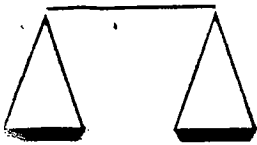


008-96



Eric E. Sterling, President

1899 L Street, N.W., Suite 500

Washington, D.C. 20036

202.835.9075

Fax: 202.833.8561

March 5, 1996

Judge Richard P. Conaboy
Chairman, United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500
Washington, DC 20002-8002
(Attention: Public Information)

Dear Judge Conaboy:

First, the Commission must be commended for having issued its outstanding report, *Cocaine and Federal Sentencing Policy* last year. I have read scores of government reports since I began working for the U.S. Congress in 1979, and I think the Commission's report is the finest government report I have ever read. It was well-organized, well-researched, thorough, and well-written. The report set forth a compelling case for reforming Federal cocaine sentencing.

Second, I commiserate with the members of the Commission who must feel chastened by Congress' overwhelming rejection of its recommendations for ending the 100-to-1 cocaine sentencing disparity by recommending a 1-to-1 equivalency between "crack" and powder cocaine. While this was the first time the Congress rejected a Commission recommendation, you should not exaggerate the meaning of that vote.

Congress, by the same vote, asked you again to submit recommendations for changes to the statutes and the sentencing guidelines regarding cocaine offenses. This is very important. First, Congress affirmed your crucial role in guiding sentencing policy. And second, Congress recognized that the 100-to-1 ratio is not appropriate. The vote and voices of disapproval of 1-to-1 equivalency reflected the popular prejudice about crack cocaine that has built up over the past dozen years, the attack upon the Commission's recommendation by the Justice Department and White House in conformity with that prejudice, and the lack of unanimity within the Commission regarding the 1-to-1 recommendation.

The vote of disapproval, while disheartening, highlights the importance of the Commission's role in making controversial decisions Congress would like to avoid. Your agency is unique for a number of reasons. Unlike the typical "regulatory" agency such as FDA or FCC, the delegation of power to the Commission is not because Congress believes it lacks the expertise to make highly complex technical decisions, because in the case of sentencing, Congress acts regularly. Instead, the delegation is in part designed to insulate the Congress from the electoral consequences of making desirable sentencing revisions that could be called "soft." (The Base Closing Commission serves a similar role in undertaking the politically unpopular "heavy lifting" of recommending the closing of economically important but militarily unnecessary military bases.) In effect, it is the unwritten responsibility of the Commission to push for these sentencing reforms precisely because they are politically objectionable.

However, what -- if anything -- should the Commission do regarding cocaine sentencing in the 1996 "cycle?" Some will counsel that you do nothing. The political climate has not changed. That is true, but in my experience, the political climate regarding drug sentencing changes very little.

Some very important observers will advise the Commission to bring forward exactly the same 1-to-1 ratio as it did last year on the basis that your recommendation was factually correct, logical, and intellectually honest. Those are very strong reasons, but they disregard the political reality which has not changed. If there is to be any reform, the reform proposal must be changed.

Reform is an incremental process. Therefore, advance a less ambitious reform than last year, which if adopted, would promote a more just outcome for those individuals who it helps. Such a proposal would not hinder the Commission in making additional reforms if the political climate does change.

As unsatisfactory as it will be to some, if not all, of the members of the Commission, I urge the members to attempt to reach a unanimous compromise ratio in the neighborhood of 10- or 20-to-1 -- that is, crack cocaine quantities would be raised at each base offense level, but not to equivalence with powder cocaine. This will be difficult for you to argue for except: (1) a significant number of offenders (which your staff can quantify) will receive somewhat less harsh sentences for drug trafficking in relatively small quantities of crack cocaine than would otherwise be the case; and (2) it has a realistic chance of being agreed to by the Attorney General and adopted by Congress. For those men and women sentenced for crack offenses at a new level (and especially for their children, parents and other family members), this would be a benefit.

Those of you who are judges and those who have been prosecutors will find this kind of political compromising extremely unpleasant, even odious. It will feel unethical, perhaps reprehensible -- and indeed if you were to make this type of

political compromise while sitting as a judge or making a decision as a prosecutor it would be unethical. However, as should now be starkly clear to you, this is a *political* decision, and compromise is often a critical ingredient for success in the political realm.

No doubt it will sound like the voice of one who has worked in Washington since 1979, but I urge the members of the Commission to set aside the commitment to intellectual honesty that you bring to the bench, to your teaching, and to your prosecutorial decision-making, and to agree *unanimously* that you will seek a *result* that enables some judges to sentence some offenders to terms of imprisonment that are closer to what the Commission's majority sees as the ideal than is now the case.

As part of your 1996 report, I urge you to expand upon your analysis of "Defendant's Function in Drug Trafficking Operation which you reported in Table 18 of your 1995 report. What Congress intended in the Anti-Drug Abuse Act of 1986 was to encourage the Justice Department to focus on the "major traffickers...the heads of organizations, who are responsible for creating and delivering very large quantities of drugs." (H.Rept. 99-845, Pt. 1, pp. 11-12). Having failed to hold hearings and to obtain testimony from DEA and the Justice Department, Congress made a fairly obvious mistake in choosing the very low quantities that it used as the triggers for identifying such high-level traffickers. Your report shows that only 11.2% of the 1992 sample of Federal drug defendants were "high-level dealers" (only 9.2% of powder cocaine defendants and only 9.5% of heroin defendants). 11% of some 20,000 Federal drug defendants is roughly 2200 high-level offenders.

This data is extremely valuable information for assisting the public in reviewing the performance of the Justice Department in choosing drug prosecutions. As you know, any of the nation's more than 200,000 felony arrests for cocaine or heroin trafficking could be prosecuted in Federal court. Deciding who should be prosecuted in Federal court is a discretionary matter for DEA, other law enforcement agencies and the U.S. Attorneys offices.

Perhaps the 1% of all felony narcotics defendants who are prosecuted in Federal court is the sum total of "high-level" narcotics traffickers in a year. But given the \$40 billion in annual narcotics trafficking in the United States and around the world, it would be very disappointing if the government could identify and prosecute only some 2200 high-level traffickers in a year. Perhaps the Justice Department should more carefully screen the nation's 200,000 heroin and cocaine trafficking arrests to find more high-level traffickers.

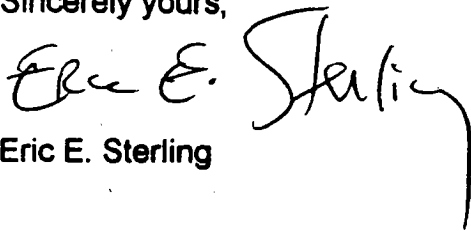
Perhaps more careful case selection might ameliorate the dissatisfaction of the Federal judiciary that must impose long sentences on crack offenders who are found to be street-level dealers, bodyguards, couriers and mules almost 64% of the time. Perhaps an increased investigative effort should be directed at traffickers

operating outside the United States who direct drugs to U.S. markets, or at money launderers who corrupt the international financial system.

In any event, the Justice Department ought to be encouraged to increase the percentage of high-level traffickers that they investigate and prosecute. If they concentrated more on genuinely high-level offenders, that effort in itself, would tend to reduce the number of low-level and minor offenders who are being subject to unconscionably long sentences.

With very best wishes,

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Eric E. Sterling". The signature is written in dark ink and is positioned above the printed name.

Eric E. Sterling