

United States Court of Appeals  
For The First Circuit

038-95

CHAMBERS OF  
MICHAEL BOUDIN  
U.S. CIRCUIT JUDGE

J. W. McCORMACK POST OFFICE  
AND COURTHOUSE  
BOSTON, MA 02109  
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April 18, 1995

Mr. Michael Courlander  
Public Information Officer  
U.S. Sentencing Commission  
One Columbus Circle, NE  
Washington, D. C. 20002-8002

Dear Mr. Courlander:

I am writing to call to the Commission's attention a problem recently encountered by this court, and by other circuits, that may warrant consideration by the Commission and possible revision or clarification of the Guidelines.

The problem, illustrated by the attached opinions in Fontana (this circuit) and Shorteeth (the Tenth Circuit), involves the use against the defendant at sentencing of information revealed by the defendant in the course of cooperating with the government in order to obtain a downward departure. Although a guideline section (§ 1B1.8(a)) deals generally with this problem, these two cases suggest that a defendant could sometimes come away with the impression that information may not be used against the defendant--even though a strictly literal reading of the guideline and plea agreement arguably permit that information to be used.

This problem obviously involves a tension among conflicting policies, including the facilitation of disclosures to the authorities, fairness to defendants, an understandable concern by the government that it not be mouse trapped, and a certain imbalance in familiarity as between prosecutors and many defendants. There is probably no simple solution, but the two cases that are attached suggest that the present guideline language may not be adequate to provide guidance in this situation and may not be the optimal resolution of this difficult problem.

Sincerely,



Michael Boudin

MB:SEH  
Enclosures 2

*Boudin, J.*

United States Court of Appeals  
For the First Circuit

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No. 94-1989

UNITED STATES OF AMERICA,

Appellee,

v.

N. JOHN FONTANA, II,

Defendant, Appellant.

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APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW HAMPSHIRE

[Hon. Steven J. McAuliffe, U.S. District Judge]

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Before

Torruella, Chief Judge,

Aldrich, Senior Circuit Judge,

and Cyr, Circuit Judge.

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James L. Sultan with whom Rankin and Sultan was on brief for appellant.

Jean L. Ryan, Assistant United States Attorney, with whom Paul M. Gagnon, United States Attorney, was on brief for appellee.

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March 28, 1995

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ALDRICH, Senior Circuit Judge. Appellant, N. John Fontana, is one of a number of persons charged under 18 U.S.C. §§ 471, 473 and 474 with the manufacture, possession and delivery of counterfeit United States currency. Fontana waived indictment and pled guilty pursuant to a plea agreement. He appeals from his sentence.

Following execution of the plea agreement, Fontana cooperated fully with federal authorities. At sentencing, the government did not object to his requesting a three-level downward adjustment for prompt acceptance of responsibility, and it filed a motion for a four-level downward departure for his substantial assistance in further uncovering the scheme, pursuant to United States Sentencing Guidelines ("U.S.S.G.") § 5K1.1. The court granted these motions, and they are not before us. However, the government recommended a three-level enhancement for a managerial or supervisory role under U.S.S.G. § 3B1.1(b), and the court, in sentencing defendant, agreed. Fontana timely challenges the enhancement as a violation of U.S.S.G. § 1B1.8, that he alleges protects him from the use of information he provided pursuant to his plea agreement.

We review a district court's legal interpretation of the sentencing guidelines de novo, United States v. Ovalle-Marquez, 36 F.3d 212, 221 (1st Cir. 1994), and its fact-bound determinations of defendant's role in the offense for clear

error. Id. at 225; United States v. Jadusingh, 12 F.3d 1162, 1169 (1st Cir. 1994).

The sentencing guidelines mandate a three level upward adjustment if the government demonstrates that (1) the defendant was a supervisor or manager, and (2) the criminal scheme involved five or more persons, or was otherwise extensive. Ovalle-Marquez, 36 F.3d at 225. See U.S.S.G. § 3B1.1(b). Neither "supervisor" nor "manager" is defined under § 3B1.1, but it is sufficient that a defendant recruited, instructed or supervised at least one other person. United States v. Rodriguez Alvarado, 985 F.2d 15, 20 (1st Cir. 1993). The court's so finding here was clearly warranted. Fontana does not dispute that he recruited and directly supervised a Mr. Aquire. The issue is whether the participation of Aquire, and Fontana's supervision of him, was properly available to the district court to consider in calculating his sentence.

In his plea agreement, Fontana promised to cooperate in all government investigations and prosecutions of others involved in the counterfeiting operation. In turn, the government made three specific promises:

In exchange for his plea and cooperation, the Government agrees: (1) that it will not object to an appropriate reduction for acceptance of responsibility . . . ; (2) that it will file a Motion pursuant to U.S.S.G. § 5K1.1 on the defendant's behalf at the time of sentencing if the defendant provides substantial assistance in the investigation and prosecution of others. . . . ; (3) that it is not aware

of more than 1.5 million dollars in counterfeit U.S. currency in the instant case and that under U.S.S.G. § 1B1.8 if the defendant provides information which leads to the discovery of more, it will not be used against him to determine his adjusted offense level.

Defendant challenges the three-level enhancement on the ground, inter alia, that the court could not find five participants as "counters." Since the court agreed that it could not count Fontana's wife, it must have considered Aquire in order to meet 3B1.1(b)'s requirements. (The government contended that there were five who had not been disclosed, but, on the record, it is mistaken.) The court, accordingly, in order to find five, may have interpreted the plea agreement as not standing in the way because of Fontana's identifications. In any event, without comment, it found five.

We think this interpretation accords with the plain reading of the agreement. Examination shows no promise by the government not to use information about the involvement of other individuals except where such information led to the discovery of more than the \$1.5 million counterfeit of which it was already aware. (None was.) A single, limited, promise manifestly cannot be construed into a general one across the board. Plaintiff was promised a willingness to recommend downward reductions for acceptance of responsibility and for cooperation, but the only upward exemption (item 3), was that if his disclosures led to finding more counterfeit currency

than the government already knew of, they should not be used against him in calculating his offense level.

Section 1B1.8(a) of the guidelines provides:

Where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others, and as part of that cooperation agreement the government agrees that self-incriminating information provided pursuant to the agreement will not be used against the defendant, then such information shall not be used in determining the applicable guideline range, except to the extent provided in the agreement.

(Emphasis supplied). U.S.S.G. § 1B1.8(a). We do not read from this a promise relating to the disclosure of any participant, unless it led to the discovery of more counterfeit currency. Evidently the court may have felt the same.

We have, however, a singular situation. Not only did Fontana read his agreement as excluding for all purposes individuals disclosed by him, but the government agreed. This calls for consideration. While in its terms the agreement does not support Fontana, plea agreements, involving possible misapprehension by defendants under stress, may invite equitable adjustments at the district court's discretion. Cf. United States v. Kinsey, 917 F.2d 181 (5th Cir. 1990); United States v. Wilder, 15 F.3d 1292, 1296-97 (5th Cir. 1994); United States v. Fields, 766 F.2d 1161, 1168 (7th Cir. 1985). We particularly believe discretion should be considered here because at sentencing, defendant's position with respect to

Aquire was agreed to by the government. We cannot deal adequately with this on this record. In view of its silence we cannot tell whether the court chose, equitably, to adopt defendant's interpretation of the agreement and found, erroneously, that there were five or more independent participants, or whether it read the agreement as written in spite of the government's acquiescence, which it was free to do. The sentence is vacated, and the case remanded to the district court for further proceedings consistent with this opinion.

So ordered.

510 emphasize that issues of nonconformity to contract specifications are handled in the Code section dealing with installment contracts. UCC § 2-610, Official Comment 1. The issue, as properly stated under section 2-612(3), is whether a "nonconformity or default with respect to one more installments substantially impairs the value of the whole contract" so as to constitute a breach of the whole contract. Official Comments to section 2-612(3) expressly state that this subsection "is designed to further the continuance of the contract" and that "[w]hether the nonconformity in any given installment justifies cancellation as to the future depends, not whether such nonconformity indicates intent or likelihood that the future deliveries will also be defective, but whether the nonconformity substantially impairs the value of the whole contract." UCC 2-612, Official Comment 6. In Phase II, the district court found that "[s]ellers tried to meet the contract specifications on every id of coal shipped to Purchaser and never owingly shipped deficient coal." It further found that sellers' occasional failure to meet the contract specifications "did not e to the level of substantially impairing a value of the contract." The district court then concluded that sellers had not eached or repudiated the coal contract, r had sellers breached any warranties, it might be applicable to the contract. Purchaser has failed to show that the strict court was clearly erroneous in finding that there was no substantial impairment of the value of the coal contract. Purchaser presented no new evidence to e district court after remand that would cessitate a finding of breach on the part sellers. Accordingly, the district court's finding on the coal quality issues must be affirmed. See, e.g., *Automated Controls, c. v. MTC Enterprises, Inc.*, 599 F.2d 288, 9 (8th Cir.1979).

#### VII. Antitrust Claim

(7) Sellers filed a motion for summary judgment with respect to purchaser's antitrust claim. The district court correctly id that the principle of res judicata accepts a non-conforming installment without seasonably notifying of cancellation or if he brings an action with respect only to past

barred purchaser's attempt to try the claim now because "based on the stipulation of the parties ... the Missouri Court was to determine all the mutual liabilities of the parties and all issues which arose or could have been brought prior to the date of the order." District Court Order, at 6.

Purchaser could have raised its antitrust claim at the time the district court reviewed the enforceability and validity of the 1979 amendment. An examination of the antitrust claim shows that purchaser attacks the twenty-five percent termination clause as being unduly restrictive of competition among coal suppliers. The purpose of the clause and the mutual benefit of long-term coal contracts were referenced and discussed by the district court in its opinion. Nothing that occurred subsequent to the rendition of that judgment changed the fact that purchaser was required to secure a price twenty-five percent lower than sellers' price in order to take sellers out of the coal contract. Purchaser had a full opportunity to litigate its antitrust claim in the earlier case. Therefore, we affirm the district court's grant of summary judgment in favor of sellers.

#### VIII. Overpayment of Depreciation Credit

Purchaser, in its brief, states that it does not dispute sellers' claim for the overpayment of depreciation credit. The sellers' requested adjustment of \$4,592.00 was apparently overlooked by the district court. We therefore remand with directions for the district court to adjust its judgment by \$4,592.00 and enter an appropriate order for payment of the depreciation credit.

AFFIRMED as to all but the overpayment of the depreciation credit. RE-MANDED to make the necessary adjustment.



installments or demands performance as to future installments.

**Editor's Note:** The opinion of the United States Court of Appeals, Tenth Circuit, in *Oakley v. City of Longmont*, published in the advance sheet at this citation, 887 F.2d 249-253, was withdrawn from bound volume and republished as amended at 890 F.2d 1128.

UNITED STATES of America,  
Plaintiff-Appellee,  
v.  
Lorrie Ann SHORTEETH, a/k/a Gloria Jackson, Defendant-Appellant.  
No. 88-2853.

United States Court of Appeals,  
Tenth Circuit.  
Oct. 10, 1989.

Defendant was convicted in the United States District Court for the Western Dis-

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trict of Oklahoma, Layn R. Phillips, J., pursuant to her guilty plea, of one count of possession with intent to distribute 55 grams of cocaine, and she appealed her sentence. The Court of Appeals, Logan, Circuit Judge, held that information that defendant disclosed in course of cooperation with Government pursuant to plea agreement could not be considered in determining applicable guidelines range.

Vacated and remanded.

### 1. Criminal Law §1013(3)

Defendant's failure to specifically raise guidelines objection in challenging district court's considering information defendant provided pursuant to plea agreement in determining applicable sentence range did not amount to waiver of objection on appeal, particularly in view of question existing at time regarding constitutionality of guidelines. Fed. Rules Cr. Proc. Rule 52(b), 18 U.S.C.A.; U.S.S.G. § 1B1.8, 18 U.S.C.A. App.

### 2. Criminal Law §986.2(1)

District court could not use information that defendant disclosed in course of cooperating with Government pursuant to plea agreement in determining applicable sentence range for defendant under guidelines, where agreement did not specifically mention district court's ability to consider that information during sentencing. U.S.S.G. § 1B1.8, 1B1.8 comment (n. 1), 18 U.S.C.A. App.

Dino E. Viera of Fellers, Snider, Blankenship, Bailey & Tipples, Oklahoma City, Okl., for defendant-appellant.

\*The Honorable J. Smith Henley, Senior United States Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

### 1. The plea agreement provided:

"This assurance that your client will not be subject to additional federal criminal prosecution for crimes committed in this judicial district is being given to ensure that the Government and the public will receive the full benefit of the knowledge and information in your client's possession and her complete, candid and truthful testimony...."

James F. Robinson, Asst. U.S. Atty. (William S. Price, U.S. Atty., with him on the brief), Oklahoma City, Okl., for plaintiff-appellee.

Before LOGAN, HENLEY\* and ANDERSON, Circuit Judges.

LOGAN, Circuit Judge.

Defendant Lorrie Ann Shortteeth appeals from the sentence entered on her plea of guilty pursuant to a plea agreement with the government. Defendant contends that the district court erred in determining her sentence in that it considered information that she disclosed in the course of cooperation with the government. The case presents an important issue of first impression under the Federal Sentencing Guidelines.

The relevant facts are undisputed. Defendant was indicted on August 2, 1968, on five counts of conspiracy and possession with intent to distribute cocaine, and possession and use of firearms. Defendant subsequently entered into a written plea agreement with the government whereby she agreed to plead guilty to one count, possession with intent to distribute fifty-five grams of cocaine in violation of 21 U.S.C. § 841(a)(1). She also agreed to cooperate fully in investigation and prosecution of other individuals. In return, the government agreed to dismiss the remaining counts; to advise the district court, in connection with defendant's sentencing, of the extent of her cooperation; and to institute no prosecutions against her for information she might reveal through her cooperation.<sup>1</sup> In addition, the plea agreement specifically provided that the agreement did not encompass sentencing.<sup>2</sup>

1 R.Supp. Tab 13, Pl. ex. 6 at 11 (emphasis in original).

2. The plea agreement provided that "the Government at the time of sentencing will make known to the trial court the nature and extent of your client's cooperation. There are no agreements whatsoever regarding what sentence your client will or should receive. Sentencing will remain in the sole discretion of the trial court." 1 R.Supp. Tab 13, Pl. ex. 6 at 10 (emphasis in original).

### U.S. v. SHORTEETH

Cite: 887 F.2d 253 (10th Cir. 1989)

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On September 12, 1968, defendant entered her guilty plea as agreed. In the course of her debriefings defendant told federal agents that she had transported six ounces of cocaine from Los Angeles to Oklahoma City. Defendant's probation officer also learned of this matter and mentioned it in defendant's presentence report. Defendant's counsel, by letter, objected to use of any information defendant disclosed in debriefings in computing the applicable guideline range for defendant's sentence. The probation officer's response was that the information was not used in computing the guideline range.

The Federal Sentencing Guidelines contain a sentencing table in which applicable sentence ranges are established by combinations of various offense levels and criminal history categories. United States Sentencing Commission, *Guidelines Manual* ch. 5, pt. A, at 5.2 [hereinafter *Guidelines*]. The offense level used to establish the appropriate sentence range is determined by adjusting an offense-specific base offense level. See *id.* § 1B1.1. For drug-related offenses, the primary determinant of the base offense level is the quantity of drugs involved in the offense. *Id.* § 2D1.1.(a)(3). In determining the quantity of drugs for computing the base offense level, *Guidelines* §§ 1B1.3(a)(2) & 3D1.2(d) require consideration of "all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction." Based upon these guidelines and defendant's prior admission to agents, the district court, over defense counsel's objection, aggregated the fifty-five grams of cocaine from defendant's conviction with the six ounces of cocaine disclosed during debriefing in arriving at the appropriate base offense level for defendant's sentence. The six ounces of cocaine increased the offense level by four levels, an ultimate increase in sentence range from fifteen to twenty-one months to twenty-seven to thirty-three months. The court sentenced defendant to twenty-seven months imprisonment.

On appeal, defendant argues that *Guidelines* § 1B1.8 prohibited the district court from using information she provided pursuant to her plea agreement in determining the applicable sentence range. We agree.

1

[1] We must first address the government's contention that defendant waived her opportunity to raise her *Guidelines* § 1B1.8 objection by failing to raise it in the district court. See Fed.R.Crim.P. 52(b). Failure to properly object to breach of a plea agreement at a sentencing hearing ordinarily does not waive the objection. *United States v. Moscalaidis*, 868 F.2d 1357, 1360 (3d Cir. 1989); *Paraiso v. United States*, 689 F.2d 28, 30 (2d Cir. 1982), *cert. denied*, 459 U.S. 1116, 103 S.Ct. 752, 74 L.Ed.2d 970 (1983). A *Guidelines* § 1B1.8 objection is closely analogous. Here, defense counsel did not specifically mention the *Guidelines*, but he did object to the district court's consideration of the six ounces of cocaine on the ground that it would violate the plea agreement. Defense counsel also was obviously surprised by the district judge's raising the issue when the probation officer had represented that the six ounces had not been used in computing the applicable sentence range. There is no indication in the record that either the district judge or counsel was aware of *Guidelines* § 1B1.8. Under the circumstances, we cannot say that failure to specifically raise a *Guidelines* objection amounts to waiver of the objection on appeal. This is especially so considering that the constitutionality of the *Guidelines* was in serious question at the time.

II

[2] Before promulgation of the *Guidelines*, there was considerable doubt about the ability of parties, through plea agreements, to restrict the information available to the district court for sentencing determinations. See *Moscalaidis*, 868 F.2d at 1362; *United States v. Crisp*, 817 F.2d 256, 259 (4th Cir.), *cert. denied*, 484 U.S. 856, 108 S.Ct. 164, 98 L.Ed.2d 118 (1987); *United States v. Reckmeier*, 786 F.2d 1216, 1223-24 (4th Cir.), *cert. denied*, 479 U.S. 850, 107 S.Ct. 177, 93 L.Ed.2d 113 (1986).

*United States v. Cook*, 668 F.2d 317, 320 & n. 4 (7th Cir.1982); *United States v. Block*, 660 F.2d 1086, 1091-92 & nn. 6-9 (5th Cir. 1981), *cert. denied*, 456 U.S. 907, 102 S.Ct. 1753, 72 L.Ed.2d 164 (1982); 18 U.S.C. § 3661 (no limitation may be placed on information a court may consider in imposing sentence); ABA Standards for Criminal Justice § 3-6.2 (1980) (prosecutor must disclose all information relevant to sentencing). But *Guidelines* § 1B1.8(a) affirmatively prohibits the sentencing court from considering certain information:

"Where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others, and the government agrees that self-incriminating information so provided will not be used against the defendant, then such information shall not be used in determining the applicable guideline range, except to the extent provided in the agreement."

(emphasis added). The commentary to this section describes a situation very similar to the instant case:

"Under this provision, for example, if a defendant is arrested in possession of a kilogram of cocaine and, pursuant to an agreement to provide information concerning the unlawful activities of co-conspirators, admits that he assisted in the importation of an additional three kilograms of cocaine, a fact not previously known to the government, this admission would not be used to increase his applicable guideline range, except to the extent provided in the agreement."

*Id.* Application Note 1.

Resolution of this case requires us to determine whether the plea agreement provided that information defendant revealed would not be "used against" her and whether the agreement provided that such information could be "used in determining the applicable guideline range." Therefore, we must interpret the meaning of both the terms of the plea agreement and the words of *Guidelines* § 1B1.8. Because the facts are undisputed, our review will be *de novo*. See *Moscakladis*, 868 F.2d at 1360 (whether government conduct violates

plea agreement is question of law); 18 U.S.C. § 3742(e)(2), (f)(1) (court of appeals determines whether guidelines were applied correctly).

In this circuit, construction of a plea agreement requires determining what the defendant reasonably understood when she entered her plea. *United States v. Pogue*, 865 F.2d 226, 227 (10th Cir.1989); *United States v. Stemm*, 841 F.2d 636, 638 (10th Cir.1988); *United States v. Greenwood*, 812 F.2d 632, 635 (10th Cir.1987). We will not allow the government to resort to a rigidly literal construction of the language of the plea agreement. *Pogue*, 865 F.2d at 227; *Greenwood*, 812 F.2d at 635, and we "cannot condone the Government accomplishing through indirect means what it promised not to do directly." *Stemm*, 847 F.2d at 638 n. 1.

With these principles in mind, we believe that the government's agreement that "no separate federal prosecutions will be instituted against [defendant] ... for conduct and acts committed by her related to information she provides the Government during ... debriefings," 1 R.Supp. Tab 13, Pl. ex. 6 at 11, is clearly encompassed within *Guidelines* § 1B1.8(a)'s coverage of agreements "that self-incriminating information ... will not be used against the defendant." The more difficult question in this case is whether the plea agreement provided for use of such information "in determining the applicable guideline range" within the meaning of *Guidelines* § 1B1.8(a) in view of the plea agreement's statement that there were "no agreements" concerning what sentence she would receive. See *ante* note 2.

Other cases have considered the effect an agreement not to base a prosecution on or otherwise use information provided by a cooperating defendant has on use of that information in sentencing. Although an agreement not to provide information to the court in connection with sentencing may have been improper before the *Guidelines*, it was questionable whether the government could properly violate such an agreement. See *Reckmeier*, 786 F.2d at 1223-24; *Cook*, 668 F.2d at 320. Cases

that allowed the government to disclose debriefing information at sentencing frequently involved plea agreements with express provisions allowing the government to do so. See *Crisp*, 817 F.2d at 258 (Government "will inform the sentencing judge ... [of] all ... information in its possession relevant to the sentence."); *Reckmeier*, 786 F.2d at 1223 n. 7 ("It is a part of this agreement that the Government reserves its right to fully allocate at the time of sentencing."). Needless to say, the plea agreement in this case is not that explicit.<sup>3</sup> Nevertheless, we believe the language and spirit of *Guidelines* § 1B1.8 require the agreement to specifically mention the court's ability to consider defendant's disclosures during debriefing in calculating the appropriate sentencing range before the court may do so. This is the most reasonable construction of the "except to the extent" language of § 1B1.8 and the commentary. It also would seem to promote the purposes of plea agreements requiring defendants' cooperation with law enforcement authorities.

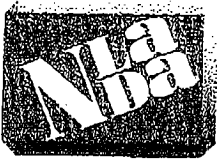
One of § 1B1.8's most important advantages is that federal prosecutors can now

assure potential informants that their statements will in no way be used against them. This advantage will be undercut if we allow ambush by broadly worded disclosures. Government prosecutors are more likely to be aware of § 1B1.8's language than some defense lawyers, and prosecutors who want to have the court consider incriminating information revealed by defendants under cooperation agreements can bargain for such a provision. The full disclosure approach we require here will ensure defendants are not unfairly surprised by sentencing determinations and will allow both the defendant and the government to bargain with full information.

Accordingly, the sentence imposed below is VACATED and the case REMANDED for further sentencing proceedings consistent with this opinion.



of the parties to a particular sentence or ... that the government will not oppose a defendant's request for a particular sentence or ... that a specific sentence is the appropriate disposition of the case."



039-95

**NATIONAL  
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April 10, 1995

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The Honorable Richard P. Conaboy  
Chairman  
United States Sentencing Commission  
One Columbus Circle, N.E.  
Suite 2-500  
Washington, D.C. 20002-8002

Dear Chairman Conaboy:

This commentary is submitted for the limited purpose of commenting on certain issues presented in the Commission's Special Report on Cocaine and Federal Sentencing Policy, including the crack/powder cocaine ratio issue presented in proposed guideline amendment no. 38.

The National Legal Aid and Defender Association commends the Commission's detailed critique of the 100-to-1 sentencing ratio contained in title 21. We are concerned not only about the broad issue of unwarranted sentencing disparity for these two varieties of the same drug, but also about the disparate racial impact, with the burden of the longer crack sentences falling overwhelmingly and vastly disproportionately on low income African American cocaine offenders. Since the weight of all evidence is clearly that the two drugs act pharmacologically the same, we support the setting of a 1-to-1 ratio in the guidelines, with any additional harms such as distribution-related violence or crack houses reflected on a case-by-case basis through adjustments or departures.

We wish to highlight two related issues. One is the effect of changes in crack sentencing on other drugs. The Commission has asked for comment on whether any changes in the crack guidelines should apply to drug offenses generally or only to cocaine offenses. And the emerging debate in Congress has raised a similar question, with conservatives arguing that whatever disparities exist between crack and powder sentencing should be addressed not by lowering the punishment for crack but by raising the punishment for powder (as has been specifically proposed by Rep. McCollum in House Judiciary Committee markup of crime legislation). Since everything the Commission does to bring rationality to the crack/powder sentencing ratio is subject to this type of congressional response, we believe that the Commission should indeed address the effect on other drugs, including specifically

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evaluating the consequences of raising all other drug punishments to proportionately match the severity of current crack quantity trigger levels.

The Commission's role as the watchdog of unwarranted sentencing disparity will require it to identify all other drugs which are as dangerous as crack cocaine and should be treated no less severely. This the Commission may already have considered, in suggesting in the discussion of current proposed amendment no. 43 that: "Most would agree that heroin, cocaine, and cocaine base pose the greatest degree of harm."<sup>1</sup> The question then becomes: what might be the consequences of establishing a mandatory minimum sentence of five years (or two years, as Rep. McCollum once suggested) for simple possession of five grams of powder cocaine or heroin, plus the ripple effect on distribution offenses, in terms of prison populations, costs, and burdens for the courts, corrections, prosecution, indigent defense and other components of the criminal justice system? We note that the latest figures from the National Institute on Drug Abuse indicate that there are more than three times as many frequent users of powder cocaine than crack (among high school seniors, 0.8% reported crack use within the past month, compared with 2.8% for powder and 0.3% for heroin, plus 1.5% for other opiates). In light of both Congress' and the Commission's interest in maintaining systemwide sentencing proportionality, the effect of commensurate increases in punishment for other serious drugs must also be evaluated, such as PCP, LSD and crystal methamphetamine (0.7%, 2.6% and 0.7% monthly use by high school seniors, respectively, according to the NIDA study).

Since the current Congress is so emphatically inclined to take the course of raising, rather than lowering any punishments (witness the pending cutbacks in even the very limited mandatory minimum "safety valve" contained in last year's crime bill), we believe it would be irresponsible not to assume this outcome in the crack debate, and develop impact assessments thereon.

The other related issue on which we wish to comment is the death penalty. Little attention appears to have focused on the fact that the ratio between powder and crack cocaine drives one of the death penalties enacted in the 1994 crime legislation. Under new 18 U.S.C. §3591(b)(1), the death penalty is established

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<sup>1</sup> We strongly support the thrust of option 1 under amendment no. 43, abandoning drug quantity as the measure of offense seriousness for offenses subject to inflexible mandatory minimums, and relying instead on more accurate indicators of seriousness and violence, including use of a weapon, injury and role in the offense.

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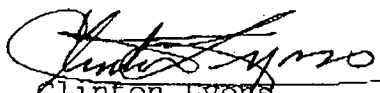
for certain large drug distribution offenses even though no death results. The penalty is directly tied to drug quantity, incorporating precisely the same 100-to-1 ratio for crack and powder cocaine where the defendant played a managerial role in a continuing criminal enterprise. The quantity necessary to trigger a death penalty for crack is three kilograms of any substance containing a detectable amount of cocaine base; if the drug is in powder form, three hundred kilograms would have to be involved. [The quantities triggering the death penalty for other drugs also starkly demonstrate the arbitrariness of the congressionally mandated quantity levels: 60 kilograms of heroin, 6 kilograms of PCP or methamphetamine, 60,000 kilograms of marijuana or 600 grams of LSD.]

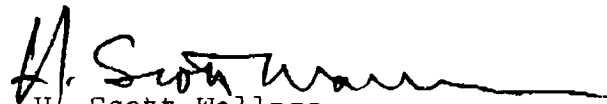
The stakes are far higher than even the Sentencing Commission's excellent report indicates. And harking back to our earlier point, we urge the attention of both the Commission and Congress to the consequences of raising other drugs to match the harshness of crack sentences. What would be the consequences of reducing the drugs-without-homicide death penalty to a 3 kilogram threshold for powder cocaine, or to 600 grams for heroin (assuming a continuation of the current powder cocaine/heroin ratio), with proportional decreases in the quantities for other drugs? How many cases would thus qualify for the death penalty? What sentences are these defendants currently receiving? How would this affect proportionality for other federal offenses? What other sentence increases would be dictated to maintain proportionality? What implications does this type of sentence inflation have for the pursuit of proportionality and the criminal law's deterrent power (e.g., to deter a mid-level drug enterprise manager from increasing the volume or the violence of his criminal conduct)?

Our fundamental point is that it would be a grave mistake to view the crack/powder differential, and the Commission's resolution of it, in isolation. We strongly urge that the Commission's proposed resolution of the issue include a careful discussion of significant potential alternative resolutions.

The Commission's kind consideration of our comments is greatly appreciated.

Sincerely,

  
Clinton Lyons  
Executive Director

  
H. Scott Wallace  
Special Counsel