

FEDERAL PUBLIC DEFENDER
Western District of Washington

041-95

Thomas W. Hillier, II
Federal Public Defender

April 10, 1995

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

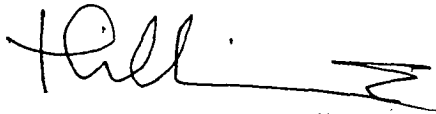
Dear Judge Conaboy:

Enclosed are materials submitted on behalf of Federal Public and Community Defenders in response to your call for public comment on several additional proposed amendments to the Sentencing Guidelines.

As always, we appreciate the opportunity to provide input to the Sentencing Commission and trust you will give serious consideration to our comments before moving forward on the important proposals presently before the Commission.

Thank you for your consideration.

Very truly yours,



Thomas W. Hillier, II
Federal Public Defender
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on behalf of the Federal Public
and Community Defenders

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Statement

of

Federal Public and Community Defenders

on

Proposed Amendments to Sentencing Guidelines

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Amendment 1
(Crack Cocaine)

Amendment 1 seeks comment on how to incorporate in the guidelines the recommendations of the Commission's report on federal sentencing of cocaine offenses. This amendment asks whether to amend the guidelines by adding specific offense characteristics to § 2D1.1 "to enhance sentences for violence and other harms associated with some crack and powder cocaine offenses as well as some other drug offenses." The amendment also asks for comment "on the usefulness of adding or amending commentary and policy statements regarding possible departures to take account of the increased harms associated with some cocaine offenses." In addition, the amendment asks whether any amendments designed to address violence and other harms of cocaine offenses should also apply to other drug offenses. If any new enhancements are added, the amendment asks whether other changes in the drug guidelines are necessary. Finally, the amendment asks whether "any of these changes" should be retroactive and "how might this process be accomplished."

The Commission has "firmly conclude[d] that it cannot recommend a ratio differential as great as the current 100 - 1 quantity ratio."¹ The Commission further notes that "[a] review of the relatively sparse empirical evidence available concerning those factors Congress considered in distinguishing crack from

¹U.S. Sentencing Com'n, Special Report to Congress: Cocaine and Federal Sentencing Policy, at 196 (Feb. 1995).

powder cocaine leads to mixed conclusions and few clear answers."² As we have stated previously, we believe that the appropriate ratio between crack cocaine and powder cocaine is one-to-one. This is best accomplished by deleting all references to cocaine base in the drug quantity table. In light of the paucity of evidence to support the penalty structure and the resulting disparate racial impact, failing to act to equalize the ratio becomes an endorsement of racial discrimination in sentencing.

Other than revising the drug quantity table, we do not believe that any other amendments are necessary to reflect the findings of the Commission's report on cocaine sentencing. Although the report states that "a policymaker could infer that crack cocaine poses greater harms to society than does powder cocaine,"³ and that "crack cocaine poses somewhat greater harm to society," the report lacks objective data to support this conclusion. For example, while the report assumes that crack cocaine offenses result in more ancillary violence, the report also states that "pulling apart the systemic crime associated with crack cocaine versus powder cocaine is difficult if not impossible."⁴ And, while the marketing of crack may make the drug more accessible to lower income people, "[t]he Commission found virtually no research that compared the respective association of crack and powder cocaine with

²Id. at 195.

³Id.

⁴Id. at 95.

economically driven crime."⁵

In addition, it is difficult to comment on any proposed enhancements to the drug guidelines without knowing just what those enhancements are. Although this amendment seeks comment on whether to amend the guidelines to add specific offense characteristics to account for "violence and other harms" associated with drug offenses, the amendment fails to present a concrete proposal upon which to comment. The amendment lists some examples, including use of a firearm, victim injury, crack houses, "violence and other harms," yet it is unclear whether the Commission is considering including all or some of these factors and how these enhancements would be implemented and relate to each other.⁶ Further, most of the perceived additional harms associated with crack cocaine offenses, such as illegal use of a firearm, violence, and distribution in a protected location are already punishable as separate offenses or statutory enhancements.⁷ There is no reason

⁵Id. at 186.

⁶If the Commission intends to add specific offense characteristics or departure language to account for those factors that the Commission believes distinguish crack offenses from other drug offenses, then we believe that those enhancements should be limited to sentences for crack offenses.

⁷We understand that there are some perceived harms that are not covered by statute, but these perceptions are unsupported by objective data. For instance, the Commission's report asserts that crack cocaine is more psychologically addictive and that "crack smokers are more likely to engage in bingeing," yet the report contains no objective data to substantiate this assertion. In addition, without comparing the addictiveness of crack cocaine with that of drugs other than cocaine, we believe that it would be unreasonable to use the perceived addictive quality of crack as a justification for an increased penalty.

to render the statutes irrelevant by creating enhancements. The suggested methodology creates the additional temptation for the government to bypass charging under the statute and thereby avoid proving either an offense or statutory enhancement beyond a reasonable doubt.

Finally, we urge the Commission to act this amendment cycle and to make the revisions retroactive. The Commission's report makes clear that the 100 to 1 ratio is unwarranted. Those defendants who have been sentenced pursuant to the ratio are being treated unfairly. If the Commission acts to remedy the disparity inherent in the current crack cocaine penalty scheme, fairness requires that any such changes be made retroactive.

Amendment 2
(Simple Possession of Crack Cocaine)

Amendment 2 seeks comment on whether to amend § 2D2.1 for offenses involving simple possession of crack cocaine. We believe that § 2D2.1 should be revised to provide for a base offense level of six if the offense involved crack cocaine. In addition, we support the deletion of the cross-reference in § 2D2.1(b) which requires the application of § 2D1.1 if the defendant is convicted of simple possession of more than five grams of a mixture or substance containing cocaine base. The disproportional treatment of simple possession of the crack form of cocaine is perhaps the most glaring indication of the unfairness of the crack cocaine penalties.

As pointed out in the report, "the crack simple possession penalties have created sentencing anomalies and unwarranted

disparities in the treatment of essentially similar defendants, results that conflict with the fundamental purposes of the Sentencing Reform Act."⁸ Further, the dramatically increased penalty for simple possession of more than five grams of crack cocaine allows a drug trafficker to be sentenced less severely than a drug possessor.⁹ There is no data to support the presumption in the sentencing scheme that possession of more than five grams of crack is necessarily inconsistent with possession for personal use.¹⁰

The Commission's report states that "because powder cocaine can be converted easily into smaller doses of crack that can be sold more cheaply and in potent quantities, crack is more readily available to a larger segment of the population, particularly women, children, and the economically disadvantaged."¹¹ Thus, the increased penalty for simple possession of five or more grams of crack cocaine falls heavily on "the most vulnerable members of society: the poor and the young"¹² who presumably are less likely

⁸Id. at 198.

⁹For instance, a first-time defendant who sells 5.5 grams of heroin to an undercover officer faces a guideline range of 15 to 21 months, while a first-time defendant who possesses 5.5 grams of crack for personal use is subject to a five-year mandatory minimum and a guideline range of 63 to 78 months.

¹⁰The Commission's report states that "the unique approach to emphasizing severe punishment of those who possess crack for personal consumption is at odds with the prevailing, treatment-oriented approach prescribed by Congress for other drug user/possessors." Id. at 198.

¹¹Id. at xiv.

¹²Id. at 195.

to possess cocaine in its more expensive powder form.

Further, these harsh penalties for simple possession are falling disproportionately on black defendants. According to the report, the mean sentence for crack cocaine possession offenses from October 1, 1992 through September 30, 1993 was 30.6 months, while the mean sentence for powder cocaine possession offenses was 3.2 months.¹³ The overwhelming percentage of defendants sentenced for simple possession of crack cocaine was black. As stated in the report, 84.5 percent of crack defendants were black, 10.3 percent were caucasian, and 5.2 percent were hispanic.¹⁴ For simple possession of powder cocaine, 73.8 percent of the defendants received probation, and of those defendants, 58 percent of were caucasian, 26.7 percent were black, and 15 percent were hispanic.¹⁵ The disparate impact of these penalties on black defendants is unjustifiable and unfair and is inconsistent with the principles that underlie our system of justice.

Amendment 3
(Offenses Involving Underage or Pregnant Individuals)

Amendment 3 seeks comment on whether to amend § 2D1.1 by adding enhancements for distribution in a protected location or to certain individuals. We oppose this amendment.

This amendment would further convert the present guideline system into a real offense sentencing system in a piece-meal

¹³Id. at 154.

¹⁴Id. at 156.

¹⁵Id. at 154-56.

manner. The Commission's attempted to draft a real offense guideline system and found that such a system was impractical and "risked return to wide disparity in sentencing practice."¹⁶ We believe that enhancements for distributing near a protected location, employing underage individuals, or distributing to underage or pregnant persons are appropriately covered under § 2D1.2 when there is a conviction under 21 U.S.C. §§ 859, 860 or 861. If the defendant's conduct involves a protected location or an underage or pregnant individual, the government can charge a violation of the applicable statute. Adding enhancements to § 2D1.1 renders these statutory provisions irrelevant and permits the government to avoid meeting its burden of proof required for a conviction by simply waiting until sentencing to assert that the defendant's offense involved a protected location or an underage or pregnant individual. There has been no data to support the need to incorporate these enhancements as specific offense characteristics instead of requiring a conviction.

The proposed amendment poses application problems as well. For instance, would the enhancement for distributing near a protected location apply if law enforcement chose the protected location? Would it apply if one of fifty sales occurred in a protected location? To avoid creating disparity, we believe that these enhancements should apply only when there is a conviction under one of the corresponding statutes.

¹⁶U.S.S.G. Ch. 1, Pt. A(4)(a), at 5.

Amendment 4
(Guideline Promulgation Authority)

Amendment 4 would revise the background commentary of § 4B1.1 to state that in promulgating the career offender guideline as directed by 28 U.S.C. § 994(h), the Commission exercised its authority under 28 U.S.C. § 994(a)-(f) and (o)-(p). Amendment 4 also invites comment on whether to amend Chapter I, Part A "to state that in its promulgation of specific guidelines, the Commission intends in all cases to rely on its general authority under 28 U.S.C. § 994(a) as well as any other more specific grant of statutory authority." We oppose this amendment.

The career offender mandate is like a mandatory minimum in that it introduces an element of inflexibility inconsistent with a guideline system. The Commission's policy should be to mitigate the impact of such a provision and to construe the mandate in 28 U.S.C. § 994(h) narrowly.

In addition, we oppose the proposed amendment to Chapter I, Part A. We believe that the Commission should determine on an amendment-by-amendment basis the scope of authority that the Commission is exercising.