Congress of the United States

Washington, DC 20510

December 16, 2024

The Honorable Joseph R. Biden
President of the United States
White House
1600 Pennsylvania Avenue
Washington, DC 20500

Dear President Biden:

We first write to extend our gratitude for your tireless work in addressing longstanding inadequacies within our federal criminal justice system. Since taking office, your administration has implemented several new policies that have created positive changes for countless citizens. Whether it was advancing effective, accountable policing and criminal justice practices to enhance public trust and safety,[1] or pardoning thousands of individuals convicted of simple use or possession of marijuana,[2] your administration has dedicated itself to rectifying systemic wrongs which have impacted certain communities for countless decades. Now, with roughly one and half months left in your administration, we call on you to continue the progress of your administration and use your constitutional clemency power on individuals impacted by misguided sentencing disparities between crack cocaine and powder cocaine who are serving sentences that would be substantially lower if sentenced today. Specifically, we urge you to commute the sentences of individuals convicted of crack cocaine offenses to sentence lengths had they been charged with *powder* cocaine offences.

As our country began to wage a "war on drugs" in the 1980's, Congress sought to address the rise in drug addictions, overdoses, and deaths through legislation. Its solution, the Anti-Drug Abuse Act, contained several provisions, including establishing mandatory minimum sentences for crack cocaine and powder cocaine.[3] Specifically, the law set forth a minimum 5-year prison sentence for possession of *5 grams crack cocaine* compared to a 5-year minimum prison sentence for every *500 grams of powder cocaine*.[4] Reports at the time noted that "public officials and government agencies [were] reacting to crack and cocaine use in the United States"—but these "politicians recognize[d] that antidrug statements and actions [we]re unlikely to be scrutinized or challenged by opponents, for no one in public life th[o]se days wants to appear soft on drugs."[5] Hence, Congress differentiated crack cocaine and powder cocaine,

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[1] Exec. Order No. 14,074, *Advancing Effective, Accountable Policing and Criminal Justice Practices to Enhance Public Trust and Public Safety*, 87 Fed. Reg. 32,945 (May 31, 2022).

[2] Proclamation No. 10,467, 88 Fed. Reg. 90083 (Dec. 22, 2023).

[3] Pub. L. 99-570 (1986).

[4] *Id.*

suggesting that crack, compared to powder cocaine, "[wa]s easily obtained,"[6] and given its "accessibility and affordability, . . . crack threatened to tear apart the nation's social fabric."[7] Members also argued that crack cocaine, unlike powder cocaine, led to greater violence and therefore stronger sentences were needed.[8] Accordingly, Congress sought to go "beyond saying that we are going to get tough. . . . We have very strong penalties, mandatory sentences for the use of crack in small amounts; we distinguish crack and make it one of the most dangerous drugs."[9]

Yet, as early as the 1990's, scientific and medical research questioned the assumed different physiological and psychotropic effects of crack cocaine compared to powder cocaine that helped justify the sentencing disparity at its time of creation. For example, a prominent medical study in 1996 showed that the "physiological and psychoactive effects of cocaine are similar regardless of whether it is in the form of cocaine [powder] or crack cocaine."[10] Then in 2002, the U.S. Sentencing Commission ("USSC") issued a report to Congress noting that "[c]cocaine, in any form produces the same physiological and psychotropic effects. . . . [Also,] [t]he negative effects of prenatal crack cocaine exposure are identical to the negative effects of prenatal powder cocaine exposure and are significantly less severe than previously believed."[11] Thus, what became evidently clear was that "[s]ome of the information available to Congress in retrospect proved not to be empirically sound."[12]

Despite this mistaken understanding, the continual application of this policy caused disproportionate harm to communities of color. As USSC's 2002 report noted, the "overwhelming majority of offenders subject to the heightened crack cocaine penalties [we]re black . . . [which] contributed to a widely held perception that the current penalty structure

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[5] Peter Kerr, *Use of Crack: The Future Unclear How Widely the Drug Will Spread*, N.Y. Times (Sept. 1, 1986), www.nytimes.com/1986/09/01/nyregion/use-of-crack-the-future-unclear-how-widely-the-drug-will-spread.html.

[6] 132 Cong. Rec. H22994 (daily ed. Sept. 11, 1986).

[7] 132 Cong. Rec. H22993 (daily ed. Sept. 11, 1986).

[8] *See* 132 CONG. REC. S26,447 (daily ed. Sept. 26, 1986) ("[Crack] can turn promising young people into robbers and thieves, stealing anything they can to get the money to feed their habit."); 132 CONG. REC. H22,667 (daily ed. Sept. 10, 1986) ("The widespread use of crack in New York City is said by many law enforcement officials in that city to have caused a rise in violent crimes last year."); 132 CONG. REC. S31,329-30 (daily ed. Oct. 15, 1986) ("we find that people, when they are addicted, will go out and steal, rob, lie, cheat, take money from any savings, take refrigerators out of their houses, anything they can get their hands on to maintain that habit. That, of course, has caused crime to go up at a tremendously increased rate in our cities and in our States.").

[9] 132 Cong. Rec. S31300 (daily ed. Sept. 26, 1986).

[10] D. K. Hatsukami & M W Fischman, *Crack Cocaine and Cocaine Hydrochloride. Are the Differences Myth or Reality?*, 19 J. Am. Med. Assoc. 1580 (1996).

[11] U.S. Sent'g Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* (May 2002), www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200205-rtc-cocaine-sentencing-policy/200205_Cocaine_and_Federal_Sentencing_Policy.pdf.

[12] *Id.* at 91.

promote[d] unwarranted disparity based on race."[13] In fact, demographic sentencing data for federal crack cocaine offenses showed that in 1992, 91.4% of individuals sentenced were Black and 3.2% were White—in 2000, 84.7% were Black and 5.6% were White.[14] Concerned about the impact of this trend, USSC stated that "even the perception of racial disparity problematic because it fosters disrespect for and lack of confidence in the criminal justice system."[15]

It was not until 2010 that efforts to have defendants "sentenced for what he or she actually did, *not [because] the form of cocaine involved*" achieved partial success.[16] Under the Fair Sentencing Act which President Obama signed into law, the 100-to-1 sentencing disparity for crack cocaine offenses was reduced to 18-to-1.[17] When debating the bill, Congress reiterated what many already knew—that "there is no pharmacological difference between the two forms of cocaine" and that at that time, "80 percent of the crack defendants [we]re black."[18] Although the bill codified the new sentencing requirements for those sentenced after its passage, the bill's 18-to-1 ratio did not apply to individuals already sentenced under the 1986 disparity. Following legal challenges and proactive efforts by USSC promoting retroactive application, Congress in 2018 passed a sweeping criminal justice reform bill—the First Step Act[19]—which codified retroactive application of the 18-to-1 sentencing standard for those previously sentenced under the 100-to-1 regime.[20] Roughly five years after its passage, the impact of the law was nothing short of astounding. USSC reported that between the enactment of First Step Act to September 30, 2021, *4,226 incarcerated persons received retroactive reductions*, of which 3877 were Black (92.0%), 170 were Hispanic (4.0%), 131 were White (3.1%).[21]

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[13] *Id.* at viii.

[14] *Id.* at 67.

[15] *Id.* at iii.

[16] 156 Cong. Rec. H619 (daily ed. July 28, 2010).

[17] Pub. L. No. 111–220, 124 Stat. 2372 (2010).

[18] 156 Cong. Rec. H6196 (daily ed. July 28, 2010).

[19] Pub. L. No. 115-391, 132 Stat. 5194 (2018).

[20] Reductions were not, however, automatically applied. Rather, to receive the retroactive reduction, a motion needed to be filed and then granted by the court. 21 U.S.C. § 841 note ("A court that imposed a sentence for a covered offense may, on motion of the defendant, the Director of the Bureau of Prisons, the attorney for the Government, or the court, impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 . . . were in effect at the time the covered offense was committed."). In addition to retroactivity, the bill also created new time served credits, expanded good time credits, and granted judges greater sentencing discretion, among other things. 21 U.S.C. § 841. *See also* Ashley Nellis & Liz Komar, *The First Step Act: Ending Mass Incarceration in Federal Prisons*, Sentencing Project (Aug. 22, 2023), www.sentencingproject.org/policy-brief/the-first-step-act-ending-mass-incarceration-in-federal-prisons/.

[21] U.S. Sent'g Comm'n, *The First Step Act of 2018 Resentencing Provisions: Retroactive Data Report*, at Tables 3-4 (2022), www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/first-step-act/20220818-First-Step-Act-Retro.pdf. An additional 34 individuals (0.8%) received reductions and demographically categorized as "other." *Id.*

While the 2010 and 2018 laws have produced positive change in our criminal justice system, efforts to completely eliminate the crack versus powder disparity continue to grow with broad support. In 2021, Congress introduced legislation establishing 1-to-1 sentencing for crack cocaine and powder cocaine.[22] This bill overwhelmingly passed out of the House of Representatives with broad bipartisan support, 361-66.[23] Bipartisan consensus for change also been seen in the U.S. Senate. During a 2021 Senate Judiciary Hearing, both Republicans and Democrats noted that the current sentencing disparity is unmerited and that it has disproportionately impacted communities of color. Republican Governor of Arkansas Asa Hutchinson testified before the committee, noting that "the sentencing disparity between crack cocaine and powder cocaine was fundamentally unfair and caused disproportionate harm, particularly in communities of color. . . . Congress now has the opportunity to build on the bipartisan successes of the Fair Sentencing Act and the First Step Act by eliminating the sentencing disparity between crack cocaine and powder cocaine once and for all. The strength of our justice system is dependent on the perception of fundamental fairness."[24] One Republican senator also stated that "I think there is widespread agreement on this committee that the disparity is difficult to defend."[25] The Democratic Chairman repeated this sentiment, stating that although the 2010 and 2018 laws have addressed "inequities in our criminal justice system . . . the task that now lies before us is finishing the job we started, by eliminating this disparity, altogether. It has no basis in science. It's done nothing to make us safer. It serves only to undermine trust in our system of justice, especially, among Black Americans, who are six times . . . more likely to be imprisoned on drug charges than white Americans, even though the drug use is at a similar rate between them."[26] Senators also dispelled the notion of greater violence acts by crack cocaine offenders compared to powder cocaine offenders when one Democratic senator, citing USCC data, noted that "more federal offenders charged with powder cocaine offenses carried weapons, 490, than those charged with crack cocaine offenses, 468. . . . The data shows that *powder cocaine* folks are more likely to have weapons."[27]

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[22] Eliminating a Quantifiably Unjust Application of the Law Act of 2021, H.R. 1693, 117th Cong. (2021).

[23] *See* Eliminating a Quantifiably Unjust Application of the Law Act of 2021, H.R. 1693, 117th Cong. (2021). Both Senate and House reintroductions of this bill in the 118th Congress continue to have bipartisan cosponsors. *See* Eliminating a Quantifiably Unjust Application of the Law Act of 2023, H.R. 1062, 118th Cong. (2023); Eliminating a Quantifiably Unjust Application of the Law Act of 2023, S. 542, 118th Cong. (2023).

[24] Testimony of Asa Hutchinson, Governor, Arkansas, Examining Federal Sentencing for Crack and Powder Cocaine, *Hearing Before the S. Comm. on the Judiciary*, at 2-3 (June 22, 2021), www.judiciary.senate.gov/imo/media/doc/Statement%20for%20the%20Record%20from%20Governor%20Asa%20Hutchinson%20(6.22.21).pdf.

[25] Examining Federal Sentencing for Crack and Powder Cocaine, *Hearing Before the S. Comm. on the Judiciary* (June 22, 2021), www.judiciary.senate.gov/committee-activity/hearings/examining-federal-sentencing-for-crack-and-powder-cocaine (statement of Senator Lee).

[26] *Id.* (statement of Chairman Durbin).

[27] *Id*. (statement of Senator Booker) (emphasis added).

It is also telling that even your administration has also called for eliminating the crack versus powder disparity equal sentencing. Indeed, in 2022, Attorney General Merrick Garland issued a department memorandum that addressed the crack versus powder sentencing disparity. In it, Attorney General Garland stated that the

> "Justice Department supports elimination of the crack-to-powder sentencing disparity . . . 'First, the crack/powder disparity is simply not supported by science, as there are no significant pharmacological differences between the drugs: they are two forms of the same drug, with powder readily convertible into crack cocaine. Second, as documented by the Sentencing Commission, the crack/powder sentencing differential is still responsible for unwarranted racial disparities in sentencing. Third, the higher penalties for crack cocaine offenses are not necessary to achieve (and actually undermine) our law enforcement priorities, as there are other tools more appropriately tailored to that end.'"[28]

In an effort to "promote the equivalent treatment of crack and powder cocaine offense," Attorney General Garland then set forth guidance for prosecutors to use to achieve this goal, such as supporting "variance[s] to the guidelines range that would apply to the comparable quantity of powder cocaine."[29]

While Congress today works to pass the EQUAL Act to establish equal sentencing for crack cocaine and powder cocaine, we recognize the unique power vested to you that can right the wrongs of our criminal justice system and build on your legacy of ensuring equitable and restorative justice. In analyzing data by BOP from January 2024, USSC estimates there are 5,351 individuals federally incarcerated for crimes which crack cocaine was the primary or only drug involved. USSC estimates that of that number, roughly "97.8 percent" or "5,234" individuals would be eligible for a reduced sentence, and "62.5 percent" or "3,268" individuals would be eligible for immediate release if crack cocaine was sentenced the same as powder cocaine.[30] Today, those currently serving crack cocaine sentences are roughly 78.9% Black, 14.3% Hispanic, and 6.4% White—meaning that the majority of those serving longer sentences because of this crack cocaine distinction are people of color.[31]

Over the last three years, you have exercised your constitutional clemency power for individuals who have had certain drug-related federal and D.C. convictions.[32] In issuing these

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[28] Memorandum from Merrick Garland, Attorney General, U.S. Dep't of Just., to Federal Prosecutors, on Additional Department Policies Regarding Charging, Pleas, and Sentencing in Drug Cases, at 4 (Dec. 16, 2022), www.justice.gov/d9/2022-12/attorney_general_memorandum__additional_department_policies_regarding_charges_pleas_and_sentencing_in_drug_cases.pdf.

[29] *Id*. at 5. Attorney General Garland made clear however that prosecutors must always be candid with the court, the probation office, and the public as to the full extent of the defendant's conduct and culpability, including the type and quantity of drugs involved in the offense, even if the charging document lacks such specificity." *Id*.

[30] Correspondence from Sekemia Mwonyonyi, Senior Legislative Specialist, U.S. Sent'g Comm'n to Office of Congresswoman Jasmine Crockett, U.S. Congress, House of Reps. (Oct. 11, 2024) (on file).

[31] Correspondence from Sekemia Mwonyonyi, Senior Legislative Specialist, U.S. Sent'g Comm'n to Office of Congresswoman Jasmine Crockett, U.S. House of Reps. (Oct. 31, 2024) (on file).

[32] Proclamation No. 10,688, 88 Fed. Reg. 90,083 (Dec. 22, 2023); Proclamation No. 10,467, 87 Fed. Reg. 6144 (Oct. 6, 2022).

pardons and reprieves, you emphasized the need to address these wrongs given that communities of color "have been arrested, prosecuted, and convicted at disproportionate rates," compared to others.[33]

Accordingly, given the misguided and disproven theories surrounding the antiquated sentencing disparity between crack cocaine and powder cocaine, as well as the disproportionate harm this disparity has had on communities of color, we respectfully request that you use your clemency power to commute the sentences of individuals convicted of crack cocaine offenses to sentence lengths had they been charged with powder cocaine offenses.

Sincerely,

Jasmine Crockett
Member of Congress

Cory A. Booker
United States Senator

Raphael Warnock
United States Senator

Shontel M. Brown
Member of Congress

Henry C. "Hank" Johnson, Jr.
Member of Congress

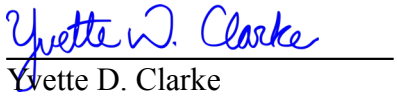
Maxine Waters
Member of Congress

Rashida Tlaib
Member of Congress

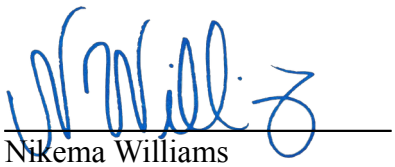
Delia C. Ramirez
Member of Congress

Bonnie Watson Coleman
Member of Congress

[33] Deepa Shivaram, *Biden Expands Pardons for Marijuana Possession and Grants Clemency to 11*, NPR (Dec. 22, 2023), www.npr.org/2023/12/22/1221230390/biden-pardons-clemency-marijuana-drug-offenses.



Yvette D. Clarke
Member of Congress

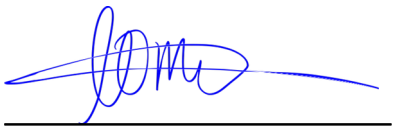


Nikema Williams
Member of Congress

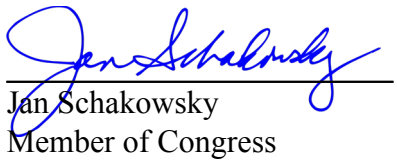
Erica Lee Carter
Member of Congress

Maxwell Alejandro Frost
Member of Congress

Eleanor Holmes Norton
Member of Congress



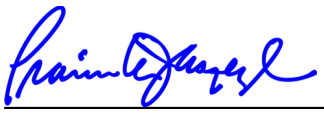
Ilhan Omar
Member of Congress



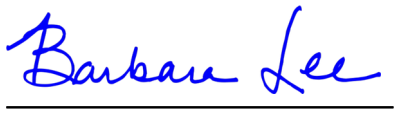
Jan Schakowsky
Member of Congress

Dan Goldman
Member of Congress

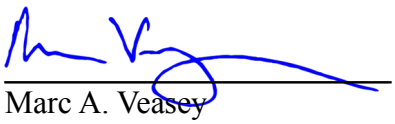
Jésús G. "Chuy" García
Member of Congress



Pramila Jayapal
Member of Congress



Barbara Lee
Member of Congress



Marc A. Veasey
Member of Congress

Cc: The Honorable Merrick Garland
Attorney General
Department of Justice

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