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**Testimony of Caroline Fredrickson, Director and Jesselyn McCurdy,
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Drugs of the Senate Committee on the Judiciary on
"Federal Cocaine Sentencing Laws: Reforming the 100-to-1
Crack/Powder Disparity"
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The American Civil Liberties Union (ACLU) would like to thank the Subcommittee on Crime and Drugs of the Senate Committee on the Judiciary for the opportunity to submit testimony for this hearing on “Federal Cocaine Sentencing Laws: Reforming the 100-to-1 Crack/Powder Disparity.” The ACLU is a nonpartisan organization with hundreds of thousands of activists and members and with 53 affiliates nationwide. Our mission is to protect the Constitution and particularly the Bill of Rights. Thus, the disparity that exists in federal law between crack and powder cocaine sentencing continues to concern our organization due to the implications of this policy on due process and equal protection rights of all people. Equally important to our core mission are the rights of freedom of association and freedom from disproportionate punishment, which are also at risk under this sentencing regime.

For many years, the ACLU has been deeply involved in advocacy regarding race and drug policy issues. The ACLU assisted in convening the first national symposium in 1993 that examined the disparity in sentencing between crack and powder cocaine, which was entitled "Racial Bias in Cocaine Laws." Fifteen years ago the conclusion of representatives from the civil rights, criminal justice and religious organizations that participated in the symposium was that the mandatory minimum penalties for crack cocaine are not medically, scientifically or socially justifiable and result in a racially biased national drug policy. In 2002 and 2007, we urged the United States Sentencing Commission (USSC) to support amendments to federal law that would equalize crack and powder cocaine sentences at the current level of sentences for powder cocaine. In 2008, we urge the United States Senate to enact S.1711, the Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2007 which would eliminate the unjust and discriminatory 100 to 1 disparity between crack and powder cocaine sentences in federal law.

Background and History

In June 1986, the country was shocked by the death of University of Maryland basketball star Len Bias in the midst of crack cocaine's emergence in the drug culture. Three days after being drafted by the Boston Celtics, Bias, who was African American, died of a drug and alcohol overdose. Many in the media and public assumed that Bias died of a crack cocaine overdose. Congress quickly passed the 1986 Anti-Drug Abuse Act motivated by Bias' death and in large part by the notion that the infiltration of crack cocaine was devastating America's inner cities. Although it was later revealed that Bias actually died of a powder cocaine overdose, by the time the truth about Bias' death was discovered, Congress had already passed the harsh discriminatory crack cocaine law.

Congress passed a number of mandatory minimum penalties primarily aimed at drugs and violent crime between 1984 and 1990. The most notorious mandatory minimum law enacted by Congress was the penalty relating to crack cocaine, passed as a part of the Anti-Drug Abuse Act of 1986. The little legislative history that exists suggests that members of Congress believed that crack was more addictive than powder cocaine, that it caused crime, that it caused psychosis and death, that young people were particularly prone to becoming addicted to it, and that crack's low cost and ease of manufacture would lead to even more widespread use of it. Acting upon these beliefs, Congress decided to punish use of crack more severely than use of powder cocaine.

On October 27, 1986, the Anti-Drug Abuse Act of 1986 was signed into law, establishing the mandatory minimum sentences for federal drug trafficking crimes and creating a 100 to 1 sentencing disparity between powder and crack cocaine. Members of Congress intended the triggering amounts

of crack to punish “major” and “serious” drug traffickers. However, the Act provided that individuals convicted of crimes involving 500 grams of powder cocaine or just five (5) grams of crack (the weight of two pennies) would be sentenced to at least five (5) years imprisonment, without regard to any mitigating factors. The Act also provided that those individuals convicted of crimes involving 5000 grams of powder cocaine and 50 grams of crack (the weight of a candy bar) be sentenced to 10 years imprisonment.

Two years later, drug-related crimes were still on the rise. In response, Congress intensified its war against crack cocaine by passing the Omnibus Anti-Drug Abuse Act of 1988. The 1988 Act created a five (5) year mandatory minimum and 20-year maximum sentence for simple possession of 5 grams or more of crack cocaine. The maximum penalty for simple possession of any amount of powder cocaine or any other drug remained at no more than 1 year in prison.

The 100 to 1 Disparity in Federal Cocaine Sentencing Has a Racially Discriminatory Impact and has had a Devastating Impact on Communities of Color

Data on the racial disparity in the application of mandatory minimum sentences for crack cocaine is particularly disturbing. African Americans comprise the vast majority of those convicted of crack cocaine offenses, while the majority of those convicted for powder cocaine offenses are Hispanic. This is true, despite the fact that whites and Hispanics form the majority of crack users. For example, in 2006, whites constituted 8.8% and African Americans constituted slightly more than 81% of the defendants sentenced under the harsh federal crack cocaine laws, while more than 66% of crack cocaine users in the United States are white or Hispanic. Due in large part to the sentencing disparity based on the form of the drug, African Americans serve substantially more time in prison for drug offenses than do whites. The average sentence for a crack cocaine offense in 2006, which was 122 months, was slightly more than 3 years longer than the average sentence of 85 months for an offense involving the powder form of the drug. Also due in large part to mandatory minimum sentences for drug offenses, from 1994 to 2003, the difference between the average time African American offenders served in prison increased by 62%, compared to an increase of 17% for white drug offenders. African Americans now serve virtually as much time in prison for a drug offense at 58.7 months, as whites do for a violent offense at 61.7 months. The fact that African American defendants received the mandatory sentences more often than white defendants, who were eligible for a mandatory minimum sentence, further supports the racially discriminatory impact of mandatory minimum penalties.

For more than 20 years, federal and state drug laws and policies have also had a devastating impact on women. In 2003, 58% of all women in federal prison were convicted of drug offenses, compared to 48% of men. The growing number of women who are incarcerated disproportionately impacts African American and Hispanic women. African American women’s incarceration rates for all crimes, largely driven by drug convictions, increased by 800% from 1986, compared to an increase of 400% for women of all races for the same period. Sentencing policies, particularly the mandatory minimum for low-level crack offenses, subject women who are low-level participants to the same or harsher sentences as the major dealers in a drug organization.

The collateral consequences of the nation’s drug policies, racially targeted prosecutions, mandatory minimums, and crack sentencing disparities have had a devastating effect on African American men, women and families. Recent data indicates that African Americans make up only 15% of the country’s drug users, yet they comprise 37% of those arrested for drug violations, 59% of those

convicted, and 74% of those sentenced to prison for a drug offense. In 1986, before the enactment of federal mandatory minimum sentencing for crack cocaine offenses, the average federal drug sentence for African Americans was 11% higher than for whites. Four years later, the average federal drug sentence for African Americans was 49% higher. As law enforcement focused its efforts on crack offenses, especially those committed by African Americans, a dramatic shift occurred in the overall incarceration trends for African Americans, relative to the rest of the nation, transforming federal prisons into institutions increasingly dedicated to the African American community.

Mandatory minimums not only contribute to these disproportionately high incarceration rates, but also separate fathers from families, separate mothers with sentences for minor possession crimes from their children, leave children behind in the child welfare system, create massive disfranchisement of those with felony convictions, and prohibit previously incarcerated people from receiving social services such as welfare, food stamps and access to public housing. For example, in 2000 there were approximately 791,600 African American men in prisons and jails. That same year, there were only 603,032 African American men enrolled in higher education. The fact that there are more African American men under the jurisdiction of the penal system than in college has led scholars to conclude that our crime policies are a major contributor to the disruption of the African American family.

One of every 14 African American children has a parent locked up in prison or jail today, and African American children are nine (9) times more likely to have a parent incarcerated than white children. Moreover, approximately 1.4 million African American males – 13% of all adult African American men – are disfranchised because of felony convictions. This represents 33% of the total disfranchised population and a rate of disfranchisement that is seven (7) times the national average. In addition, as a result of federal welfare legislation in 1996, there is a lifetime prohibition on the receipt of welfare for anyone convicted of a drug felony, unless a state chooses to opt out of this provision. The effect of mandatory minimums for a felony conviction, especially in the instance of simple possession or for very low-level involvement with crack cocaine, can be devastating, not just for the accused, but also for that person's entire family.

Facts Dispel the Myths Associated with Crack Cocaine

The rapid increase in the use of crack between 1984 and 1986 created many myths about the effects of the drug in popular culture. These myths were often used to justify treating crack cocaine differently from powder cocaine under federal law. For example, crack was said to cause especially violent behavior, destroy the maternal instinct leading to the abandonment of children, be a unique danger to developing fetuses, and cause a generation of so-called "crack babies" that would plague the nation's cities for their lifetimes. It was also thought to be so much more addictive than powder cocaine that it was "instantly" addicting.

In the more than 20 years since the enactment of the 1986 law, many of the myths surrounding crack cocaine have been dispelled, as it has become clear that there is no scientific or penological justification for the 100 to 1 ratio. In 1996, a study published by the Journal of American Medical Association (JAMA) found that the physiological and psychoactive effects of cocaine are similar regardless of whether it is in the form of powder or crack.

For instance, crack was thought to be a unique danger to developing fetuses and destroy the maternal instinct causing children to be abandoned by their mothers. During the Sentencing Commission hearings that were held prior to the release of the commission's 2002 report on Cocaine

and Federal Sentencing Policy, several witnesses testified to the fact that the so-called myth of “crack babies” who were thought to suffer from more pronounced developmental difficulties by their in-utero exposure to the drug was not based in science. Dr. Ira J. Chasnoff, President of the Children’s Research Triangle, testified before the Sentencing Commission that since the composition and effects of crack and powder cocaine are the same on the mother, the changes in the fetal brain are the same whether the mother used crack cocaine or powder cocaine.

In addition, Dr. Deborah Frank, Professor of Pediatrics at Boston University School of Medicine, in her 10-year study of the developmental and behavioral outcomes of children exposed to powder and crack cocaine in the womb, found that “the biologic thumbprints of exposure to these substances” are identical. Dr. Frank added that small but identifiable effects of prenatal exposure to powder or crack cocaine are prevalent in certain newborns’ development, but they are very similar to the effects associated with prenatal tobacco exposure, such as low birth weight, height or head circumference.

Crack was also said to cause particularly violent behavior in those who use the drug. However, in the 2002 report on Cocaine and Federal Sentencing Policy, the Commission includes data that indicates that significantly less trafficking-related violence is associated with crack than was previously assumed. For example, in 2005: 1) 57.3% of overall crack offenses did not involve the use of a weapon by any participant in the crime; 2) 74.5% of crack offenders had no personal weapons involvement; and 3) only 2.9% of crack offenders actively used a weapon. Most violence associated with crack results from the nature of the illegal market for the drug and is similar to violence associated with trafficking of other drugs.

Another of the pervasive myths about crack was that it was thought to be so much more addictive than powder cocaine that it was “instantly” addicting. Crack and powder cocaine are basically the same drug, prepared differently. The 1996 JAMA study found that the physiological and psychoactive effects of cocaine are similar regardless of whether it is in the form of powder or crack. The study also concluded that the propensity for dependence varied by the method of ingestion, amount used and frequency, not by the form of the drug. Smoking crack or injecting powder cocaine bring about the most intense effects of cocaine. Regardless of whether a person smokes crack or injects powder cocaine, each form of the drug can be addictive. The study also indicated that people who are incarcerated for the sale or possession of cocaine, whether powder or crack, are better served by drug treatment than imprisonment.

Federal Cocaine Sentencing Should Reflect the Original Legislative Intent of Congress and Focus on High-Level Drug Traffickers

Indeed, if the message Congress wanted to send by enacting mandatory minimums was that the Department of Justice should be more focused on high-level cocaine traffickers, Congress missed the mark. Instead of targeting large-scale traffickers in order to cut off the supply of drugs coming into the country, the law established low-level drug quantities to trigger lengthy mandatory minimum prison terms. The USSC’s 2007 report states that 61.5% of crack defendants have low-level involvement in drug activity, such as street level dealers, couriers, or lookouts.

Harsh mandatory minimum sentences for crack cocaine have not stemmed the trafficking of cocaine into the United States, but have instead caused an increase in the purity of the drug and the

risk it poses to the health of users. The purity of drugs affects the price and supply of drugs that are imported into the country. The Office of National Drug Control Policy below best explains how purity and price are related to reducing the supply of drugs.

“The policies and programs of the *National Drug Control Strategy* are guided by the fundamental insight that the illegal drug trade is a market, and both users and traffickers are affected by market dynamics. By disrupting this market, the US Government seeks to undermine the ability of drug suppliers to meet, expand, and profit from drug demand. When drug supply does not fully meet drug demand, changes in drug price and purity support prevention efforts by making initiation to drug use more difficult. They also contribute to treatment efforts by eroding the abilities of users to sustain their habits.” National Drug Control Strategy, Office of National Drug Control Policy, The White House, February 2006, page 17.

One indication that the National Drug Control Strategy has not made progress in cutting off the supply of drugs coming into this country is the fact that the purity of cocaine has increased, but the price of the drug has declined in recent years. In the context of a business model, declining prices and higher quality products are what one would commonly expect from most legitimate products (i.e. televisions, computers and cell phones), but not from illegal cocaine trade. According to ONDCP, for cocaine from 1981 to 1996 the retail price declined dramatically and then rose slightly through 2000. However, the purity or quality of cocaine sold on the streets is twice that of the early 1980s, although somewhat lower than the late 1980s. As a result there is more cocaine available on the street at a lower price. This is a clear indication that this country’s drug control policy has not properly focused on prosecuting high-level traffickers in order to reduce the flow of drugs coming into the country.

In the 1995 Commission report on Cocaine and Federal Sentencing Policy, the Drug Enforcement Agency (DEA) explained that powder cocaine is typically imported into the United States in shipments “exceeding 25 kilograms and at times reaching thousands of kilograms.” These shipments are generally distributed to various port cities across the country. In 2007, the USSC found that the median drug quantity for powder offenders is 6,000 grams versus 51.0 grams for crack cocaine offenders. Even though the DEA recognizes that importers ship well over 25 kilograms at a time into the country, the discussion about what constitutes a high-level crack cocaine trafficker should at the very least start at the median level of approximately 6000 grams of powder cocaine.

Increasing Support in Congress and by the United States Sentencing Commission for Changing the 100 to 1 Crack Cocaine Disparity

Several members of 110th Congress have introduced legislation addressing the 100 to 1 disparity between federal crack and powder cocaine sentences. S.1711, introduced by Senator Joseph Biden (D-DE), would eliminate the current disparity in federal sentences between crack and powder cocaine offenses. The ACLU supports this legislation because many of the myths associated with determining the 100 to 1 ratio have been proven wrong by recent data. Numerous scientific and medical experts have determined that the pharmacological effects of crack cocaine are no more harmful than powder cocaine. The effect of cocaine on users is the same regardless of form. Thus, federal law should not make a distinction between sentences for selling or possession of the two drugs and equalizing the disparity is the only fair way to address the 100 to 1 ratio.

Senators Hatch (R-UT) and Kennedy (D-MA) and Senator Sessions (R-AL) have also introduced bills that would reduce the federal crack cocaine disparity from 100 to 1 to 20 to 1. Senators Hatch and Kennedy would increase the amount of crack cocaine that would trigger a five-year sentence to 25 grams and the amount that would trigger a ten-year sentence to 250 grams. Senator Sessions' bill would increase the amount of crack cocaine that would subject a person to the five-year mandatory minimum sentence to 20 grams, but decrease the amount of powder cocaine that would result in a five-year sentence to 400 grams. While we acknowledge the efforts of Senators Hatch, Kennedy and Sessions to reduce the federal crack cocaine disparity, the ACLU supports eliminating the 100 to 1 disparity entirely because there is no justification for treating the drugs differently under the law.

In the House, H.R.4545, the Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2007 was introduced by Representatives Sheila Jackson-Lee (D-TX) and Christopher Shays (R-CT). This legislation is the companion bill to Senator Biden's S.1711 and would also eliminate the current disparity in federal sentences between crack and powder cocaine offenses. The ACLU supports H.R.4545 for the same reasons we endorsed S.1711.

The ACLU also commends Representatives Charles Rangel (D-NY) and Bobby Scott (D-VA) for their long-standing efforts to address the federal crack cocaine disparity. Representative Rangel has introduced H.R.460, the Crack Equitable Sentencing Act of 2007 which would also eliminate the federal crack and powder cocaine disparity. Representative Bobby Scott has introduced H.R.5035, Fairness in Cocaine Sentencing Act of 2008 which would eliminate the mandatory minimum sentences for both crack and powder cocaine offenses on the federal level, as well as provide funding for federal and state drug courts.

In addition, Representative Roscoe Bartlett (R-MD) has introduced H.R.79, the Powder-Crack Cocaine Penalty Equalization Act of 2007 legislation that would equalize the trigger quantities of crack and powder cocaine at the current five (5) gram level of crack. The ACLU opposes any measures that would lower the amount of powder cocaine required to trigger a mandatory minimum. Powder cocaine sentences are already severe and increasing the number of people incarcerated for possessing small amounts of cocaine is not the answer to the problem. Additionally, any measures that decrease the amount of powder cocaine would disproportionately impact minority communities, particularly Hispanic communities, because of the disparate prosecution of powder cocaine offenses. In 2006, 14.3% of all powder cocaine defendants were white, 27% were black and 57.5% were Hispanics. The mandatory sentences for crack cocaine and the disparity with powder cocaine sentences have created a legacy that must come to an end.

In April 2007, the United States Sentencing Commission (USSC) promulgated amendments to the Federal Sentencing Guidelines that make them more consistent with the statutory mandatory minimums. This guideline amendment became effective November 1, 2007. On December 11, 2007, in a 7-0 unanimous decision, the USSC decided to apply the guideline amendment changes retroactively. This will result in approximately 19,500 prisoners who are serving sentences longer than the five- and ten-year mandatory minimums, as a result of the sentencing guidelines, to be eligible for the sentence they should have received in accordance with the law.

However, even with all these recent developments it is important to remember that the USSC's guideline amendments are only a small step forward in the efforts to reform the federal crack

cocaine law. These guideline changes will not eliminate or even significantly alleviate the very long mandatory minimum sentences that many people are serving for crack cocaine offenses.

Conclusion

October 2006 marked the twentieth anniversary of the enactment of 1986 Anti-Drug Abuse Act. In the more than twenty years since its passage, many of the myths surrounding crack cocaine have been dispelled, as it has become clear that there is no scientific or penological justification for the 100 to 1 sentencing disparity ratio. This sentencing disparity has resulted in unwarranted disparities based on race. Nationwide, statistics compiled by the USSC reveal that African Americans are more likely to be convicted of crack cocaine offenses, while Hispanics are more likely to be convicted of powder cocaine offenses. In addition, many of the assumptions used in determining the 100 to 1 ratio have been proven wrong by recent data. Scientific and medical experts have determined that in terms of pharmacological effects, crack cocaine is no more harmful than powder cocaine – the effects on users is the same regardless of form. Finally, Congress made it explicitly clear that in passing the current mandatory minimum penalties for crack cocaine, it intended to target “serious” and “major” drug traffickers. The opposite has proved true: mandatory penalties for crack cocaine offenses apply most often to offenders who are low-level participants in the drug trade.

Congress must act in order to eliminate the statutory 100 to 1 disparity between crack and powder cocaine. For these reasons, the ACLU urges Congress to enact S.1711/H.R. 4545, the Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2007 in order to end this 20-year travesty of justice.

Thank you for taking our views into consideration.