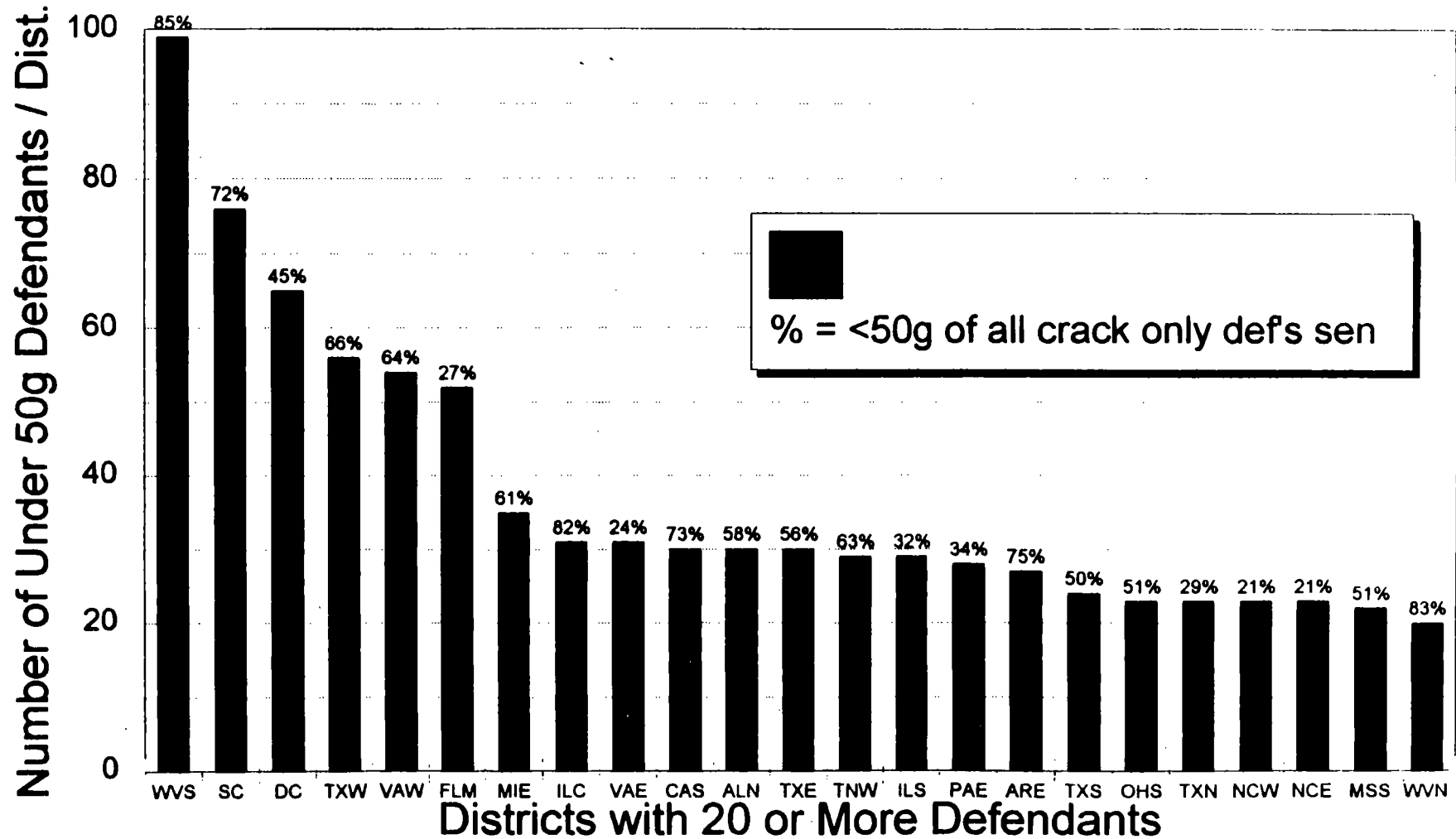


CHART 7

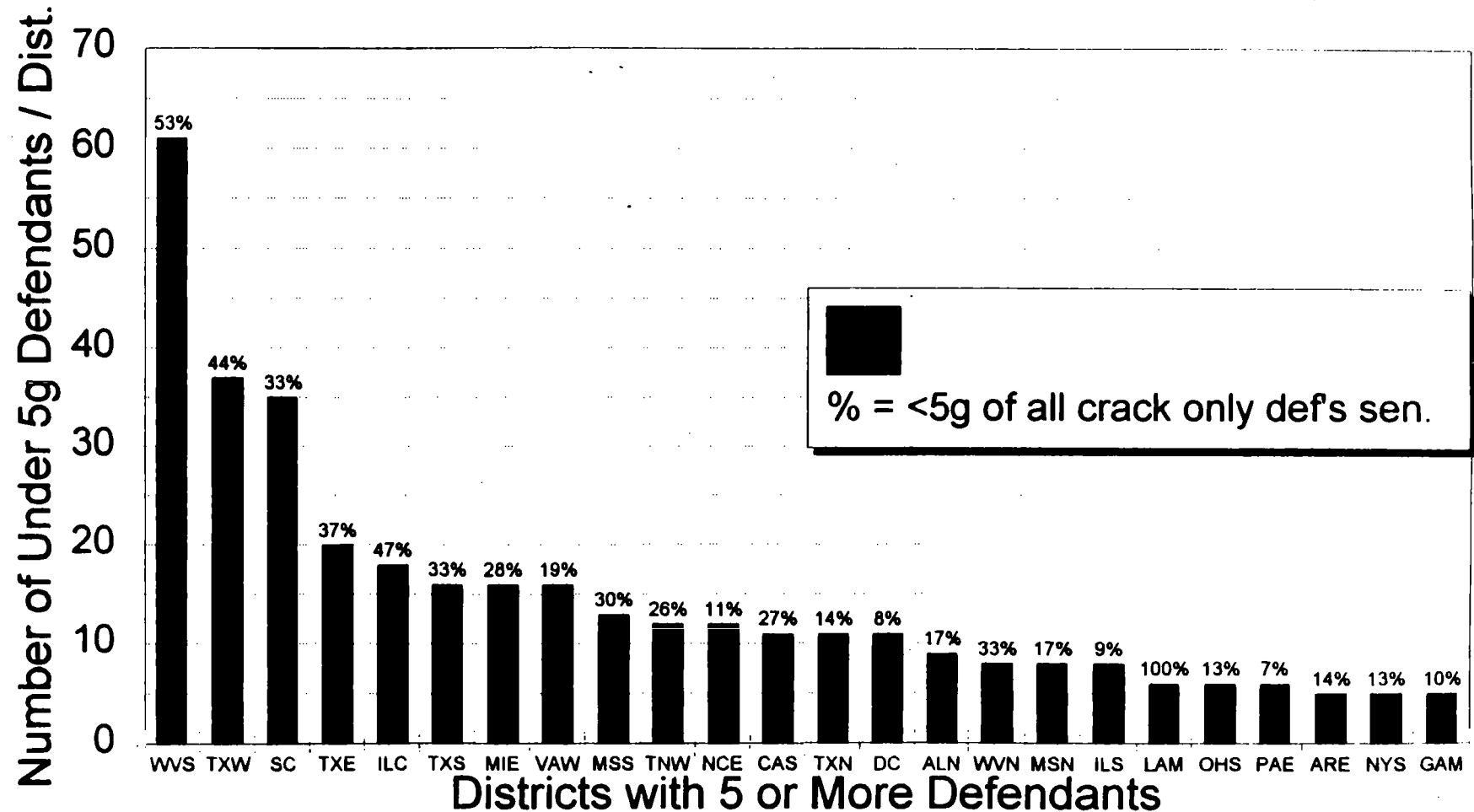
Districts with 20 or more "Crack Only" Defendants Sentenced: Under 50 Grams



Note: These 23 districts account for 71% of all <50g crack defendants sentenced in FY 1994 (total = 1,212).

CHART 8

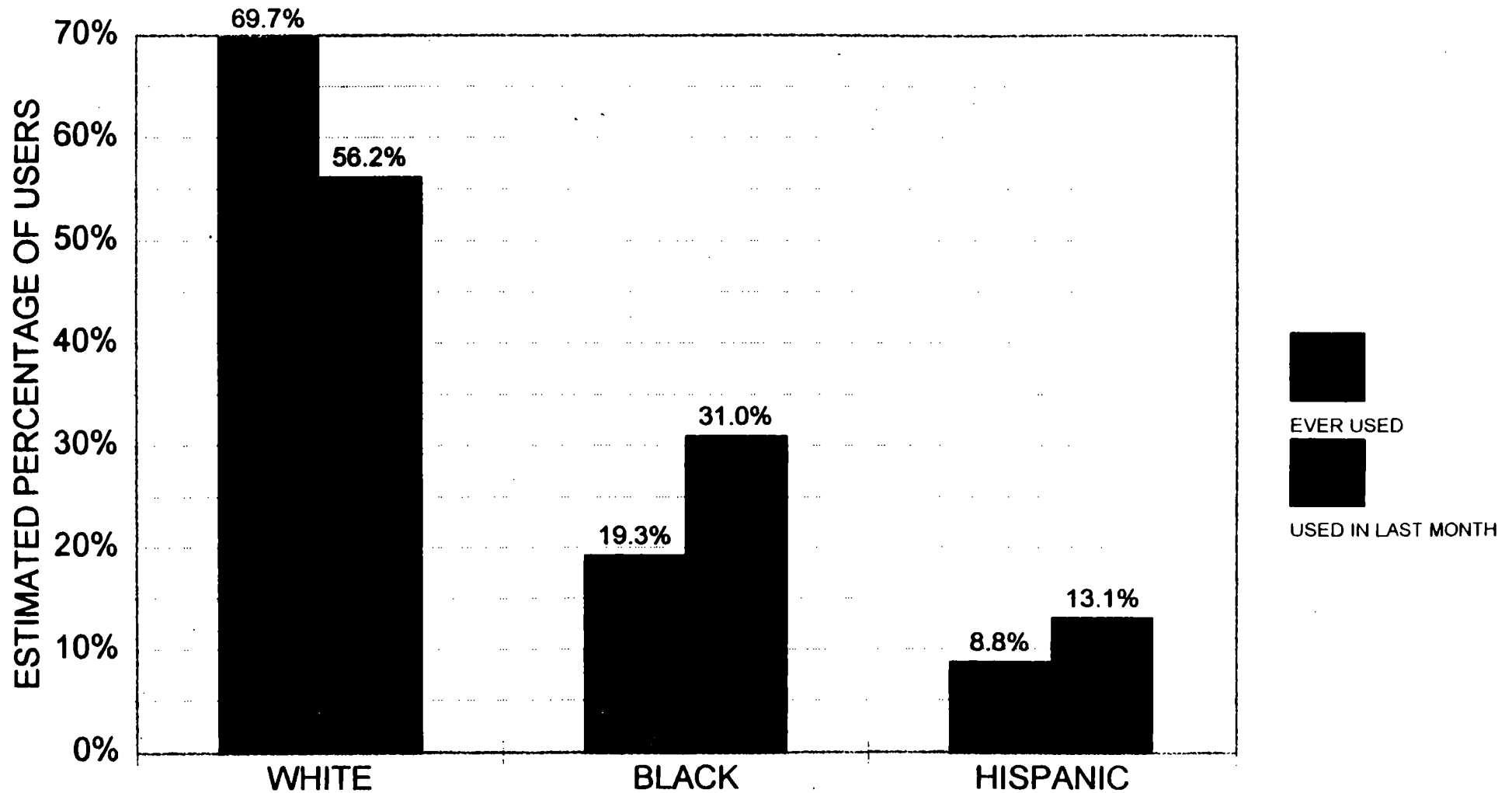
Districts with 5 or more "Crack Only" Defendants Sentenced: Under 5 Grams



Note: These 23 districts account for 71% of all <50g crack defendants sentenced in FY 1994 (total = 1,212).

CHART 9

POPULATION EVER USED & USED IN THE LAST MONTH BY RACE



SOURCE: NIDA. National Household Survey on Drug Abuse for 1994.

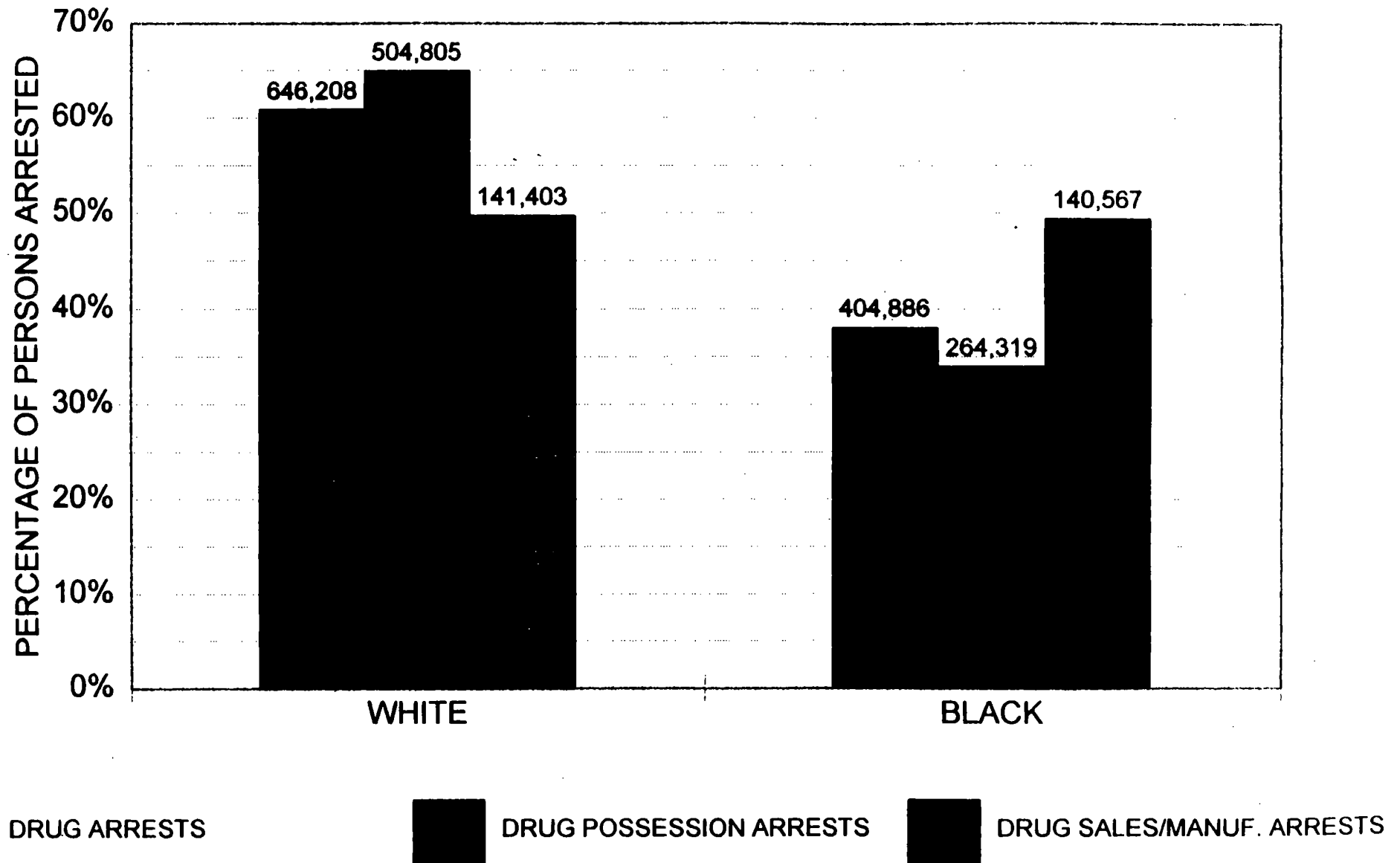
Note: Users (population estimate) are in thousands. When making assumption regarding this data caution should be used since "users" represent population estimates, with confidence intervals that should be kept in mind.

Percentages represent proportions of all persons who have ever used or who have used in the last month for 1994.

Percentages may not equal 100% due to rounding.

CHART 10

DRUG SALES/MANUFACTURING & POSSESSION ARRESTS BY RACE

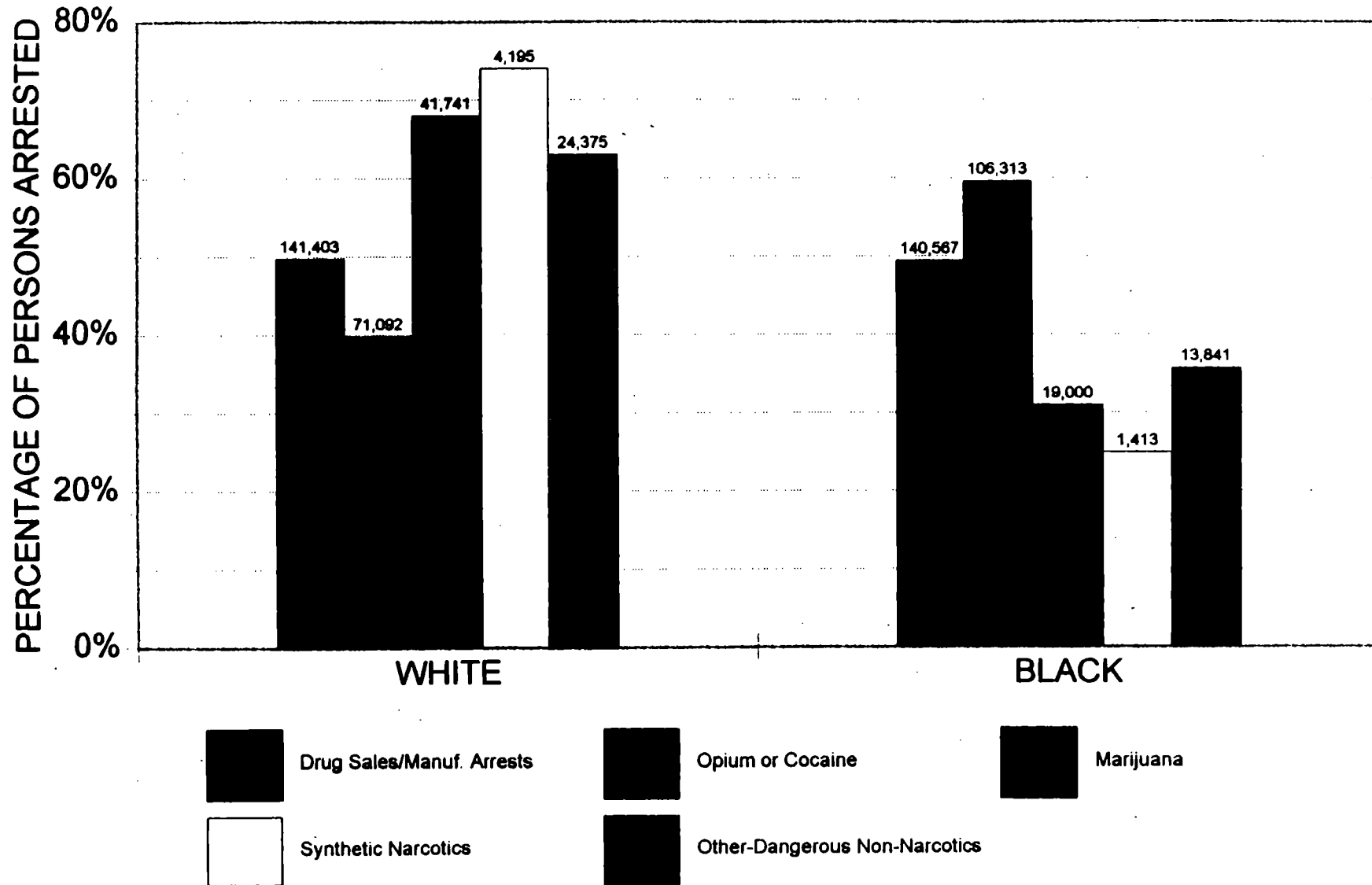


SOURCE: UCR special run.

NOTE: Percentages represent proportions of all persons arrested in each category.

CHART 1

DRUG SALES/MANUFACTURING ARRESTS BY RACE

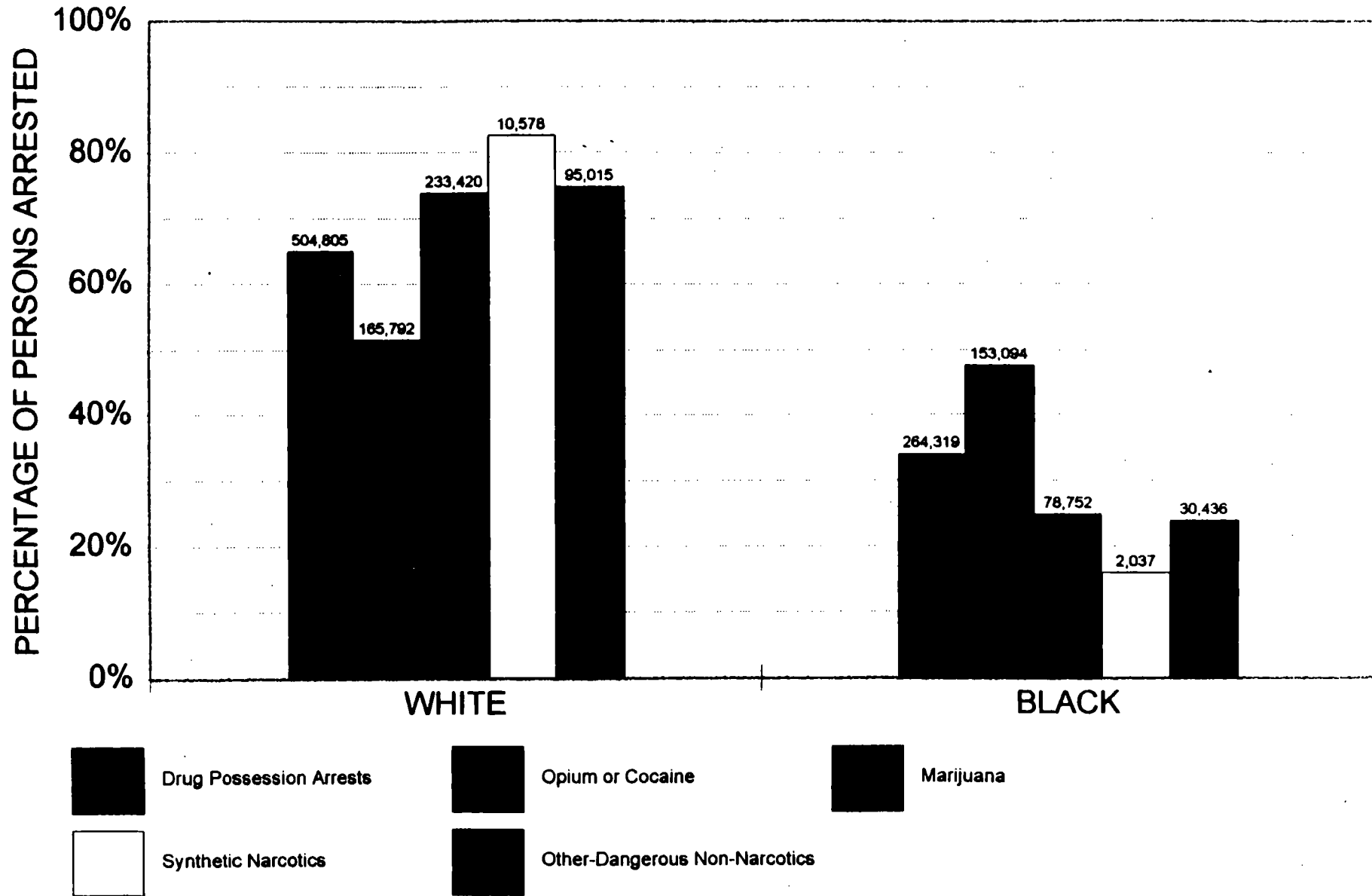


SOURCE: UCR special run.

NOTE: Percentages represent all persons arrested in each drug sales category.

CHAR. 12

DRUG POSSESSION ARRESTS BY RACE FOR 1994



SOURCE: UCR special run.

NOTE: Percentages represent all persons arrested in each drug possession category.

E. RACE OF USERS VERSUS RACE OF TRAFFICKERS: UNDERSTANDING CRACK MARKETS

- o Some commentators have compared the racial composition of crack users to the racial composition of federal sentenced crack defendants. The more appropriate comparison is between crack traffickers generally and defendants sentenced for crack in the federal system. It has become clear to us that we need to understand the demographics of crack traffickers generally.
- o Building on the Drug Use Forecasting System (DUF), NIJ implemented a Crack and Heroin Procurement Addendum last summer. In six cities, interviewers have been asking arrestees about their drug purchasing habits -- where they bought their drugs, from whom, how frequently, etc. NIJ has included a question about the race of the suppliers.

Preliminary results from three months of data showed the following:

- o **Distribution of Race in Six City Sample.** The total sample included 350 blacks, 164 whites, and 136 hispanics. 81% (129) of crack users in the sample were black, compared to 10% (16) white and 9% (15) hispanic.
- o **Race of Main Source of Crack.** In those cities represented in the sample, 59% (54) of crack users reported their main source for the drug was black, 5% (5) white, and 34% (31) hispanic.
- o **Where Crack was Purchased.** Overall, crack was purchased outdoor 73% of the time, while powder was bought outside 53% of the time. By race (averaged across sample cities), 77% (147) of blacks bought crack outdoors compared to 62% (29) of whites and 71% (17) of hispanics.
- o **Purchases During Past Seven Days.** Across all racial groups and sample cities, crack and heroin users report more purchases, on average, over the last week before their arrest than powder users.

Please note that because of the small sample size, these data must be considered very preliminary. Findings could change substantially with the addition of new data. NIJ plans to collect a full year's worth of data. As more quarters of data become available, NIJ will update and expand their analyses.

D. DRUG TRAFFICKING AND CRACK DEFENDANTS IN THE STATES

- o Although the USSC publishes detailed information about federal defendants sentenced for crack, there is no comparable information available for defendants prosecuted or sentenced for crack at the state level.
- o The majority of states do not distinguish between crack cocaine and powder cocaine for penalty or recordkeeping purposes. Indeed, many states only distinguish between possession and trafficking or manufacture, with no reference to drug type.
- o National data on defendants sentenced for drug offenses at the state level are estimated by the National Judicial Reporting Program (NJRP), a biennial survey that collects detailed information from a sample of jurisdictions on the sentences and characteristics of convicted felons. The NJRP estimates the number of felons convicted for drug possession and for drug trafficking. Among traffickers, the NJRP distinguishes only marijuana, other, and unspecified drugs; it does not identify felons convicted for crack.

The NJRP estimates that in 1992, 55% of convicted drug traffickers were black, 44% were white, and 1% were other.

- o The USSC's February 1995 Special Report to the Congress: Cocaine and Federal Sentencing Policy indicates that 14 states made some distinction between crack and powder cocaine in their statutory schemes. The Commission reported that only three states (South Carolina, Virginia, and Minnesota) were able to provide statistics on the number of crack cases. South Carolina reported that 50% of its drug cases involved crack cocaine. Minnesota reported that about 17% of its drug cases involved crack. Virginia reported that about 18% of its drug convictions were for crack cocaine, compared to about 53% for powder cocaine. The report did not include the race of the defendants.
- o NIJ has contacted Virginia, Minnesota, and South Carolina and has received data from them. Preliminary analysis from one state showed that 87% of those convicted for crack offenses in FY 1994 were black, 12% were white, and 1% were hispanic and other.

C. 1994 DRUG ARRESTS
UCR DATA

- o Cocaine is not listed as a separate category in the Uniform Crime Reports system; it is grouped with opiates.

All Drug Arrests (1,061,563). 61% of those arrested for drugs were white and 38% were black. (See Chart 10)

Arrests for Drug Sales/Manufacture - All drugs (284,008). 50% were white, 50% were black. (See Chart 10)

Arrests for Drug Possession - All drugs (777,555). 65% were white, 34% were black. (See Chart 10)

Arrests for Drug Sales/Manufacture - Opiates, Cocaine and derivatives. (178,297). 60% were black, 40% were white. (See Chart 11)

Arrests for Possession of Opiates, Cocaine or derivatives (321,607). 52% were white, 48% were black. (See Chart 12)

- o Although the 60/40 ratio of white to black drug arrests is often cited, when we look only at trafficking arrests, the ratio changes to 50/50. Further, when we look at drug trafficking arrests for opiates or cocaine, the ratio becomes 60/40 black to white.
- o Possession arrests account for almost 75% of all drug arrests, with an almost equal number of opium/cocaine arrests (321,607) and marijuana arrests (316,107).
- o The National Incident Based Reporting System (NIBRS), which is being phased in, separates cocaine from heroin and has a distinct category for crack. It includes both offense and arrest data, including the race of those arrested. Unfortunately, NIBRS is currently being implemented in only nine states, and is still incomplete and not validated for many of these states.

Available NIBRS data for 1994 show that 85% of those arrested for crack cocaine were black and 15% were white. Of the arrests reported by NIBRS in 1993, 88% of those arrested for crack were black.

**B. 1994 CRACK USE
HOUSEHOLD SURVEY DATA, NIDA***

- o Most reported crack users--those who had ever used as well as those who had used during the last month--were white.
- o Blacks as a group had a higher rate of crack use than other ethnic groups. Moreover, as the frequency of use increased, blacks made up a larger proportion of users.
- o **Ever Used.** For 1994, of the estimated 4,042,000 persons who had ever used crack, about 19% were black, 70% were white, and 9% were hispanic. This translates to population estimates of 782,000 blacks, 2,816,000 whites, and 354,000 hispanics who had ever used crack.

Rates of use. 3.3% of blacks surveyed reported ever having used crack, compared to 1.8% of whites and 1.9% of hispanics.

- o **Current Use/Past Month.** For 1994, of the estimated 520,000 persons who had used crack in the past month, about 31% were black, 56% were white, 13% were hispanic. This translates to population estimates of 161,000 blacks, 292,000 whites, and 68,000 hispanics who were current crack users.

Rates of use. 0.7% of blacks, 0.2% of whites, and 0.4% of hispanics reported having used crack in the past month.

Chart 9 displays, by race, the proportions of all users who had ever used crack or who had used crack in the past month.

* Note that the "users" reported are population estimates based on NIDA's survey to a sample of specially selected households, and thus are approximations. Each estimate has an upper and lower confidence limit.



U.S. Department of Justice
Criminal Division

FILE COPY

Office of the Assistant Attorney General

Washington, D.C. 20530

MAR 15 1996

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: The Deputy Attorney General

FROM: Robert S. Litt *W*
Deputy Assistant Attorney General

Mary Frances Harkenrider *MFH*
Counsel to the Assistant Attorney General

SUBJECT: Proposed Letter to the U.S. Sentencing Commission
Regarding Crack Cocaine

PURPOSE: Responds to Request for a Letter to the U.S. Sentencing
Commission Presenting the Department's Views on Crack
Cocaine Issue

In response to the request of the Attorney General and the Deputy Attorney General, attached is a proposed letter to the United States Sentencing Commission presenting a scheme for sentencing cocaine offenses. The letter presents four options for sentencing ratios for trafficking offenses involving crack cocaine, eliminates the severe sentencing of simple possession of crack, and proposes additional sentencing enhancements. We believe these proposals would vindicate essential law enforcement interests. Our ratios are based on the assumption that crack trafficking should be punished more severely than powder trafficking, but that the disparity should be narrowed.

The Bureau of Prisons has estimated the net effects of these ratios five and ten years from now, as displayed in the following table. The ratio indicated after the letter identifying each option reflects the quantity ratio in grams of crack and powder, respectively, that triggers a five-year mandatory minimum sentence.

CRACK/ POWDER RATIOS	NET EFFECT: 5 YRS		NET EFFECT: 10 YRS	
	INMATES	\$ COSTS (millions)	INMATES	\$ COSTS (millions)
A: 50/250	+400	+15.6	+150	+34.0
B: 50/500	-2,900	-113.4	-5,300	-438.4
C: 25/250	+1,600	+189.5	+2,300	+520.2
D: 25/500	-1,700	-66.5	-3,200	-261.3

The proposed letter also addresses pending legislative proposals that would alter the crack/powder ratios and expresses the Department's opposition to these bills. Two of the pending bills would equalize powder and crack cocaine at the level of crack; another would raise powder penalties five-fold without changing crack penalties, thus resulting in a 20:1 ratio at the current crack level. The greater cocaine powder penalties proposed in these bills would cause a high increase in the federal prison population over levels currently projected, as displayed below. Both the 1:1 and 20:1 quantity ratios proposed would drain prison resources to an excessive degree, particularly in light of the absence of a law enforcement need for the sharp increase in the cocaine powder sentences proposed.

PENDING BILLS	NET EFFECT: 5 YEARS		NET EFFECT: 10 YEARS	
	INMATES	\$COSTS (millions)	INMATES	\$ COSTS (millions)
Equalization at 5 grams	+14,000	+1,658.0	+26,600	+5,443.8
20:1 at 5/100	+6,000	+710.6	+10,500	+2,209.1

The letter would allow the Department to take an affirmative role in the discussion of crack sentencing policy. It could help establish a framework for discussion with the Commission to ensure that it works towards a reasonable ratio. It would also respond to past criticism that the Department was too vague about what sentencing scheme it considered appropriate.

On the other hand, any proposal that has the effect of decreasing sentences for some crack traffickers (as all of these proposals would do) could be used to portray the Department as soft on crime and drugs. Additionally, a letter at this point may regenerate interest in the issue, leading to the adoption of harsher proposals than we might prefer. Recommending legislation

at this time must also be considered against the backdrop of the recent enactment that disapproved the Sentencing Commission's proposal to reduce crack penalties to the levels applicable to cocaine powder, Pub. L. No. 104-38, 109 Stat. 334. The President's signing statement of October 30, 1995 (attached), contained strong references to the need for tough penalties and signaled a reluctance to reduce them: "I am not going to let anyone who peddles drugs get the idea that the cost of doing business is going down."

Finally, it bears noting that the Sentencing Commission has indicated its desire not to make recommendations on changes in the crack penalties until the 1997 amendment cycle. The Commission wishes to proceed slowly and to assure itself that it has carefully considered all options. The alternatives to sending the attached letter include not pursuing the issue at the current time at all, sending a letter from another Department official, or presenting the proposals through discussions with the Sentencing Commission. A combination of the first and last alternatives may be the most appealing. Members of the Commission have made numerous requests for the Department's position. When the Commissioners again focus on the issue, informal discussions would permit us to put forth our ideas to influence the Commission's eventual proposal to Congress, but in a manner that would not require us to take the lead.

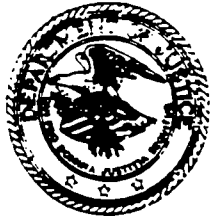
RECOMMENDATION: The Criminal Division recommends that it be authorized to discuss the proposals outlined in the attached letter with the Sentencing Commission when the Commission next addresses the crack penalty issue and to share draft legislation implementing these proposals without submitting a formal recommendation to the Commission.

Approved: _____

Disapproved: _____

Date: _____

Attachment



Office of the Attorney General
Washington, D. C. 20530

The Honorable Richard P. Conaboy
Chairman
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Judge Conaboy:

As you know, the development of an appropriate sentencing scheme for cocaine offenses has been an important issue for the Department of Justice and one that continues to occupy our efforts. We believe it would be most useful if the Department and the United States Sentencing Commission could join forces and agree upon a new scheme for recommendation to Congress. To this end we offer for your consideration the following statutory amendments, including several options to amend current mandatory minimum sentences, as well as a guideline amendment. We believe it is important for these recommendations to be considered together as a complete package reflecting a balanced approach to sentencing crack and cocaine powder offenders. Our recommendations include:

- ▶ Changing the 100:1 ratio, as set forth below;
- ▶ Conforming penalties for simple possession of crack with penalties for simple possession of other drugs;
- ▶ Adding enhancements to address:
 - violence during a drug transaction;
 - using a minor in a drug transaction;
 - distributing powder cocaine knowing that it is to be converted into crack.

Guiding Principles

Our guiding principles are fourfold:

- (1) Crack cocaine is the more harmful form of cocaine. Therefore, the law should punish trafficking in crack

more severely than trafficking in equal quantities of cocaine powder.

- (2) Penalties for trafficking in crack must adequately punish this illegal activity, and any change in penalties must not send the wrong message. We continue to believe that the distribution of crack cocaine is a serious offense.
- (3) The disparity between crack and cocaine powder sentencing should be narrowed to recognize that powder cocaine is easily converted to crack. However, the narrowing should not result in the equalization of crack and powder penalties because some powder remains in this less harmful form when ultimately used.
- (4) The penalties for powder dealers must be sufficient to account for the harms associated with the distribution of crack cocaine -- harms that they set in motion by their traffic in powder cocaine. In addition, individuals who distribute powder cocaine knowing that it will be converted into crack should be punished more harshly than those individuals who traffic in powder cocaine without such knowledge.

Our guiding principles are consistent with the recently enacted legislation disapproving the Commission's previously proposed equalization of crack and cocaine powder penalties, which directed the Commission to submit to Congress recommendations regarding cocaine sentencing. That legislation further directed that the recommendations reflect such considerations as the need for sentences applicable to crack trafficking to exceed those applicable to trafficking in a like quantity of powder cocaine and the need for treating a powder seller like a crack seller if the former had knowledge that the powder would be converted into crack prior to its distribution to individual users. Pub. L. No. 104-38, 109 Stat. 334.

Powder/Crack Ratio Options

We believe that it is possible to develop a sentencing scheme for crack offenses that will vindicate the important law enforcement concerns listed above. We offer four options relating to the powder/crack ratio for consideration. We would find any one of the following acceptable:

- **Option A**, a 5:1 ratio, would provide for a five-year mandatory minimum at 50 grams of crack or 250 grams of powder and a ten-year mandatory minimum at 500 grams of crack or 2.5 kilograms of powder.

- Option B, a 10:1 ratio, would provide for a five-year mandatory minimum at 50 grams of crack or 500 grams of powder and a ten-year mandatory minimum at 500 grams of crack or 5 kilograms of powder.
- Option C, a 10:1 ratio, would provide for a five-year mandatory minimum at 25 grams of crack or 250 grams of powder and a ten-year mandatory minimum at 250 grams of crack or 2.5 kilograms of powder.
- Option D, a 20:1 ratio would provide for a five-year mandatory minimum at 25 grams of crack or 500 grams of powder and a ten-year mandatory minimum at 250 grams of crack or 5 kilograms of powder.

(The enclosed Appendix depicts the differences among the options and compares them to the current penalty structure.)

These options vary in four respects:

First, the ratio between powder and crack cocaine

There is no exact mathematical way to reflect the differences in harms caused by crack and powder cocaine trafficking. Nonetheless, we believe the differences best justify a ratio between 5:1 and 20:1, and that each ratio presented here reflects a reasonable assessment of the differences between crack and powder cocaine.

We believe the lowest supportable ratio to be 5:1, although we cannot recommend a 5:1 ratio that maintains the current powder penalties. Such a proposed ratio, like the equalization of penalties previously recommended by the Sentencing Commission, would reduce crack sentences too greatly and send the wrong message to crack dealers.

Second, the mandatory minimum penalties

Two of the options set a five-year mandatory minimum penalty for distribution of 25 grams of crack (Options C and D) and two at 50 grams of crack (Options A and B). We believe that either of these levels would be consistent with effective law enforcement by providing a mandatory minimum sentence for persons who deal in quantities of crack that merit such sentences. Setting the mandatory minimum at any amount greater than 50 grams, however, would send the wrong message to crack violators.

Third, whether powder sentences are increased

Two of the options raise cocaine powder penalties (Options A and C). These options achieve a lower ratio between the substances while reducing crack penalties to a lesser degree than the other options. Additionally, some argue that the present sentencing structure understates the harm done by cocaine powder because of its easy conversion to crack. Raising sentences for powder cocaine addresses this rationale as well.

Fourth. the impact on the prison system

Displayed below are Bureau of Prisons' estimates of the net effects of these ratios five and ten years from now, both in terms of population changes and increasing or decreasing costs. The ratio indicated after the letter identifying each option reflects the quantity in grams of crack and powder, respectively, that triggers a five-year mandatory minimum sentence.

CRACK/ POWDER RATIOS	NET EFFECT: 5 YRS		NET EFFECT: 10 YRS	
	INMATES	\$ COSTS (millions)	INMATES	\$ COSTS (millions)
A: 50/250	+400	+15.6	+150	+34.0
B: 50/500	-2,900	-113.4	-5,300	-438.4
C: 25/250	+1,600	+189.5	+2,300	+520.2
D: 25/500	-1,700	-66.5	-3,200	-261.3

Pending Bills

In addition to the ratio options presented above, there are at least three bills pending which would revise cocaine penalties: H.R. 2598, S. 1253, and S. 1398. H.R. 2598 and S. 1398 would equalize crack and cocaine powder trafficking penalties by raising powder penalties under 21 U.S.C. §841(b) (1) to the crack levels. S. 1253, sponsored by Senators Abraham, Kyl, Feinstein, and Shelby, would provide for a 20:1 quantity ratio between cocaine powder and crack by lowering the powder quantities (and thereby raising the penalties for offenses involving them) while leaving the current crack penalties untouched.

The greater cocaine powder penalties proposed by these bills would cause a high increase in the federal prison population over levels currently projected. The Bureau of Prisons has estimated the net effects of these ratios, as displayed below. Both the 1:1 and 20:1 quantity ratios proposed would drain prison resources to an excessive degree, particularly in light of the

absence of a law enforcement need for the sharp increase in the cocaine powder sentences proposed.

PENDING BILLS	NET EFFECT: 5 YEARS		NET EFFECT: 10 YEARS	
	INMATES	\$ COSTS (millions)	INMATES	\$ COSTS (millions)
Equalization at 5 grams	+14,000	+1,658.0	+26,600	+5,443.8
20:1 at 5/100	+6,000	+710.6	+10,500	+2,209.1

Equalization at crack penalty levels

The bills that equalize penalties for powder and crack trafficking offenses are inconsistent with the Department's stated position that the distribution of crack cocaine should be punished more harshly than the distribution of equal quantities of cocaine powder.¹ Moreover, the legislation disapproving the Sentencing Commission's attempt to equalize crack and powder penalties, Pub. L. No. 104-38, 109 Stat. 334, directed the Sentencing Commission to submit to Congress recommendations regarding changes to the statutes and sentencing guidelines relating to cocaine that must reflect, among other things, that sentences for trafficking in crack should generally exceed those for trafficking in a like quantity of cocaine powder.

Equalization at the level of current crack penalties is also problematic because it creates a sharp increase in powder sentences. As indicated above, it would result in a vast growth in the federal prison population. Finally, law enforcement concerns do not dictate the level of increase proposed, which seems to be based purely on the desire to address the current crack/powder differential.

¹ H.R. 2598, introduced by Congressman Solomon, would also equalize the penalties for simple possession of 5 grams of powder and crack cocaine by providing a 5-year mandatory minimum for both. S. 1398, introduced by Senator Breaux, would leave intact the 5-year mandatory minimum for simple possession of crack cocaine without expanding this provision to powder cocaine. As more fully discussed below, we do not believe the mandatory minimum penalty is desirable for simple possession of either form of cocaine.

20:1 Ratio Maintaining Current Crack Penalties

S. 1253 would provide for a 20:1 quantity ratio between cocaine powder and crack by lowering the powder quantities (and thereby raising the penalties for offenses involving them) while leaving the current crack quantities untouched. Specifically, it

The Honorable Richard P. Conaboy
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amends 21 U.S.C. §841(b) to decrease the amount necessary to trigger the mandatory minimum sentences for cocaine powder from 500 grams and 5 kilograms to 100 grams and 1 kilogram for the 5- and 10-year penalties, respectively. It makes no adjustment to the current simple possession penalties.

Although a 20:1 quantity ratio is within the range of reasonableness, we do not favor reaching that result by only raising powder penalties. Our concerns about a sharp increase in powder sentences stated above with regard to the proposed equalization of crack and powder penalties extend as well to this proposed 20:1 ratio. That is, a five-year mandatory prison term for distributing 100 grams of cocaine powder is a harsher punishment than warranted to address law enforcement concerns involving cocaine powder and would produce too great an increase in the federal prison population.

Conforming Penalties for Simple Possession of Crack with Penalties for Simple Possession of Other Drugs

At present, simple possession of 5 grams of crack -- without the intent to distribute it -- carries a five-year mandatory minimum sentence. We recommend conforming penalties for simple possession of crack with penalties for simple possession of other drugs -- i.e., a maximum one-year penalty. Federal enforcement should be focused on those distributing drugs to others. While 5 grams of crack are generally more than a person would possess for personal use, the requirement of proving intent to distribute has not typically hindered prosecutions of actual dealers.

New Enhancements

We believe the law should provide stronger enhancements for particularly egregious trafficking cases to assure appropriate punishment and to send a clear message that this behavior will not be tolerated. Thus, we recommend the following in conjunction with a change in the sentencing ratio between crack and powder cocaine trafficking.

Violence During a Drug Transaction

We recommend consideration of a statutory change to provide a sentencing enhancement for violence during a drug transaction. The enhancement could take the form of an amendment to present 18 U.S.C. §924(c), which now provides a five-year additional penalty for using or carrying a firearm during a drug trafficking felony. It would provide a 10-year mandatory sentence for discharging a firearm or for causing serious bodily injury during a drug trafficking felony by the use of a firearm or other dangerous weapon. A statutory change of the type discussed would be preferable to a guideline enhancement in order to send a strong message to crack traffickers that violence will be dealt with severely.

Employing Minors in the Commission of a Drug Felony

We recommend consideration of a statutory change to provide a mandatory sentencing enhancement ranging from one to five years for employing a minor or minors in the commission of a drug felony. The sentencing guidelines presently contain enhancements that call for an approximately 25% increase in the guidelines sentence for drug offenses when minors are used. We believe the guidelines enhancement to be insufficient but must be wary of casting too wide a net. For example, we do not wish to over-punish a dealer who may have involved a single minor close to his or her age. One possibility may be to provide a one-year minimum enhancement for employing a single minor close in age to the offender, and a five-year minimum enhancement for employing more than one minor or employing one who is more than three years younger than the offender. In this regard a statutory amendment is needed to send a strong message to crack and other drug traffickers that employing youth will not be tolerated.

Trafficking in Powder with Knowledge It Will Be Converted to Crack

We recommend consideration of a sentencing guideline amendment to provide that if a distributor of cocaine powder knows it is to be converted to crack, the distributor should be sentenced as though he or she were distributing crack. This enhancement would provide clear authority to impose crack sentences for such more culpable powder dealers in instances in which we may not be successful in prosecuting them as crack conspirators.

The Honorable Richard P. Conaboy
Page 8

We would be pleased to work with the Commission to
accomplish the goals set forth above.

Sincerely,

Janet Reno

Enclosure

APPENDIX

CHARTS

1. Option A, a 5:1 ratio, would provide for a five-year mandatory minimum at 50 grams of crack or 250 grams of powder and a ten-year mandatory minimum at 500 grams of crack or 2.5 kilograms of powder.
2. Option B, a 10:1 ratio, would provide for a five-year mandatory minimum at 50 grams of crack or 500 grams of powder and a ten-year mandatory minimum at 500 grams of crack or 5 kilograms of powder.
3. Option C, a 10:1 ratio, would provide for a five-year mandatory minimum at 25 grams of crack or 250 grams of powder and a ten-year mandatory minimum at 250 grams of crack or 2.5 kilograms of powder.
4. Option D, a 20:1 ratio would provide for a five-year mandatory minimum at 25 grams of crack or 500 grams of powder and a ten-year mandatory minimum at 250 grams of crack or 5 kilograms of powder.

OPTION A:**5:1 RATIO WITH HIGHER CRACK THRESHOLDS/LOWER PENALTIES
AND LOWER POWDER THRESHOLDS/HIGHER PENALTIES:****CRACK THRESHOLDS AT 50 AND 500 GRAMS; POWDER THRESHOLDS AT 250 AND 2,500 GRAMS (2.5 KG)**

QUANTITY	DRUG (RANGE)	OFFENSE LEVEL	SENTENCE (IN MONTHS)	PENALTY RATIO (AT MINIMUM)	PRESENT OFFENSE LEVEL	SENTENCE (MONTHS)
5 G	Crack (5-10 G) Powder (< 12.5 G)	16 12	21-27 10-16	4.2:1 ¹ -- crack/powder	26 12	63-78 10-16
10 G	Crack (10-20 G) Powder (< 12.5 G)	18 12	27-33 10-16	5.4:1 ¹ -- crack/powder	26 12	63-78 10-16
25 G	Crack (20-30 G) Powder (25-50 G)	20 16	33-41 21-27	1.6:1 -- crack/powder	28 14	78-97 15-21
50 G	Crack★ (50-200 G) Powder (50-100 G)	26 18	63-78 27-33	2.3:1 -- crack/powder	32 16	121-151 21-27
100 G	Crack (50-200 G) Powder (100-150 G)	26 20	63-78 33-41	1.9:1 -- crack/powder	32 18	121-151 27-33
200 G	Crack (200-350 G) Powder (200-250 G)	28 24	78-97 51-63	1.5:1 -- crack/powder	34 20	151-188 33-41
250 G	Crack (200-350 G) Powder★ (250 G-1 KG)	28 26	78-97 63-78	1.2:1 -- crack/powder	34 20	151-188 33-41
500 G	Crack♦ (500 G-1.5 KG) Powder (250 G-1 KG)	32 26	121-151 63-78	1.9:1 -- crack/powder	36 26	188-235 63-78
2 KG	Crack (1.5-5 KG) Powder (1.75-2.5 KG)	34 30	151-188 97-121	1.6:1 -- crack/powder	38 28	235-293 78-97
2.5 KG	Crack (1.5-5 KG) Powder♦ (2.5-7.5 KG)	34 32	151-188 121-151	1.2:1 -- crack/powder	38 28	235-293 78-97
5 KG	Crack (5-15 KG) Powder (2.5-7.5 KG)	36 32	188-235 121-151	1.6:1 -- crack/powder	38 32	235-293 121-151

¹ Offense level 12 is subject to a split sentence with a minimum of 5 months incarceration. See U.S.S.G. § 5C1.1 (d) and (e).

OPTION A:**5:1 RATIO WITH HIGHER CRACK THRESHOLDS/LOWER PENALTIES****AND LOWER POWDER THRESHOLDS/HIGHER PENALTIES:****CRACK THRESHOLDS AT 50 AND 500 GRAMS; POWDER THRESHOLDS AT 250 AND 2,500 GRAMS (2.5 KG)**

QUANTITY	DRUG (RANGE)	OFFENSE LEVEL	SENTENCE (IN MONTHS)	PENALTY RATIO (AT MINIMUM)	PRESENT OFFENSE LEVEL	SENTENCE (MONTHS)
15 KG	Crack (15 KG or >)	38	235-293	1.6:1 -- crack/powder	38	235-293
	Powder (7.5-25 KG)	34	151-188		34	151-188
50 KG	Crack (15 KG or >)	38	235-293	1.3:1 -- crack/powder	38	235-293
	Powder (25-75 KG)	36	188-235		36	188-235
150 KG	Crack (15 KG or >)	38	235-293	1:1 -- crack/powder	38	235-293
	Powder (75 KG or >)	38	235-293		38	235-293

Key

- ★ 5-year mandatory minimum triggered
- ◆ 10-year mandatory minimum triggered

**OPTION B: 10:1 RATIO WITH LOWER CRACK PENALTIES / HIGHER THRESHOLDS (50 & 500 GRAMS)
AND POWDER PENALTIES / THRESHOLDS HELD AT PRESENT LEVELS (500 & 5,000 GRAMS (5 KG))**

QUANTITY	DRUG (RANGE)	OFFENSE LEVEL	SENTENCE (IN MONTHS)	PENALTY RATIO (AT MINIMUM)	PRESENT OFFENSE LEVEL	SENTENCE (MONTHS)
5 G	Crack (5-10 G) Powder (< 25 G)	16 12	21-27 10-16	4.2:1 -- crack/powder	26 12	63-78 10-16
10 G	Crack (10-20 G) Powder (< 25 G)	18 12	27-33 10-16	5.4:1 -- crack/powder	26 12	63-78 10-16
25 G	Crack (20-30 G) Powder (25-50 G)	20 14	33-41 15-21	2.2:1 -- crack/powder	28 14	78-97 15-21
50 G	Crack★ (50-200 G) Powder (50-100 G)	26 16	63-78 21-27	3:1 -- crack/powder	32 16	121-151 21-27
100 G	Crack (50-200 G) Powder (100-200 G)	26 18	63-78 27-33	2.3:1 -- crack/powder	32 18	121-151 27-33
200 G	Crack (200-350 G) Powder (200-300 G)	28 20	78-97 33-41	2.4:1 -- crack/powder	34 20	151-188 33-41
250 G	Crack (200-350 G) Powder (200-300 G)	28 20	78-97 33-41	2.4:1 -- crack/powder	34 20	151-188 33-41
500 G	Crack♦ (500 G-1.5 KG) Powder★ (500 G-2 KG)	32 26	121-151 63-78	1.9:1 -- crack/powder	36 26	188-235 63-78
2 KG	Crack (1.5-5 KG) Powder (2-3.5 KG)	34 28	151-188 78-97	1.9:1 -- crack/powder	38 28	235-293 78-97
2.5 KG	Crack (1.5-5 KG) Powder (2-3.5 KG)	34 28	151-188 78-97	1.9:1 -- crack/powder	38 28	235-293 78-97
5 KG	Crack (5-15 KG) Powder♦ (5-15 KG)	36 32	188-235 121-151	1.6:1 -- crack/powder	38 32	235-293 121-151

¹ Offense level 12 is subject to a split sentence with a minimum of 5 months incarceration. See U.S.S.G. § 5C1.1 (d) and (e).

OPTION B:

**10:1 RATIO WITH LOWER CRACK PENALTIES / HIGHER THRESHOLDS (50 & 500 GRAMS)
AND POWDER PENALTIES / THRESHOLDS HELD AT PRESENT LEVELS (500 & 5,000 GRAMS (5 KG))**

QUANTITY	DRUG (RANGE)	OFFENSE LEVEL	SENTENCE (IN MONTHS)	PENALTY RATIO (AT MINIMUM)	PRESENT OFFENSE LEVEL	SENTENCE (MONTHS)
15 KG	Crack (15 or > KG) Powder (15-50 KG)	38 34	235-293 151-188	1.6:1 -- crack/powder	38 34	235-293 151-188
50 KG	Crack (15 or > KG) Powder (50-150 KG)	38 36	235-293 188-235	1.3:1 -- crack/powder	38 36	235-293 188-235
150 KG	Crack (15 or > KG) Powder (150 or > KG)	38 38	235-293 235-293	1:1 -- crack/powder	38 38	235-293 235-293

Key

- ★ 5-year mandatory minimum triggered
- ◆ 10-year mandatory minimum triggered

OPTION C:**10:1 RATIO WITH HIGHER CRACK THRESHOLDS/LOWER PENALTIES****AND LOWER POWDER THRESHOLDS/HIGHER PENALTIES:****CRACK THRESHOLDS AT 25 AND 250 GRAMS; POWDER THRESHOLDS AT 250 AND 2,500 GRAMS (2.5 KG)**

QUANTITY	DRUG (RANGE)	OFFENSE LEVEL	SENTENCE (IN MONTHS)	PENALTY RATIO (AT MINIMUM)	PRESENT OFFENSE LEVEL	SENTENCE (MONTHS)
5 G	Crack (5-10 G) Powder (< 12.5 G)	18 12	27-33 10-16	5.4:1 ¹ -- crack/powder	26 12	63-78 10-16
10 G	Crack (10-15 G) Powder (< 12.5 G)	20 12	33-41 10-16	6.6:1 -- crack/powder	26 12	63-78 10-16
25 G	Crack★ (25-100 G) Powder (25-50 G)	26 16	63-78 21-27	3:1 -- crack/powder	28 14	78-97 15-21
50 G	Crack (25-100 G) Powder (50-100 G)	26 18	63-78 27-33	2.3:1 -- crack/powder	32 16	121-151 21-27
100 G	Crack (100-175 G) Powder (100-150 G)	28 20	78-97 33-41	2.4:1 -- crack/powder	32 18	121-151 27-33
200 G	Crack (175-250 G) Powder (200-250 G)	30 24	97-121 51-63	1.9:1 -- crack/powder	34 20	151-188 33-41
250 G	Crack♦ (250-750 G) Powder★ (250 G-1 KG)	32 26	121-151 63-78	1.9:1 -- crack/powder	34 20	151-188 33-41
500 G	Crack (250 G-750 G) Powder (250 G-1 KG)	32 26	121-151 63-78	1.9:1 -- crack/powder	36 26	188-235 63-78
2 KG	Crack (750 G-2.5 KG) Powder (1.75-2.5 KG)	34 30	151-188 97-121	1.6:1 -- crack/powder	38 28	235-293 78-97
2.5 KG	Crack (2.5-7.5 KG) Powder♦ (2.5-7.5 KG)	36 32	188-235 121-151	1.6:1 -- crack/powder	38 28	235-293 78-97
5 KG	Crack (2.5-7.5 KG) Powder (2.5-7.5 KG)	36 32	188-235 121-151	1.6:1 -- crack/powder	38 32	235-293 121-151

¹ Offense level 12 is subject to a split sentence with a minimum of 5 months incarceration. See U.S.S.G. § 5C1.1 (d) and (e).

OPTION C:**10:1 RATIO WITH HIGHER CRACK THRESHOLDS/LOWER PENALTIES****AND LOWER POWDER THRESHOLDS/HIGHER PENALTIES:****CRACK THRESHOLDS AT 25 AND 250 GRAMS; POWDER THRESHOLDS AT 250 AND 2,500 GRAMS (2.5 KG)**

QUANTITY	DRUG (RANGE)	OFFENSE LEVEL	SENTENCE (IN MONTHS)	PENALTY RATIO (AT MINIMUM)	PRESENT OFFENSE LEVEL	SENTENCE (MONTHS)
15 KG	Crack (7.5 KG or >)	38	235-293	1.6:1 -- crack/powder	38	235-293
	Powder (7.5-25 KG)	34	151-188		34	151-188
50 KG	Crack (7.5 KG or >)	38	235-293	1.3:1 -- crack/powder	38	235-293
	Powder (25-75 KG)	36	188-235		36	188-235
150 KG	Crack (7.5 KG or >)	38	235-293	1:1 -- crack/powder	38	235-293
	Powder (75 KG or >)	38	235-293		38	235-293

Key

- ★ 5-year mandatory minimum triggered
- ◆ 10-year mandatory minimum triggered

**OPTION D: 20:1 RATIO WITH LOWER CRACK PENALTIES / HIGHER THRESHOLDS (25 & 250 GRAMS)
AND POWDER PENALTIES / THRESHOLDS HELD CONSTANT AT PRESENT LEVELS (500 AND 5,000 GRAMS (5 KG))**

QUANTITY	DRUG (RANGE)	OFFENSE LEVEL	SENTENCE (IN MONTHS)	PENALTY RATIO (AT MINIMUM)	PRESENT OFFENSE LEVEL	SENTENCE (MONTHS)
5 G	Crack (5-10 G) Powder (< 25 G)	18 12	27-33 10-16	5.4:1 ¹ -- crack/powder	26 12	63-78 10-16
10 G	Crack (10-15 G) Powder (< 25 G)	20 12	33-41 10-16	6.6:1 ¹ -- crack/powder	26 12	63-78 10-16
25 G	Crack★ (25-100 G) Powder (25-50 G)	26 14	63-78 15-21	4.2:1 -- crack/powder	28 14	78-97 15-21
50 G	Crack (25-100 G) Powder (50-100 G)	26 16	63-78 21-27	3:1 -- crack/powder	32 16	121-151 21-27
100 G	Crack (100-175 G) Powder (100-200 G)	28 18	78-97 27-33	2.9:1 -- crack/powder	32 18	121-151 27-33
200 G	Crack (175-250 G) Powder (200-300 G)	30 20	97-121 33-41	2.9:1 -- crack/powder	34 20	151-188 33-41
250 G	Crack♦ (250-750 G) Powder (200-300 G)	32 20	121-151 33-41	3.7:1 -- crack/powder	34 20	151-188 33-41
500 G	Crack (250 G-750 G) Powder★ (500-2 KG)	32 26	121-151 63-78	1.9:1 -- crack/powder	36 26	188-235 63-78
2 KG	Crack (750 G-2.5 KG) Powder (2-3.5 KG)	34 30	151-188 78-97	1.9:1 -- crack/powder	38 28	235-293 78-97
2.5 KG	Crack (2.5-7.5 KG) Powder (2-3.5 KG)	36 32	188-235 78-97	2.4:1 -- crack/powder	38 28	235-293 78-97
5 KG	Crack (2.5-7.5 KG) Powder♦ (5-15 KG)	36 32	188-235 121-151	1.6:1 -- crack/powder	38 32	235-293 121-151

¹ Offense level 12 is subject to a split sentence with a minimum of 5 months incarceration. See U.S.S.G. § 5C1.1 (d) and (e)

**OPTION D: 20:1 RATIO WITH LOWER CRACK PENALTIES / HIGHER THRESHOLDS (25 & 250 GRAMS)
AND POWDER PENALTIES / THRESHOLDS HELD CONSTANT AT PRESENT LEVELS (500 AND 5,000 GRAMS (5 KG))**

QUANTITY	DRUG (RANGE)	OFFENSE LEVEL	SENTENCE (IN MONTHS)	PENALTY RATIO (AT MINIMUM)	PRESENT OFFENSE LEVEL	SENTENCE (MONTHS)
15 KG	Crack (7.5 KG or >)	38	235-293	1.6:1 -- crack/powder	38	235-293
	Powder (15-50 KG)	34	151-188		34	151-188
50 KG	Crack (7.5 KG or >)	38	235-293	1.3:1 -- crack/powder	38	235-293
	Powder (50-150 KG)	36	188-235		36	188-235
150 KG	Crack (7.5 KG or >)	38	235-293	1:1 -- crack/powder	38	235-293
	Powder (150 KG or >)	38	235-293		38	235-293

Key

- ★ 5-year mandatory minimum triggered
- ◆ 10-year mandatory minimum triggered

THE WHITE HOUSE
WASHINGTON

95 NOV 12 10 41

November 2, 1995

MEMORANDUM TO THE PRESIDENT

From: Bruce Reed
Rahm Emanuel
Dennis Burke 

Subject: The "Safety Valve" and mandatory minimums

You had mentioned that Director Brown believed you had incorrectly stated the law on the "Safety Valve" for mandatory minimums in your Roundtable with the Trotter group on Wednesday.

We have checked the transcript from that meeting and believe that you made a minor misstatement of the law but it by no means had any bearing on your argument.

Your Crime Bill created a "safety valve" to permit judges to apply the sentencing guidelines rather than the statutory mandatory minimum penalties in cases of first-time, non-violent drug offenders. During the interview, you had stated that the judge could ignore the guidelines under the safety valve. However, under the safety valve, what the judge is ignoring is the mandatory minimum -- which is the real issue in this whole debate -- and applying the guidelines instead, which results in lesser sentences. This is a very minor misstatement that does not effect the thrust of your argument.

Without the safety valve, a defendant convicted with 5 or more grams of crack cocaine would have to serve -- at the minimum -- 5 years. However, the safety valve provides an exemption from that mandatory minimum if the defendant 1) doesn't have a significant criminal history; 2) did not cause death or seriously bodily injury; 3) was not an organizer, leader, manager or supervisor; and 4) provided information about the offense to the Government.

The Sentencing Commission predicts that around 600 defendants -- which will be about 3.6% of all drug defendants -- will be sentenced under the safety valve this year and that it will result in an average reduction in a person's sentence of 25%.

These facts support the thrust of your argument to these reporters -- you believe that crack should be punished harsher than cocaine powder; our U.S. Attorneys are in reality busting high-level crack traffickers and not first-time offenders; and you enacted real sentencing reform in last year's crime bill with your "safety valve" provision.



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF NATIONAL DRUG CONTROL POLICY
Washington, D.C. 20503

NOV - 2 1995

MEMORANDUM FOR THE PRESIDENT

FROM:

LEE P. BROWN

RE:

CRACK PENALTIES

After our discussion this morning at the CADCA event, I reviewed the sentencing provisions of the 1994 crime bill, the Violent Crime Control and Law Enforcement Act of 1994, ("the Act") to ascertain how the crack cocaine sentencing issue was addressed in that law.

Crack Provision

Section 280006 of the act directed the United States Sentencing Commission to submit a report to the Congress relating to sentences applicable to offenses involving the possession or distribution of all forms of cocaine. The study specifically directed the Commission to address the differences in penalty levels that apply to different forms of cocaine, and include recommendations that the Commission may have for retention or modification of such differences in penalty levels.

This directive resulted in the February 28, 1995, report to the Congress that contained the recommendation that the current 100-1 ratio disparity between crack and cocaine which triggers a 10 year mandatory sentence under 21 USC 841 be reduced, and that the penalty structure for simple possession which provides for a mandatory five-year penalty for simple possession of crack but a statutory maximum penalty of one year for simple possession of any other drug also be reviewed. Subsequently, the commission recommended that the penalty for crack crimes be reduced and brought into line with penalties for powder offenses.

The Congress rejected the recommendation of the Sentencing Commission concerning crack penalties in S.1254, which was signed on October 20, 1995.

Limits on Mandatory Minimums

In addition, the Act in section 80001 amended Title 21 by providing a new provision that limits the applicability of mandatory minimums. This is commonly referred to as the safety

valve provision. It provides that in cases where mandatory minimums would apply, the court may depart from the statutory minimum if it finds:

(1) the defendant does not have more than 1 criminal history point under the sentencing guidelines;

(2) the defendant did not use violence, credible threats of violence, or a firearm or dangerous weapon in connection with the offense;

(3) the offense did not result in death or serious bodily harm to any person;

(4) the defendant is not a leader or organizer of the offense under the guidelines, or engaged in a continuing criminal enterprise; and

(5) that the defendant has fully cooperated with the Government concerning information the defendant has concerning the offense.

The Sentencing Commission recently promulgated regulations to carry out the safety valve provision which provide if a defendant meets the test promulgated by this section, the judge may drop the sentence down two levels under the guidelines.

Conclusion

While the safety valve provision may provide relief to some defendants who are subject to the current mandatory crack penalties, this provision applies to all Federal criminal defendants facing mandatory minimum sentences and does not address the underlying disparity in the law between crack and powder cocaine. Also, it permits judicial discretion and therefore is not mandatory. It is the underlying disparity between crack and powder cocaine that is the subject of intense criticism from the Congressional Black Caucus, the media, and other concerned parties.

I trust this is helpful, and look forward to working with you on this matter.

United States Sentencing Commission Fact Sheet: (March 21, 1995) Application of the Mandatory Minimum Safety Valve

History of the legislation

Congress created a "safety valve" to permit judges to apply the sentencing guidelines rather than the statutory mandatory minimum penalties in cases of certain first-time, non-violent, drug offenders. It became effective September 23, 1994. (Title VIII of the Violent Crime Control and Law Enforcement Act of 1994; codified at 18 U.S.C. 3553(f).)

The guideline range for some offenders who receive mitigating adjustments for having a limited role in the offense or accepting responsibility for their crime is lower than the mandatory minimum. Before the safety valve the mandatory minimum statutes "trumped" the guidelines in these cases. Any first-time offender whose crime involved the amount of drugs listed in the statutes received the minimum term — either five or ten years imprisonment — regardless of what mitigating factors were present in the case.

The safety valve applies to a select group of non-violent first-time offenders.

- ✓ About 600 defendants will be sentenced under the safety valve this year.
- ✓ 3.6% of all drug defendants are expected to benefit from the safety valve.

Defendants qualify for the safety valve only if they: 1) are without significant criminal history, 2) did not use or threaten violence or possess a firearm, 3) did not cause death or serious bodily injury, 4) were not an organizer, leader, manager or supervisor, and 5) they provide all the information they have about the offense to the Government. Sentencing Commission data show that in the first quarter of its implementation, the safety valve was applied to 149 cases. This leads to a projection of about 600 cases this year. (There do not appear to be significant seasonal fluctuations in numbers of cases sentenced.)

Offenders sentenced under the safety valve are imprisoned for lengthy terms.

- ✓ The safety valve results in an average reduction in a person's sentence of 25%.
- ✓ The median sentence for persons subject to a five-year mandatory minimum is 46 months.
- ✓ The median sentence for persons subject to a ten-year mandatory minimum is 87 months.

Persons who would receive mandatory minimums but for the safety valve still receive lengthy imprisonment under the guidelines. Courts are sentencing safety valve defendants within the applicable guideline range; none have so far received an additional mitigating departure below the range.



U.S. Department of Justice

Grace

Office of Policy Development

Active File CRACK/COCAINE STUDY

Assistant Attorney General

Washington, D.C. 20530

RACIAL DISPARITY

March 23, 1995

MEMORANDUM

TO: Jan M. Chaiken, Director, Bureau of
Justice Statistics

Jeremy Travis, Director, National
Institute for Justice

Julie Samuels, Director
Office of Policy Management and Analysis

FROM: Eleanor D. Acheson 
Assistant Attorney General

SUBJECT: Attached Assignment from the Attorney General

As the accompanying memorandum reflects, the Attorney General and the Deputy Attorney General have asked the Office of Policy Development, in the person of Harry Litman, to coordinate an analysis of the apparent racial disparity in arrest rates for drug related crimes. We will, of course, need the expertise and resources in statistical analysis and primary data research of your respective offices to accomplish this assignment at all and certainly on the short schedule the Deputy's office has suggested. Would you be kind enough to assign staff to work on this project with Harry Litman and have the individuals assigned contact Harry as soon as possible? We have been asked to provide the Deputy at least the outline of a research plan as soon as possible and a final report within a few weeks.

Please don't hesitate to call Harry Litman or me about this any time. Thanks in advance for your help.

cc: Merrick Garland, Principal Associate Deputy Attorney General
Grace Mastalli, Deputy Assistant Attorney General, Office
of Policy Development

ROUTING AND TRANSMITTAL SLIP		DATE	March 13, 1995
TO: (Name, office symbol, room number, Agency/Post)		Initials	Date
1. Eleanor Acheson, AAG, OPD			
2.			
3.			
4.			
REMARKS: Re: <u>AG Request for Analysis of Arrest-Rate Statistics</u> Attached is a preliminary memorandum prepared for the DAG by Casey Cooper, suggesting some reasons for the racial disparity in arrest rates for drug-related crimes. At this morning's staff meeting, the AG and DAG asked that OPD undertake a more comprehensive analysis of this issue. Both suggested that Harry Litman would be the right person for the project. The AG also said that when she was in St. Louis recently, Chief Judge Filippine had some ideas on this subject. She would like you or Harry to speak with him. The AG and DAG have asked to be advised of the status of progress on this project in about two weeks. Thanks for your help. DO NOT use this form as a RECORD of approvals, concurrences, disposals, clearances, and similar actions.			
FROM: (Name, org. symbol, Agency/Post)  Merrick B. Garland Principal Associate Deputy Attorney General U.S. Department of Justice		Room No. -Bldg. 4206-Main DOJ Phone No. 202-514-2105	



U. S. Department of Justice
Office of the Deputy Attorney General

Washington, D.C. 20530

MEMORANDUM FOR THE DEPUTY ATTORNEY GENERAL

FROM: Casey Cooper *CC*

SUBJECT: Requested information on the disparity in African-American drug use and arrest rates.

The statistics you brought to my attention indicated that while 12-15% of admitted recent drug users are black, some 40% of those arrested on drug charges are black. Why the disparity? The following, I think, are a number of the reasons. I have all the cited sources if you would like to see any of them.

1. **Drug enforcement is most frequently targeted at urban retail markets in which blacks are more likely to participate.**

The current structure of the retail drug market and law enforcement's response to it are the primary reasons for disproportionate drug arrest rates for blacks. The emergence of crack cocaine in the mid-1980's stimulated a rapid expansion of urban drug markets and a corresponding rise in drug enforcement activity at the street level. In 1980, drug arrests by state and local police totalled 560,000; by 1990, that figure had nearly doubled, to 1.1 million. Marijuana arrests fell from two-thirds of total arrests to just one-third. The racial composition of drug arrests also changed dramatically. In 1980, 23 percent of those arrested were black; by 1990, this figure had risen to 40 percent.¹

The typical urban drug distribution system is highly-tiered and diffuse. At the top sits a high-volume dealer; at the bottom are literally hundreds of retailers, carriers, couriers, and lookouts, many of whom are also users. Not surprisingly, most of the people arrested for drug possession and distribution come from the lower levels of the trade. First, there are many more people involved at this level. Second, the transactions are more

¹Reuter and MacCoun, Street Drug Markets in Inner-City Neighborhoods: Matching Policy to Reality, in, Urban America: Policy Choices for Los Angeles and the Nation 227, 229, 240-42 (J.B. Steinberg, et al. eds. 1992).

exposed and therefore more susceptible to detection by police and the community. Third, the street trade, particularly in crack, generates the violence that most concerns communities; thus, it is a focus of police activity.²

Law enforcement's focus on the retail trade is confirmed by the arrest practices of local police departments. According to the Bureau of Justice Statistics, the most frequently used law enforcement strategies to arrest drug offenders are undercover street buys, sweeps of "open-air" drug markets, and raids of dwellings from which the police believe drugs are being sold ("crack houses" and "shooting galleries"). These techniques target low-level use, possession, and distribution that is, for the most part, open and apparent to the police and the community. In fact, most sweeps and raids are conducted in response to complaints by community members.³

Although no one has studied the racial composition of drug dealers prior to their arrests, it seems clear that blacks and other minorities dominate inner-city retail drug markets. Their differential arrest rates, therefore, are explained largely by law enforcement's focus (misguided or not) on this segment of the illegal drug trade.

2. The cited statistics probably understate black drug usage.

The estimate that 12-15% of African Americans use drugs is derived from the National Household Survey on Drug Abuse (NHSDA), which is conducted by the National Institute on Drug Abuse. To conduct the survey, researchers call random households and ask whether the respondent has used drugs ever, in the past year, and in the past month.

One deficiency of the NHSDA is that it does not capture hardcore drug use among segments of the population that are difficult to survey or reluctant to report usage. For instance, the survey does not reach chronic drug users who are homeless, transient, or incarcerated, and it does not ask how many times in the past year or month the respondent has engaged in drug use. Moreover, those engaging in more frequent use may be less likely to respond forthrightly to the survey, if at all.⁴

²Id. at 242.

³Bureau of Justice Statistics, *Drugs, Crime, and the Justice System*, 152-53 (1992).

⁴The White House, *National Drug Control Strategy: Strengthening Communities' Response to Drugs and Crime* 26 n.5 (1995).

The failure to account fully for chronic users is significant. The Office of National Drug Control Policy (ONDCP) estimates that while chronic users represent only 20 percent of the drug using population, they consume about two-thirds of the total amount of cocaine in the country.⁵ Although little is known demographically about hard-core users, it is likely that blacks--due their over-representation in poor, urban populations and relative lack of access to drug treatment--comprise a disproportionate share of this segment of users. To the extent that this is so, the NHSDA understates the rate of drug use among blacks. Moreover, chronic users are probably more susceptible to arrest because their use is more frequent and conspicuous than that of casual users. These two factors suggest that the disparity between black use and arrest rates is not as great as statistics cited above would indicate.

3. Discriminatory enforcement practices undoubtedly exist.

Although targeting drug enforcement at inner-city drug markets explains much of the use/arrest disparity among blacks, evidence still suggests that blacks outside the urban drug trade are more likely than their white counterparts to be arrested on drug charges. It is this disparity that is the most disturbing. According to a recent USA Today study, blacks are more likely than whites to be arrested on drug charges in every sector of the country: six times more likely in the suburbs; four times more likely in the central city; and three times more likely in rural areas.⁶

Some of this may be due to disproportionate black involvement in the readily-detectable retail drug trade, even outside the inner-city. At least some of this disparity, however, can be explained by no other reason than discriminatory enforcement. The use of drug courier profiles, pretextual automobile stops, "random" interrogations in public places, and investigatory discretion in general inject significant sources of prejudice into the drug enforcement process. These practices undoubtedly result in higher arrest rates among blacks. How much higher, however, is unknown and probably unknowable.

⁵Id. at 20.

⁶Is the War on Drugs Racist?, USA Today, July 23, 1993, at 1A.



Washington, D.C. 20530

STATEMENT

OF

JAY P. MCCLOSKEY
UNITED STATES ATTORNEY
DISTRICT OF MAINE

CHAIRMAN,
SUBCOMMITTEE ON SENTENCING GUIDELINES
ATTORNEY GENERAL'S ADVISORY COMMITTEE OF
UNITED STATES ATTORNEYS

AND

ROBERT S. LITT
DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

BEFORE THE

UNITED STATES SENTENCING COMMISSION

CONCERNING

PROPOSED SENTENCING GUIDELINE AMENDMENTS

MARCH 14, 1995

We appreciate the opportunity to appear before you today to discuss the proposed amendments to the Sentencing Guidelines. We will focus on three major issues of concern to the Department of Justice at today's hearing. Those issues include: (1) the proposed controlled substance and role-in-the-offense guidelines; (2) the proposed money laundering guidelines; and (3) the manner in which the Commission should implement Congressional directives. Appendix A to our written statement addresses additional amendment proposals.

An overriding concern for the Department, one which we share with others involved in the federal criminal justice system, is that the sentencing guidelines are becoming increasingly complex. Prosecutors across the country have voiced concern that the complexity of the guidelines, the number of issues requiring factual hearings, the proliferation of guideline amendments, and appellate litigation over guideline issues have made their work particularly difficult. Of course, the many recent directives to the Commission by Congress in the Violent Crime Control and Law Enforcement Act of 1994 have only compounded this problem. In this cycle we ask the Commission to strike a balance between the need to provide clear guidance to users of the guidelines and the need to avoid unnecessary amendments and further complexity. The Department looks forward to working with the Commission and others in future attempts to ensure the guidelines do not become overly burdensome and complex in their application.

DRUG AND ROLE AMENDMENTS (Amendments 33-43)

Amendments 33 through 43 propose a number of amendments to the guidelines concerning controlled substances and role in the offense which would result in a major restructuring of the guidelines. We strongly oppose adoption of these amendments.

The Department of Justice opposes
excessive change in the guidelines.

The guidelines system cannot readily absorb the breadth of change that the drug and role amendments would produce, particularly in a year when numerous other guideline amendments are required by new statutes. The wholesale revision of the drug and role guidelines will affect a large number of federal offenders. Determining which set of guidelines to apply in a particular case would present problems in itself because in some cases the proposed amendments would call for higher sentences than the current guidelines, and the *ex post facto* clause would prevent application of the guidelines in effect at the time of sentencing. To make the determination of which set of guidelines to apply, it would often be necessary to calculate the applicable sentencing range under both the current and amended guidelines, thus doubling the number of potential litigation issues. The new guidelines would also produce litigation regarding many substantive issues at a time when numerous issues under the current guidelines have been resolved.

The Department of Justice opposes
unnecessary change in the guidelines.

We also object to the present effort to revise the drug and role guidelines because the Commission has not adequately assessed the effect of significant, recent changes in both the guidelines and relevant statutes which were enacted to moderate the effect of drug quantity on sentencing.

Change in Relevant Conduct Guideline. In 1992, the Commission revised the relevant conduct guideline, §1B1.3, to provide that a defendant's relevant conduct based on jointly undertaken activity is not necessarily as broad as the scope of the entire conspiracy. Moreover, relevant conduct need not be the same for every conspirator. This amendment was intended to have a limiting effect on relevant conduct, particularly in the case of offenders whose activities were undertaken as part of a large conspiracy.

Effect of Quantity Capped at Level 38. Similarly, in the last amendment cycle, the Commission reduced to level 38 the maximum base offense level tied to drug quantity so as to moderate the impact of quantity on drug sentencing.

Safety Valve. Finally, the "safety valve" exemption from mandatory minimum sentences, 18 U.S.C. §3553(f), enacted as part of the Violent Crime Control and Law Enforcement Act of 1994 and

embodied in guideline §5C1.2, can be expected to have an effect on both guideline and mandatory minimum sentences. The Commission should study the effect of the current safety valve guideline before seeking further amendment to the guidelines. Additionally, if the Commission is concerned that use of quantity inappropriately ensnares "low-level, non-violent drug offenders" (see Synopsis of Amendment 43), the Commission should consider expanded use of the safety valve to minimize the effect of quantity for those select defendants rather than seeking to amend the guidelines for all drug defendants.

The Commission has not determined what impact these rather significant revisions have had on sentencing in controlled substance cases. Until the Commission analyzes the need for the Amendments 33 to 43 in light of these past revisions, the Commission should avoid further disruption to federal sentencing.

The Department of Justice believes that quantity is an appropriate measure of the seriousness of drug-trafficking offenses.

The purpose of the proposed drug amendments is to reduce further the impact of drug quantity on the sentence as a measure of the seriousness of a drug-trafficking crime, and in the case of Amendment 43, Option 1, to eliminate the effect of quantity completely. As noted above, many steps have already been taken

to reduce the effect of quantity on the ultimate sentence in appropriate cases.

We continue to believe that, in most cases, the quantity of a controlled substance involved in a trafficking offense is an important measure of the dangers presented by that offense. Assuming no other aggravating factor in a particular case, the distribution of a larger quantity of a controlled substance results in greater potential for greater societal harm than the distribution of a smaller quantity of the same substance.

In establishing mandatory minimum penalties for controlled substance offenses, Congress relied on quantity as well as the type of substance involved to set appropriate sentence levels. Thus, the most serious drugs of abuse carry the highest statutory penalties, regardless of whether violence or other criminal activity is present in a particular case. And, greater quantities of the same substance result in higher mandatory penalties, regardless of other factors.

The proposed aggravating factors for firearms use, injury, and other non-quantity considerations cannot remedy the disproportionality that would result from eliminating or severely reducing the impact of drug quantity. Reliance on such factors undervalues the dangers presented by the unlawful sale of large quantities of drugs in the absence of these other factors.

Finally, we predict that minimizing the use of quantity as a proxy for dangerousness and harms caused to society will result in a much more complex and time consuming sentencing process. Relying on specific offense and offender characteristics to try to fill the void left by eliminating quantity differentials will complicate sentencings at every stage in the process.

Summary of specific objections.

While we object to Amendments 33 through 43 on the general grounds presented above, we also have specific objections to many of the proposals. It may be useful to highlight a few of these to demonstrate the particular difficulties that can be expected, if the Commission were to embark on this major revamping of the drug and role guidelines at the present time.

Amendment 43, Option 1, which eliminates drug quantity as a factor in sentencing entirely, is particularly problematic. First, setting the appropriate offense level when quantity is eliminated or greatly reduced as a factor is extremely difficult. For example, Amendment 43, Option 1, proposes a base offense level of 20-28 for heroin trafficking with no variation based on quantity.¹ An offense level from within the proposed 20-28 range would represent a significant increase over current base

¹ We assume the Commission would choose a single offense level from within this range in order to assure compliance with the statutory requirement that the maximum term of imprisonment in an applicable range not exceed the minimum by more than 25 percent or six months. 28 U.S.C. §994(b)(2).

offense levels for a small-scale heroin trafficker and a significant reduction for a large-scale one. (Current base offense levels for heroin trafficking range from 12 to 38.) We believe that it is impossible to choose an offense level that captures the varying degrees of harm caused by the whole spectrum of drug trafficking when all other factors are equal; a single offense level will be too high for some offenses and too low for others. Additionally, a base offense level not based on quantity could provide an incentive for dealers to increase their trafficking since quantity would not affect the ultimate sentence while it could greatly increase profit. The need for a dramatic flattening of sentences by eliminating or significantly reducing drug quantity as a factor has not been demonstrated.

While Amendment 43 presents the most extreme example of reducing the impact of drug quantity on sentences, other proposals are problematic as well. The effect of many of the amendments would be to lower guideline sentences for drug traffickers without regard to the impact of mandatory minimum sentences. Amendment 40 directs the user to apply the guidelines on the basis of the weight of the actual controlled substance (or a quantity determined through a presumed purity level established by the proposed amendment), instead of the quantity of the mixture or substance of which the controlled substance is a part. As a result, Amendment 40 directly conflicts with applicable mandatory minimum sentences, which are based on the weight of a

"mixture or substance containing a detectable amount" of the controlled substance. 21 U.S.C. §841(b)(1)(A) and (B).

Other proposed amendments also inappropriately increase the tension between the sentencing guidelines and mandatory minimum sentences: Amendment 33 compresses the drug quantity table; Amendment 37 addresses the equivalency between marihuana plants and marihuana by weight (and directly contravenes the statutory equivalency); and Amendment 39 arbitrarily limits the quantity of the controlled substance to that possessed or distributed within a specified time frame (as opposed to the entire quantity proven). If such changes were made, in many cases the mandatory minimum penalties would trump guideline sentences, and offenders with different levels of culpability under these trumped guidelines would all be treated alike under the mandatory penalties. Thus, the amendments would diminish a defendant's incentive to accept responsibility for an offense. A sentencing system that incorporates both mandatory minimum and guidelines sentences must strive for compatibility, not friction, between the two structures.

We are also troubled by aspects of the proposed role-in-the-offense adjustments in Amendment 35. First, the amendments provide a level of detail that could lead to numerous disputes over definitions. For example, whether a defendant has all or only most of the characteristics listed in a proposed application

note regarding mitigating role would distinguish a minimal from a minor player, and whether a task is considered "unsophisticated" would also have a bearing on this decision. (See Application Notes 1 and 2 to proposed guideline §3B1.2.) Litigation focusing on these issues could become extremely burdensome for both the prosecution and defense, as well as for the district courts and courts of appeal.

Another problem is that while the role amendments would apply to all cases, their implications in non-drug cases may not have been sufficiently explored. For example, the amendment proposes deleting language from the aggravating role guideline, §3B1.1, regarding criminal activities that are "otherwise extensive." Under the current guideline an offender who supervised an "otherwise extensive" criminal activity would be subject to an aggravating role increase even though fewer than five people were involved. An extensive fraud scheme could make use of modern technology and relatively few people to accomplish its goal. The organizer, leader, or supervisor of such an activity should be subject to an increased sentence based on his or her role in the offense despite the fact that few people were supervised. Similarly, the proposed mitigating role amendments are problematic when viewed in the white collar context. For example, they provide that a characteristic ordinarily associated with a mitigating role is that the total compensation or benefit to the defendant was very small, compared to the total profit

typically resulting. (Proposed Application Note 2, guideline §3B1.2.) An employee of a company may commit an offense to benefit the company and gain very little personally. While small personal gain may make sense to identify a low-level drug offender, it does not necessarily translate in a legitimate business context.

There are many other particular problems with Amendments 33 through 43. Because of these, as well as our general objections to the proposed amendments, we urge the Commission not to adopt this group of amendments.

Crack and powder cocaine sentencing.

Amendment 38 addresses crack and powder cocaine sentencing. The Commission requests comment as to whether the guidelines should be amended with respect to the current 100:1 quantity ratio between crack and powder cocaine. In connection with the Commission's recent "Special Report to the Congress: Cocaine and Federal Sentencing Policy," the Department expressed its views on crack and powder cocaine sentencing. We reiterate these views, as follows:

Although cocaine base (crack) and cocaine hydrochloride (cocaine powder) are chemically similar, there are significant differences in the predominant manner the two substances are ingested and marketed. Based on these differences and the resulting harms to society, the Department of Justice rejects any proposal to equate crack with cocaine powder and believes that traffickers of crack cocaine should be subject to higher penalties than traffickers of like amounts of cocaine powder.

Current research shows that crack is a more dangerous and harmful substance for many reasons. The most common routes of administration of the two drugs cause crack to be the more psychologically addictive of the substances. The quicker, more intense, and shorter-acting effects of crack contribute to its greater abuse and dependency potential as compared to snorted cocaine powder. Moreover, identifiable social and behavioral changes occur much more quickly with crack use than with the use of cocaine powder.

Crack can easily be broken down and packaged into very small and inexpensive quantities for distribution -- sometimes as little as single dose quantities. Crack is thereby marketed to the most vulnerable members of society, including those of lower socioeconomic status and youth. Additionally, the open-air street markets and crack houses used for the distribution of crack cocaine contribute heavily to the deterioration of neighborhoods and communities. Both the scale of marketing and its open and notorious nature enable many, who would not previously have had access to cocaine powder, to purchase, use, and become addicted to crack cocaine. Moreover, the present crack market is associated with violent crime to a greater extent than that of cocaine powder. Crack cocaine has thus had a severe, negative impact on many families and communities, and in particular, on minority communities.

The seller of crack is well aware of its addictive qualities and the familial and community devastation it engenders. Thus, we believe that crack cocaine traffickers should be sentenced more heavily than cocaine powder traffickers. Although we recognize, as a policy matter, that an adjustment in the current penalty structure may be appropriate, any such adjustment must reflect the greater dangers associated with crack as opposed to cocaine powder.

Furthermore, we do not believe that specific offender characteristics in the Sentencing Guidelines will be able to account for all of the differences in harms caused by the substances, both because of the systemic nature of some of those harms and because of problems of proof in individual cases. Before making any final recommendations, the Sentencing Commission should consider and report to Congress about the impact any suggested changes would have on law enforcement's efforts against crack and cocaine powder trafficking and any impact these changes may portend for the level of use of the substances.

MONEY LAUNDERING (Amendment 44)

The Commission has proposed a sweeping amendment of the money laundering guidelines, §§2S1.1 and 2S1.2. The amendments would substantially lower the penalties for many serious money laundering offenses even though Congress determined money laundering to be a significant offense and established 10- or 20-year penalties (depending upon the offender's intent). The Department opposes the amendment as proposed.

To the extent that revision of the money laundering guidelines is prompted by a perceived disparity between these guidelines and the fraud guidelines, we suggest the Commission review the fraud guidelines -- which we believe generally to be inadequate -- before weakening the money laundering guidelines. We urge the Commission to consider this entire area of the law comprehensively. However, if the Commission is intent upon proceeding now with a revision of the money laundering guidelines in isolation, we strongly suggest certain revisions to the proposed amendment, as set forth in Appendix B.

The proposed amendment of guideline §2S1.1 would reduce the offense level for many money laundering offenses to a level equivalent to, or slightly above, the level applicable to a fraud offense involving the amount of money laundered. This decrease would apply both to money laundering related to white collar

offenses and money laundering related to a myriad of other serious offenses, such as arms violations, murder for hire, other violent crimes and exploitation of children. In many cases the amendment would also reduce the offense level for money laundering related to drug trafficking, which now starts at level 23 or 26 under guideline §2S1.1, and 22 under guideline §2S1.2, and increases depending on the amount of funds laundered. The only cases generally spared from reduction are those in which the money launderer committed the underlying unlawful activity and the offense level for that activity is equal to or greater than the currently applicable money laundering offense level. We do not believe this reduction of sentences is appropriate.

The suggested change appears to respond to the class of money laundering cases in which the money laundering activity is not extensive, including "receipt and deposit" cases -- those in which the money laundering conduct is limited to depositing the proceeds of unlawful activity in a financial institution account identifiable to the person who committed the underlying offense. We agree that application of the current guideline to receipt-and-deposit cases, as well as to certain other cases that do not involve aggravated money laundering activity, can be problematic. We have taken steps internally to address these concerns through prosecution guidelines. In view of the Commission's continuing

concern, we believe it is not inappropriate to treat these non-aggravated cases separately in the guideline.

Nevertheless, we do not agree that past sentencing anomalies arising from this narrow class of cases requires an overall downward adjustment in the money laundering guidelines. We seek a middle ground. Attaining this middle ground is particularly imperative in view of the emergence of a class of professional money launderers, who commingle licit and illicit proceeds, drug and non drug-predicated.

To this end, we are submitting a proposed alternative -- based on the format of the proposed amendment -- that would:

- 1) set the base offense levels at 16 and 12 (as opposed to the proposed levels of 12 and 8);
- 2) add to the higher category (which currently only applies to offenses involving controlled substances) offenses involving a matter of national security or munitions control, a crime of violence, a firearm, an explosive, and exploitation of children; and
- 3) carve out "receipt and deposit" cases, to be sentenced at a level of 8 plus the amount established by the fraud table

in guideline §2F1.1 corresponding to the value of the funds.²

The effect of this scheme is to set a moderate base offense level in the ordinary money-laundering case, to decrease it where the money laundering activity is very limited, and to increase it where the money laundering activity is significant. A copy of our proposed alternative is attached.

In addition, our proposed alternative makes the following technical corrections:

- The proposed amendment applies the underlying offense level in cases where the defendant committed the underlying offense. Our proposed alternative adds two levels in order to ensure that a defendant who commits the underlying offense and launders the proceeds does not go unpunished for the laundering offense. Congress has determined that money laundering is a separate offense and the Commission should follow that determination.
- The proposed amendment contains a specific offense characteristic relating to two intents identified in §1956 (concealment and promotion), for which 2 levels are added.

² The base level of 8 corresponds to the base level of 6 for fraud plus two levels for more than minimal planning, which is likely to be present in the vast majority of such cases.

Our proposed alternative provides an alternate enhancement of 1 level for the remaining \$1956 intents (tax evasion and avoidance of currency reporting requirements).

- Our alternative includes as sophisticated money laundering the use of the services of an individual or organization engaged in the business of money laundering. Sophisticated money laundering would be subject to a two-level enhancement. This addition is intended to reach both the individual who solicits the services and the launderer, defined for these purposes as one who collects a commission (or other benefit). We believe that it is appropriate to impose a more severe punishment on those who launder for profit or engage professional money launderers.

We vigorously oppose certain portions of the proposed commentary:

- The note on "value of the funds" which limits the amount laundered to "the loss attributable to the offense" (i.e., the amount of a fraud less any amounts that can be recouped by the victim) is inappropriate. While this concept is arguably relevant to a fraud guideline, it has no relevance to an amount laundered. That is, if the defendant transfers all of the victim's money to his account in the Cayman Islands, he should not be credited for amounts that

ultimately can be repaid. The harm in money laundering is properly measured by the funds themselves.

- We oppose as confusing and unnecessary the note which makes reference to "actual money laundering." Money laundering is a term defined by statute.
- Finally, we propose to add commentary to clarify the use of the term "proceeds" in paragraph (a)(2) of the amendment. There is a small category of money laundering cases under section 1956 involving international transportation of currency to promote specified unlawful activity which does not have as an element of the offense that the funds be proceeds. Our proposed commentary makes clear that if otherwise appropriate, the base offense level set forth in subsection (a)(2) applies to these cases as well.

With the incorporation of these suggested changes, the Department would support amendment of the guideline if the Commission is intent upon moving forward now.

LEGISLATIVE DIRECTIVES TO THE COMMISSION

The Violent Crime Control and Law Enforcement Act of 1994 (the "Crime Act") contains a number of directives to amend the guidelines to provide enhancements for various factors. Where such a directive exists, the Commission should implement it through a guideline provision, not a recommendation to depart from the guidelines.

One such directive to the Commission concerns solicitation of a minor to commit a crime. It requires the Commission to:

promulgate guidelines or amend existing guidelines to provide that a defendant 21 years of age or older who has been convicted of an offense shall receive an appropriate sentence enhancement if the defendant involved a minor in the commission of the offense.

Section 140008 of the Crime Act. The Act specifically directs the Commission to consider a number of factors in implementing the directive: the severity of the crime, the number of minors involved, the fact that involving a minor in a crime of violence is generally more serious than involving a minor in a drug trafficking offense, and the possible relevance of the proximity of age between the offender and the minor.

Despite the clear language of the directive to amend the guidelines to provide that the offender "shall receive" an appropriate sentence enhancement, the Commission has invited comment as to whether the directive should be implemented through a policy statement on departure from the guidelines.

Amendment 25(A). Such a policy statement does not satisfy the statutory directive since it would not impose an appropriate sentencing enhancement. Under a policy statement recommending upward departure, a court faced with a defendant who solicited a minor to commit a crime would not be required to increase the sentence, regardless of the seriousness of the offense, the nature of the involvement, or the possibility of recruitment of a number of youths. A policy statement recommending departure does not establish a clear disincentive to adult criminals who train children in the ways of criminality and fails to counteract the explosion of youth crime that is plaguing our country. We strongly urge the Commission to adopt the guideline amendment the Department previously proposed, Amendment 25(B). This amendment would provide a two-level enhancement for soliciting a minor to commit a crime and additional enhancements if more than five minors are solicited.

The Crime Act also requires the Commission to amend the guidelines to provide "an appropriate enhancement" for any felony that involves or is intended to promote international terrorism, unless this factor is an element of the crime. 120004 of the Crime Act. Amendment 24, however, refers to the existence of a current policy statement recommending upward departure in such cases, §5K2.15. The amendment also inquires whether the guidelines should be amended to address the directive and, if so, how.

Again, a policy statement recommending departure does not meet the statutory directive to the Commission "to amend its sentencing guidelines to provide an appropriate enhancement" Congress was presumably aware of the current policy statement, yet it mandated an amendment. Congress has thus required a guideline enhancement that specifies the consequences for any felony that involves or is intended to promote international terrorism in order to combat this serious threat to public safety.

In sum, we urge the Commission to follow closely directives enacted by Congress relating to sentencing.

We would be pleased to answer any questions you may have.

APPENDIX A

HIV INFECTION (Amendment 1)

Amendment 1 seeks comment regarding guideline amendments for offenses in which an HIV-infected person engages in sexual activity with knowledge of his or her HIV infection and with the intent through such sexual activity to expose another person to HIV. See Section 40503 of the Crime Act. In our view, an offender who acts with knowledge of his or her HIV infection and with intent to infect another effectively transforms a sexual offense into an attempted homicide and, in some cases, into an eventually completed homicide. Engaging in such conduct should be subject to a severe sanction.

We believe that the Commission should provide a guideline enhancement to address sexual offenses by a defendant with knowledge that he or she is HIV-infected regardless of whether or not the defendant intended to infect another with HIV. Additionally, the Commission should consider the possibility of a departure in the context of crimes of violence not constituting sexual offenses, when an offender with knowledge of his or her HIV infection engages in conduct that can cause the infection of another.

We do not believe that an HIV enhancement should depend on whether the victim was actually infected with the virus. Currently, the sexual abuse guideline includes enhancements if the victim sustained varying levels of bodily injury. Guideline §2A3.1(b)(4). If an HIV enhancement related solely to whether the victim became HIV-positive, the risk of HIV infection and the fear of such infection in the mind of the victim would be overlooked.

INTERNATIONAL PARENTAL KIDNAPPING (Amendment 4)

The Commission has requested comment on two approaches to implement the International Parental Kidnapping Crime Act of 1993 which makes it unlawful to remove a child from the United States with intent to obstruct the lawful exercise of parental rights and establishes a three-year maximum term of imprisonment for such offenses (18 U.S.C. §1204).

Option 1 establishes a separate base offense level of 12 within the kidnapping guideline §2A4.1 for international parental kidnapping. We believe level 12 is too low given the significant difficulties that arise with international kidnapping cases in returning the child to the custodial parent. Finding a child outside the United States and obtaining cooperation of the State

Department and foreign law enforcement authorities in investigating the case are particularly problematic.

Because proposed level 12 makes it likely that a defendant who accepts responsibility for the offense will receive a sentence of probation and not serve any time in prison, or only a few months at most, there will not be an adequate deterrent to the commission of the offense. United States Attorneys have reported that the likelihood of little or no prison time has already created difficulties in enforcing the law, which requires significant cooperation and effort by the State Department and on the part of other countries.

We do not believe option 2, which references the statute to the obstruction of justice guidelines, is appropriate because parental kidnapping may not involve a court order and may not fit well into the obstruction guideline.

CIVIL RIGHTS (Amendment 14)

Amendment 14 contains two options designed to effect the Congressional mandate to increase sentences in hate crime prosecutions. Option 1 goes well beyond that mandate and will have an impact on the sentencing structure for virtually every case prosecuted under the federal criminal civil rights statutes. That impact will be felt most strongly in federal police prosecutions where sentences could be reduced by as much as 30 months. These official misconduct prosecutions comprise approximately one half of the criminal civil rights cases prosecuted by the Department. Any wholesale lowering of sentences in these very important prosecutions is ill-advised, particularly in the face of recent Congressional action designed to provide for harsher punishment in this area.

Option 2, proposed by the Department, is narrowly drawn to address the specific concerns of Congress without weakening the Department's enforcement effort in the official misconduct area. In addition, under Option 1 sentences in many hate crime prosecutions will either be reduced or not significantly increased, while Option 2 provides for an across-the-board, if modest, bump in sentences for convictions of racially violent behavior. Consequently, the Department strongly supports the adoption of Option 2, and strongly opposes Option 1.

Impact of Option 1

Most official misconduct cases involve beatings by police officers that result in some form of bodily injury to the victim. In many cases, a dangerous weapon is used, such as a baton or gun. Under the current guidelines a sentence for such crimes is computed under §2H1.4(a)(2) by adding six offense levels (the

civil rights adjustment) to the applicable underlying offense -- aggravated assault as defined under §2A2.2. After adding points for serious bodily injury and the use of a dangerous weapon, an aggravated assault offense level of 23 is obtained for a total base offense level of 29 (23+6). Under the scheme published as Option 1, the civil rights adjustment would be decreased by as much as four levels, resulting in a total base offense level of 25, not 29, or a decrease in sentence of approximately 30 months.

Similarly, in a cross-burning conspiracy resulting in neither personal injury nor property damage -- a typical prosecution brought by the Department -- the proposed approach in Option 1 has the potential of lowering the sentence by two levels. Under the current guidelines this conspiracy to violate civil rights is calculated pursuant to §2H1.1(a)(1), resulting in a base offense level of 15 and a sentence of 18-24 months. Under the proposed amendment, the offense level could be as low as 13 (10 plus the new three-level bump for hate crimes), a six-month sentencing reduction.

Even in those cases specifically earmarked by Congress for more severe punishment, hate crimes, the changes proposed in Option 1 result, at best, in only modest increases from present levels and, at worst, in reductions of sentencing levels. Thus, for example, in certain types of racially motivated conspiracies, Option 1 could actually decrease punishment by about six months, as discussed above. In the typical racially motivated beating case brought under 18 U.S.C. §245, only a one-level gain is achieved over present numbers, and even that incremental increase is not secured without cost. Under the present guidelines the sentencing court looks to the underlying offense, aggravated assault at a level 15, and if applicable, adds upward adjustments for serious bodily injury (4) and use of a dangerous weapon (4) for a total underlying offense score of 23. In addition, two levels are added pursuant to §2H1.3(a)(3) for an offense level of 25 or 57-71 months.

Under the Option 1 proposal the same underlying offense calculations would be made, but no two-level civil rights adjustment would be added automatically. Instead, the minimum three-level upward adjustment mandated by Congress in the Crime Act would be factored in, but only if there is a finding by the court that the defendant selected his victim because of race or some other impermissible factor. This finding is subject to the highest standard of proof -- beyond a reasonable doubt. While it is likely that in most civil rights prosecutions such a finding would routinely be made, the upward adjustment under the proposed plan is not automatic, as it is under the existing scheme, but would be subject to some measure of judicial discretion.

As Option 1 reduces sentences in two of the most significant types of civil rights cases brought by the Department, and

replaces the current two-level adjustment with a less certain three-level enhancement in hate crimes, it is unacceptable.

Option 2 - The Preferred Approach

Accommodating the Congressional mandate for increased sentences in hate crimes need not result in a wholesale revamping of the civil rights guidelines with its concomitant lowering of the guideline range in police cases.¹ Instead, as presented in Option 2, minor adjustments can be made to the present guideline scheme.

Under Option 2, sentences in hate crime cases would increase as Congress intended. For example, in a cross-burning conspiracy with no injury or damage, the base offense level would be 16, an increase of one level over present calculations and an increase of as much as three levels over Option 1. In the typical racial violence case resulting in serious injuries and involving the use of a dangerous weapon, the guideline level would be 26 (15 for aggravated assault plus eight for injury and use of weapon, plus three for the civil rights adjustment). This represents a one-level increase over present calculations and is identical to Option 1. Finally, in a cross-burning prosecution without a conspiracy, the base offense level under proposed Option 2 would increase from 10 under the existing calculation for §2H1.3, to 11.

Alternatives Within Option No. 1

Option 1 provides two choices. First, it allows for the possibility of a two-level increase for conspiracy. Second, in official misconduct cases it provides a range of upward adjustments of two to four levels. While the Department strongly opposes Option 1, if the Commission decides to adopt it, we believe the Commission should also adopt the two-level conspiracy adjustment and the four-level adjustment for official misconduct cases.

SEMIAUTOMATIC ASSAULT WEAPONS (Amendment 15)

Amendment 15 addresses the new ban on the manufacture, transfer, or possession of semiautomatic assault weapons by including violations of this new ban in the existing firearm guideline, §2K2.1. Without any further amendment the unlawful possession of this type of dangerous weapon will be treated in

¹ This is not to say, however, that a reconsideration of the guidelines in police cases might not be appropriate in the near future. A significant sentencing problem in these cases is the guidelines' relative insensitivity to various degrees of assault.

the same manner as a violation involving an ordinary firearm (other than one possessed solely for lawful sporting purposes).

We urge the Commission to provide more severe sentences for violations of the new ban on semiautomatic assault weapons than for violations involving ordinary firearms. Assault weapons should be treated in the same manner as other particularly dangerous weapons, such as machineguns, which are subject to a similar ban. Under the firearms guideline the unlawful possession of a machinegun is subject to a base offense level of 18 (27-33 months of imprisonment for a first offender), rather than a level 12 for ordinary guns (10-16 months for a first offender, which is subject to a split sentence including only five months of imprisonment). Guideline §2K2.1. The newly enacted prohibition of semiautomatic assault weapons must result in a substantial sentence if the ban is to be meaningful.

JUVENILE HANDGUN VIOLATIONS (Amendment 16)

Amendment 16 applies to violations of the recently enacted provision prohibiting: (1) the possession by a juvenile of a handgun or ammunition suitable for use only in a handgun, and (2) the transfer of a handgun or handgun ammunition to a person if the transferor knows or has reasonable cause to believe is a juvenile. 18 U.S.C. §922(x). The Commission proposes three options to address the youth handgun provision. The first would assign an offense level of 6 (0-6 months of imprisonment) to the offense. The second would assign an offense level of 12 (10-16 months, subject to a split sentence including five months of imprisonment). The third would assign an offense level of 12 to the transferee but level 14 to the transferor. (It would also apply offense level 14 in the case of any transfer of a firearm if the transferor knew or had reasonable cause to believe that the transferee was a prohibited person, such as a convicted felon or underage person.)

We favor Option 3 with a modification. Option 3 assigns offense level 12 to the juvenile offender who unlawfully possesses a handgun.² This offense level would provide a sufficient upper limit for purposes of juvenile incarceration and a sufficient period of imprisonment for a juvenile possessor who has been transferred to adult status (ordinarily because of a

² The new youth handgun statute provides that a juvenile who is a first offender is subject only to six months of probation for unlawful possession of a handgun or ammunition. Although the sentencing guidelines do not apply to juvenile delinquency proceedings, the maximum of the guideline range serves as a maximum for the juvenile proceeding, unless departure is warranted. Policy Statement §1B1.12.

prior record). Without subjecting a repeat offender to a period of incarceration, the provision would have little deterrent value.

Option 3 assigns offense level 14 to a transferor who knew or had reasonable cause to believe that the transferee was a prohibited person or was underage. Because of the one-year statutory maximum term of imprisonment for violations of the youth handgun provision (except where the transferor had reasonable cause to know that the juvenile intended to possess the handgun or ammunition in the commission of a crime of violence), level 14 is too high in the context of transfers that only violate this provision. The unlawful transfer of a handgun or handgun ammunition in violation of the newly enacted section 922(x) should be subject to an offense level of 12, more in keeping with the one-year statutory maximum term of imprisonment than offense level 14.

Offense level 14 should apply to transfers to underage persons by firearms licensees in violation of 18 U.S.C. §922(b)(1), which is subject to a maximum term of imprisonment of five years. Offense level 14 should also apply to the unlawful transfer of firearms to prohibited persons, such as convicted felons, whose unlawful possession would result in an offense level of 14.

SEMIAUTOMATIC WEAPONS (Amendment 17)

Amendment 17 seeks comment on how the offense level for an offense involving a semiautomatic firearm should be modified to address the directive in the section 110501 of the Crime Act to provide an appropriate enhancement for a crime of violence or drug trafficking crime if a semiautomatic firearm is involved. The Commission also requests comment on whether such an increase should apply to all semiautomatic firearms or those that have characteristics that make them more dangerous than other firearms.

The statutory directive is clear that the enhancement must apply to all semiautomatic firearms as defined by Congress in the same section of the Crime Act directing the Commission to provide for an enhancement. We do not believe that the Commission has authority to limit the enhancement to certain semiautomatic firearms. However, it would be appropriate for the Commission to provide an additional enhancement to recognize particularly dangerous semiautomatic firearms, such as semiautomatic assault

weapons, in the context of amending the guidelines in accordance with this Crime Act directive.

CONSPIRACY TO VIOLATE 18 U.S.C. §924(C) (Amendment 21)

Amendment 21 addresses a provision of the Crime Act that creates a new offense of conspiring to violate 18 U.S.C. §924(c), which makes it unlawful to use or carry a firearm during and in relation to a federal crime of violence or drug trafficking crime. 18 U.S.C. §924(n), as enacted by section 110518 of the Crime Act. The maximum term of imprisonment for the new offense is 20 years, but life if the firearm is a machinegun or certain other dangerous weapon. The Crime Act also makes a parallel amendment with respect to conspiring to violate 18 U.S.C. §844(h), which makes it unlawful to use fire or an explosive to commit a federal felony or to carry an explosive during a federal felony. 18 U.S.C. §844(m).

Amendment 21 would include the new conspiracy offenses in the firearms guideline, §2K2.1, and the explosives guideline, §2K1.3, without further amendment. In both cases the resulting offense level would be at least 18 (27-33 months of imprisonment for a first offender). By contrast, the substantive offense of using a firearm, explosive, or fire is subject to a mandatory five-year term of imprisonment.

We recommend that the guideline sentence for the conspiracy offense be aligned with the mandatory prison terms for the substantive offense. As proposed, the guideline would provide a windfall for a conspirator whose unlawful conduct was interrupted by law enforcement efforts just prior to completion.

IMMIGRATION, NATURALIZATION AND PASSPORTS (Amendments 22 and 23)

The Commission has published for comment amendments submitted by the Department that would increase the base offense levels and provide appropriate enhancements for alien smuggling and passport and visa offenses. These proposed increases are commensurate with the significant increases in the maximum penalties enacted by Congress in the Crime Act. The current offense levels in the guidelines for alien smuggling (§2L1.1), and passport and visa fraud (§§2L2.1 and 2L2.2), which often do not result in prison terms, are far too low to provide an effective deterrent to persons committing crimes in violation of the immigration laws and provide little incentive to law enforcement officials to investigate and prosecute the cases.

Section 60025 of the Crime Act more than doubled the penalties for alien smuggling. The offense levels for guideline §2L1.1 should be increased accordingly as set forth in the

Department's proposal published for comment as amendment 22(C). The proposed commentary published as amendment 22(D) is needed to address a problem with guideline §2L1.2 that has arisen in the courts and to clarify that an upward departure may be made with respect to unlawful entry by persons with repeated prior instances of deportation.

Amendment 23 addresses the significant increase in penalties for passport and visa fraud. The Secretary of State and the Assistant Secretary of the Bureau of Diplomatic Security and Acting Inspector General, writing in strong support of Amendment 23 related to passport and visa statutes for which the State Department is responsible, have emphasized the urgent need to raise these offense levels. We agree with the need to increase these guidelines. We understand that Commission staff has suggested some minor changes to the published proposals. We would be pleased to work with the staff and representatives of the State Department to fine-tune the proposals if necessary.

We strongly urge the Commission to adopt the significant increases in offense levels to ensure that the guidelines appropriately reflect the intent of Congress in significantly increasing the maximum penalties for immigration offenses.

TELEMARKETING FRAUD (Amendment 27(C))

Section 250002 of the Crime Bill provides the potential for an additional 5-year sentence for fraud convictions that involve telemarketing and an additional 10-year sentence for such convictions if the offense targeted persons over the age of 55 or victimized ten or more persons over the age of 55. The Commission has invited comment on this section.

We believe guideline §2F1.1 does not adequately address telemarketing fraud. First, while §2F1.1(b)(1) appears adequate to address the sheer quantum of actual or intended loss, §2F1.1(b)(2) currently provides only a two-level increase for an offense which involved more than one victim. The Department's experience in prosecuting telemarketing fraud has shown that in many cases, the owners and operators of a fraudulent telemarketing enterprise seek out large numbers of victims over a substantial period of time. In recent years, federal prosecutors have reported a number of cases in which the victims of a single telemarketing scheme -- often elderly victims -- can literally be counted in the thousands. To place such large-scale schemes on a par with small-scale investment swindles affecting a few victims appears inequitable. We urge the Commission to consider an additional two- to four-level enhancement under §2F1.1(b) where the offense involved a scheme to defraud large numbers of victims (e.g., 100 or more).

Additionally, §2F1.1 does not address an increasingly prevalent phenomenon in telemarketing fraud: the operation of a scheme which targets previously defrauded victims for a different fraud. Federal law enforcement officials have observed numerous instances in which telemarketers operate so-called "recovery rooms." In these telemarketing schemes, the operators deliberately target victims whom they have already defrauded under one business name by contacting the victims and offering, for an often substantial fee, assistance in recovering the victim's money. Such flagrant conduct is not adequately addressed under either guidelines §2F1.1 or §3A1.1. The Commission should consider including a separate two- to four-level enhancement for an offense which involves a scheme to defraud the same victim or victims more than once.

We also note that the generalized calculation of loss under §2F1.1(b)(1) may not adequately take into account the drastic impact which some frauds directed at older persons can have. Many of the victims of telemarketing fraud schemes are older Americans who entrusted all or substantially all of their life savings to the defendants. This trend is likely to continue, as some burgeoning types of telemarketing frauds, such as those purporting to offer investments in wireless cable partnerships, frequently invite prospective victims to "roll over" their IRA funds, in blocks of at least \$10,000, into the fraudulent investment scheme. Because many telemarketers have routinely spent the proceeds of their fraud on luxury items which cannot be recovered for victims (e.g., drugs and lavish vacations and parties), there may be little or nothing on which a sentencing court can draw to provide some measure of restitution for the victims. The Commission may therefore wish to take into account whether an offense causes substantial financial hardship to one or more victims.

Increasing sentences based on these general attributes of telemarketing fraud should ameliorate much of the concern regarding elderly victims. Additionally, in particularly aggravated cases, departure may be appropriate.

APPENDIX B

MONEY LAUNDERING

[The following indicates the Department of Justice's alterations of the proposed Sentencing Commission money laundering guideline, as published in Amendment 44, through shading of additional material and strike-out of material to be deleted.]

§2S1.1. Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity

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

- (1) The offense level for the underlying offense from which the funds were derived **plus 2 levels**, if the defendant committed the underlying offense (or otherwise would be accountable for the commission of the underlying offense under §1B1.3 (Relevant Conduct)) and the offense level for that offense can be determined; or
- (2) ~~12~~ **16** plus the number of offense levels from the table in §2F1.1 (Fraud or Deceit) corresponding to the value of the funds, if the defendant knew or believed that the funds were the proceeds of an offense involving a **matter of national security or munitions control, a crime of violence, a firearm, an explosive, the sexual exploitation of children, or the manufacture, importation, or distribution of a controlled substances** ~~for listed chemicals, a crime of violence, or an offense involving firearms or explosives, national security, or international terrorism~~; or
- (3) ~~8~~ **12** plus the number of offense levels from the table in §2F1.1 (Fraud or Deceit) corresponding to the value of the funds.

(b) Specific Offense Characteristics

(1) **Apply the greater:**

- (A) If the defendant knew or believed that
(i) ~~(A)~~ the financial or monetary transactions, transfers, transportation,

or transmissions were designed in whole or in part to conceal or disguise the proceeds of criminal conduct, or (ii) ~~(B)~~ the funds were to be used to promote further criminal conduct, increase by 2 levels; or

(B) If the defendant (i) intended to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986, or (ii) knew or believed that the transactions were designed in whole or in part to avoid a transaction reporting requirement under State or Federal law, increase by 1 level.

(2) If subsection (b)(1)(A) is applicable and the offense (A) involved placement of funds into, or movement of funds through or from, a company or financial institution outside the United States, or (B) otherwise involved a sophisticated form or money laundering, increase by 2 levels.

(c) Special Instruction for Receipt and Deposit Cases

The offense level is 8 plus the number of offense levels from the table in §2F1.1 (Fraud and Deceit) corresponding to the value of the funds where all of the following are present:

1) the defendant's money laundering conduct is limited solely to the deposit of the unlawful proceeds into a domestic financial institution account that is readily identifiable as belonging to the person who committed the specified unlawful activity;

2) the offense was not intended or designed, either in whole or in part, to conceal or disguise the nature, location, source, ownership, or control of the proceeds of specified unlawful activity, to violate section 7201 or 7206 of the Internal Revenue Code of 1986, or to avoid a transaction reporting requirement under State or Federal law; and

(3) the specified unlawful activity did not involve a matter of national security or munitions control, a crime of violence, a firearm, an explosive, the sexual exploitation of children, or

the manufacture, importation, or distribution of a controlled substance.

Commentary

Statutory Provisions: 18 U.S.C. §§1956, 1957.

Application Notes:

1. "Value of the funds" means the value of the funds or property involved in the financial or monetary transactions, transportation, transfers, or transmissions that the defendant knew or believed (A) were criminally derived funds or property, or (B) were to be used to promote criminal conduct.

When a financial or monetary transaction, transfer, transportation, or transmission involves legitimately derived funds that have been commingled with criminally derived funds, the value of the funds is the amount of the criminally derived funds, not the total amount of the commingled funds. For example, if the defendant deposited \$50,000 derived from a bribe together with \$25,000 of legitimately derived funds, the value of the funds is \$50,000, not \$75,000.

Criminally derived funds are any funds that are derived from a criminal offense, e.g., in a drug trafficking offense, the total proceeds of the offense are criminally derived funds. In a case involving fraud, however, the loss attributable to the offense occasionally may be considerably less than the value of the criminally derived funds (e.g., the defendant fraudulently sells stock for \$200,000 that is worth \$120,000 and deposits the \$200,000 in a bank; the value of the criminally derived funds is \$200,000, but the loss is \$80,000). ~~If the defendant is able to establish that the loss, as defined in §2F1.1 (Fraud and Deceit), was less than the value of the funds (or property) involved in the financial or monetary transactions, transfers, transportation, or transmissions, the loss from the offense shall be used as the value of the funds.~~

Subsection (a)(2) applies even where the funds are not proceeds of unlawful activity, where the offense involves a financial or monetary transaction, transfer, transportation, or transmission from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States with the intent to promote the carrying on of a specified unlawful activity described in that subsection.

2. If the defendant is to be sentenced both on a count for an offense from which the funds were derived and on a count under this guideline, the counts will be grouped together under subsection (c) of §3D1.2 (Groups of Closely-Related Counts).
3. Subsection (b)(1)(A) is intended to provide an increase for those cases that involve ~~actual money laundering i.e.,~~ efforts to make criminally derived funds appear to have a legitimate source. This subsection will apply, for example, when the defendant conducted a transaction through a straw party or a front company, concealed a money-laundering transaction in a legitimate business, or used an alias or otherwise provided false information to disguise the true source or ownership of the funds.
4. In order for subsection (b)(1)(B) to apply, the defendant must have known or believed that the funds would be used to promote further criminal conduct, i.e., criminal conduct beyond the underlying acts from which the funds were derived.
5. Subsection (b)(2) is designed to provide an additional increase for those money laundering cases that are more difficult to detect because sophisticated steps were taken to conceal the origin of the money. Subsection (b)(2)(B) will apply, for example, if the offense involved the "layering" of transactions, i.e., the creation of two or more levels of transaction that were intended to appear legitimate, or if the offense involved the use of individuals or organizations engaged in the business of money laundering, i.e., those who receive payment or other benefit for conducting or assisting in the transaction.
6. The lower offense level provided by the special instruction in subsection (c) is reserved for offenses which meet all the specified criteria. When these criteria are met, the offense level under this guideline is 8 plus the number of offense levels from the table in §2F1.1 (Fraud and Deceit) corresponding to the value of the funds. The offense level under subsection (c) is not subject to enhancement under any other subsection of this guideline.

For example, a defendant who deposits a check constituting the proceeds of his or her spouse's specified unlawful activity into the spouse's account would qualify for the reduced offense level of subsection (c) if all the other limitations are present.

* * *



Office of the Attorney General
Washington, D. C. 20530

SPECIAL

FACSIMILE TRANSMITTAL COVER SHEET

DATE:

4/28/97

TO:

Leanne Shimabukuro
Cabinet Affair

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TELEPHONE NO.

FROM:

Kent Markus / perl

FACSIMILE NO.

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5

COMMENTS:

SPECIAL

~~DRAFT~~

**FEDERAL SENTENCING POLICY RELATING TO CRACK COCAINE
Q AND As**

Q: Why have you changed your position from last year?

A: We haven't changed our position. We thought the Sentencing Commission went too far in its report last year, by recommending equalization of penalties between powder and crack cocaine. This year's report recognizes that the penalties for crack should be tougher than those for powder, but also argues that the 5 gram mandatory minimum for crack cocaine does not target the mid-level dealer, but instead sweeps in lower-level dealers. The current mandatory penalties for small distributors of crack are disproportionate and unnecessary for effective law enforcement.

Q: Does the Administration agree with the Commission's report?

A: The United States Sentencing Commission's Report is fundamentally sound. The Commission suggests that the federal penalties for crack, with their severe impact on a single racial group, inappropriately focus federal resources on a lower level of the drug trade than is ordinarily warranted in the federal system.

Q: So you don't believe that crack cocaine is a dangerous substance? Are you giving up on the drug war?

A: We continue to believe that the distribution of crack cocaine is a serious offense in our communities. And any revised penalty structure needs to reflect that crack cocaine is the more harmful form of cocaine.

Q: Doesn't lowering penalties for drug offenders send the wrong message, especially with increased drug use by youth?

A: We are vigorously enforcing federal drug laws on many fronts. Overall sentences for drug defendants (overall and for crack) will continue to be significant in the federal system. At the same time, we must direct our limited federal resources where they will have the most impact and where our federal tools provide us a comparative advantage.

Q: Won't federal law enforcement efforts be undermined by a change in crack penalties?

A: No. There is no reason that this change in penalties should affect our ability to effectively enforce federal drug laws.

When Congress initially established the 5-year mandatory minimum sentence, they said they wanted it to apply to a "mid-level" or serious dealer. The current penalty structure leads to an over-emphasis of federal resources on low-level defendants.

- 5 grams of crack cocaine is worth as little as \$400 and is characteristic of a street level dealer. While it can be important to prosecute at this level of the distribution chain, state and local prosecutors are often in a better position to target this level of the trade and certainly can do so as effectively and possibly more cheaply than can the federal government. (The current 5-year mandatory minimum for this \$400 worth of crack costs taxpayers over \$100,000 in incarceration costs.)
- DEA data suggest that a mid-level crack dealer deals in ounce or multi-ounce quantities.
(1 ounce = 28 grams).

We must direct our limited federal resources where they will have the most impact and where our federal tools provide us a comparative advantage and have a longer lasting impact on the trade overall. These resources are best directed at disrupting and dismantling organizations as a whole. Our strategy should emphasize prosecutions against both cocaine powder organizations and crack cocaine organizations and their leaders. Targeting individual distributors -- who are easily replaced -- results in only a short term "fix."

Q: Aren't high crack penalties important for prosecuting dangerous/violent gang members? Aren't you going to make it easier for dangerous criminals to go unpunished or underpunished?

A: The change in crack penalties would still leave in place substantial federal tools to focus on violent and dangerous offenders. And we will continue to prosecute crack cases in the federal system especially when there is organized drug dealing; use of weapons; using minors in drug trafficking; trafficking near schools and other places; or other aggravating factors.

We agree with the Sentencing Commission that lower-level street cases are ordinarily better handled at the state level.

Q: What do you think about legislative proposals that would raise powder penalties, but leave crack unchanged?

A: We do not believe the problem can be solved by increasing powder penalties without changing crack penalties.

- Increasing powder penalties alone fails to address the problems with current

crack penalties: 5 gram mandatory minimum for crack cocaine does not target the mid-level dealer, but instead sweeps in lower-level dealers.

- Increasing powder penalties may have the unintended effect of focusing more federal resources lower in the distribution chain for powder cocaine (for which just under 50% of the federal defendants are Hispanic).
- Increased costs would be incurred by targeting lower-level offenders:
 - Increasing powder penalties (using 100 grams as the 5 year mandatory minimum trigger as does the Hatch Bill), could cost the government about \$500 million in the first five years in extra prison expenditures.
 - Projections suggest this could increase to \$4.7 billion in 20 years and \$9.5 billion in 30 years.
- By only increasing powder sentences, the harsh crack penalties will continue to impact a group of low-level defendants, 90% of whom are African-American.

Q: To what extent was your change in position due to racial concerns?

A: The racial implications of the current cocaine sentencing structure are deeply troubling. The current harsh penalties for crack cocaine fall disproportionately on African-Americans and target a lower level of the drug trade than do the penalties associated with other controlled substances.

- 90% of crack defendants are Black.
- It takes only 5 grams of crack as opposed to 500 grams of powder cocaine to get a 5-year mandatory minimum sentence in the federal system.

The problem inherent in this penalty structure is magnified because the harsh penalties, particularly for the small dealers, have become a symbol of racial injustice in the criminal justice system. We need to recognize the corrosive effect this has had on respect for the law in certain communities and on the effective administration of justice. When communities lose faith in the fairness of the legal process, our ability to enforce the law suffers.

Q: What penalty structure does the Administration support? Do you agree with the ranges suggested by the Commission's report?

A: We hope that we will all be able come together with Congress to address the issue in a deliberate manner. The President has asked the Attorney General and the Director of ONDCP to recommend what steps should be taken in response to the

Sentencing Commission's report.

We believe that a re-designed penalty structure could help target limited federal resources in a more efficient and effective manner -- and most importantly, in a manner that is not seen to provide inappropriately harsh punishments for a single racial group.

We could support a strategy (such as that proposed by the Sentencing Commission) to bring the sentences closer together in the middle, raising the triggering amounts for the mandatory minimum for crack and lowering those for powder.

April 28, 1997



Department of Justice

STATEMENT

OF

JO ANN HARRIS

ASSISTANT ATTORNEY GENERAL

CRIMINAL DIVISION

BEFORE THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

CONCERNING

COCAINE SENTENCING POLICY

PRESENTED ON

AUGUST 10, 1995

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to appear before you today to discuss sentencing of offenders who violate federal laws relating to crack cocaine.

The Department of Justice strongly opposes the recent action by the United States Sentencing Commission to equalize penalties for trafficking in crack and cocaine powder at the much lower, current levels applicable to powder. To this end we have submitted a legislative proposal to override the Commission's guideline amendments aimed at this purpose and urge Congress to act quickly to prevent the amendments from taking effect November 1, 1995.

Our reason for urging this action is two-fold. First, we believe that equalization is entirely unwarranted and counter to good law enforcement policy. Crack is simply the more dangerous form of the drug. That is not to say, however, that the question of appropriate penalties for crack and powder cocaine does not warrant review. Second, if after a careful review, Congress concludes that some change in the ratio is appropriate, it is essential that a statutory change in the relevant mandatory minimums precede the applicable guidelines changes.

The Commission's guideline amendments currently pending in Congress are inconsistent with current statutory minimum penalties. The process employed by the Commission in moving forward with guideline changes that are discordant with the current statutes is in our view wrong -- rather, the Commission

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should first have asked Congress to change the statutes. Moreover, the process employed will produce bad sentences. I shall explain each of these concerns in greater detail.

Before doing so, I would like to commend the United States Sentencing Commission for its Special Report to the Congress, entitled Cocaine and Federal Sentencing Policy. It is a valuable resource which I recommend as you study the issue before you. In its Report the Commission concludes there are substantial differences between crack and cocaine powder and that crack is associated with more societal harms than cocaine powder.

The Department of Justice is concerned that equalization of the penalties for crack and cocaine powder trafficking does not reflect the significant differences between the two, the impact crack has had on our communities, and the effect a drastic change in penalties would have on deterring those who traffic in this dangerous drug. We believe, nonetheless, that a review of the current penalty structure is appropriate, and we look forward to working with this Committee and with Congress and, if appropriate, with the Commission in that review.

Crack is More Dangerous

The Crack Market

Because crack, unlike powder cocaine, is typically broken down and packaged into very small and inexpensive quantities for distribution, it has become readily available to a large segment of our population, including those most vulnerable -- the poor

and the young. In addition, crack is easy to use, which makes it attractive to potential buyers targeted by traffickers.

The ability to sell small quantities of crack has led to street-based marketing patterns and the development of "crack houses." Violence is heavily associated with the crack trade, both because of its street-based nature as well as the sheer volume of transactions taking place involving these quantities of crack. As the number of deals increases, so too the probability that any one will result in a dispute. Guns are prevalent on the street and are used freely to protect the trade.

As the Sentencing Commission itself concluded, "crack dealers generally tend to have a stronger association with systemic violence [violence associated with the marketing of a drug] and are more likely to possess weapons than powder cocaine dealers." Special Report at 195. Moreover, crack dealers "tend to use young people to distribute the drug at an increased rate." Id. Thus, the violent crack culture is being transmitted to our youth.

Effects of Crack and Cocaine Powder Use

Because of the way it is consumed, small quantities of crack can be very dangerous. This danger follows from the route of administration of the two drugs: crack is smoked while cocaine powder typically is snorted. This difference in the most common routes of administration makes crack the more harmful form of cocaine.

Smoking crack as compared to snorting cocaine results in significant physiological and psychotropic differences. Those who smoke crack reach maximum physiological effects in approximately two minutes and maximum psychotropic effects in just one minute. In contrast, those who snort cocaine powder reach these effects in 40 and 20 minutes, respectively. Crack that is smoked enters the brain in just 19 seconds, compared to five minutes for cocaine powder that is snorted. Id. at 29. Smoking crack is also a more efficient absorption route than snorting powder. Id. at 23. However, the duration of effect for crack is shorter than for cocaine powder when snorted: 30 minutes, compared to 60 minutes. Id. at 29. Duration of effect is significant because it is related to dependency; because of the short but intense nature of the euphoria induced by crack, the user is more likely to administer the drug frequently and in binges. Id. at 28. In summary, crack is more psychologically addictive than cocaine powder.

The Department's conclusions about the harmful effects of crack as compared to cocaine powder are virtually the same as those reached by the Sentencing Commission, which itself concluded: "[T]he higher addictive qualities associated with crack combined with its inherent ease of use can support a higher ratio for crack over powder." Id. at 183.

Sentencing Commission's Actions

On May 1, 1995, the United States Sentencing Commission submitted to Congress amendments to the sentencing guidelines, policy statements, and official commentary that would equalize penalties for cocaine base (which is usually in the form of crack) and cocaine powder. The resulting penalties for crack would be at the current levels for cocaine powder. These amendments, adopted by a 4-3 vote, will take effect November 1, 1995, unless an Act of Congress provides otherwise.

The Sentencing Commission has actually taken two steps to lower crack penalties. First, the Commission has recommended that Congress eliminate the differential treatment of crack and cocaine powder in the mandatory minimum penalties currently provided by statute. In addition, the Commission has promulgated an amendment of the sentencing guidelines to treat crack and cocaine powder alike under the guidelines, both for simple possession and trafficking, regardless of whether Congress first revises the statutory minimum penalties.

Impact on Crack Sentences

The Commission's amendments and legislative proposal would reduce crack trafficking penalties to extremely low levels. As a result of the Commission's combined actions, an offender convicted of distributing 50 grams of crack (about 500 doses), for whom the current law imposes a mandatory minimum 10-year term of imprisonment, would face a guideline sentence of 21-27 months of imprisonment. However, unlike a mandatory minimum sentence,

the guideline sentence would be subject to reduction for various guideline factors. If the 50-gram trafficker accepted responsibility for his or her offense, the sentencing guideline range would be just 12-18 months of imprisonment. If the court found that the offender had also played a minimal role in the offense, the sentencing guideline range would be reduced to 4-10 months of imprisonment, which could be satisfied by probation with home detention.

In short, if Congress adopts the Commission's recommendation to treat crack and cocaine powder alike for purposes of the mandatory minimum penalties, some offenses now subject to a 5- or 10-year mandatory minimum prison term will potentially result in a sentence involving no required prison term at all. The message to crack traffickers would be to expand their operations in response to a windfall reduction in the cost of doing business.

Problems of Guidelines Without Statutory Change

Even if Congress does not adopt the Commission's recommendation as to mandatory minimum penalties for crack, the sentencing guideline amendments the Commission has submitted create serious problems. The Commission did not make the sentencing guideline amendments contingent upon amendment of the mandatory minimum sentences. Thus, the low guideline sentences that would result from equalization of crack and cocaine powder penalties would create tension between the guidelines and the current statutory scheme, with the result that mandatory minimum sentences will override many guideline sentences and produce

sharp cliffs in sentencing. For example, a tenth of a gram of crack could make the difference between a guideline sentence of a half-year of imprisonment (or probation with conditions of confinement) and a five-year mandatory minimum term. Moreover, many sentences that would have been well above the mandatory minimum levels, based on quantity, will be reduced to the mandatory minimum. As a result, distinctions in offense seriousness based on drug quantity will be obliterated in many cases.

In short, by moving forward with guideline amendments without any statutory change to the crack penalty structure, the Commission has put the cart before the horse -- with the result that bad sentences will be imposed. The sentencing guidelines should work in concert with, rather than in opposition to, mandatory minimum sentences.

Another effect of the Commission's guideline changes, even in the absence of a statutory change in mandatory minimum crack sentences, is that the low proposed guideline sentences will prevail in the case of crack offenders subject to the "safety-valve" exemption from mandatory minimum sentences, 18 U.S.C. §3553(f). This will result in sentences below the Congressionally mandated guideline floor of 24 months for safety-valve defendants. Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §80001(b)(1)(B).

The majority of the Sentencing Commission believes that crack's greater dangers can be captured through the use of guideline enhancements targeted to particular harms associated with some crack offenses -- harms such as sales to juveniles and the use of firearms. To this end the Commission has proposed a new enhancement regarding the possession and use of a weapon for all drug trafficking offenses.

Along with the minority, we believe it is not enough to rely on these factors to account for the differences between crack and cocaine powder trafficking in individual sentences. Relying on such enhancements ignores the fact that equally or more culpable defendants will be able successfully to shield themselves from association with the aggravating factors. Many members of an organization benefit from the fact that a few enforcers carry guns. All distributors should be held accountable for the systemic harms characteristic of the crack trade.

Moreover, relying on enhancements for such factors as using a minor or possessing a firearm overlooks the differences in the harms caused by the drugs themselves. A distributor of crack commits a more serious offense than a distributor of an equal amount of cocaine powder, assuming no aggravating characteristics are present, because the drug distributed by the former is more dangerous to the user and is associated with more systemic violence.

Department's Legislative Proposal

As you know, the amendments to the sentencing guidelines recently submitted by the Sentencing Commission are subject to a 180-day review period and will take effect November 1, 1995, except to the extent that an amendment is modified or disapproved by Act of Congress. See 28 U.S.C. §994(p). The Department has submitted a legislative proposal seeking Congressional disapproval of the proposed equalization of crack and cocaine powder guideline sentences applicable to trafficking offenses. However, the Department's legislative proposal would not overturn the Sentencing Commission's actions to equalize guideline sentences for simple possession of crack and cocaine powder.

It must be emphasized that time is of the essence in enacting legislation to override the Sentencing Commission's equalization guideline amendments. Inattention by Congress to this important matter will mean that the Commission's 1:1 quantity ratio for sentencing crack and cocaine powder offenders will take effect November 1, with all of the negative consequences discussed earlier.

While we urge Congress to adopt our legislative proposal disapproving the Sentencing Commission's guideline amendments, we recognize that the present sentencing structure is not the only one that could vindicate essential law enforcement purposes. We believe that in the future Congress should weigh the policy considerations relating to a particular quantity ratio for the sentencing of crack and cocaine powder trafficking offenses. To

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do so Congress needs to consider the specific sentencing consequences of any ratio considered. To choose a ratio because it sounds better than the current 100:1 or the Commission's 1:1 is not enough. The Department urged the Sentencing Commission to provide Congress with the sentencing consequences of a number of ratios and to consider the impact of the safety valve within these ratios. We suggested that these models could illustrate the actual penalty impacts of these ratios, depending upon adjustments in the mandatory minimums. Instead, the Sentencing Commission voted 4-3 to promulgate the 1:1 ratio in the face of inconsistent mandatory minimums and provided Congress no information on a range of options.

Sentencing Policy Applied Fairly

Part of the motivation for the Sentencing Commission's proposed crack amendments relates to a concern about racial bias arising from the current penalty structure. Federal prosecution efforts in all areas reflect an intent to direct federal resources toward the greatest criminal problems devastating our communities. Race is never a factor in our decision-making.

Maintaining a differential in the sentencing of crack and cocaine powder trafficking offenses reflects an attempt to ensure proper punishment of those who prey on the most vulnerable members of our society.

I would be pleased to answer any questions you may have.