

## HUMAN RIGHTS WATCH

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October 20, 2009

Senator Richard Durbin  
United States Senate  
309 Hart Office Building  
Washington, DC 20510

Dear Senator Durbin:

I am writing to express Human Rights Watch's strong support for the *Fair Sentencing Act of 2009* (S.1789). Passage of this bill will overturn drug sentencing laws enacted more than two decades ago which established far higher criminal penalties for one form of cocaine, crack cocaine, than for another form, powder cocaine. The harsher sentences for crack cocaine have yielded egregiously severe sentences for low level offenders and unjustifiable racial disparities, as black Americans have borne the brunt of crack cocaine sentences. Reform of federal cocaine sentencing legislation is long overdue.

The Fair Sentencing Act will dismantle the infamous 100-1 ratio of the quantity of powder cocaine required to trigger the same federal sentence as crack cocaine that was established in 1986. The 100-1 ratio has created sentences for crack offenses that are far longer than those for powder offenses involving the same amount of drugs. In 2008 the average sentence for federal crack cocaine drug offenders was 114.5 months compared to an average sentence of 91 months for federal powder cocaine offenders.<sup>1</sup> The Act will also eliminate the current mandatory minimum five year sentence for simple possession of crack cocaine (the only federal mandatory minimum sentence for simple possession of a drug even if by a first time offender).

### Disproportionately Harsh Sentences

The United States Sentencing Commission has amply documented that the preponderance of federal crack offenders occupy the lower rungs of the drug trade.<sup>2</sup> For example, 61.5 percent are street-level dealers, couriers, lookouts, and the like. These low level offenders are, however, punished severely. The average length of imprisonment for a street-level dealer of crack cocaine is 97 months, just over eight years. The severity of such sentences in and of itself justifies reform. But the case for reform becomes overwhelming in light of the fact that a street-level dealer of powder cocaine receives an average sentence that is about one half (48 months) as long.

The contrast between federal crack cocaine sentences and state sentences is startling. The average sentence for state defendants convicted of drug felonies

<sup>1</sup> United States Sentencing Commission, Sourcebook of Federal Sentencing Statistics, 2008, Figure J, available at <http://www.ussc.gov/ANNRPT/2008/figj.pdf>.

<sup>2</sup> See, for example, United States Sentencing Commission, Report to Congress: Cocaine and Federal Sentencing Policy, May 2007, available at [http://www.ussc.gov/r\\_Congress/Cocaine2007.pdf](http://www.ussc.gov/r_Congress/Cocaine2007.pdf).

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is 51 months.<sup>3</sup> Indeed, the average sentence for state defendants convicted of a violent offense is 92 months—less than the average federal sentence for someone who sells crack cocaine to a willing buyer.

When Congress enacted the current cocaine sentencing laws in 1986 and 1988, it was responding to extensive public concern that that crack was uniquely addictive, inherently caused violence, and, among other dire effects, yielded “crack babies.” Time and science, however, have demonstrated that most of the assertions about crack employed to support harsher sentences for crack offenders were exaggerated, false, or simply not supported by sound evidence. We now know, for example, that the pharmacological properties of crack and powder are identical and any difference in impact depends on the method of ingestion; that crack does not cause violence—the violence that accompanied its emergence reflected rival groups trying to establish control over distribution (and that violence has since subsided); and that the prenatal effects of crack are not only much less severe than previously believed, but are no different than the prenatal effects of powder cocaine. The United States Sentencing Commission, in several reports to Congress on cocaine sentencing, has carefully marshaled the evidence about crack’s direct and indirect effects and has concluded that the far severer treatment of crack offenses compared to powder cannot withstand scrutiny.

The principle that punishment should not exceed that which is proportionate to the crime reflects three basic human rights precepts: the inherent dignity of the individual, the right to be free of cruel, inhuman or degrading punishment, and the right to liberty.<sup>4</sup> By eliminating the 100-1 ratio and the five year mandatory minimum for simple possession of crack, Congress would be taking a huge step forward to restoring respect for human rights in US drug laws.

### **Racially Discriminatory Impact of Crack Sentences**

The burden of the unjustifiably long crack offense sentences has fallen overwhelming on black Americans. In 2007, 27 percent of crack cocaine users were black and 65 percent were white.<sup>5</sup> But 79.8 percent of federal defendants sentenced for crack cocaine offenses in Fiscal Year 2008 were black.<sup>6</sup> This is no anomaly: blacks have consistently accounted for the great preponderance of federal crack cocaine offenders since the 100-1 differential was enacted. The disproportionate number of black compared to white drug offenders sentenced for crack cocaine offenses helps explain the far longer average sentence lengths for all black federal drug offenders compared to white: 111.5 months compared to 73.5 months.<sup>7</sup>

The dramatic racial disparities in the imposition of crack sentences puts the United States at odds with its obligations under the International Convention on the Elimination of All Forms of Racial

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<sup>3</sup> Matthew R. Durose and Patrick A. Langan, *Felony Sentences in State Courts, 2004*, Bureau of Justice Statistics, July 2007, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fssc04.pdf>.

<sup>4</sup> Human Rights Watch, “Human Rights Watch Presentation to the United States Sentencing Commission on Proportionality and Federal Crack Sentences,” March 13, 2002, available at <http://www.hrw.org/en/news/2002/03/13/human-rights-watch-presentation-united-states-sentencing-commission-proportionality->

<sup>5</sup> SAMHSA, Office of Applied Studies, *National Survey on Drug Use and Health, 2006 and 2007*. Table 1.34A.

<sup>6</sup> Sourcebook of Criminal Justice Statistics on line, Table 5.38.2008, available at <http://www.albany.edu/sourcebook/pdf/t5392008.pdf>.

<sup>7</sup> Department of Justice, Bureau of Justice Statistics, Table 5.4. Average incarceration sentence lengths imposed, by offense and offender characteristics, October 1, 2005 – September 30, 2006, Federal Justice Statistics, 2006, available at <http://www.ojp.usdoj.gov/bjs/pub/html/fjsst/2006/tables/fjs06st504.pdf>.

Discrimination (ICERD), a treaty it ratified in 1994. ICERD prohibits conduct that has either the “purpose or effect” of restricting rights on the basis of race. Even in the absence of any malign racist intent, public policies that appear racially neutral on their face will constitute prohibited racial discrimination under ICERD if they create unwarranted racial disparities. As discussed above, the far higher sentences for crack than powder cocaine offenses cannot be justified by differences in the adverse effects of crack cocaine compared to powder cocaine. An indefensible sentencing differential has become unconscionable in light of its racial impact.

This is an opportune time for reform of federal drug laws that distinguish between powder and crack cocaine offenses. While we wish Congress would go further and eliminate all mandatory minimum sentences for drug offenses, we support current Congressional efforts to equalize sentences for crack and powder cocaine offenders who engage in equivalent conduct. With the nation reeling economically, the costs of long prison sentences for low level nonviolent crack cocaine drug offenses are even harder to justify. Public safety is not protected by giving crack cocaine offenders much harsher sentences than their powder cocaine counterparts. Rather, public safety is weakened when disproportionate crack sentences undermine faith among all races in the fairness and common sense of the criminal justice system.

Sincerely,

A handwritten signature in cursive script that reads "Jamie Fellner".

Jamie Fellner, Esq.  
Senior Counsel, US Program

CC: Senate Judiciary Committee