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TESTIMONY OF
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THE CRIMINAL JUSTICE POLICY FOUNDATION
BEFORE THE
UNITED STATES SENTENCING COMMISSION
ON PROPOSED GUIDELINE AMENDMENTS
FOR PUBLIC COMMENT

MARCH 22, 1993

Judge Wilkins, members of the Commission, thank you very much for permitting me to testify before you today regarding the proposed guideline amendments for public comment that the Commission published at the end of 1992.

Background

I am Eric E. Sterling, the President of The Criminal Justice Policy Foundation. The Foundation is a four year old educational organization that works with policymakers and the public to advance innovation in approaching the problems of the criminal justice system. Prior to joining the Foundation in 1989, I served as counsel to the Committee on the Judiciary at the U.S. House of Representatives for nine years. For eight years, as counsel to the Subcommittee on Crime, I was the principal staffer on the Judiciary Committee for drug enforcement, gun control, money laundering, organized crime, pornography, arson and explosives, and other matters. I played a major role in the development of many provisions of the Comprehensive Crime Control of 1984, the Anti-Drug Abuse Act of 1986, and the Anti-Drug Abuse Act of 1988, as well as other public laws.

I hope my experience as the Committee counsel who staffed the development of the mandatory minimum sentence amendments to the Controlled

Substances Act in the Anti-Drug Abuse Act of 1986 will be of value to the Commission in these hearings.

History of the Anti-Drug Abuse Act of 1986

The Controlled Substances Act sentencing provisions were initiated in the Subcommittee on Crime in early August 1986 in a climate in the Congress that some have characterized as frenzied. Speaker O'Neill returned from Boston after the July 4th district work period where he had been bombarded with constituent horror and outrage about the crack cocaine overdose death of NCAA basketball star Len Bias after signing with the championship Boston Celtics. The Speaker announced that the House Democrats would develop an omnibus anti-drug bill, easing the reelection concerns of many Democratic members of the House, by ostensibly preempting the crime and drug issue from the Republicans who had used it very effectively in the 1984 election season. The Speaker set a deadline for the conclusion of all Committee work on this bill as the start of the August recess -- five weeks away.

The development of this omnibus bill was extraordinary. Typically Members introduce bills which are referred to a subcommittee, and hearings are held on the bills. Comment is invited from the Administration, the Judicial Conference, and organizations that have expertise on the issue. A markup is held on a bill, and amendments are offered to it. For this omnibus bill much of this procedure was dispensed with. The careful deliberative practices of the Congress were set aside for the drug bill.

And unfortunately for the Democrats, their attempt to preempt the drug and crime issue was easily rebuffed by the Republicans who simply raised the stakes by offering amendments with longer sentences, in favor of the death penalty, for elimination of the exclusionary rule, and so forth.

Background to the Mandatory Minimum Sentence Provisions

Recognizing the intensity of the climate of legislative haste, it is testimony to the integrity of the Chairman of the Subcommittee on Crime, William J. Hughes, that the Subcommittee attempted to develop a new sentencing scheme for drug offenses in a rational manner. The Subcommittee determined that it wanted to create incentives for the Department of Justice to direct its "most intense focus" on "major traffickers, the manufacturers or the heads of organizations, who are responsible for creating and delivering very large quantities of drugs."¹ The Subcommittee directed staff to consult "with a number of DEA agents and prosecutors about the distribution patterns of drugs which if

¹ H.Rept. 99-845, Part 1, Sept. 19, 1986, Report of the Committee on the Judiciary to accompany H.R. 5394, the Narcotics Penalties and Enforcement Act of 1986, pp. 11-12.

possessed by an individual would likely be indicative of operating at such a high level."² The Subcommittee "determined that a second level of focus ought to be on the managers of the retail level traffic, the person who is filling the bags of heroin, packaging crack into vials or wrapping pcg (sic) in aluminum foil, and doing so in substantial street quantities."³

The concepts and details were developed during four meetings. The provisions regarding quantities of drugs were based, first upon calls to various individual law enforcement officers and reflected their personal experiences, and then upon adjustments to those quantities based on experiences in the various districts the Subcommittee members were from, rather than national standards, which tended to drive some of major level trafficker quantities in 841(b)(1)(A) down.

The Subcommittee did not make a determination about harmfulness of drugs, or more particularly develop a "harmfulness equivalent" concerning the quantities of drugs subject to the same level of punishment. Its punishment analysis was developed to direct prosecutorial resources to particular levels in the drug distribution bureaucracy, "major" traffickers, and "serious" traffickers. One problem with that analysis is that different drugs have differing distribution patterns. In the case of LSD, for example, the number of transactions between the chemist and the ultimate consumer is many fewer than the number of transactions between the heroin chemist and the heroin consumer. And it assumed that the high-level LSD distributor inflicts equivalent social harm as the high-level heroin, cocaine and PCP distributors.

The length of sentences originated without any advice or comment from the various agencies with relevant expertise, from the Judicial Conference, or from the public, **and without understanding of how it would affect the sentencing guideline structure under development by the Sentencing Commission.** The members were still operating in a mind-set of parole, and unfettered judicial discretion in sentencing.

The development of this bill was the sole instance during more than nine years with the Judiciary Committee that I did not see the usual procedure of hearings upon introduced bills followed. The terrible consequences of taking the approach of mandatory minimum sentences are now well known to this Commission, to the Judiciary, to the Bureau of Prisons, to the Bar, and to the nation at large.

² Ibid. p. 12

³ Ibid. p. 12

Recommendations

AMENDMENT NO. 40

Yes, the Commission should ask Congress to change the drug sentences.

The Commission should regularly use its authority under 28 U.S.C 994(w) and 994(r) to analyze the grades and maximum penalties of offenses and make recommendations to Congress.

Nobody is in a better position to make such recommendations than the commission. To achieve the purposes of the Commission in 28 U.S.C. 991(b) regarding certainty, fairness, avoiding unwarranted disparity, and "reflecting...advancement in knowledge of human behavior," **the invitation for comment is perhaps the most important proposal in this guideline amendment package, because it represents an inclination of the Commission to initiate correction of the legislative excesses of 1986.**

Regarding the 100:1 cocaine to crack ratio, it was originally a 50:1 ratio in the Crime Subcommittee's bill, H.R. 5394, and was arbitrarily doubled simply to symbolize redoubled congressional seriousness. Even the 50:1 ratio was too high. Cocaine had been the drug driving the violence in Florida that underlay the establishment of the Vice President's South Florida Task Force in 1982, and had long been regarded as a terribly serious component of the nation's drug problem. But it was the fearful image of crack in the popular consciousness that drove the legislative package. Some Members were warning that summer that 1000 new crack addicts were being created every day -- suggesting there would be a population of at least 3.6 million crack addicts at the end of the year. Yet by 1988, the estimate of the number of "frequent cocaine users" (use in the last week) was put at 862,000.⁴ This number included the many snorters of cocaine, cocaine addicts of all descriptions, as well as the highly feared "crack" addicts. Many serious users of cocaine, upon using crack found it to be an intensely pleasurable, highly reinforcing, and deadly addictive drug. However, millions of Americans have in fact tried crack, they don't like it and don't use it.

The threshold quantities originally developed by the Subcommittee for the "serious level traffickers" who would be subject to the mandatory minimum of 5 years were one kilogram of cocaine and 20 grams of crack. The text of the "issue for comment" is incorrect in stating that the "legislative history of this section of the 1986 Crime Control Act (sic) indicates that the mandatory

⁴ National Drug Control Strategy, February 1991, p. 9. And by 1990, the Administration was proudly reporting that the number had gone down 23% to 662,000.

minimum was designed to target street level dealers who possess small quantities of cocaine base (crack).⁵ The Crime Subcommittee's target for prosecution by the 1986 amendment to 21 U.S.C.841(b)(1)(B)(iii) for trafficking in 5 grams or more of cocaine base (crack) was not "street-level dealers."⁶ The target for investigation and prosecution were "wholesale/major retail level traffickers".⁷ The "[q]uantities are based on the amounts that would be

⁵ Proposed Guideline Amendments for Public Comment, U.S. Sentencing Commission, Jan. 1993, p.63. The 1986 Act, the "Anti-Drug Abuse Act of 1986", included many titles that had their own short titles, but none of them were known as the 1986 Crime Control Act. In 1988, Congress passed the "Anti-Drug Abuse Act of 1988." Subtitle L of Title VI (the "Anti-Drug Abuse Amendments Act of 1988") of that Act amended the simple possession provisions of the Controlled Substances Act to provide for mandatory minimum sentences for the possession of crack. Generally the maximum penalty for the possession of a controlled substance is imprisonment for one year. However, for first offense possession of more than 5 grams of crack, a mandatory minimum of 5 years imprisonment up to a maximum of 20 years shall be imposed.

⁶ "Legislative history" is a term frequently used, but it is not synonymous with legislative intent. In the case of this legislation, it is hard not to be confused by both the "legislative history" and the "legislative intent."

It is often hard to ascertain Congress' "legislative intent." In trying to understand a particular provision, one should distinguish the "legislative intent" of the members of the Subcommittee who actually wrote the provision, and the "legislative intent" expressed in the blizzard of press releases that accompanied the debate on legislation by members who most likely never read the bill. The intent of such members regarding this legislation, so clear and pure that it was pungent, was to "send a message" to the voters that they were tough on drugs and should therefore be re-elected.

The intent of the authors of the provisions is often expressed in the Committee's report, and was so expressed in the case of this legislation.

⁷ H.Rept. 99-845, Part 1, Sept. 19, 1986, Report of the Committee on the Judiciary to accompany H.R. 5394, the Narcotics Penalties and Enforcement Act of 1986, p. 17, emphasis in the original. The subhead used in the report to explain these penalties was *Serious Trafficker Penalties*.

possessed by persons operating at the retail supervisory/wholesale level of distribution of the particular drug."⁸

The Subcommittee was concerned about the violence of the street markets in which crack was being sold. The Subcommittee believed that, rather than the "buy and bust" strategy of arresting street level dealers, the approach should be to prosecute the managers of the street level traffic.⁹

The 20 grams of crack was the minimum believed to be in the possession of such a manager in the course of his work.

The U.S. Sentencing Commission, in order to reduce unwarranted sentencing disparity, should request a review by the National Institute on Drug Abuse in consultation with the National Academy of Sciences of the drug quantity structure to determine dosages and quantify relative dangerousness or harmfulness.

The Drug Quantity Table in Part D of the Sentencing Guidelines as well as the quantitative levels for offenses in 21 U.S.C. 841 and other drug mandatory minimum sentences do not reflect a scientific measurement of relative harmfulness. Congress, in its arbitrary selection of equivalent punishments for varying quantities, created the appearance that it had studied or understood relative harmfulness. The arbitrary 100 to 1 ratio between cocaine and crack reflects no actual calculation of the relative harmfulness to society or an individual of a given number of doses of an illegal drug. This problem exists for all of the drugs listed on the table. The crude quantitative approach is a decades-old artifact of the way that drug enforcement agents have measured their cases.

Any fair sentencing scheme based on drug quantities should rest upon an accurate understanding of "quantity harmfulness" and have an equivalence across drugs. **This quantitative factoring could be in terms of the chemical or physical/psychological harmfulness of the drug, or perhaps it could be translated into the actual market value of the quantity of drugs. An innovative approach to eliminate sentencing disparity in this area that the commission could consider would be to follow the models used in theft, fraud and tax violations, and use the value of the illegal transactions as the basis for sentencing.** The "harm" would be seen in terms of how "big" the

⁸ Ibid. p. 17

⁹ The "buy and bust" enforcement strategy has been found to be unsuccessful and counterproductive and has been abandoned by the police in New York City and Washington, D.C.

trafficker was, as measured by the dollar volume, not the quantity. Congress has used dollar value in creating the highest level offenses in the Continuing Criminal Enterprise offense, 21 U.S.C. 848(b)(2)B).

In looking at the statutory mandatory minimum in 21 U.S.C. 841(b)(1)A), for example, is there any "harmfulness" basis for treating 1 kg of heroin, 5 kg of cocaine, 50 gms of crack, 100 gms of PCP, 10 gms of LSD, 400 gms of fentanyl, or 1000 kg of marijuana as equivalent? If pure, how many doses of the drug do these quantities represent? How do the costs of these different quantities compare? Quantity-based sentences for drug offenses should be imposed on the basis of a genuine dangerousness or harmfulness factor.

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[Amendment No. 40 was addressed out of order because of its saliency for sentencing reform.]

AMENDMENT NO. 9

This amendment is a good amendment in that it moderates the excesses of the 1986 Anti-Drug Abuse Act and focuses on the dangerous characteristics of an offender. It moves away from an excessive focus on weights regarding high-level offenders.

AMENDMENT NO. 10

This is an excellent amendment which will reduce unwarranted sentencing disparity.

The Los Angeles Times, in an article by Jim Newton, computed the sentences that now result under the guidelines by including the weight of the carrier.¹⁰

<u>Carrier</u>	<u>Weight of 100 doses</u>	<u>Guideline Range</u>
Pure LSD	5 milligrams	10 - 16 months (Level 12)
Gelatin Capsule	225 milligrams	27 - 33 months (Level 18)
Blotter paper	1.4 grams	63 - 78 months (Level 26)
Sugar cubes	227 grams	188 - 235 months (Level 36)

¹⁰ Jim Newton, "Long LSD Prison Terms -- It's All in the Packaging," Los Angeles Times, p. 1, July 27, 1992. See also, Dennis Cauchon, "Band's followers handed stiff LSD sentences," USA Today, p. 11A, Dec. 17, 1992.

The U.S. Sentencing Commission, pursuant to 28 U.S.C 994(r), should recommend to Congress that it eliminate the "detectable amount" standard entirely, since it, in conjunction with mandatory minimums is the primary source of the worst "unwarranted sentencing disparity" in Federal law. The Commission might recommend to Congress that it repeal the entire quantitative structure in the area of controlled substances offenses and leave the sentencing enhancements to the Commission and the Sentencing Guidelines.

AMENDMENT NO. 11

This amendment more accurately reflects the level of business of a drug trafficker. The U.S. Drug Enforcement Administration in its G-DEP classification of high level drug traffickers limits the quantitative factor for determining the class of drug trafficker to the quantities which are handled on a monthly basis.

However, the level 32 quantities of controlled substances are not very substantial as major traffickers. To move to aggregation of all quantities at such a trigger will not provide the remedy the amendment seeks. Setting the aggregation level at 34 or 36 more closely reflects the levels of substantial traffickers.

AMENDMENT NO. 12

This amendment accurately reflects the boasting nature of drug trafficking negotiations, and prevents unfairness and unwarranted sentencing disparity from resulting from unrealistic claims that a defendant might make.

AMENDMENT NO. 13

This proposal is worthy, but may not go far enough. Where a government agent has set up a reverse sting sale for a discount price, the Judge should be permitted to consider not only the practical limits of the defendant's financial resources, but also the extent to which the agent's discount pricing may have boosted the size of the deal within the defendant's financial resources but beyond his original disposition -- i.e. to determine how much of the quantity to be sold was the defendant's idea and how much was the agent's idea, and to sentence only on the basis of the former.

AMENDMENT NO. 47

The government routinely encourages defendants to cooperate with it in the investigation of crime. A great many defendants, in fact, in the hope of sentence mitigation provide assistance. In course of such cooperation, some defendants have reservations about informing against family members or long-

time intimate associates. Such reservations can cause the government's attorneys and investigators enormous frustration. In other cases, personality conflict may arise, or the government may disbelieve some declarations or denials by the defendant.

It is in the interest of fairness in sentencing to permit the court to make its own independent determination about a defendant's "substantial assistance" to avoid unwarranted government withholding of a motion for departure from the guidelines on the ground of substantial assistance.

AMENDMENT NO. 48

With over twenty million Americans using marijuana and other cannabis products annually, there are obviously a great many persons violating the Controlled Substances Act. There are millions of Americans who are on the outer-most fringes of criminal enterprises that supply the American demand for cannabis. If their participation in the criminal conduct was truly minimal, it does not offend one's conscience that their potential incarceration be set at a maximum of level 16, or roughly two years. And if their participation were truly minor, then a maximum level of 22, or roughly 4 years, does not seem to be too low a maximum.

AMENDMENT NO. 49

This amendment would not include in the weight of a mixture or substance the uningestible materials mixed with a controlled substance to facilitate the smuggling of the substance such as mixing the drug with fiberglass and molding it into a suitcase. One could understand the desire of the government to seek extra punishment for an especially clever or hard-to-detect means to smuggle drugs into the country. That issue should be addressed directly, and not through a manipulation of the mixture or substance weights.

This amendment would eliminate unwarranted sentencing disparity. That such an amendment has become necessary reflects the degree of illogic that has invaded some discussions of drug quantities, and the degree of extremism attached to the term "mixture or substance containing a detectable amount of..."

AMENDMENT NO. 50

This is a very worthy amendment. Perhaps the greatest contemporary example of sentencing disparity is to sentence people to prison for long terms for the weight of the paper or sugar cubes on which LSD is "carried" rather than on the basis of the prohibited drug itself.

AMENDMENT NO. 51

This amendment, defining "cocaine base" as crack for the purposes of differentiating it from cocaine for sentencing purposes, accurately reflects the intent of the House Committee on the Judiciary when it used the cocaine base. In the Committee's report, it used the common term, "crack," when describing the types of offenders the new sentencing provision was designed to apply to.¹¹

The Committee was aware of another meaning of cocaine base as an intermediate product in the processing of coca leaves into cocaine hydrochloride, but did not intend this definition or these penalties to be applied to criminal conduct such as the importation of that material.

AMENDMENT NO. 63

Without undertaking a scientific study of the relative dangerousness of drugs, these proposed amendments are unwarranted. These proposals reflect the tendency to punish more harshly anabolic steroids, the drug du jour. There is no question that there are serious risks in the abuse of anabolic steroids. But just how widespread and how severe are those risks? The claim of a former NFL star that he believes his brain cancer was caused by his use of anabolic steroids does not make it so, nor does it suggest that the a risk of brain cancer from such drug use is high.

This amendment may be warranted. But the Commission cannot adopt this amendment without risking increased sentencing disparity in the absence of a comprehensive examination of relative drug harmfulness.

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¹¹ H.Rept. 99-845, Part 1, Sept. 19, 1986, Report of the Committee on the Judiciary to accompany H.R. 5394, the Narcotics Penalties and Enforcement Act of 1986, p. 12