

Testimony of Eric E. Sterling on behalf of the Criminal Justice Policy Foundation to the Subcommittee on Crime Committee on the Judiciary, U.S. House of Representatives on D.E.A. Oversight

Mr. Chairman McCollum, Ranking Minority Member Mr. Scott, thank you very much for the opportunity to submit a statement to you about oversight of the Drug Enforcement Administration. The first hearing I set up for members of the House Judiciary Committee, in March 1980, was a DEA oversight hearing. I have been following DEA's activities and other drug policy matters for almost 20 years. These are the key points I think the Subcommittee should keep in mind.

(1) There is a need for Congressional oversight of DEA's performance. (2) DEA is not being held accountable. (3) DEA has been profoundly ineffective as demonstrated by key measures. (4) DEA's priorities are misdirected. (5) Federal drug enforcement is prima facie racist in effect. (6) Race is a factor in profiling drug suspects. (7) Case selection is driven by informants, not DEA managers. (8) DEA can play an important role in fighting violent crime domestically.

It is important to note at the outset that criticism of DEA is not a disparagement, in the least, of the courage and dedication of the individual men and women of DEA. Drug enforcement is necessary. A great many of the current crop of drug traffickers are among the most dangerous and evil persons alive today, and they must be fought by representatives of the law. The men and women who engage in that dangerous fight deserve our respect.

It is also important to make clear at the outset that to be critical of DEA does not mean that one is not 100% committed to the objectives of our national drug strategy — of raising children who never use drugs, of having neighborhoods free of the crime and disorder of drug trafficking and violence, of protecting the public from the dangers of those under the influence of drugs, of protecting governments and the administration of justice -- here and abroad -- from corruption, and of protecting the global economy from being undermined by money laundering and racketeering.

Indeed, if one is indifferent to these objectives there really is no need to pay any attention to DEA. DEA is a bureaucracy. Unless its activities are carefully overseen by the Congress, and its managers required to account to the public for the agency's performance, DEA will inevitably follow its own leadings, and not those of the citizens

(1) There is a need for careful evaluation of DEA's performance.

DEA has grown enormously. During the 1980s, when I was counsel to this subcommittee, as you know Mr. Chairman, then-Chairman William J. Hughes of New Jersey frequently held hearings to examine DEA's policies and priorities. Mr. Hughes prodded DEA, in the face of pressure to cutback to meet government-wide budget balancing objectives, to expand its cooperation with state and local law enforcement, to expand its international program, and to more aggressively address the problem of diverting legitimate pharmaceuticals from legitimate medicine to abuse in the streets. Since then, DEA's appropriation has grown from \$280 million in 1983 to \$1.4 billion in 1999.

My understanding from communication with the committees' document clerks is that neither the House nor Senate Judiciary Committees have held hearings specifically on DEA oversight in the past decade.

I commend you, Chairman McCollum, for convening this hearing, and I encourage you to continue this work. I especially commend you for requesting the General Accounting Office to examine DEA's work in a number of areas.

(2) DEA is not being held accountable.

Performance Measurement System of the National Drug Control Strategy In 1998, the White House Office of National Drug Control Policy (ONDCP) Director, Gen. Barry McCaffrey, announced a detailed "Performance Measurement System" for our national anti-drug strategy. Numerous drug strategy "targets" would be reduced by various percentages over five or ten years. Developing these targets has been underway since 1996, but three years later, there are still no baselines for most of those targets.

In the report from GAO to you, GAO notes that DEA has not developed either targets or baselines for its role in the strategy. DEA has not collected data that would support the strategy, such as the number of drug trafficking organizations. Failure to set baselines for reductions means that the targets aren't real. How could anyone say with a straight face to the American people and to the Congress that America's anti-drug efforts are going to reduce a variety of specific drug trafficking problems by specific percentages over the next five and ten years when, at the time these statements are made, the anti-drug agencies do not know or cannot agree what the actual size of those problems are? The 1999 National Drug Strategy is based on the targets of ONDCP's Performance Measurement System, and on that basis, the strategy is a fraud.

DEA, with 25 years of experience as the lead agency, should be in the front of the effort to accurately analyze the scope of the drug problem and to present concrete and realistic assessments of what can be achieved. Unfortunately, DEA is not in the habit of being held accountable.

(3) DEA has been profoundly ineffective as demonstrated by key measures.
Price and Purity of Drugs Sold in the U.S.

In the early 1980s, when I was counsel to the Judiciary Committee and DEA Administrator Bensinger testified, he pointed to the increasing price and decreasing purity of heroin as evidence of DEA's successful efforts. Price and purity are very important concrete measures of the effectiveness of the anti-drug effort.

Price

Raising the price of drugs is good policy. Drug users are price sensitive. Raising the price of drugs deters experimenters. Higher prices limit the degree of drug use, and encourage addicts to seek treatment.

Drug prices also measure the market. Higher prices mean that drugs are scarcer, they are less available. It means it takes more effort for drug users to find drugs. High prices measure the risks traffickers face. If a drug trafficker doesn't believe that his or her cost of going to prison, or otherwise being harmed in the market, is very great, the trafficker doesn't have to charge very much. Decreasing drug prices tell us the opposite. Falling drug prices mean that drug traffickers face less risk.

Purity The purity of drugs on the street is also an important indicator. Drugs are "cut," that is, they are adulterated, to improve profits. If a seller is not motivated to cut the drugs, that means he is quite satisfied with the level of profit he is

making. High purity also indicates that traffickers are competing against each other for customers. Higher purity is a sign of trafficker health, not starvation. Purity is also important as a public health matter. While the adulterants used to cut drugs can often be harmful in themselves, higher purity, particularly for heroin, creates a greater risk of overdose. Heroin suppresses respiration, and as DEA will tell you, the number of overdoses from heroin is increasing.

Using DEA's data, reprinted in the 1999 National Drug Control Strategy (Table 29, p. 131), **the price of a gram of pure heroin at retail has declined from \$3,114.80 in 1981 to \$1798.80 in 1998**, not controlling for inflation. This decline has been almost completely steady. **The average purity of retail heroin has increased from 4.69% in 1981 to 24.49% in 1998.**

In March 1980, DEA began its oversight hearing by proudly pointing out that during the 16 calendar quarters from the beginning of 1976 through the end of 1979, the retail purity of heroin had dropped from 6.7% to 3.8%. The price of heroin had increased from \$1250 per gram to \$2300 per gram.

Cocaine price and purity data has shows the same catastrophic changes. **The 1981 retail price for a pure gram of cocaine was \$328.70. Last year it had dropped to \$169.25, not controlling for inflation. Street level purity at retail averaged 40.02% in 1981 and was up to 71.23% in 1998. Wholesale cocaine prices have dropped even more dramatically. From a 1981 level of \$191.35 per gram, the price was down to \$44.30 per gram in 1998, the lowest level during the entire period.** This number tells us that at the wholesale level, drug traffickers have continually evaluated the risks they face --primarily of arrest, imprisonment and seizure of their assets — as declining ones.

Price and purity are probably the most important hard numbers available for accurately evaluating DEA's real impact on the drug trade. By these measures, DEA's performance has been worse than abysmal. Of course, it may not be DEA's fault. As we know, markets around the world have demonstrated that they are often highly independent of government efforts to intervene in them. But at a minimum, this data tells us that we are profoundly and systematically failing in a key objective of our anti-drug effort.

Drug Availability to Teenagers

In one sense, I'm sure that you would agree that DEA's most important performance measure ought to be how hard it is for kids to get drugs. For 24 years we've been asking high school teenagers to tell us how easy they believe it is for them to get various drugs. This is obviously subjective. And because most of the respondents do not actually use the drugs they are reporting about, as an actual measure of availability, it is of very limited accuracy. It is a case in which the trend is probably much more important than the actual percentage. Mr. Chairman, last year America's high school seniors said, "Heroin and crack cocaine have never been easier to get!"

35.6% of the nation's high school seniors reported heroin was "fairly easy" or "very easy to get," the highest percentage since the survey was commenced in 1975. 43.8% said the same about crack cocaine, the highest percentage since 1989. This was reported in HHS' Monitoring the Future survey released last winter, reporting on the survey from the spring of 1998 (Table 11, Long-Term Trends in Perceived Availability of Drugs by Twelfth Graders).

(4) DEA's priorities are misdirected.

The need for a more effective international enforcement effort

These failures are, in some sense, ironic. Heroin and cocaine come to the U.S. from abroad. The management of heroin and cocaine production, smuggling and distribution is more complex than for other drugs. And heroin and cocaine trafficking organizations pose much greater threats to legitimate governments around the world. They are wealthier and have access to larger, better trained, better paid armies or paramilitary forces than organizations involved in other drugs. Seriously curtailing these organizations is important not only for drug enforcement purposes but for the protection of democracy and the global economy from corruption.

Evaluating the international assets available for a comprehensive, international anti-drug fight, DEA and other Federal agencies are the probably the only highly equipped, highly trained, mostly-honest agencies that can effectively target global drug and crime organizations. It is not realistic to think that Mexican or Colombian law enforcement agencies will effectively or substantially combat drug trafficking organizations at any time in the foreseeable future.

But DEA is going in the wrong direction. DEA is increasing its efforts on insignificant defendants and cases that can best be handled by the more than 620,000 sworn officers and 240,000 civilian employees of state and local law enforcement agencies around the nation. DEA is wasting scarce, precious resources. **Almost 40% of DEA's effort is targeted on local cases, and that percentage has roughly doubled in the past decade.**

The mistake of a Federal focus on local drug traffickers

One consequence of the over-Federalization of local law enforcement, and local drug enforcement, is that appropriate Federal law enforcement doesn't take place. You can't expect the Orange County, Florida, Sheriff or the Isle of Wight County, Virginia, Sheriff, or even the Florida Department of Law Enforcement or the Virginia State Police, to investigate drug trafficking organizations in Mexico and Colombia or money laundering in Grand Cayman. When you ask DEA to investigate crack dealing organizations in Orlando or Richmond, you are wasting very scarce Federal assets. There are over 600,000 state and local law enforcement officers in America but only 4,515 DEA Special Agents. There is space to incarcerate 1.8 million persons in America's state and local prisons and jails, but only 130,000 persons in Federal prisons.

When you direct DEA and the Department of Justice to lock up a street-level crack dealer in Federal prison for 20 years after a Federal investigation and Federal court trial, you have wasted some of the most precious assets in the world available for fighting the global plague of crime, violence and corruption that is intrinsic to drug prohibition.

We need almost every Federal anti-drug agent focused on the international, high-level drug trafficking organizations if we are at all serious about fighting drugs through enforcement.

The Federal focus on low-level offenders

DEA always claims to be fighting the highest level traffickers, but the results of Federal drug enforcement efforts are seen in **who goes to prison -- overwhelmingly low-level offenders.** Last year, two-thirds of Federal drug prisoners didn't meet the very low quantity thresholds required to be sentenced

to a ten-year mandatory minimum. Only 41 defendants, out of over 20,266 prosecuted for drug offenses, were sentenced under the Federal drug kingpin statute. Almost fifteen times that number (601 defendants) were sentenced for simple possession. At least 174 were imprisoned for a mean sentence of 19.6 months for this offense.

(5) Federal drug enforcement is prima facie racist in effect.

If these performance failures weren't bad enough, Federal drug enforcement (particularly cocaine enforcement) is prima facie a racist enterprise. **In 1998, less than one in four Federal drug defendants was white.** It is inconceivable that in a nation dominated by whites that such a lucrative industry is not also dominated by whites. Indeed, looking at all Federal crimes, except for immigration crimes (dominated by Hispanics trying to illegally enter the United States, 91.2%), and Federal enforcement of violent crimes on Indian reservations (such as sexual abuse, assault, murder, manslaughter, and burglary), whites are much more frequently accused of violating Federal criminal laws than other racial groups. Whites were typically 40, 50, or 70 or 80% of sentenced Federal offenders – for crimes such as firearms, auto theft, forgery, bribery, money laundering, gambling, pornography, arson, etc., as well as antitrust (100% white) or food and drug (82.6% white).

The largest category of Federal prosecutions for hard drugs is crack cocaine, 4,890 persons sentenced to prison in FY1998. These prisoners were 84.8% black, 8.7% Hispanic, 0.7% other, and 5.7% white.

Federal cocaine prosecutions are dominantly against people of color. Only 12.3% of all new Federal cocaine prisoners in 1998 were white. 85.2% of all black Federal drug defendants were charged with cocaine offenses. Black cocaine defendants were 27.8% of all Federal drug offenders sentenced to prison in 1998. Black cocaine defendants were 11.3% of all persons sentenced to Federal prison in 1998 for all crimes.

Bear in mind that drug use is overwhelmingly a white phenomenon in America. In 1997 there were 10.3 million white current drug users and only 1.8 million current black drug users. There were 970,000 white current cocaine users, and only 342,000 black current cocaine users, according to the National Household Survey.

American citizens who are prosecuted are overwhelmingly black Americans. 93% of Federal crack cocaine defendants are American citizens. For other types of drugs, one-quarter to one-half of the Federal defendants are non-citizens. The crack cocaine defendants targeted by the Federal government – overwhelmingly black -- are overwhelmingly low-level offenders. 63.1% of the crack defendants were street-level dealers, bodyguards, couriers or mules. Only 5.5% of the crack defendants were identified as high-level offenders by the U.S. Sentencing Commission in its 1995 study. The percentage of high-level crack defendants was the lowest for all categories of drugs.

From the universe of more than 1.5 million persons arrested for drug offenses in America in a year, all of whom could be prosecuted in Federal court, the selection of overwhelmingly low-level offenders (in contradiction to the goals of the National Drug Control Strategy, and common sense) who are overwhelmingly black – for sentences that are the longest imposed for all classes of drugs -- suggests that there is a pattern or practice of racial discrimination in the selection of cases. Sadly these defendants are on average six years younger than other Federal drug traffickers.

Why is this possible? Because DEA and the Justice Department have no system-wide review of cases to assure that only appropriate cases are investigated and prosecuted and that racial factors do not enter into investigations and prosecutions.

(6) Race is a factor in profiling drug suspects.

In Maryland in the early 1990s, the State Police circulated an "intelligence report" that drug couriers were black males and black females. In 1993, the Maryland State Police (MSP) denied it used racial profiling. In 1995, MSP agreed to stop racial profiling, and to record data on those they stopped. But according to an Associated Press computer analysis of this data in May 1996, African-Americans were stopped by the Maryland State Police on Interstate 95 in numbers completely disproportionate to their numbers among all motorists -- 73% of all stops, but only 25% of the state population, only 20% of the state's licensed drivers, and only 17% of the drivers along the studied stretch of I-95. On April 9, 1999 Attorney General Reno asked law enforcement to study whether drug searches are based on racial profiles. Eleven days later, in New Jersey, where racial profiling was formally in violation of state policy, then-Attorney General Peter Verniero issued a report conceding that on the New Jersey Turnpike **racial profiling is "real, not imagined."** 77.2% of the motorists searched were black or Hispanic, while 21.4% were white. New Jersey is 74% white, 13% black and 9% Hispanic. Two New Jersey State Troopers have been indicted for falsifying reports to make it appear that black motorists they stopped were white. These practices exist in many jurisdictions. While black drug users are about 15% of the nation's population, they have been between 36% and 40% of those arrested for drug offenses during this decade.

In Esquire magazine in April 1999, journalist Gary Webb, on assignment as an investigator for the California legislature, wrote of DEA's role in "Operation Pipeline," a program to stop the transportation of illegal drugs over the nation's highways. Webb writes that participants in Operation Pipeline understood that blacks and Hispanics were presumptively more likely to be stopped. I commend the Members who voted in the 104th Congress for H.R. 118 to study the racial and ethnic data on traffic stops. As I noted above, whites are the dominant segment of the population that uses drugs. Race is neither a legitimate nor logical proxy for suspicion of drug use or drug trafficking. But the truth is that race has been one of the bases police around the nation have used to make decisions about whom to investigate for a drug offense.

(7) Case selection is driven by informants, not DEA managers.

In practice, how are most Federal drug prosecutions initiated? An informant provides information to a DEA Special Agent or other law enforcement officer about drug trafficking. Cases start with informants.

Many of DEA's problems are due to the fact that informants -- who, if they are to have any information that is at all significant must actually be in the drug trade -- have more impact on case selection than DEA managers, the Justice Department, or ONDCP. As long as you provide information about low-level and mid-level traffickers, you can make a good living as a DEA informant. Rep. John Conyers, when he was chairman of the then-Committee on Government Operations, developed information about the numerous Federal informants making six-figure incomes. If you are making a good living as an informant on low-level Federal cases -- the ones that dominate the Federal trial docket -- how powerful are the incentives to provide information about the highest-level traffickers? If you do so,

your life is in jeopardy. Low-level, if not minor traffickers are much less likely to try to have you killed, and the compensation from the government is just as great.

(8) DEA can play an important role in fighting violent crime domestically. DEA needs to limit its domestic operations to high-priority matters. Drug traffickers who engage in murder are certainly high-priority targets. An example of the valuable role DEA has played fighting violent drug gangs was its cooperative effort in Operation Ceasefire in Boston. That effort has practically eliminated youth gang homicide. The operation, with important direction by David Kennedy of the John F. Kennedy School of Government at Harvard University, identified the numerous youth drug gangs operating in Boston, and the patterns of conflict between them. The gangs were contacted and told that while enforcement against all of their illegal activities would continue, if they engaged in any homicides they would be the focus of an extraordinarily intense enforcement that would destroy them. One gang, Roxbury's Intervale Posse, greeted this warning with contempt, and engaged in several murders. DEA brought in out-of-town personnel and conducted a sufficient number of buys to indict and arrest on August 29, 1996, 15 members of the gang for Federal drug offenses carrying long mandatory minimums. Soon some of the defendants identified the killers, and the murders were solved. Very importantly, Operation Ceasefire gained credibility thus saving many lives. (See David M. Kennedy, "Pulling Levers: Chronic Offenders, High-Crime Settings, and a Theory of Prevention," 31 Valparaiso University Law Review 449 at 467, Spring 1997). DEA, when it is selective, can play a very important role in support of state and local law enforcement.

Mr. Chairman, DEA has an important role to play, but it is not playing it. Without oversight by the Congress, DEA will not be held accountable to the public which it serves. I commend you and Mr. Scott for holding this hearing today.

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