

WHY THE DEPARTMENT OF JUSTICE IS WRONG ABOUT COCAINE SENTENCING

The U.S. Sentencing Commission is again considering changes to the rules governing federal cocaine sentences. On March 19, Deputy Attorney General Larry Thompson testified before the Commission that current penalties are “proper” and no change is needed. This memo rebuts the Department of Justice position.

Background:

Current law (21 U.S.C. §§ 841 & 960) mandates a five year minimum sentence for a defendant found responsible for the sale of either 500 grams of powder cocaine or 5 grams of crack cocaine. The same 100 to 1 ratio appears in statutory provisions governing higher quantities of drugs (e.g., 10 year mandatory minimum triggered by 50 grams of crack and 5 kilograms of powder) and in the federal sentencing guidelines as well. These rules are irrational and discriminatory.

In 1995 the U.S. Sentencing Commission transmitted to Congress a comprehensive report analyzing scientific, economic and sociological evidence about crack and powder cocaine. The Commission found the 100 to 1 ratio to be empirically indefensible and proposed to eliminate the disparity by setting crack sentences at the powder cocaine levels. Congress rejected that proposal, but directed the Commission to formulate a new recommendation between the discredited 100 to 1 ratio and the rejected 1 to 1 ratio.

In January, 2001, President Bush said: “I think a lot of people are coming to the realization that maybe long minimum sentences for the first-time users may not be the best way to occupy jail space and/or heal people from their disease. And I’m willing to look at that.” He then expressed support for “making sure the powder-cocaine and the crack-cocaine penalties are the same. I don’t believe we ought to be discriminatory.” (Houston Chronicle, 1/28/01) But on March 19, 2002, the Bush Justice Department endorsed the 100 to 1 disparity in current law and said any change in the ratio should be accomplished by raising powder cocaine penalties.

Responses to DOJ Assertions:

DOJ says the current penalties are “proper.”

Response: In defending the current statutes, DOJ stands alone against the weight of scientific, legal and judicial opinion. In February and March, 2002, the Commission has heard testimony from noted scientists and criminologists, including Dr. Glenn Hansen, Director of the National Institute on Drug Abuse. Uncontradicted expert testimony makes clear that crack and powder cocaine are pharmacologically identical. This year’s testimony validates the Commission’s 1995 findings and shows that since 1995, crack use has stabilized, crack markets have become less violent and the medical community has rejected the myth of the “crack baby.”

In addition to scientific evidence, the Commission heard testimony from the Judicial Conference of the United States, the American Bar Association and leading civil rights organizations urging that current law be revised. Congress itself, in rejecting the Commission's 1995 proposal, directed the Commission to "propose revision of the drug quantity ratio of crack cocaine to powder cocaine" (Pub. L. 104-38). And the record of the House and Senate Judiciary Committee hearings that year is replete with statements from Republicans, Democrats and then-representatives of the Justice Department condemning the 100 to 1 ratio and promising eventual change. At that time no one defended the 100 to 1 ratio that DOJ now calls "proper."

The 100 to 1 ratio in current law leads to unfair and discriminatory sentences. Street level crack dealers, many of them drug addicts themselves, face harsh mandatory sentences while more culpable members of the drug operation who sell powder cocaine to the street dealers receive less severe punishment. At the same time over 90% of federal crack defendants are African-American, fueling severe racial disparities in the criminal justice system as a whole.

DOJ says the actual ratio is somehow lower than 100 to 1.

Response: As set forth above, the statutes are unambiguous: the same mandatory minimum sentence is triggered by 100 times less crack cocaine as powder cocaine (e.g., 5 grams of crack, 500 grams of powder). DOJ says that the sentences imposed are not 100 times different, but this is a classic straw man argument – no one has ever contended that the sentences imposed for crack were 100 times greater. No one has ever said, for example, that powder defendants were receiving 5 years and crack defendants were receiving 500 years. All current and previous proposals to revise the rules are based on the correct understanding that the 100 to 1 ratio is reflected in the quantity of drugs that triggers dramatically harsher punishment.

Even so, the Department's analysis undermines its own position. The new DOJ study shows that the average sentence for cases involving five grams of powder is 13 months while the average sentence for cases involving five grams of crack is 70.5 months. That 5.4 to 1 ratio is astonishing considering that crack is nothing more than a processed form of powder cocaine.

DOJ says if any changes are made, powder sentences should be raised.

Response: There are three primary reasons why powder cocaine penalties should not be raised. First, no one seriously believes that current powder cocaine sentences are insufficient to fulfill the purposes of punishment. Mr. Thompson conceded to the Commission that there is "no evidence that existing powder penalties are too low." And in 1997, 27 federal judges who formerly served as U.S. Attorneys wrote an unusual letter to Congress specifically opposing any increases in current powder cocaine sentences, which they termed "severe." Second, lowering the powder threshold would subject more low-level powder defendants to harsh mandatory sentences; by definition, lowering the threshold affects low-level defendants. Third, raising powder sentences would have a disproportionate impact on Hispanics, who comprise over 50% of powder cocaine defendants. This change would make the current problems even worse.

DOJ says it is important to consider the victims of drug abuse.

Response: Drug abuse is indeed a significant social problem with many victims, but recognition of that fact does not support any particular sentence or sentencing structure. Moreover, many of the low-level non-violent drug sellers who receive unjustifiably harsh sentences under current law are themselves addicts victimized by drugs. For example, DOJ points to women who prostitute themselves for drugs, but many such women also sell drugs to support their habits. Federal Bureau of Prisons Director Kathy Hawk Sawyer has testified before Congress that “70-some percent of our female population are low-level, nonviolent offenders. The fact that they even have to come into prison is a question mark for me. I think it has been an unintended consequence of the sentencing guidelines and the mandatory minimums.”

DOJ says the Commission may not decouple the guidelines from the mandatory sentencing laws by promulgating guideline amendments with a ratio different than the statutory ratio.

Response: Nothing in the Sentencing Reform Act of 1984 mandates that the guidelines mirror mandatory sentencing statutes. The LSD and marijuana guidelines were decoupled from the corresponding statutes many years ago without objection. The Department’s concern that decoupling cocaine guidelines would create unwarranted sentencing disparity is highly ironic, given the Department’s endorsement of the gross disparity caused by the 100 to 1 crack-powder ratio and by mandatory sentencing laws in general.

DOJ says current law adequately allows for consideration of mitigating factors.

Response: While judges may consider mitigating factors under the guidelines, such consideration is explicitly precluded by the application of mandatory sentencing laws. As a practical matter, the only time that a defendant avoids an otherwise applicable mandatory sentence is when the prosecutor chooses to certify that the defendant has cooperated sufficiently to warrant lesser punishment. So when DOJ says current law adequately allows for “consideration of mitigating factors,” the Department apparently means that prosecutors (rather than impartial judges) have adequate authority to grant leniency.

DOJ says revising the crack-powder ratio would be too complex.

Response: Federal sentencing is already unbearably complex because the Department has resisted efforts to simplify it, including efforts by the Commission to simplify the guidelines. Any additional minor inconvenience resulting from implementing a solution to the longstanding crack-powder disparity would be far outweighed by the advantage of improving the fairness and perceived fairness of the federal sentencing system.

DOJ says the Commission's proposal to punish violence through sentencing enhancements is unworkable because of "problems of proof in individual cases."

Response: The current crack and powder threshold quantities are based in part on the perception that crack markets are more violent than powder cocaine markets. The Commission's most recent data belies that concern; crack markets have stabilized and fewer than 20% of all federal crack cases involve a gun or other types of violence, according to presentence reports.

The Commission now proposes to punish such violence through the use of sentencing enhancements that would apply in all drug cases involving violence, not just crack cases. DOJ's reference to "problems of proof in individual cases" is just another way of saying a prosecutor may lack evidence to prove that the defendant was in fact violent, even under the lower evidentiary standards that apply at sentencing. The Department thus endorses an unfair system in which all crack defendants (but not other defendants) are presumed to be violent rather than a system in which a defendant's actual conduct drives the sentence.

DOJ says lowering crack penalties sends the "wrong message."

Response: Current law, based as it is on the scientifically indefensible and racially disparate 100 to 1 ratio sends the wrong message: that the criminal law is unfair. Testifying against the crack-powder disparity, Leadership Conference on Civil Rights Executive Director Wade Henderson said: "Few policies have contributed more to minority cynicism about law enforcement. If anti-drug efforts are to have any credibility, especially in minority communities, these penalties must be significantly revised." Changes to make these laws fair and rational would finally send the right message, not the wrong message.