

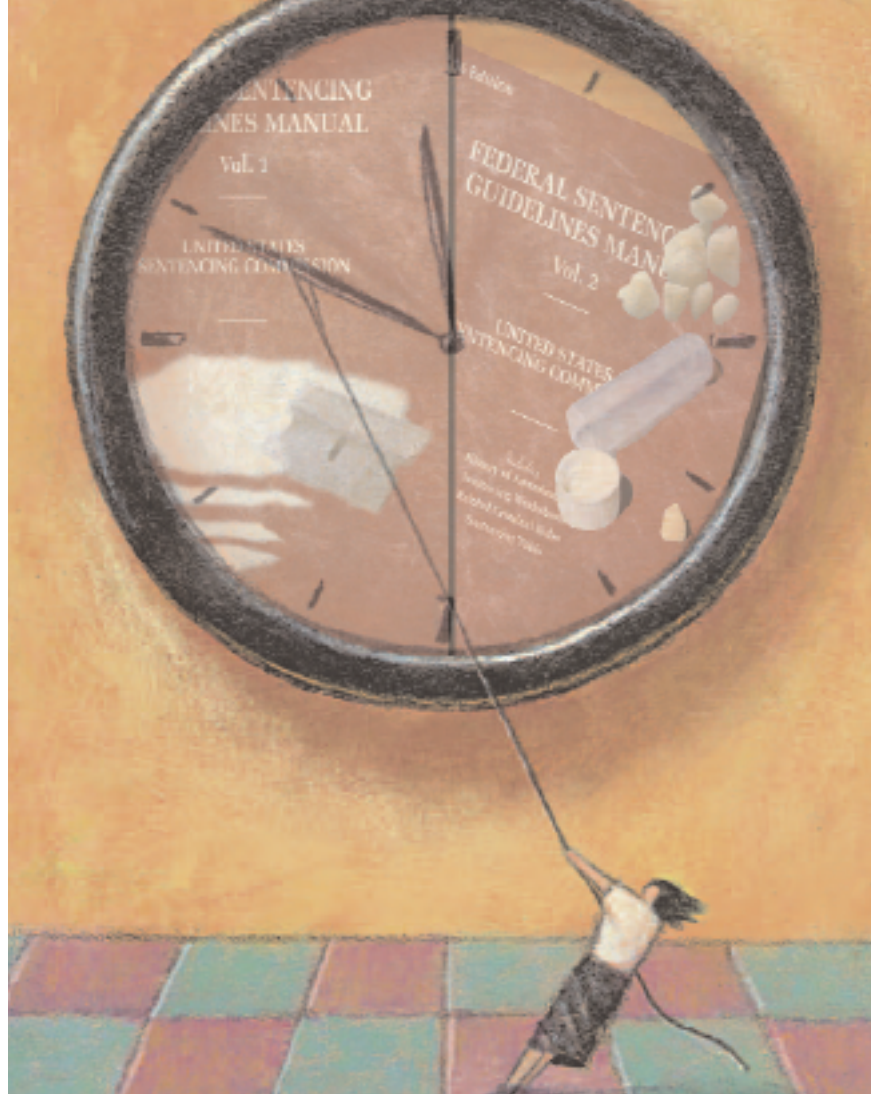
Race and Crack Cocaine Offenses: Correcting a Troubling Injustice Post-Booker

Since 1987, and the promulgation of the federal Sentencing Guidelines, there has been an egregious sentencing disparity between crack and powder cocaine offenses. Courts and defense attorneys throughout the country have asserted that the disparity has disproportionately affected minorities. These draconian crack cocaine sentences offer little hope for rehabilitation and provide neither just nor reasonable punishment.

A person with two kilos of crack cocaine can receive a life sentence while that same person in a powder cocaine offense would only receive a sentence of five to six years in custody.¹ A life sentence, with no hope for release, for a first offender in a nonviolent crack cocaine offense takes aim at the poor, in effect punishing minorities who tend to be the less advantaged in our society. Since *Booker*,² the door is once again open to argue the unreasonableness of a sentencing scheme that creates disparity between crack and powder cocaine offenders.

In 2001, in *United States v. Peterson*,³ the U.S. District Court for the Eastern District of Virginia evaluated the serious implications of the crack cocaine issue in the context of downward departure considerations.⁴ In doing so, the court wrote a 40-page opinion focusing on the problems found in the disparate sentencing of crack cocaine offenders. The court did not grant the relief requested, but this case sets the stage for possible arguments in crack cocaine offenses in the changed landscape of the post-*Booker* world.

In a more recent decision, *United States v. Perry*,⁵ by the Honorable William E. Smith of the U.S. District Court for the District of Rhode Island, the court took a step-by-step approach to the conflict regarding unbalanced sentencing in crack versus powder cocaine offenses. Judge Smith laid out the foundations of why, under the advisory guidelines and 18 U.S.C. § 3553(a), and in light of the *Booker* and *Fanfan* decisions, the disparity can no longer withstand constitutional scrutiny. Specifically, the court noted that for over a decade the Sentencing Commission has urged the overhaul of the laws concerning sentencing in cocaine cases, particularly related to the crack versus powder cocaine controversy.⁶ The court took issue with the numerous commenta-



tors and courts expressing criticism of this conflict while doing nothing to equalize the penalties for powder and crack cocaine offenses. The court discussed the statistical analysis showing that race is being punished through this unwarranted disparate condition. The detailed opinion is useful in advocating for a departure in a crack cocaine case.

Although this analysis cannot avoid the mandatory minimums, it does apply to sentencing guidelines that exceed the statutory minimum. The arguments expressed by the petitioner in *Perry* and other recent cases can be used to reduce a sentence to the mandatory minimum, notwithstanding any other basis for departure such as cooperation or the safety valve (U.S.S.G. §§ 5k1.1 and 5C1.2). In case of a 5K1.1 motion or the safety valve, advocacy concerning the inequality of crack cocaine cases with that of powder cocaine can provide the court a reason to sentence a person at the applicable guideline range below the mandatory minimum. Although mandatory minimums affect the total sentencing process, they do not eliminate departure arguments.

In order to take a strategic and structured approach to addressing these problems, one must look at the history of the crack cocaine legislation and its application to the present status of the law.

BY MARCIA G. SHEIN

A. History of Crack Cocaine Legislation

Anti-Drug Abuse Act and Crack Cocaine

In 1986, prior to implementation of the federal Sentencing Guidelines (the "Guidelines"), Congress enacted the Anti-Drug Abuse Act, establishing a 100-to-1 ratio between powder cocaine and crack cocaine offenses. It is this ratio that lies at the heart of the debate surrounding cocaine and federal sentencing policy.⁷ In addition, Congress set forth in the Anti-Drug Abuse Act of 1988 a mandatory minimum penalty for simple possession of crack cocaine that distinguished possession of crack from simple possession of all other controlled substances.⁸

In the early to mid-1980s, a national sense of urgency surrounded the drug problem generally and crack cocaine specifically. Whether the media simply reported an urgent situation, or helped create a sense of emergency, has been and will continue to be debated. What is clear, however, is that the crack cocaine problem in the United States received unprecedented coverage in newspapers, magazines, and on network television during this period.⁹

Evoking the then recent drug-related deaths of two nationally known sports figures, Len Bias (who was assumed to have died from a crack overdose)¹⁰ and Don Rogers, members of Congress repeatedly described the dimensions of the crack problem in dramatic terms such as "epidemic." Because of this heightened public concern and media emphasis, Congress acted quickly to pass the Anti-Drug Abuse Act of 1986, which established mandatory minimum penalties for drug trafficking offenses in general, and the powder cocaine and crack cocaine quantity differential, in particular.¹¹

Congress considered crack more dangerous than powder cocaine for several reasons. First, members of Congress viewed crack cocaine as extraordinarily addictive, characterizing it as "intensely addictive" and "quite possibly the most addictive drug on Earth."¹² Second, members perceived crack cocaine to be "caus[ing] crime to go up at a tremendously increased rate," emphasizing what they believed was a higher correlation between crack cocaine use and the commission of other serious crimes. Members believed that crack users stole money to support their habits, that crack addicts committed especially brutal acts due to the drug's influence, and

that sellers traded drugs for stolen property thereby encouraging a market in stolen goods.¹³ Third, Congress considered the physiological effects of crack cocaine to be especially perilous, leading to higher rates of psychosis and death.¹⁴ Fourth, and of particular concern, members of Congress felt that young people were especially prone to crack cocaine use because the drug could be obtained relatively easily. Finally, Congress believed that crack cocaine's purity and potency, relatively low cost, ease of manufacture, transportation, disposal, and consumption, were leading to widespread use.¹⁵

Congress demonstrated its continued concern about the increased dangers of crack cocaine in 1988 when it established a different penalty structure for crack offenses charged under the simple possession statute than for other drug offenses. The clearest indication of congressional intent comes from floor statements made by the chief sponsors of the amendments. These statements suggested that (a) the apparently increasing supply of cocaine (particularly crack cocaine) threatened to create new users due to the drug's easy availability; (b) crack cocaine "cause[d] greater physical, emotional, and psychological damage than any other commonly abused drug;" (c) crack cocaine was considered "linked to violent crime," especially gang activity; and (d) because the stiff penalties set forth in the 1986 Act presumptively discouraged dealers from carrying quantities above five grams, Congress assumed that "possession of as little as five grams means individuals [carrying such amounts] in most instances are dealers, not users."¹⁶

Mandatory Minimums

Congress further underscored its concern about drugs generally, and crack cocaine specifically, in the Anti-Drug Abuse Act of 1988. The most far-reaching change of this legislation applied the same mandatory minimum penalties to drug trafficking conspiracies and attempts that were previously applicable only to substantive, completed, drug trafficking offenses. With respect to crack cocaine, the Act amended 21 U.S.C. § 844 to make crack cocaine the only drug with a mandatory minimum penalty for a first offense of simple possession.

As originally introduced, the 1988 bill did not contain mandatory minimum penalties for possession of cocaine base (the term "cocaine base" as used in the bill has been found synonymous

with the term "crack cocaine" in almost all cases where the distinction has been argued). Rather, the penalties were added by floor amendments in both the House and the Senate. Relatively little debate surrounded the proposals to attach mandatory minimum penalties to cocaine base possession.

The 1988 Act's mandatory minimum penalties single out cocaine base possession in a manner that is much more severe than possession penalties for other controlled substances. Under the Act, and today's law, simple possession penalties for cocaine base compared to any other drug are as follows:

- (a) possession of *any quantity* of any other controlled substance, including heroin or powder cocaine, results in a maximum sentence of one year,¹⁷ with a guidelines range of 0-6 months for a first offender;¹⁸
- (b) but a mandatory minimum sentence of five years must be imposed for simple possession of five or more grams of cocaine base for a first offense; three or more grams for a second offense; and *more than* one gram for a third or subsequent offense.¹⁹

There was little debate on the amendments establishing the mandatory minimum cocaine base possession penalties. It is noteworthy that the Department of Justice opposed the amendments.

The 1995 Commission Study

In 1995, the U.S. Sentencing Commission ("Commission") reviewed the legislative history on the 1986 and 1988 Acts. The Commission found that: (a) Congress determined that substantial involvement in drug trafficking, measured in terms of specified threshold quantities of each of the more common street drugs, warranted a mandatory minimum sentence (10 years for major traffickers involved with larger quantities, five years for serious traffickers involved with somewhat lesser quantities); (b) to the extent Congress saw the drug problem as a national epidemic, it viewed crack cocaine to be at the forefront of that epidemic; (c) the decision by Congress to differentiate between powder and crack cocaine in the penalty structure was deliberate, not inadvertent; and (d) the congressional decision to treat powder and crack cocaine differently arose primarily from beliefs, not facts, that crack cocaine was significant-

ly more dangerous than powder cocaine.²⁰

Nevertheless, in examining these rationales, the Commission found little support for the 100-to-1 disparity. The Commission concluded that, although cocaine is not physiologically addictive, using the drug in any form can create psychological addiction. The Commission further found that the use of cocaine creates essentially the same physiological response no matter what form the drug takes. This same philosophy was applied to heroin addiction in the 1960s and 1970s.²¹

The 1995 report to Congress further stated that powder cocaine can always be easily converted into crack,²² making it difficult to establish a punishment enhancement based on form.

The Commission also advised that one of the issues driving the debate concerning the different penalty structures for crack and powder cocaine relates to the racial implications of disparate treatment for defendants convicted of either possession or distribution of crack cocaine. The Commission asserted that 88.3 percent of the offenders convicted in federal court for crack cocaine distribution in 1993 were Black and 7.1 per-

cent were Hispanic. Moreover, the Commission found that, to the extent that a comparison of the harms between powder and crack cocaine reveals a 100-to-1 quantity ratio to be an unduly high ratio, the vast majority of those persons most affected by such an exaggerated ratio are racial minorities. Ultimately, the report stated, "... sentences appear to be harsher and more severe for racial minorities than others as a result of this law, and hence [there exists] the perception of unfairness, inconsistency, and a lack of evenhandedness."²³

The 1995 report from the Sentencing Commission proposed a change in the sentencing guidelines to eliminate the differential treatment between crack and powder cocaine offenses in setting base sentences. The report also recommended that Congress eliminate the differential treatment in the mandatory minimum statutes. The Department of Justice immediately sent draft legislation to Congress to overturn the Commission's proposals.²⁴

On October 18, 1995, the U.S. House of Representatives voted 332 to 83 to reject the Sentencing Commission's proposal for parity in crack and powder cocaine sentencing as outlined

in the 1995 report Congress requested. This was the first time since the enactment of the Guidelines that Congress had failed to adopt the Commission's proposed Guideline amendments. Congress asked the Commission to take another look at the issue and report back, but this time with non-binding recommendations.

Pursuant to Public Law No. 104-38, the Sentencing Commission, in April 1997, submitted a special report to Congress titled *Cocaine and Federal Sentencing Policy* ("1997 report").

The 1997 Commission Study

The 1997 report recommended that the triggering amount for a five-year mandatory minimum sentence for crack be changed from the current five grams to somewhere in the range of 25-75 grams; and that the triggering amount for a five-year mandatory sentence for powder cocaine be changed from the current 500 grams to somewhere in the range of 125-375 grams. In other words, the 1997 report seemed to advocate replacing the current 100-to-1 ratio between crack and powder cocaine with a 5:1 quantity ratio between the two. The overarching concern about disparate

The *Claiborne* Case and Crack-Powder Disparity Issues

By Anne E. Blanchard

Although the crack-powder disparity is not at issue before the Supreme Court yet, it is present in the background in one of the two *Booker* reasonableness cases now pending — *United States v. Claiborne*. In fact, the 100-to-1 crack-powder differential is a looming presence in both the record and the briefs of this potentially pivotal sentencing case. At the very least, *Claiborne* provides a vivid illustration not only of the dramatic differences in sentences produced by crack as compared to powder, but of the portentous role that drug quantity alone has been given in federal sentencing.

Claiborne comes out of the Eighth Circuit. This is the circuit that has developed a well-earned reputation for affirming (all) within-Guideline sentences and (nearly all) above-Guidelines sentences as reasonable, and reversing as unreasonable below-Guideline sentences time and time again. Mario Claiborne was convicted of possessing 5.03 grams of crack and possessing with intent to distribute .23 grams of crack.¹ Because the amount was three

hundredths of a gram over the five-gram limit, Claiborne faced a mandatory minimum of five years incarceration and a statutory maximum of 20 years. Had the amount been less than five grams, the maximum sentence permitted would have been one year. Had Claiborne been charged with 5.26 grams of cocaine powder instead, his Guideline range would have been 6 to 12 months.²

In pronouncing Claiborne's sentence of 15 months, the district court found the Guideline range of 33 to 46 months to be "excessive."³ This finding was not based on the crack-powder disparity. With respect to the drugs in the case, the judge stated only that the case involved a small amount of drugs compared to other cases which had come before her involving greater quantities and lower Guideline ranges. In addition to the small-scale quantity, the court based its sentence on Claiborne's lack of a criminal record, his financial support of his family, his sustained employment since his arrest, and a desire to allow Claiborne to continue his "momentum of success."

The Eighth Circuit vacated the sentence and remanded for resentencing, observing that the sentence imposed was

40 percent lower than the Guideline range and that the reasons given in justification were not of a comparable magnitude.⁴ Based on its presumption of Guidelines reasonableness, the *Claiborne* court dismissed the district court's judgment as to the small quantity of crack because it was "taken into account in determining his Guidelines range."⁵ That statement was both the beginning and the end of the Eighth Circuit's discussion of the issue.

The specific questions posed by the Supreme Court in *Claiborne* — whether the district court's sentence was reasonable and, in deciding that, if it is consistent with *Booker* to require extraordinary circumstances in cases involving substantial variances — do not call for any consideration of the crack-powder issue.⁶ The Court's attention might be called to the issue, however, in light of the *amici curiae* brief filed by Senators Edward Kennedy, Orrin Hatch and Dianne Feinstein. The senators support affirmance of the Eighth Circuit decision, yet emphasize that remand is appropriate to allow the district court to provide clearer and more particularized reasons for the sentence imposed.⁷ In doing so, they note:

impact on minority offenders in crack cocaine cases was reinforced and changes recommended.

Somehow, in the two-year interval between 1995 and 1997, the Sentencing Commission found that its analysis of the data which had justified sentencing parity in 1995 now permitted a slight disparity between crack and powder due to the systemic violence associated with multiple and anonymous drug sales of the crack market. The Commission reached this conclusion despite the fact that the Sentencing Guidelines were designed to take just such factors into account. Either way, for a second time the Commission found unwarranted disparity in crack cocaine sentencing.

Judicial Resistance to Imposing the 100-to-1 Disparity

There is also increasing resistance on the front lines by federal district court judges who see the unfairness of the crack-powder differential. As the following cases demonstrate, however, a district court's imposition of a below-Guidelines sentence does not necessarily mean that a court of appeals will agree that a downward departure is warranted due to the severe crack cocaine penalties.

District Judge Donald E. Ziegler called the harsh crack cocaine penalties under the Sentencing Guidelines "arbitrary and capricious" and refused to apply them in *United States v. Alton*. Darnell Lee Alton, a defendant described as a "heavy crack cocaine trafficker in the Pittsburgh area,"²⁵ received a 10-year prison sentence from the district court, followed by five years of parole. This sentence comported with guidelines for powder cocaine, not crack. Judge Ziegler justified the departure by pointing out that Congress had reconsidered the rationality of the 100-to-1 ratio, that the Sentencing Commission acted in an arbitrary and capricious manner in setting the crack cocaine penalties, and that the Commission did not adequately consider the potential for racially disparate impact when developing the Guidelines. The U.S. Court of Appeals for the Third Circuit, however, vacated the sentence imposed by Judge Ziegler. The appellate court remanded for sentencing within the guideline ranges. "We defer to Congress and the Sentencing Commission to address the related policy issues and to consider the wisdom of retaining the present sentencing scheme," the Third Circuit stated.²⁶

In Omaha, District Judge Lyle Strom departed from the Guidelines in sentencing two crack cocaine defendants, justifying his departure by the racially disparate impact of the Guideline-mandated sentences. Reversing, the Eighth Circuit found that a downward departure was not justified simply because the Sentencing Commission did not consider the potential for racially disparate impact in setting the crack cocaine penalties.²⁷

In the District of Columbia, District Judge Harold H. Greene railed against the Sentencing Guidelines in general, as well as police power to "manipulate these statutes and Guidelines so as to achieve ends that may not be consistent with justice,"²⁸ in connection with the case of Sharon Shepherd. Shepherd had offered an undercover officer a quantity of powder cocaine, but the officer asked the defendant to convert it into crack because he wanted to trigger the harsher crack cocaine penalties. The Sentencing Guidelines mandated a sentence of 120 to 135 months once the cocaine was converted to crack, as compared to a sentence of 60 months had the drugs remained in powder form. Judge Green wrote:

[A]mici do not foreclose the possibility that courts might cite the disproportionate emphasis assigned by the Guidelines to the relevant quantity of crack cocaine as a principled reason for imposing a sentence below the applicable range.⁸

The senators emphasize that the disproportionate impact that the crack-powder disparity has on African-American defendants is completely contrary to the goals of the Sentencing Reform Act and that "§ 3553(a) enables courts to consider this impact as they develop principled rules on sentencing."⁹

Although the press, the Sentencing Commission, and members of Congress are currently focused on the crack-powder disparity, it remains to be seen whether the Supreme Court will use *Claiborne* as an opportunity to speak to the issue. At oral argument, the question was briefly joined, confirming the centrality of the crack-powder issue in the post-*Booker* world. Some justices seemed to suggest that it is a congressional policy

prerogative. Given the attention being afforded the crack-powder disparity in other arenas, including Congress, the safe bet is that the U.S. Supreme Court will sit this one out.

Notes

1. Sentencing transcript of U.S. District Court for the Eastern District of Missouri in *United States v. Claiborne*, No. 4:04-cr-00423-DJS, sentencing transcript available at http://www.nycdl.org/itemcontent/booker/ciaiborne_sentencing_transcript.pdf.

2. *Id.*

3. *Id.* at 20.

4. See *United States v. Claiborne*, 439 F.3d 479 (8th Cir. 2006).

5. *Id.* at 484.

6. Order granting Writ of Certiorari, available at <http://www.supremecourtus.gov/qp/06-05618qp.pdf>.

7. *Amicus* brief filed by Senators Edward Kennedy, Orrin Hatch and Dianne Feinstein in support of affirmance in *Claiborne v. United States*, available at http://www.nycdl.org/ItemContent/booker/Amici_Curiae_Senators.pdf.

8. *Id.* at 27.

9. *Id.* at 28. ■

About the Author

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This case demonstrates that, because of the mandatory minimum sentences and the rigid sentencing guidelines, effective control of sentencing — from time immemorial in common law countries a judicial function — has effectively slipped, at least in some cases, not only to the realm of the prosecution, but even further to that of the police. This development denies due process and is intolerable in our constitutional system.²⁹

In Atlanta, U.S. District Judge J. Owen Forrester called his own chemistry experts to testify at an evidentiary hearing, then found that “the penalty provisions of § 841 set out a scientifically meaningless distinction between cocaine and cocaine base, and that the heightened penalty provision for cocaine base must be ignored by operation of the rule of lenity.”³⁰ Judge Forrester, characterized as a “Reagan appointee with a reputation for tough sentences,”³¹ found that “cocaine and cocaine base are synonymous terms referring to the same substance having the same molecular structure, molecular weight and melting point.”³² Looking at the legislative history of § 841, he noted that “the statutory provisions that are at issue . . . were passed with much fanfare and little debate,”³³ and concluded that “there is no rational basis for having heightened penalties for cocaine or cocaine base derived only by one means of manufacture, when it is clear beyond doubt that all forms of cocaine are equally smokable, and therefore, equally dangerous.”³⁴

In the Eighth Circuit, Senior Circuit Judge Gerald W. Heaney concurred in affirming the sentence of Carl Travis Netter, who pleaded guilty to possession with intent to distribute both cocaine and cocaine base (crack), triggering the statutory minimum sentence.³⁵ But Judge Heaney’s concurrence suggested that Congress has no rational basis in establishing the crack cocaine penalties:

I concur in the court’s opinion, but only because I am bound by our prior decisions. I continue to believe that Congress did not have a rational basis to treat one gram of crack cocaine as equivalent to 100 grams of powder cocaine. See *United States v. Willis*, No. 91-2467, slip op. at 10-12 (8th Cir. June 26, 1992) (Heaney, J., concurring). *What makes matters worse is*

that the crack laws have a disparate impact on blacks. Until our court *en banc* or the Supreme Court overrules our prior cases, however, I must concur.³⁶ (Emphasis supplied).

Senior District Judge Howard F. Sachs, in a sentencing memorandum from the Western District of Missouri, expressed similar frustration:

“Federal judges appear to be uniformly appalled by the severe crack cocaine punishments, particularly as compared with the more moderate punishments mandated for transactions in ordinary, powdered cocaine. If Justice Anthony Kennedy is correctly quoted in a current AP dispatch, he has just advised a Congressional Appropriations Committee that, ‘I simply do not see how Congress can be satisfied with the results of mandatory minimums for possession of crack cocaine.’³⁷ Even if this wording is inexact, I am aware of no federal judge who does not share the sentiment expressed.³⁸ . . . *Seeing the wholesale commitment of African American defendants to extraordinarily long terms of imprisonment for crack cocaine trafficking*, where severe but less shocking sentences are imposed on others for trafficking in powdered cocaine in comparable amounts, rubs many judicial nerves raw.”³⁹ (Emphasis supplied).

In Manhattan, Second Circuit Judge Guido Calabresi, though concurring with the court’s rejection of a challenge based on both equal protection and double-counting in the sentencing of defendant Manuel Then, added: “The unfavorable and disproportionate impact that the 100-to-1 crack/cocaine sentencing ration has on members of minority groups is deeply troubling.”⁴⁰

B. Unjustified Racial Disparate Treatment of Cocaine Offenders

The severe statutory penalties for crack cocaine have never been supported by scientific or social realities. The misperceptions that crack offenses are more serious than powder cocaine offenses and that African-Americans

commit crack offenses to a significantly greater extent than whites have several repercussions. More than 90 percent of federal crack defendants are African-American. When that number is coupled with the disparity in applicable sentencing statutes and guidelines, the end result is that African-Americans are sentenced to substantially longer terms of imprisonment for offenses involving what is essentially the same drug: cocaine.⁴¹

Despite the fact that African-Americans total 12 percent of this nation’s population, 92 percent of federal crack prosecutions nationwide have involved African-American defendants.⁴²

More compelling is the fact that, although both whites and blacks use and distribute crack cocaine in substantially similar amounts, non-black crack offenders are more frequently prosecuted in state, rather than federal, court. Statistics from two state jurisdictions support the conclusion that there are significantly more white offenders than are actually prosecuted in federal court. In the Eastern District of Washington, data showed that in state prosecutions in Spokane County, the most populous county in the district, whites accounted for 82 (or 28.9 percent) of 284 crack prosecutions, while African-Americans comprised 193 (or 68.0 percent) of the defendants.⁴³ Similarly, 552 (or 19.6 percent) of 2,661 crack defendants in state courts within the Southern District of Florida were white.⁴⁴

These numbers illustrate the marked inequality with which African-Americans are prosecuted, convicted, and sentenced for crack offenses in federal court. Attempts to explain the disparity between population figures and prosecutions by claims that African-Americans commit crack offenses more often than whites cannot explain the gross differences.

C. District Courts Have Always Had the Power to Depart

The Sentencing Reform Act always set the stage for departures and consideration of the entire scope of the Act pursuant to 18 U.S.C. § 3553. In fact, the *Booker* decision merely reinforces what existed in the statute before it was decided.

In an attempt to eliminate the widespread sentencing disparity, Congress enacted the Sentencing Reform Act of 1984 (the “Act”).⁴⁵ The Act created the U.S. Sentencing Commission and

assigned it the task of formulating guidelines and policies⁴⁶ that would maintain consistency, fairness, and sufficient flexibility in sentencing.⁴⁷ The Commission completed its guidelines in 1987.⁴⁸

From the beginning, the Commission established its departure powers in *unusual circumstances*. Outside the heartland cases are those cases that reflect facts or circumstances that are not adequately considered in the federal Sentencing Guidelines. Congress may be acting willfully by refusing to amend statutory parameters to avoid the racially disparate results, but it is the court that must act upon the Guideline distinctions and depart where it can, despite congressional inaction. In combining the Commission's two reports and the facts they contain, courts in a post-*Booker* world may depart pursuant to U.S.S.G. § 5K2.0 for reasonableness to at least the minimum mandatory, or even below when authorized. The reports clearly support evidentiary findings that equal sentences for powder and crack offenses are indicated to avoid disparity that is both unjust and has clear racial impact.

The flexibility to depart based on offender characteristics not only existed in the literal language of the statutory directives and the Guidelines, but also in the minds of the Commission members when they drafted the Guidelines and reported other issues.

Following *Booker*, a court will typically follow a three-step sentencing process. First, the court must determine the applicable advisory guideline range. Ordinarily, this will require resolution of objections to the PSR's Guideline calculations as well as any factual disputes.

Second, the court must determine whether, pursuant to the Sentencing Commission's policy statements, any departures from the advisory Guideline range are clearly applicable.⁴⁹

Finally, the court must determine the appropriate sentence in light of all factors set forth in 18 U.S.C. § 3553(a). The court may impose a sentence within the applicable Guideline range (after any clearly applicable departures) if such is consistent with the court's consideration of the § 3553(a) factors, or impose a non-Guideline sentence if such is justified by the § 3553(a) factors.⁵⁰ A non-Guideline sentence need not be supported by factors that would have justified a departure under the old, mandatory regime⁵¹ and the court need not definitively resolve any departure issues if it has decided to impose a non-Guideline sentence.⁵² However, the court is free to rely upon departure case law in determining whether a guideline

sentence is appropriate and in translating its findings into a numerical sentence.⁵³

Title 18, United States Code § 3553(a) *has always* governed federal sentencing decisions, as it existed in the pre-*Booker* world. It still requires courts to consider seven factors in the sentencing process.

1. The nature and circumstances of the offense and the history and characteristics of the defendant.
2. The need for the sentence imposed to:
 - a. reflect the seriousness of the offense, to promote respect for the law and to provide just punishment for the offense;
 - b. afford adequate deterrents to criminal conduct;
 - c. protect the public from further crimes of the defendant; and
 - d. provide the defendant with needed educational or vocational training, medical care, other correctional treatment in the most effective manner. (This would include rehabilitation.)
3. The kinds of sentences available.
4. The sentencing range established by the guidelines.
5. Any pertinent policy statements issued by the Sentencing Commission. Such as the 1995 and 1997 studies on the disparity in crack cocaine offense.
6. The need to avoid unwarranted sentencing disparity among defendants with similar records who have been found guilty of similar conduct. (Crack and powder cocaine similarities in chemical structure and use.)
7. The need to provide restitution to any victim of the offense.

After considering all these factors a court must "impose a sentence sufficient, but *not greater* than necessary, to comply with the purpose set forth in paragraph 2."⁵⁴

Courts, the Sentencing Commission, and commentators have long criticized the disparity between crack cocaine offense sentencing schematics and that of powder cocaine offenders. There is a lack of persuasive penological or scientific justification that supports a racially disparate impact in federal sentencing.⁵⁵

The Commission has studied the issue in depth and at least twice conclud-

ed that the assumptions underlying the disparity between crack and powder are unsupported by data. While legislators may have intended to target serious drug traffickers, the Commission's data indicates that two-thirds of federal crack cocaine defendants are street level dealers.⁵⁶ Indeed, the 100-to-1 ratio actually targets low-level dealers in a manner wholly inconsistent with the intent of the 1986 Act.

None of the previously offered reasons for the 100-to-1 ratio withstand scrutiny. As the result of different penalties for crack and powder cocaine, and contrary to one of the Sentencing Reform Act's primary goals, the Sentencing Guidelines have led to increased disparity between the sentences of blacks and whites.

To its great credit, the Commission has *repeatedly* sought to reduce the disparity.⁵⁷ After *Booker*, district courts need no longer blindly adhere to the 100-to-1 guideline ratio.

D. Crafting Motions for Departures Post-*Booker*

Several motions have been successful in obtaining downward departures in crack cocaine offenses.⁵⁸ In *United States*



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v. *Perry*, the court carefully scrutinized and analyzed the question of the impact of the *Booker* decision on the legislative history of crack versus powder cocaine, expressing disdain for the disparity and the Commission's history of trying to minimize the disparity.⁵⁹ Under the post-*Booker*, nonmandatory guidelines construct, litigators may use this analysis to seek amelioration of the crack disparity based on the specific circumstances of each case. While most courts of appeals are reversing and remanding below-Guideline sentences that are based solely on a district court's rejection of the 100-to-1 ratio, such sentences should not be rejected when there is independent evidence to support a lesser sentence. These sentences stand a greater chance of being upheld when a district court ties the § 3553(a) factors to the individual characteristics of the defendant and the offense committed. In *United States v. Spears*,⁶⁰ the Eighth Circuit stated: "Nothing in *Booker* authorizes district courts to alter the Guidelines; rather, *Booker* provides district courts the flexibility to tailor individual sentences for each defendant against the framework of the congressionally-approved Guidelines scheme."

As the *Perry* court stated, "... when

a Guideline sentence involves a nearly impossible-to-justify disparity such as this [that identified in crack versus powder cocaine], the sentence neither accurately reflects the seriousness of the offense, nor promotes general respect for the criminal justice system."⁶¹ The court acts well within its discretion under § 3553(a) in sentencing below the Guideline range to account for the unreasonable inflation of sentences called for in crack cases.⁶² Courts in Rhode Island have found that crack guidelines are almost universally believed to be way too high.⁶³

There are other courts that have stated the disparity of the Sentencing Guidelines between cocaine base and powder is not a valid basis for downward departure.⁶⁴ In the Eastern District of Virginia a judge stated, "A sentencing judge may consider that in light of other § 3553 factors, the sentencing guideline range is inappropriate because that range is based on ... inapposite policy judgments of the Sentencing Commission such as the disparity of the crack cocaine sentencing ranges."⁶⁵

Other courts have also imposed non-Guideline sentencing on powder versus crack cocaine offenses.⁶⁶ In the post-*Booker* world, the sentiments of the courts are the same as they were in a pre-*Booker* world. The disparity is not justified. If Congress fails to remedy this fundamental injustice, it remains for the courts to navigate around the statutory and Guideline constraints. We, as practitioners in the field of criminal justice, must steer the courts through these muddy waters.

Notes

1. Approximate sentence of a person with no prior convictions.
2. *United States v. Booker*, 128 S. Ct. 738 (2005).
3. 143 F. Supp. 2d 569 (E.D. Va. 2001).
4. *Id.*
5. 389 F. Supp. 2d 278, 282 (D.R.I. 2005).
6. *Id.* at 300.
7. Pub. L. No. 99-570, 100 Stat. 3207 (1986).
8. Pub. L. No. 100-690, 102 Stat. 4181 (1988); 21 U.S.C. 844.
9. See Craig Reinerman & Harry G. Levine, *The Crack Attack: Politics and Media in America's Latest Drug Scare*, in IMAGES OF ISSUES: TYPIFYING CONTEMPORARY SOCIAL PROBLEMS 115, 117 (Joel Best ed., 1989).
10. As detailed by the U.S. Sentencing Commission in its 1995 Special Report to Congress (the "1995 Report"), the Bias autopsy revealed that in fact he had died from a powder cocaine overdose.

11. The development of this omnibus bill was extraordinary. Typically, members introduce bills, which are referred to a subcommittee, and hearings are held on the bills. Comment is invited from the Administration, the Judicial Conference, and organizations that have expertise on the issue. A markup is held on a bill and amendments are offered to it. For this omnibus bill, much of the procedure was omitted. The careful deliberative practices of Congress were set aside for the drug bill. See Hearings Before the U.S. Sentencing Comm'n on Proposed Guideline Amendments (March 22, 1993) (testimony of Eric E. Sterling, President of the Criminal Justice Policy Foundation).

12. See 132 Cong. Rec. 6729 (Daily Ed. Sept. 11, 1986) (statement of Rep. LaFalce regarding H.R. 5484) ("Crack is thought to be even more highly addictive than other forms of cocaine or heroin.").

13. 132 Cong. Rec. 26,447 (1986) (statement of Lawton Chiles that "[t]he whole nation now knows about crack cocaine. They know it can be bought for the price of a cassette tape, and make people into slaves. It can turn promising young people into robbers and thieves, stealing anything they can to get the money to feed their habit.

14. *Id.*

15. *Id.*

16. See U.S. Sentencing Comm'n, Special Report, *infra*.

17. 21 U.S.C. § 844(a).

18. U.S.S.G. § 2D2.1(a)(1).

19. 21 U.S.C. § 844(a).

20. U.S. Sentencing Comm'n, Special Report, *supra*.

21. *Id.*

22. "Crack cocaine ... is derived from powder cocaine. ... The powder is simply dissolved in a solution of sodium bicarbonate and water. The solution is boiled and a solid substance separates from the boiling mixture. This solid substance, crack cocaine, is removed and allowed to dry. ... One gram of pure powder cocaine will convert to approximately 0.89 grams of crack cocaine." *Sentencing Commission Report*, at 14.

23. *Id.*

24. *Id.* Congress requested this report and study due to concern regarding the disparate impact of crack laws on African-Americans.

25. *United States v. Alton*, 60 F.3d 1065, 1066 (3d Cir. 1995).

26. *Id.* at 1071.

27. *United States v. Majied*, 25 F.3d 1389, 1400-1401 (8th Cir. 1994).

28. *United States v. Shepherd*, 857 F.Supp. 105, 107 (D.C. Cir. 1994), remanded, 102 F.3d 558 (D.C. Cir. 1996). The appellate



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court remanded the case with instructions to vacate Shepherd's judgment of conviction, and allow her to enter a plea and be resentenced; the lower court had rejected a mid-trial plea bargain.

29. *Id.* at 105.

30. *United States v. Davis*, 864 F.Supp. 1303, 1309 (N.D. Ga. 1994).

31. *Judge Rejects Basis for Crack Sentences*, NATIONAL LAW JOURNAL, Sept. 12, 1994, at A10.

32. *Davis*, 864 F.Supp. at 1306.

33. *Id.*

34. *Id.* at 1309.

35. *United States v. Netter*, 1992 U.S. App. LEXIS 25771 (8th Cir. 1992).

36. *Id.* at *3.

37. N.Y. TIMES, March 10, 1994.

38. *United States v. Conard*, 1994 U.S. Dist. LEXIS 3259 at *3 (W.D. Mo. 1994).

39. *Id.* at *6.

40. *United States v. Then*, 56 F.3d 464, 467 (2nd Cir. 1995).

41. See Douglas C. McDonald & Kenneth E. Carlson, *Sentencing in the Federal Courts: Does Race Matter?* U.S. Dept. of Justice, Bureau of Statistics 1-3 (Dec. 1993).

42. 1992 U.S. Sentencing Comm'n Monitoring Data Files (April-July, 1992); Special Report, Ch. 7, p. 12.

43. Data submitted in *United States v. Turner*, 901 F.Supp. 1491 (C.D. Cal. 1995), at n.4; see State Crack Prosecutions in Spokane County, Washington, 1992-94 in original.

44. Data filed in *United States v. Hickman*, CR-93-14021 (S.D. Fla.).

45. Pub.L. No. 98-473, ch. 2, 98 Stat. 1987 (codified at 18 U.S.C. §§ 3551-673 (1988); 28 U.S.C. §§ 991-98 (1988)). In addition to the reduction of sentencing disparity, Congress sought through the Act to achieve "honesty in sentencing." Senate Report at 3225. Under the indeterminate sentencing system, the sentence pronounced by the judge did not represent the actual length of time the defendant would serve in prison. The Parole Commission made the final incarceration decision. *Breyer* at 4.

46. Pursuant to 28 U.S.C. § 994(a)(2) (1988) the Commission is authorized to promulgate "general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation."

47. The Sentencing Commission shall "provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized

sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices." 28 U.S.C. § 991(b)(1)(B) (1988). The process by which a judge should impose a sentence in accordance with the purposes of sentencing is outlined in 18 U.S.C. § 3553.

48. United States Sentencing Comm'n, Guidelines Manual (1991).

49. See U.S.S.G. § 5K.

50. See *United States v. Crosby*, 397 F.3d 103, 113 (2d Cir. Feb. 2, 2005).

51. *United States v. Ranum*, 353 F. Supp. 2d 984, 986-87 (E.D. Wis. 2005).

52. *Crosby*, 397 F.3d at 112.

53. See *United States v. Galvez-Barrios*, 355 F.Supp. 2d 958,964(E.D. Wis. 2005).

54. 18 U.S.C. § 3553; *United States v. Webb*, 403 F.3d 373, 385 (6th Cir. 2005).

55. See, e.g., *United States v. Dumas*, 64 F.3d 1427, 1432 (9th Cir. 1995)(Boochever, J., concurring); *United States v. Willis*, 967 F.2d 1220, 1226 (8th Cir. 1992)(Heaney, J. concurring); *United States v. Clary*, 846 F. Supp. 768 (E.D. Mo.) rev'd, 34 F.3d 709 (8th Cir. 1994); *United States v. Clary*, 846 F. Supp. 839 (C.D. Cal. 1993); David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283 (1995); Matthew F. Leitman, *A Proposed Standard of Equal Protection Review for Classifications Within the Criminal Justice System that Have a Racially Disparate Impact: A Case Study of the Federal Sentencing Guidelines' Classification Between Crack and Powder Cocaine*, 25 U. TOL. L. REV. 215 (1994); *The Debate on 2002 Federal Drug Guideline Amendments*, 14 FED. SEN. REPTR. 123, 188-242 (Nov./Dec. 2001-Jan./Feb. 2002); *Rethinking the Crack Cocaine Ratio*, 10 FED. SEN. REPTR. 179, 184-208 (Jan./Feb. 1998).

56. Diana Murphy, *Statement to Senate Judiciary Committee, May 22, 2002*, reprinted in 14 FED. SEN. REPTR. 236, 237 (Nov./Dec. 2001-Jan./Feb. 2002).

57. See U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Criminal Justice System is Achieving the Goals of Sentencing Reform*, at 132 (2004); Diana Murphy, *Statement to Senate Judiciary Committee, May 22, 2002*, reprinted in 14 FED. SEN. REPTR. 236 (Nov./Dec. 2001-Jan./Feb. 2002); U.S. Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policy* (Apr. 1997), reprinted in 10 FED. SEN. REPTR. 184, 189 (Jan./Feb. 1998); U.S. Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policy* (Apr. 1997): see also U.S. Sentencing Commission Hearing, 3/10/02, *Cocaine Sentencing*, reprinted in 14 FED. SEN. REPTR. 217, 224 (Nov./Dec. 2001-Jan./Feb. 2002)(testimony of Judge Sim Lake on

behalf of the U.S. Judicial Conference, in favor of "dramatically lowering the current 100 to 1 crack to powder cocaine ratio").

58. *United States v. Ranum*, 353 F. Supp. 2d 984 (E.D. Wis. 2005); *United States v. Hubbard*, 369 F. Supp. 2d 149 (D. Mass. 2005); *United States v. Perry*, 389 F. Supp. 2d 278 (D. R.I. 2005).

59. *Perry*, *supra*.

60. *United States v. Spears*, 469 F.3d 1166, 1176 (8th Cir. 2006).

61. *Perry*, 389 F.Supp. 2d at 304.

62. *United States v. Beamon*, 372 F.Supp. 2d 878, 887 (E.D. Wis. 2005); *United States v. Leroy*, 373 F. Supp. 2d 887, 896 (E.D. Wis. 2005).

63. *United States v. Vasconcelos*, N.O. 04-081ML, Tr. of Sentencing at 18, 22 (Lisi, J.)(D.R.I. Jan. 20, 2005) and *United States v. Bilby*, N.O. 04-38, Tr. of Sentencing at 21 (Torres, J.)(D.R.I. Jan. 14, 2005).

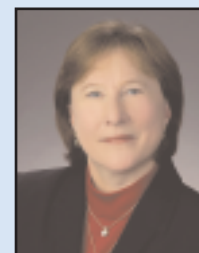
64. *United States v. Franklin*, 2005 U.S. Dist. LEXIS 10810 (D. Kan. 2005) and *United States v. Tabor*, 365 F. Supp. 2d 1052, 1058 n.9 (D. Neb. 2005) (describing crack cocaine Guidelines as "deeply troubling").

65. See *United States v. Biatiri*, 356 F.Supp. 2d 589, 594 n.7 (E.D. Va. 2005); *United States v. Moreland*, 366 F.Supp. 2d 416, 421-22, 24 (S.D. W.Va. 2005)(opposing non-Guideline sentence on defendant convicted of crack-related offenses in light of excessive sentence recommended by career offender provision of the guidelines).

66. *United States v. Carvajal*, 2005 U.S. Dist. LEXIS 3076, *5-6 (S.D.N.Y. 2005); *United States v. Nellum*, 2005 U.S. Dist. LEXIS 1568 (N.D. Ind. 2005). ■

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