

## THE CRACK SENTENCING DISPARITY AND THE ROAD TO 1:1

The Anti-Drug Abuse Act of 1986 (“the 1986 Act”) initiated the disparate treatment between crack and powder cocaine.<sup>1</sup> At that time, crack cocaine was believed to be more problematic and dangerous than powder.<sup>2</sup> Based on these mistaken beliefs, the 1986 Act authorized a 100-to-1 ratio sentencing scheme, which equated a single gram of crack with 100 grams of powder. No rationale for the ratio was discussed in the legislative history.<sup>3</sup> The newly created United States Sentencing Commission<sup>4</sup> simply adopted the 1986 Act’s sentencing scheme without utilizing the required empirical approach founded upon past sentencing practices. *United States v. Kimbrough*, 128 S. Ct.

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<sup>1</sup>Pub. L. 99-570, 100 Stat. 3207.

<sup>2</sup>“Congress apparently believed that crack was significantly more dangerous than powder cocaine in that: (1) crack was highly addictive; (2) crack users and dealers were more likely to be violent than users and dealers of other drugs; (3) crack was more harmful to users than powder, particularly for children who had been exposed by their mothers’ drug use during pregnancy; (4) crack use was especially prevalent among teenagers; and (5) crack’s potency and low cost were making it increasingly popular.” *Kimbrough v. United States*, 128 S. Ct. 558, 567, 169 L. Ed. 2d 481(2007), citing, United States Sentencing Commission, Report to Congress: Cocaine and Federal Sentencing Policy (May 2002) (the 2002 Report) available at [http://ussc.gov/r\\_congress/02crack/2002crackrpt.pdf](http://ussc.gov/r_congress/02crack/2002crackrpt.pdf) (All Internet materials as visited Sept. 15, 2008.)

<sup>3</sup>William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 Ariz. L. Rev. p. 1252, n.1 (1996).

<sup>4</sup>The Sentencing Reform Act of 1984 created the United States Sentencing Commission which was vested with the authority to develop guidelines and policy statements to aid federal courts. Pub. L. 98-473, Title II § 217(a), Oct. 12, 1984. Through the Sentencing Commission, Congress sought to foster honesty, uniformity and proportionality within federal sentences. 1A1.1 cmt. pt.A P3.

at 567, see U.S.S.G. § 1A1.1, cmt. pt. A, P3. However, since then, the Sentencing Commission repeatedly acknowledged the unwarranted disparity.

In a series of reports, the Sentencing Commission recognized distinct problems with the presumptions in the 1986 Act and attempted to remedy them. In 1995, the Sentencing Commission found the crack/powder disparity inconsistent with the 1986 Act's concerns about penalizing serious drug traffickers more severely than street-level dealers.<sup>5</sup> It found that a disparity resulted in "retail crack dealers get[ting] longer sentences than the wholesale drug distributors who supply them the powder cocaine."<sup>6</sup> Based on these findings, the Sentencing Commission proposed a reduction to the crack/powder differential which would have changed the ratio from 100-to-1 to 1-to-1.<sup>7</sup> Congress declined to implement the proposed change,<sup>8</sup> however it invited the Sentencing Commission to draft a modified ratio for its further consideration.<sup>9</sup> As invited, in 1997,

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<sup>5</sup>United States Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy (Feb. 1995), available at <http://www.ussc.gov/crack/exec.htm> (Hereinafter 1995 Report).

<sup>6</sup>Id. at 174.

<sup>7</sup>Amendments to the Sentencing Guidelines for United States Courts, 60 Fed. Reg. 25075-25077 (1995).

<sup>8</sup>Pub. L. 104-38 § 1, 109 Stat. 334.

<sup>9</sup>Pub. L. 104-38 § 2(a)(2), 109 Stat. at 335.

the Sentencing Commission issued another report which suggested a 5-to-1 ratio.<sup>10</sup>

Congress did not act upon the Sentencing Commission's 1997 proposal.

Then, in 2002, the Sentencing Commission's research showed that many of the concerns which drove the 1986 Act's disparity never materialized.<sup>11</sup> Specifically, the epidemic abuse levels feared and the violence associated with the crack cocaine trade were found to be over represented by the disparate ratio.<sup>12</sup> Additionally, the 2002 Report found that 85 percent of the individuals sentenced under the 100-to-1 ratio were African-American, thus resulting in the most severe sentences imposed "primarily on black offenders."<sup>13</sup> In response, the Sentencing Commission recommended a reduction of the ratio to "at least" 20-to-1.<sup>14</sup> Congress, again, failed to act.

In its fourth report to Congress in 2007,<sup>15</sup> the Sentencing Commission re-urged a change to the inequitable ratio, however it did not await a congressional response. Instead, the Sentencing Commission enacted a series of amendments as a "partial

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<sup>10</sup>United States Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy 2 (Apr. 1997), available at [http://www.ussc.gov/r\\_congress/newcrack.pdf](http://www.ussc.gov/r_congress/newcrack.pdf). (Hereinafter 1997 Report).

<sup>11</sup>See the 2002 Report, *supra*.

<sup>12</sup>2002 Report pp. 94, 100.

<sup>13</sup>*Id.* at 103.

<sup>14</sup>*Id.* at viii.

<sup>15</sup>United States Sentencing Commission, Report to Congress: Cocaine and Federal Sentencing Policy 8 (May 2007), available at [http://www.ussc.gov/r\\_congress/cocaine2007.pdf](http://www.ussc.gov/r_congress/cocaine2007.pdf) (Hereinafter 2007 Report).

remedy” for the disparate treatment between crack and powder cocaine.<sup>16</sup> On April 17, 2007, the Sentencing Commission amended the crack guidelines to address the disparity between crack cocaine and powder cocaine penalties.<sup>17</sup> The Sentencing Commission declared that Amendment 706 would be effective as of November 1, 2007.<sup>18</sup> As enacted, the Amendment reduced the base offense level for the majority of crack offenses by two levels.<sup>19</sup> On December 11, 2007, the Sentencing Commission decided to make Amendment 706 retroactive, effective March 3, 2008.<sup>20</sup>

As of March 5, 2009, a total of 19,239 sentences were reconsidered under the amended guidelines.<sup>21</sup> Of those cases, 13,408 - or sixty-nine percent - received a sentence reduction.<sup>22</sup> The majority of the cases in which the defendants were denied a reduction

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<sup>16</sup>2007 Report p.10.

<sup>17</sup>Amendments to the Sentencing Guidelines for United States Courts, 72 Fed. Reg. 28571-72 (2007).

<sup>18</sup>Id.

<sup>19</sup>Id.

<sup>20</sup>Amendments to the Sentencing Guidelines for the United States Courts, 73 Fed. Reg. 217-20 (2007).

<sup>21</sup>United States Sentencing Commission Preliminary Crack Cocaine Retroactivity Data Report, p. 5, Table 2 (March 2009), available at <http://www.ussc.gov>. The Commission offered the caution that “the data in this report represents information concerning motions decided through March 5, 2009 and for which court documentation was received, coded and edited at the U.S. Sentencing Commission by March 9, 2009” and that it is only the preliminary report. Id. at p. 3.

<sup>22</sup>Id. at p. 5, Table 2.

rested on the ruling that the defendant was ineligible under U.S.S.G. 1B1.10.<sup>23</sup> On average, defendants obtained a twenty-four month reduction of their sentence.<sup>24</sup> Recently, Lanny Breuer, the head of the Department of Justice's Criminal Division, testified before Congress that the disparity between crack and powder cocaine should be "completely eliminated."<sup>25</sup> When he was asked specifically whether the Department of Justice supported the enactment of a 1 to 1 ratio, he clearly stated "yes."<sup>26</sup> Moreover, he suggested that federal prosecutors should inform the courts that sentences should be fashioned consistent with the objectives of 18 U.S.C. 3553(a). Although this testimony, alone, will change neither the Sentencing Commission's guidelines and nor Congress' statutory mandatory minimums, these statements certainly signal the administration's position as to this disparity. Hopefully, this will also encourage judges to exercise their considerable discretion in regard to the disparate treatment of crack sentences.

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<sup>23</sup>Id. at p. 14, Table 9. Specifically, the courts ruled, inter alia, that the defendants were subjected to mandatory minimums, career offender, armed career offender guidelines or had already served their sentence.

<sup>24</sup>Id. at p. 11, Table 8.

<sup>25</sup><http://judiciary.senate.gov/pdf/09-04-29BreuerTestimony.pdf>

<sup>26</sup><http://judiciary.senate.gov/hearings/hearing.cfm?id=3798>