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Crack/Cocaine Sentencing Recommendations

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THE PRESIDENT HAS SEEN
7-7-97

THE WHITE HOUSE

WASHINGTON

July 4, 1997

MEMORANDUM FOR THE PRESIDENT

FROM: PHIL CAPLAN Phil

SUBJECT: Crack/powder cocaine sentencing recommendations

The attached Bruce Reed/Elena Kagan memo recommends that you accept a recommendation from the Attorney General and Director McCaffery and authorize them to work with Congress on legislation to change the threshold for a 5-year mandatory sentence for crack cocaine from 5 grams to 25 grams and from 500 grams to 250 grams for powder cocaine -- a ratio of 10:1 rather than the current 100:1. **You should act upon this before your trip if possible.**

Background. In May 1995, the U.S. Sentencing Commission voted to make the ratio 1:1 at 500 grams for both substances. The Administration opposed these changes and, in October 1995, you signed legislation rejecting them and directing the Sentencing Commission to submit new recommendations to Congress. On April 29, the Commission submitted the new report that suggested a range of 25-75 grams for crack and 125-375 grams for powder. You asked the AG and McCaffery to review the recommendations.

Recommendations. The AG's and McCaffery's recommendations stand upon a three-pronged rationale. First, the revised sentencing structure would help federal prosecutors and law enforcement officials better allocate resources by enabling them to focus on mid- to high-level dealers and permitting state and local prosecutors to focus on lower level dealers. Second, the current 100:1 ratio is outdated because the rates and danger of crack and powder use have narrowed over the years. Third, the current ratio is a symbol of racial bias and that our proposal would reduce the perception of injustice and inconsistency.

Congress. Next week, Senators Hatch and Abraham may offer an amendment to the juvenile justice bill lowering the minimum for powder to 100 grams while leaving crack at 5 grams -- a 20:1 ratio. Other Members have proposed lowering powder to as low as 5 grams for a 1:1 ratio. Bruce/Elena note that addressing the disparity in this manner will increase the federal government's role in low-level drug cases, overwhelm the courts and add billions to the federal prison budget.

Yes - says many Repubs agree with Democrats argument

Views. *Bruce/Elena* believe that the recommended changes represent the middle ground and the best hope of achieving progress on the issue. They advocate getting into the debate now and pushing for sensible legislation, but note that the Congressional Black Caucus will criticize 10:1 and advocate for further reducing the ratio. *Ben Johnson* notes that 10:1 will not sit well with the African-American and Hispanic communities, but that agrees that we need to enter the debate so as to push for sensible legislation. *Rahm* notes that our communications strategy will need

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refining from the current Reno/McCaffery approach, but agrees with the underlying decision to accept 10:1 and move ahead. *Ann Lewis* concurs. *John Podesta would like to get a sense of where you stand on the issue before you depart, and then meet about the communications strategy on Monday before making any further moves as several relevant senior staffers are out of town for the holiday. Once our strategy is set, he would like to confirm with you on the road.*

Recommendation. Enter the debate based on the Reno/McCaffery recommendation, but move forward only after a communications strategy is set:

✓ Agree _____ Disagree _____ Discuss

Though I would favor further reduction — under them is a criminal justice or biological impact justification & haven't heard — agree can't all be raising crack ceiling — cocaine must be lowered —

THE WHITE HOUSE

WASHINGTON

July 3, 1997

'97 JUL 3 PM 7:30

MEMORANDUM FOR THE PRESIDENT

FROM: BRUCE REED
ELENA KAGAN

SUBJECT: CRACK SENTENCING RECOMMENDATIONS

On April 29, the U.S. Sentencing Commission submitted a report to Congress with new recommendations on sentencing policy for trafficking in crack and powder cocaine. In response, you directed the Attorney General and ONDCP Director to review the report and make recommendations to you within 60 days. Today, they submitted a joint recommendation, attached to this memo, that you support changing the threshold for a 5-year mandatory sentence from 5 grams to 25 grams for crack cocaine and from 500 grams to 250 grams for powder cocaine. This change would reduce the current disparity between crack and powder cocaine sentences from a ratio of 100:1 to a ratio of 10:1. The DPC believes that you should accept this recommendation and instruct your advisers to begin working with Congress immediately to enact legislation making these changes in crack and powder cocaine sentencing.

I. Background

Under current law, the same 5-year mandatory minimum sentence applies to a person selling 5 grams of crack cocaine (worth about $300) and a person selling 500 grams of powder cocaine (worth about $30,000). This disparity is often referred to as the "100-to-1" ratio between crack and powder cocaine sentences.

In May 1995, the Sentencing Commission, by a 4-3 vote, issued changes to the sentencing guidelines to reduce crack cocaine penalties to the same level as powder sentences -- a 1:1 ratio at 500 grams. The Administration opposed these changes on the ground that crack is more harmful than powder cocaine. In October 1995, you signed legislation rejecting the changes and directing the Commission to submit new recommendations to Congress.

The Sentencing Commission's revised recommendations, submitted this April, suggested appropriate ranges for the amount of crack or powder cocaine that should trigger a mandatory minimum sentence: between 25 and 75 grams for crack cocaine and between 125 and 375 grams for powder cocaine. In asking the Attorney General and ONDCP Director to review these recommendations, you stated that "the sentencing laws must continue to reflect that crack cocaine is a more harmful form of cocaine," but that "some adjustment to the cocaine penalty structure is warranted as a matter of sound criminal justice policy."

II. Department of Justice and ONDCP Recommendation

After reviewing the Sentencing Commission's report, the Attorney General and ONDCP Director have recommended that the Administration support and work with Congress to enact legislation changing the mandatory minimum thresholds from 5 grams of crack and 500 grams of powder to 25 grams of crack and 250 grams of powder cocaine. These changes would reduce the current ratio between crack and powder sentencing from 100:1 to 10:1.

The Attorney General and ONDCP Director believe that this revised sentencing structure would help to ensure that federal prosecutors focus on the prosecution of mid- and high-level cocaine traffickers, rather than on lower-level traffickers whom state and local authorities can easily prosecute. A mid-level crack dealer typically deals in ounce (28 grams) or multi-ounce quantities. By raising the mandatory minimum to this level, Congress would remove incentives for federal prosecutors to prosecute lower-level dealers and increase the likelihood of their bringing only high-priority cases involving mid- and high-level traffickers.

The Attorney General and ONDCP Director also state that the current 100:1 ratio is outdated because the rates of crack and powder cocaine use, as well as the dangers associated with such use, have narrowed over the years. Finally, they note that the current ratio has become a symbol of racial bias in the criminal justice system and has had a corrosive effect on "respect for the law in certain communities and on the effective administration of justice."

III. Suggested Course of Action

We suggest that you endorse the recommendation submitted by the Attorney General and the ONDCP Director. The proposed 10:1 ratio, with mandatory minimum triggers at 25 grams of crack cocaine and 250 grams of powder cocaine, is fundamentally sound. This recommendation reduces the disparity between crack and powder cocaine sentencing, as well as the perception of injustice and inconsistency that goes with it. At the same time, the recommendation makes sense from a law enforcement perspective by linking the crack threshold to an amount (25 grams) that corresponds with the practice of mid-level crack dealers to traffick in ounce (28 grams) or multi-ounce quantities.

The one downside of this recommendation is that the proposed approach risks placing the Administration in the center of a debate that has no center -- with Members of Congress attacking from both directions. On the one hand, Republicans will accuse the Administration of coddling drug users by raising the mandatory minimum threshold for crack cocaine. Senators Hatch and Abraham support a proposal to drop the threshold for powder cocaine from 500 grams to 100 grams while leaving intact the threshold for crack cocaine (resulting in a 20:1 ratio). Other Republican Members have proposed dropping the powder cocaine threshold to as low as 5 grams, which would reduce the ratio to 1:1, but only at the cost of overprosecuting other low-level drug dealers and adding billions of dollars to the federal prison budget. On the other hand, the Congressional Black Caucus and others in the African-American community will attack the

Administration for failing to go far enough to remove a racial injustice. As you know, many CBC Members favor removing the disparity between crack and powder cocaine entirely -- or at least reducing it far more sharply than the Attorney General and ONDCP Director recommend.

But precisely because it takes a middle position -- and because, as noted above, it can be hooked to law enforcement objectives -- this recommendation offers the best hope of achieving progress on this issue. The CBC approach to this issue will go nowhere in Congress, even with our support. The Republican approach stands a scarily high chance of success, unless we counter it with a credible alternative. We are not particularly optimistic that the recommended approach (assuming you accept it) will prevail, but it stands a better than any alternative approach of leading to a decent outcome.

We also suggest, if you accept the recommendation, that you authorize the Attorney General and ONDCP Director to begin immediate discussions with Members of Congress on this issue. Senators Hatch and Abraham may offer their alternative proposal as early as next week at the Senate Judiciary Committee's markup of the Juvenile Justice bill. We should engage with an alternative proposal as quickly as possible.

_____ Agree _____ Disagree _____ Discuss

'97 JUL 3 PM4:05

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

July 3, 1997

The President
The White House
Washington, DC 20500

Re: Crack and Powder Cocaine Sentencing
Policy in the Federal Criminal Justice System

Dear Mr. President:

On April 29, 1997, the United States Sentencing Commission ("Commission") submitted to Congress a report containing recommendations regarding crack and powder cocaine sentencing policy in the federal criminal justice system. The Commission recommended that the triggering amount for a five-year mandatory minimum sentence for crack be changed from the current 5 grams to somewhere between 25 and 75 grams, and that the triggering amount for a five-year mandatory minimum sentence for powder cocaine be changed from the current 500 grams to somewhere between 125 and 375 grams.

In a statement issued on the day the report was submitted to Congress, you commended the Commission for its report, agreeing that "some adjustment to the cocaine penalty structure is warranted as a matter of sound criminal justice policy [because] [f]ederal prosecutors should target mid- and high-level drug traffickers, rather than low-level drug offenders." You recognized that "[t]he disparity between sentences for powder and crack cocaine has led to a perception of unfairness and inconsistency in the federal criminal justice system." You further stated, however, that crack has had a particularly devastating impact on communities across America, and thus "[t]he sentencing laws must continue to reflect that crack cocaine is a more harmful form of cocaine." You directed us to study the Commission's report and to make our recommendations on cocaine sentencing in the federal system.

Recommendation

The Office of National Drug Control Policy (ONDCP) and the Department of Justice (DOJ) have carefully studied the Commission's report, engaged in a comprehensive review of recent literature on this subject, and examined information from the

Commission, DOJ, ONDCP, and the Department of Health and Human Services. Consistent with the Commission's report, we recommend that the threshold for the five-year mandatory minimum sentence for crack be set at 25 grams and the corresponding threshold for powder be set at 250 grams and urge that the Administration work with Congress to adopt implementing legislation.

Rationale

When Congress enacted the current mandatory minimum sentences for a wide range of illegal drugs, it stated that these sentences should be reserved for significant drug traffickers. Accordingly, the federal government should primarily focus its narcotics enforcement resources on mid-level and high-level drug traffickers, generally leaving lower-level traffickers and users for prosecution by state and local law enforcement. Indeed, the overwhelming majority of drug prosecutions in this country are brought by state and local prosecutors.

This division of responsibility makes sense. With its powerful enforcement tools, such as the RICO statute, wiretapping capabilities, and the witness protection program, and with its national and international enforcement programs, the federal government is better situated to target and dismantle major drug trafficking organizations, whether the organizations deal in heroin, LSD, methamphetamine, cocaine, or other dangerous narcotics. Because successful narcotics prosecutions often involve "working up the chain," there is also a federal interest in prosecuting individuals who, if they were to cooperate, could provide information that would lead to the prosecution of these organizations and major drug dealers.

The current sentencing structure for cocaine, however, has undermined this division of responsibility. Today, a defendant who traffics in 500 grams of powder cocaine faces a five-year mandatory minimum sentence. According to the Drug Enforcement Administration (DEA), 500 grams -- a half-kilogram -- of powder cocaine has a street value of approximately $30,000. An individual who deals in $30,000 (or more) of powder cocaine is a serious drug dealer who should, at the minimum, have information relevant to prosecuting even larger individual dealers or organizations.

In contrast, serious mandatory minimum sentences are not reserved for mid-level and high-level dealers when it comes to crack cocaine. Under the current system, a defendant need only traffic in 5 grams of crack in order to face a five-year mandatory minimum sentence. According to the DEA, 5 grams of crack is worth a few hundred dollars at most, and its sale is

characteristic of a low-level street dealer. A mid-level crack dealer typically deals ounce or multi-ounce quantities. (A single ounce equals 28 grams.) Thus, setting the five-year mandatory minimum threshold at 25 grams would ensure that even the very bottom of the mid-level range would be covered; setting the threshold any lower than 25 grams would undermine positive change and would continue, inappropriately, to target low-level street dealers.

Several negative consequences have resulted from the current cocaine sentencing scheme:

- Agents and prosecutors have the incentive to concentrate on cases where less effort can nonetheless result in long sentences. Thus, the current sentencing scheme may lead federal agents and prosecutors to focus on low-level street dealers of crack, who could as easily and appropriately be prosecuted by our state and local law enforcement partners.

- To the extent that law enforcement resources are directed against low-level street dealers, scarce federal law enforcement agents and prosecutors are diverted away from other higher priorities including larger-scale and more serious drug traffickers. Moreover, imprisoning scores of lower-level crack dealers for long periods of time has consumed considerable resources of the Bureau of Prisons.

- The large disparity in the sentencing scheme is outdated insofar as current data show that crack use has stabilized over the past few years; that the violence associated with crack dealing has dropped over the past few years, contributing to the overall crime drop across America; that of all the cocaine consumed in the United States, there is nearly an even split between crack users and powder users; and that treatment programs for crack and powder addicts are similar and have similar success rates.

- A sentencing scheme that treats crack 100 times more harshly than powder undoubtedly has become an important symbol of racial injustice in our criminal justice system. We cannot turn a blind eye to 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.

These problems cannot be solved by increasing powder penalties, while leaving current crack penalties unchanged. Such a change would merely replicate for powder cocaine the major

problem with current law enforcement efforts against crack cocaine -- the diversion of scarce federal resources to the prosecution and incarceration of low-level drug dealers who are more properly the focus of state and local officials. Moreover, simply increasing powder cocaine penalties would do little to address the perception that crack penalties inappropriately target racial minorities for harsh punishment. We support, in conjunction with a change in crack penalties, a change in the triggering amount for powder cocaine from 500 grams to 250 grams recognizing that all crack is brought into this country as powder and the ease by which that powder is converted to crack.

None of this is to say that the federal government should retreat from its vigorous prosecution of crack cocaine offenses. Under our recommended penalty structure, federal law enforcement would continue to prosecute crack cases in the federal system, particularly when there is organized drug dealing, the use of weapons, the use of minors in drug trafficking, drug trafficking near schools and other places, or other aggravating factors. Moreover, crack dealers would continue to be punished more harshly than powder dealers, which appropriately reflects the additional dangers associated with crack cocaine.

Conclusion

In short, we support a revised penalty structure with the five-year mandatory minimum threshold for crack set at 25 grams and the corresponding threshold for powder set at 250 grams because it would:

- Maintain tough federal sentences for serious drug offenders.
- Properly focus federal law enforcement efforts on mid-level and high-level drug traffickers.
- Improve the allocation of scarce federal law enforcement resources.
- Address perceptions of serious unfairness and inconsistency in the current sentencing scheme.
- Continue to reflect an appropriate distinction between crack and powder cocaine.

With your concurrence, we will work with Congress to adopt legislation that will improve federal law enforcement's response to the scourge of powder and crack cocaine trafficking in this country.

Sincerely,

Janet Reno
Attorney General

Sincerely,

Barry R. McCaffrey
Director, Office of
National Drug Control Policy