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Cocaine: Crack and Powder Sentencing Disparities

Distinguishing Crack and Powder Cocaine

Cocaine is a stimulant drug, usually distributed in a powder form that can be snorted or injected after being dissolved in water. It can also appear in a more solid, chunk form, known as cocaine base or crack, which can be smoked. Whether consumed in powder or crack form, cocaine produces the same type of physiological and psychotropic effects; however, the route of administration affects the onset, duration, and intensity of these effects. The maximum psychotropic effects take longer to reach when snorting powder cocaine versus either injecting powder cocaine or smoking crack cocaine, but the effects last longer.

The Drug Enforcement Administration (DEA) notes that cocaine is easy to obtain in the United States, and its availability is steady. The cocaine consumed in the United States is generally produced in Colombia, and Colombian transnational criminal organizations (TCOs) largely control its production and supply. The Southwest border is the main entry point for cocaine flowing into the United States, and Mexican TCOs control its transportation into and wholesale distribution within the United States. U.S. criminal groups and street gangs largely control retail-level distribution of powder cocaine within the country as well as the production (conversion to crack) and distribution of crack cocaine.

Cocaine Use

Cocaine is a widely used illicit drug in the United States. The 2020 National Survey on Drug Use and Health (NSDUH) estimates that about 5.2 million people (about 1.9% of the 12-and-older population) used cocaine—either crack or powder cocaine—within the past year, and 657,000 of these individuals (about 0.2% of the 12-and-older population) used crack cocaine within the past year. Persons aged 18-25 had the highest cocaine use, with an estimated 1.8 million users (about 5.3% of that population). Further, NSDUH estimates there were about 1,800 new cocaine users aged 12 and older each day in 2019 (the number that stop using each year is unknown), and approximately 1.0 million individuals suffered from a cocaine use disorder that year.

Drug overdose deaths in the United States are of continuing concern to lawmakers. In recent years, there has been an increase in the rate of drug overdose deaths involving cocaine. According to the National Center for Health Statistics, there were 15,883 drug overdose deaths involving cocaine in 2019, and of these deaths, 75.5% also involved an opioid. The rate of drug overdose deaths involving both cocaine and opioids increased from 0.7 (per 100,000) in 2009 to 3.8 in 2019, while the rate of overdose

deaths involving cocaine without opioid involvement increased from 0.7 to 1.1.

Federal Cocaine Sentencing and History of the Disparity

The Controlled Substances Act (CSA; enacted in 1970) is the legal framework through which the federal government regulates certain drugs that are deemed to pose a risk of abuse and dependence, including powder and crack cocaine (see CRS Report R45948, *The Controlled Substances Act (CSA): A Legal Overview for the 117th Congress*). Some violations of the CSA are criminal offenses that may result in large fines and long prison sentences. The CSA as enacted did not distinguish between powder and crack cocaine; however, the Anti-Drug Abuse Act of 1986 amended the CSA to impose mandatory minimum sentences for certain trafficking-related offenses involving cocaine. While these minimum sentences applied to both powder and crack cocaine, the amount of each substance required to trigger the mandatory minimum varied by a ratio of 100:1. For example, offenses involving 5 kilograms of cocaine powder or 50 grams of crack carried a mandatory 10-year sentence, and offenses involving 500 grams of cocaine powder or 5 grams of crack carried a mandatory 5-year sentence. Prior to the enactment of the Anti-Drug Abuse Act of 1986, offenses involving smaller or unspecified amounts of powder or crack cocaine were also subject to criminal penalties, but did not carry a mandatory minimum prison term. The Anti-Drug Abuse Act of 1988 subsequently established a 5-year mandatory minimum penalty for simple possession of crack cocaine.

Fair Sentencing Act of 2010 and First Step Act of 2018

The Fair Sentencing Act of 2010 (the Fair Sentencing Act) revised these penalties. It increased the threshold amount of crack cocaine necessary to trigger the mandatory minimum penalties from 5 grams to 28 grams for the 5-year sentence and from 50 grams to 280 grams for the 10-year sentence. These changes reduced the disparity between the thresholds for powder and crack cocaine to a ratio of approximately 18:1. The act also eliminated the 5-year mandatory minimum for simple possession of crack cocaine. There remains the 18:1 disparity in the threshold amount of powder cocaine and crack cocaine that triggers the mandatory minimum penalties for trafficking-related offenses. The Fair Sentencing Act applied to future cases and cases that were pending on the date of enactment, but did not apply to cases in which a sentence had already been imposed. The First Step Act of 2018 made the Fair Sentencing Act's changes to crack sentences retroactive and permitted those convicted and sentenced prior to passage of the Fair Sentencing Act to seek resentencing. According to the U.S. Sentencing Commission (USSC), there have been

3,705 cases in which the court granted a motion for a sentence reduction due to Section 404 of the First Step Act.

Federal Sentencing Guidelines

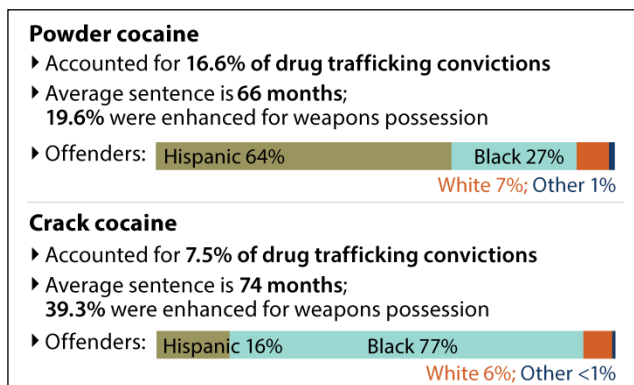
The USSC promulgates federal sentencing guidelines (the Guidelines) that judges consult when sentencing federal offenders. The Guidelines originally were binding on federal courts: a judge had discretion to sentence a defendant, but only within the sentencing range that the Guidelines provided. In the 2005 case *United States v. Booker*, the Supreme Court held that the Guidelines are advisory and cannot mandate a certain sentence; however, a federal court must consider them (as one of a number of sentencing factors) in determining what sentence to impose within statutory parameters.

The Guidelines originally reflected the statutory differential treatment of crack and powder cocaine offenders. However, in 2007 the USSC revised the Guidelines to eliminate the 100:1 ratio. The USSC opted to make these amendments apply retroactively, thus allowing eligible crack cocaine offenders who were sentenced prior to November 1, 2007, to petition a federal judge to reduce their sentences. That said, the USSC did not (and could not) change the statutory penalties in effect at the time an offender was sentenced. Because Congress did not make the Fair Sentencing Act retroactive, offenders sentenced *prior* to its enactment remained subject to the mandatory minimums then in effect and could not have their sentences reduced below those minimums, even if recommended under the Guidelines.

Federal Cocaine Trafficking Offenses

Generally, in enforcing federal drug control laws the Department of Justice focuses its resources on investigating and prosecuting drug traffickers over arresting individual drug users. Federal drug trafficking convictions reflect these priorities. In FY2020, of the 16,501 federal drug cases reported to the USSC, 16,287 (98.7%) involved drug trafficking. Of these drug trafficking cases, 16.6% involved powder cocaine and 7.5% involved crack cocaine (see **Figure 1**).

Figure 1. Federal Cocaine Trafficking Convictions, FY2020



Source: CRS presentation of data from U.S. Sentencing Commission, *Quick Facts: Powder Cocaine Trafficking Offenses*, June 2021; and U.S. Sentencing Commission, *Quick Facts: Crack Cocaine Trafficking Offenses*, June 2021.

Of the *powder* cocaine trafficking offenders sentenced, 64.4% were Hispanic, 27.3% were Black, 7.0% were White, and 1.3% were other races/ethnicities. The average sentence for these offenders was 66 months, and sentences were enhanced for possessing a weapon in 19.6% of cases.

Of the *crack* cocaine trafficking offenders sentenced, 77.1% were Black, 15.9% were Hispanic, 6.3% were White, and 0.7% were other races/ethnicities. The average sentence for these offenders was 74 months, and sentences were enhanced for possessing a weapon in 39.3% of cases.

Policymakers had justified the sentencing disparity by stating that violent crime was associated with crack cocaine more than powder cocaine. The USSC, in a 1995 report to Congress entitled *Cocaine and Federal Sentencing Policy* (one of several USSC reports on federal cocaine sentencing policy), noted that violent crime associated with crack cocaine is directly related to the marketing and distribution of crack—specifically, attempts to consolidate turf and take control of drug distribution in urban areas—and not users of crack cocaine. The USSC stated that while crack and powder cocaine users may commit crimes—such as selling drugs—to support their drug habits, these users generally are not committing large numbers of violent crimes to support their habits.

Going Forward: Considerations for Congress

There are a number of options policymakers may consider in addressing federal cocaine sentencing. Given the racial differences in offenders convicted of crack and powder cocaine trafficking offenses, policymakers may consider how the former and current sentencing disparities between crack and powder cocaine may contribute to racial inequality in the criminal justice system or whether the differences are justified, and may consider whether to alter or eliminate the sentencing disparity. Policymakers may also wish to consider expanding resentencing opportunities for offenders convicted prior to the sentencing changes discussed above who are not entitled to retroactive resentencing under the First Step Act (such as the offender in the recent Supreme Court case *Terry v. United States*). For legal discussion of retroactivity and federal cocaine sentencing, see CRS Legal Sidebar LSB10611, *Crack Cocaine Offenses and the First Step Act of 2018: Overview and Implications of Terry v. United States*.

In the 117th Congress, there are several bills that would address the powder and crack cocaine sentencing disparity. The Eliminating a Quantifiably Unjust Application of the Law Act (EQUAL Act; S. 79; H.R. 1693, as passed by the House on September 28, 2021) would eliminate the sentencing disparity both going forward and retroactively. The Equal Enforcement of Cocaine Laws Act (S. 2156) also would eliminate the disparity, but would not apply the change retroactively.

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