

Appendix B

SUMMARY OF PUBLIC COMMENT ON CRACK/POWDER COCAINE SENTENCING DIFFERENTIAL

On December 31, 1992, the Commission published in the Federal Register a notice of proposed amendments that, among other things, requested comment on whether the Commission should recommend that Congress modify or eliminate provisions distinguishing the penalties for powder cocaine offenses from crack offenses. Similarly, on December 21, 1993, the Commission published in the Register an invitation to the public to comment on whether the Commission should modify guideline provisions that distinguish between powder cocaine and crack cocaine offenses.

The Commission specifically solicited comment on cocaine sentencing issues from the American Bar Association, the American Civil Liberties Union, the U.S. Department of Justice, the Drug Enforcement Administration, Families Against Discriminative Crack Laws, Families Against Mandatory Minimums, the Federal Public Defenders, the National Association for the Advancement of Colored People, the National Association of Criminal Defense Lawyers, the Office of National Drug Control Policy, and the Sentencing Commission's Practitioners' Advisory Group (a group of criminal defense attorneys) and Probation Officers' Advisory Group.

The following is a summary of the comment received by the Commission:

1. U.S. Department of Justice

The Department of Justice (DOJ), in a position statement issued February 1, 1995, rejects any proposal to equate crack with powder cocaine. The DOJ believes that traffickers of crack cocaine should be subject to higher penalties than traffickers of like amounts of powder cocaine because of the differences in the manner in which the two drugs are ingested and marketed, and because the seller of crack is well aware of its addictive qualities and the familial and community devastation it engenders.

In its statement, the DOJ said crack is a more dangerous and harmful substance than powder cocaine for many reasons, including its greater abuse and dependency potential, its marketing in inexpensive quantities that makes it accessible to youth and those in a lower socioeconomic status, its association with violent crime, and its contribution to the deterioration of neighborhoods and communities.

...Although we recognize, as a policy matter, that an adjustment in the current penalty structure may be appropriate, any such adjustment must reflect the greater dangers associated with crack as opposed to powder cocaine.

Furthermore, we do not believe that specific offender characteristics in the Sentencing Guidelines will be able to account for all of the differences in harms caused by the substances, both because of the systemic nature of some of those harms and because of the problems of proof in individual cases.

2. Office of National Drug Control Policy

Dr. Lee P. Brown, Director of the Office of National Drug Control Policy, expressed concern about current federal sentencing policy for crack and powder cocaine due to the "differential between the impact on 'low end' users and traffickers versus 'high end' users and kingpins, and the differential of the impact on African Americans versus others who use or traffick in narcotics." In a January 19, 1995, letter to the Commission, Dr. Brown said that research evidence does not support the 100-to-1 differential between crack and powder cocaine on which both the federal mandatory minimum penalties and the sentencing guidelines have been based.

In my opinion, one of the goals of sentencing policy in general should be to eliminate race-based differentials. However, the research does not clearly support elimination of the sentencing differential for powder versus crack cocaine. In fact, the greater availability of crack cocaine, the greater degree of addictiveness of crack cocaine, the impact on many inner city communities, and the greater systemic violence which surrounds the crack trade indicate that some differential may be warranted.

It appears that more time is warranted to further examine both the impact in differentials in sentencing which are less than 100-1, through "modeling" of sentencing guidelines which dictate a lesser statutory ratio; and to study the viability of utilizing the federal sentencing guidelines to punish based on offender characteristics involving violence.

3. Federal Public and Community Defenders

The Federal Defenders support elimination of the distinction between powder cocaine and crack cocaine. They cite disparate treatment, stating that crack cocaine offenses are committed overwhelmingly more by Blacks and that powder cocaine offenses are committed primarily by Whites. They also note a lack of scientific data confirming that crack cocaine is more dangerous than powder cocaine.

An additional letter of support for congressional modification or elimination of this distinction came from an assistant federal defender.

4. Probation Officers' Advisory Group

The Probation Officers' Advisory Group reported that the majority of probation officers expressed opposition to the 100-to-1 quantity ratio. In general, they felt the ratio was unwarranted, arbitrary, and "too high." Probation officers were troubled that crack cocaine abusers, dealing to maintain their habit, receive equal if not greater penalties than the more sophisticated, powerful, and monetarily successful powder cocaine dealers. Many probation officers questioned the rationale behind these penalties.

The Commission was told that a DEA chemist advised one probation officer to use a .894 conversion figure to convert powder cocaine to crack cocaine. This conversion figure is the proportion of molecular weight of crack cocaine to that of powder cocaine (303/339).¹ One probation officer noted that under current drug laws, a defendant who sells 100 grams of pure powder cocaine will receive a lesser sentence than a defendant who sells 89.4 grams of crack cocaine, despite the fact that 100 grams of pure powder cocaine could easily be converted to 89.4 grams of crack cocaine.

Most probation officers suggested that the ratio be substantially reduced (perhaps ten-to-one) or eliminated altogether. However, due to its easy marketability, convenient route of administration, simple manufacture, low cost, powerful addictiveness, and social destructiveness, some probation officers consider crack cocaine a much more dangerous drug than powder cocaine. The probation officers who supported the 100-to-1 quantity ratio believed that the availability of crack cocaine bred violence and dependency. They argued that, through deterrence and incapacitation, the ratio reflected the amount of social and physical harm caused by the drug.

The Commission received a separate response from a deputy chief U.S. probation officer, responding on his own behalf, who said that the "ratio of 100-to-1 is the most unfair sentencing issue of which [he is] aware." He cites the lack of scientific evidence to conclude that crack cocaine is 100 times more potent or dangerous than powder cocaine. And he believes the ratio "more severely

¹ See *U.S. v. Paz*, 927 F.2d 176 (4th Cir. 1991). The court upheld use of this figure.

punishes the street level addicted dealer than the conspiratorial businessman who is higher on the chain of distribution." This is so, he says, because "the larger conspiratorial offenders tend to deal in large quantities of powder cocaine" that is later distributed to the street-level dealers and converted into crack cocaine. This probation officer allows that crack cocaine may be more addictive than powder cocaine and is probably more available due to its lesser cost.

5. U.S. District Court Judges

Two U.S. District Court judges wrote of their concern about the 100-to-1 quantity ratio. One said, "[t]he ratio is irrational and leads to unfair sentences. Quantity based sentencing involving crack cocaine produces sentences, in many cases, that are harsh, have no deterrent impact and are grossly disproportionate." The second judge urged the Commission to ask Congress to eliminate the existing quantity ratio, stating that "[t]he Draconian sentences required for crack offenders are unconscionable."

6. Foundations and Organizations

The Criminal Justice Policy Foundation urged the Sentencing Commission to request a review "of the drug quantity structure to determine dosages and quantify relative dangerousness or harmfulness." The Foundation suggested that this study be performed by the National Institute on Drug Abuse in consultation with the National Academy of Sciences. The Foundation views the ratio as "arbitrary," stating that it reflects "no actual calculation of the relative harmfulness to society or an individual of a given number of doses of an actual drug." Families Against Mandatory Minimums wrote that the ratio was "racially discriminatory," and urged a one-to-one ratio for powder cocaine and crack cocaine penalties to be implemented retroactively. And the National Association of Criminal Defense Lawyers characterized the current ratio between powder cocaine and crack cocaine penalties as "grossly unfair, illogical, and racially biased."

Citizens for the Rehabilitation of Errants (C.U.R.E.), citing discrimination against the mostly black users of crack, urged the elimination of differences in the penalties for crack and powder cocaine. The Drug Policy Foundation stated that the 100-to-1 ratio should be modified so that crack cocaine and powder cocaine are treated equally. The Foundation said that there is "no scientific basis for treating one unit of crack as 100 units of powdered cocaine" and that "the differentiation . . . has a significantly racially disproportionate effect."

7. American Bar Association

The American Bar Association Criminal Justice Section's Committee on the U.S. Sentencing Guidelines urged publication of this Commission's report on cocaine. The ABA stated, "if, as we suspect, the report suggests that the current ratio is unjustified) or at least overstated) we would support amendments to rectify this error."

8. American Civil Liberties Union

The American Civil Liberties Union (ACLU) urged the Sentencing Commission to request Congress to eliminate the penalty provisions that distinguish crack cocaine from powder cocaine. In its written submission, the ACLU presented many of the findings of a panel of experts that participated in its 1993 national symposium, "Racial Bias in Cocaine Laws." The ACLU stated, "the overwhelming testimony of the expert's (sic) panel was that the mandatory minimum sentences for crack cocaine are not medically, scientifically or socially supportable, are highly inequitable against African Americans, and represent a national drug policy tinged with racism."

The ACLU disputed the arguments that stiffer penalties for crack cocaine are justified because of its alleged dangerousness, associated violence, or cheapness and accessibility. On the issue of dangerousness, the ACLU noted that it is irrational to distinguish between the two forms of the drug because powder cocaine easily can be transformed into crack cocaine. The ACLU also cited medical opinion stating that: 1) both forms of cocaine have the same effect on the body and temperament; 2) only the administration methods of the two forms of cocaine differ; and 3) no method of administration is more addictive than another.

The ACLU also cited an expert's finding that there is no difference in associated violence between crack cocaine users and powder cocaine users. This expert attributes any such violence to the dynamics of the drug marketplace.

Finally, to punish crack cocaine offenders more severely because of the drug's lesser cost or greater accessibility discriminates against those of lower socioeconomic status, the ACLU said.

9. Practitioners' Advisory Group

The Practitioners' Advisory Group strongly supported the modification or elimination of the 100-to-1 quantity ratio between powder cocaine and crack cocaine. The Group urged the Commission, at a minimum, to conduct a study focusing on whether the "ratio of 100 to 1 accurately reflects current scientific research and whether, in fact, the ratio should be reduced."

10. The National Rainbow Coalition

Reverend Jesse L. Jackson, President and Founder of the National Rainbow Coalition, voiced his concern over the disparity in crack cocaine and powder cocaine penalties. He cited statistics showing that while most crack cocaine users are white, most of those incarcerated in federal prison for crack use are black. Reverend Jackson stated that studies show that "there is no molecular difference in the two forms of the drug, and that powder may in fact be more addictive than crack." He attributes violence associated with crack to the nature of the drug trade rather than the drug itself.

11. Comments from an Assistant U.S. Attorney

An assistant U.S. attorney generally stated that the 100-to-1 quantity ratio was excessive. The prosecutor added two observations. First, he argued that the 100-to-1 ratio did not affect those Congress intended to target. He wrote, "in very few cases have the prosecutions in this district risen above the mid-level management level." Second, he noted that he could not identify any "deterrent impact, or positive social benefit resulting from federal prosecutions under the present penalty scheme."

12. Private Defense Attorneys

Three private defense attorneys voiced their concerns about the 100-to-1 quantity ratio, citing the lack of scientific support for the ratio and its disparate impact on black offenders.

13. Private Citizens

The Commission received approximately 1,900 letters supporting the discontinuation of the 100-to-1 penalty ratio for powder cocaine and crack cocaine offenses.