



*United States District Court
District of South Carolina*

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*8/4/03
COPY TO JUDGE MURPHY,
JUDGE LEE AND KIM
WHITNEY.
JRP*

*J. Ross Anderson, Jr.
United States District Judge*

July 29, 2003

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Judge William T. Moore, Jr.
United States District Court
Old Federal Building
125 Bull Street
Savannah, Georgia 31401

Re: United States Sentencing Commission Request for Public Comment

Dear Judge Moore:

After reviewing the Sentencing Guidelines in light of the United States Sentencing Commission's request for public comment on July 18, 2003, I have drafted the following suggestions.

1. Section 3E1.1. The court, not the government, should possess the authority to grant the additional point reduction for acceptance of responsibility.

The U.S. Sentencing Guidelines provide a three-point reduction for acceptance of responsibility. Currently, the government must move to allow a defendant to receive the additional point decrease before a criminal defendant receives the third point deduction. This places the discretionary decision-making power in the government's hands—not in the hands of the judge. (See generally, Frank O. Bowman, III, *Departing is Such Sweet Sorrow; "A Year of Judicial Revolt on Substantial Assistance Departures Follows a Decade of Prosecutorial Indiscipline*, 29 STETSON L. REV. 7, 67 (1999) (Defendants in District A may very well receive different sentences than

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identically situated defendants in District B because of differing local substantial assistance practices.")) This should be changed. Obviously, it is difficult for the government to change roles from an adversary to an impartial decision maker within the same case.

Furthermore, this is subject to governmental abuse because it gives the government the final decision on whether a defendant "substantially" assisted the investigation. This problem is also evidenced by the differences in the frequency of substantial assistance departures being granted. Some commentators explain that the reason is "that requirements for receiving a substantial assistance departure are different among U.S. Attorney's Offices." Jon. J. Lambiras, *White-Collar Crime: Why the Sentencing Disparity Despite Uniform Guidelines?*, 30 PEPP. L. REV. 459, 517 (2003). Each U.S. Attorney's Office may establish its own substantial assistance policy. "One commentator, a federal district court judge, has noted that 'there are no national Department of Justice guidelines governing either the amount of substantial assistance necessary to trigger a section 5K1.1 motion, or the degree of a downward departure to recommend.'" *Id.* If the authority was transferred to the court and the Sentencing Commission created a uniform definition for substantial assistance, its application would be neutral and the considerable gap will be narrowed.

Although this extra point should not be granted to every criminal defendant, the court – not the government – should possess the authority to ultimately decide when the defendant's assistance is substantial or extraordinary. And if the court finds the defendant's assistance extraordinary, it would grant the additional point reduction.

2. Section 4A1.2(d) should be amended to prevent a defendant's juvenile convictions in adult criminal court from being used to determine his criminal history.

The Sentencing Guidelines's use of a defendant's juvenile convictions in adult criminal court

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when computing his criminal history category fosters inequality. This inequality is evidenced in the Sentencing Commission's explanation for not using all of a defendant's juvenile convictions. The commentary to section 4A1.2 states that "[a]ttempting to account for every juvenile adjudication would have the potential for creating large disparities due to the differential availability of records." However, there are other reasons why these disparities exist. In some jurisdictions, prosecutors have complete discretion in determining whether a minor will be tried in juvenile court system. Other jurisdictions allow juvenile judges to waive jurisdiction and allow juveniles to enter the adult judicial system. And some states completely exclude certain offenses from the juvenile system. See Melissa Sickmund & Howard N. Snyder, *Juvenile Offenders & Victims: 1999 National Report*, Washington, D.C. Office of Juvenile Justice & Delinquency Prevention, at 102.

To avoid this inequality when deciding whether to apply the defendant's juvenile conviction, the Sentencing Guidelines should base its decision on the following factors: (1) the type of sentence received; (2) the amount of time actually served; and (3) the type of proceeding used to convict the offender. *United States v. English*, 1999 U.S. App. LEXIS 3709, * 10 (citing *United States v. Pinion*, 4 F.3d 941, 944 (11th Cir. 1993)). (See also *United States v. Mason*, 284 F.3d 555 (4th Cir. 2002) ("Mason argues that the district court erred in using his 1981 conviction of a robbery offense, committed when he was sixteen, to classify him as a career offender. . . . We agree with Mason and hold that he should not have been classified as a career offender.")

This interpretation allows sentences that are consistent with adult sentences to be used as a predicate offense for the career offender provision; however, sentences that are more consistent with the juvenile sentence will not be used to determine the defendant's criminal history. (Cassandra S. Shaffer, *Inequality within the United States Sentencing Guidelines: The Use of Sentences Given*

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to Juveniles by Adult Criminal Court as Predicate Offenses for the Career Offender Provision, 8

ROGER WILLIAMS U. L. REV. 163, 166 (2002).)

3. The disparate treatment of crack cocaine when compared to powder cocaine should be altered to reflect the defendant's culpability and should not be based solely on form and amount.

Currently, the Sentencing Guidelines provides different consequences for possession of crack cocaine and powder cocaine. Although they are basically the same illegal drug, the Sentencing Guidelines makes a distinction. Defendants convicted of possessing 500 grams of powder cocaine receive a mandatory minimum sentence of five years in prison; however, defendants caught with crack cocaine receive the same mandatory five-year sentence for possessing just five grams. (Section 2D1.1; *see also* 21 U.S.C. §§ 841(b), 844.) This sentencing disparity is extreme and must be adjusted. Its effect is evidenced in the following scenario:

A supplier sells 250 grams (a quarter-kilo) of powder cocaine to a middleman, who in turn cuts (i.e. increases the quantity by adding adulterants) and sells smaller-ounce (28 grams) quantities of this powder to several street dealers. One of the street dealers mixes 5 grams of this powder cocaine with baking soda [and] cooks it, producing 5-plus grams of crack. If the street dealer gets arrested and charged federally, he faces a mandatory minimum sentence of five years. The supplier who is "up the ladder" of culpability, however, would have to get caught with 500 grams of powder cocaine to face that much time in a federal prison.

Kevin J. Cloherty & Dawn M. Perlman, *Powder vs. Crack: 100 to 1 Current Quantity Ratio Under Attack*, FEDERAL LAWYER, March/April 2003, at 50.

Despite the Sentencing Commission's previous attempts to justify the current 100 to 1 ratio, many of the justifications used to enforce the current ratio lack merit. The Sentencing Commission has found that the penalties exaggerate the harm of crack cocaine. This is evident because "[c]ocaine in any form produces the same physiological and psychotropic effects" U.S.

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Sentencing Commission, *Report to the Congress: Cocaine and Federal Sentencing Policy* (May 2002).

The 100 to 1 ratio also has a devastating effect on blacks when compared to whites. A 1996 study found that whites were more apt to use powder cocaine while a larger percentage of blacks and Hispanics were more likely to use crack cocaine. See U.S. DEP'T OF JUSTICE, *FEDERAL COCAINE OFFENSES: AN ANALYSIS OF CRACK AND POWDER PENALTIES* at 6 (March 19, 2002) (charting the usage of crack and powder cocaine defendants by percentage for 2000) (citing Marian Fischman & Dorothy Hatsukami, *Crack Cocaine and Cocaine Hydrochloride: Are the Differences Myth or Reality*, 276 JAMA 1580, 1582 (1996)). "Ninety percent of crack defendants are African American, and federal sentences in crack cases are between three and eight times longer than sentences for comparable powder offenses." Joseph Kennedy, *The New Data: Over-Representation of Minorities in the Criminal Justice System / Drug Wars in Black & White*, 66 LAW & CONTEMP. PROBS. 153, 170 (2003).

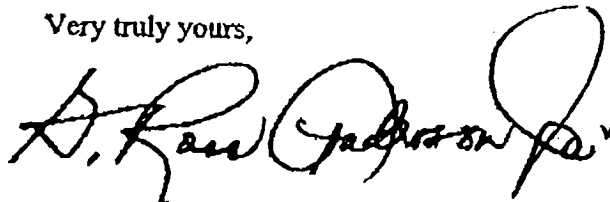
Justice Stevens addresses this devastating issue in *United States v. Armstrong*, 517 U.S. 456 (1996). He states that "it is undisputed that the brunt of the elevated federal penalties falls heavily on blacks." *Armstrong*, 517 U.S. at 479 (Stevens, J., dissenting). Justice Stevens also explains that blacks receive sentences that are 40% longer than whites because of the current 100 to 1 ratio. This creates "a major threat to the integrity of federal sentencing reform, whose main purpose was the elimination of disparity (especially racial) in sentencing." *Armstrong*, 517 U.S. at 480 (Stevens, J., dissenting). Moreover, crack cocaine neither affected youth as predicted nor chemically caused more addictions. (Cloherty & Perlman, *FEDERAL LAWYER* at 50.) In addition, "the negative effects from prenatal cocaine exposure are similar to those associated with prenatal tobacco exposure and less

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severe than the negative effects of prenatal exposure." (*Id.*)

Because of this new research and reports, the Sentencing Commission should alter the sentencing guidelines to reflect the defendant's culpability and not merely base the defendant's sentence on the form or amount of crack the defendant possessed. This could be done by using various mitigating and enhancing factors. Furthermore, the Sentencing Commission should also balance the punishment for crack cocaine and powder cocaine by raising the minimum sentence requirements for powder cocaine. These changes will create equal punishment regardless race and of the cocaine's form.

Very truly yours,



G. Ross Anderson, Jr.

