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Reforming Cocaine Sentencing: The New Commission Speaks

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REFORMING COCAINE SENTENCING: THE NEW COMMISSION SPEAKS

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This year has been one of the most exciting and unexpected ever for the United States Sentencing Commission. With President Clinton's belated appointment of four new members, the Commission entered 1995 with none of its original members. The reconstituted Commission quickly began to assert itself when on February 28 it issued the long-awaited "Crack Report." The Report offers an exhaustive review of medical, legal, societal and historical issues related to cocaine. It concludes that the 100-to-1 powder cocaine to crack ratio in current federal sentencing law should be repealed, although the Report does not endorse a specific alternative.

Following the issuance of the Report, the Commission upped the stakes in April 1995 when it: (1) approved amendments equalizing the guidelines' treatment of powder cocaine and crack; and (2) recommended that Congress bring the statutory mandatory minimum penalties applicable to crack in line with those governing powder cocaine. These actions were highly controversial and in October Congress passed, and President Clinton signed, legislation rejecting the proposed guideline changes.

Despite the politically motivated, unreflective nature of this first ever rejection of Commission amendments, there are important lessons to be learned from the Commission's bold action this year. In this article I will summarize and comment upon the Crack Report, describe the Commission's actions in April and explain why, in my view, although there is much to be admired, the Commission's efforts suffer from serious strategic defects.

I. THE CRACK REPORT

A. Summary

In 1994 Congress directed the Sentencing Commission to prepare a study of federal cocaine sentencing policy. In particular, it asked the Commission to examine and report on the differential treatment of powder and crack cocaine. The resulting *Special Report to the Congress: Cocaine and Federal Sentencing Policy*, was issued in February 1995.

The Report consists of eight chapters. Chapter 1 provides background information and discusses the study's methodology. Chapter 2 discusses cocaine's forms, methods of use, and pharmacological effects. The Report makes the important point, often ignored by policymakers, that powder cocaine and crack are simply different forms of the same substance. All forms of cocaine produce the same types of physiological and psychotropic effects. The main difference between powder cocaine and crack is the method of use. Because crack is typically smoked, it reaches the bloodstream faster than powder cocaine that has been snorted. As a result, the effects of crack are felt more quickly and intensely, but for a shorter period of time. When powder cocaine is dissolved and injected (which, the Report states, is not a frequent method of use), the effects are comparable to crack's.

Chapter 3 examines public health issues related to cocaine, such as trends in cocaine use, health effects, social problems, and the availability of treatment for cocaine abusers. Chapter 4 describes the distribution and marketing of cocaine. Chapter 5 considers the connection between cocaine and crime. The Report notes that there is little evidence suggesting that either crack or powder cocaine causes, in a psychopharmacological sense, users to commit crime. On the other hand, there is a great deal of crime, especially violent crime, associated with the cocaine distribution market. This is especially true of crack markets.

Chapter 6 reviews the past and present state and federal law enforcement response to cocaine. Chapter 7 details current sentencing policies applicable to cocaine offenders.

Chapter 8 contains the Report's findings and recommendations. It principally focuses on the notorious 100-to-1 quantity ratio. This policy, established by Congress in the mandatory minimum provisions of the Anti-Drug Abuse Act of 1986 and extended by the Sentencing Commission to all guideline sentences, provides that to receive the same sentence as someone who sells a given quantity of crack, an offender must sell 100 times as much powder cocaine.[1]

B. The Commission's View of the Disparate Treatment of Crack.

The Report summarizes, and seems to endorse, the arguments in support of the conclusion that, relative to powder cocaine, "crack cocaine poses somewhat greater harm to society."[2] The Report notes that while much of the rhetoric surrounding crack at the time Congress passed the mandatory minimum statutes ("quite possibly the most addictive drug on Earth") is not supported by the evidence, crack can be quite psychologically (but not physiologically) addictive. The same is true of powder cocaine, but the Report notes that the intensity and duration of the drug's effects when it is smoked increase the likelihood of dependence and abuse. The Report also notes that harsher penalties for crack can be justified by its ability to be marketed cheaply, thus making it appealing to a broader segment of society, including those most vulnerable, the poor and the young. Further, the violence associated with the cocaine trade is most evident with the marketing of crack, and crack dealers generally have more exten-

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sive criminal records than other drug dealers. Crack dealers also appear to involve young people in their trade more frequently than do other drug offenders.

On the other hand, even though crack may be more dangerous than powder cocaine, the Report cites factors that cut against punishing crack much more severely than powder cocaine. The 100-to-1 ratio confounds Congress's intention that major and serious drug dealers receive more severe penalties than low level dealers. The 500 grams of powder cocaine necessary to trigger a 5-year mandatory prison term represents 2,500-5,000 doses of cocaine, while the five grams of crack triggering the same mandatory sentence represents only 10-50 doses. Thus a low level crack dealer receives the same sentence as a much more significant player in powder cocaine (whose product may, in fact, be converted into a large quantity of crack).

The Report also emphasizes that when Congress established the 100-to-1 ratio in 1986, the sentencing guidelines did not yet exist. Some of the factors that led Congress to treat crack more severely, such as violence, the presence of weapons and the criminal history of offenders, are now incorporated into the guidelines. Thus, even if a 100-to-1 ratio were theoretically appropriate, it would be redundant to establish that quantity ratio by statute and then further enhance sentences under the guidelines for some of the same factors warranting disparate treatment of the forms of cocaine.

The Report also recognizes the troubling racial disparity caused by the 100-to-1 ratio. As most convicted crack offenders are black, and most convicted powder cocaine offenders are white, African Americans bear a heavily disproportionate share of the severe mandatory minimum penalties and long guideline sentences.

The last section of the Report, the Commission's recommendations, is rather tentative. The Commission comes out strongly against the 100-to-1 ratio, finding that such a ratio greatly overstates any differential in harm between crack and powder cocaine. It does not, however, recommend a different ratio, nor does it endorse a different method of taking into account the perceived greater harm associated with crack. Instead, the Commission concludes by suggesting that it will, in the guideline amendment process, explore the issue of a proper ratio and the ways the guidelines can account for crack's harms. The Commission hints that a 1-to-1 ratio may not be in the offing, because "there may well be some harms that are inherent in [crack] itself and that, as a practical matter, are not addressable through this type of specifically tailored guideline provision."

On a final point, the Report urges Congress to repeal the severe mandatory penalty for possession of 5 grams of crack. While a conviction for such an offense requires a 5 year prison term (the same mandatory sentence applicable to sales of 5 grams), the *maximum* sentence available for *possession* of any quantity of other drugs is one year.

C. Analysis

The Crack Report, like some other major Commission studies,[3] has much to commend it. The Report is thorough, well written and clearly reasoned. It makes a significant contribution to our understanding of the issues surrounding cocaine and drug sentencing in general. In many ways it is a shining example of what Congress envisioned when it established the Commission in part to reflect "advancement in knowledge of human behavior as it relates to the criminal justice process."[4]

The Report does have one important shortcoming, though. Out of what seems to be a desire that the Report not be too controversial, the Commission seems to shy away from some of the implications of its own study. This pattern weakens the Report's impact.

1. Mandatory minimums. For example, although pointing out many of the problems caused by the mandatory minimums, the Commission pulls its punches. The Report would have been an appropriate time for the Commission forcefully to make the argument that if Congress truly believes in the Commission and sentencing guidelines, all mandatory sentencing statutes should be repealed. This would free the Commission not only to assess the proper relationship between crack and powder cocaine penalties, but also to reexamine the extent to which the quantity of drugs involved in an offense should determine the sentence. The Commission recognizes that many other factors can be of equal or greater relevance to determining the proper sentence, but as long as there are quantity-based mandatory minimum sentences, irrationality and disproportionality are the inevitable results. The reader is left with the impression that the Commission knows this but is afraid to say so. The Commission could have attempted to dull the likely criticism of such a suggestion by pointing out that even such a "tough on crime" figure as New York's Governor Pataki has called for repeal of that state's tough mandatory drug sentencing statutes, the so-called "Rockefeller Laws."

2. The need to reduce crack sentences. Another surprising aspect of the Report is its failure to state the obvious: in the Commission's view the problem with the 100-to-1 ratio is that crack sentences are too high. This is an important omission, even though it is implicit in the Report's conclusions (if the mandatory sentences applicable to powder cocaine offenders were too low, the Commission could simply increase the applicable guideline ranges), and even though the Commission's later guideline amendments and statutory proposals make this explicit. It reflects timidity on the part of the Commission. The Commission should have been thinking ahead,

envisioning a response such as Senator John Breaux's proposed legislation, which says in effect, "The Sentencing Commission has convinced me that the 100-to-1 ratio should be reduced. We should accomplish that reduction by *increasing* the mandatory terms applicable to powder cocaine." The Commission should have made the case why the purposes of sentencing could be fulfilled by lower crack sentences.

3. Too much reliance on quantity. The Report could also have provided the occasion for the Commission to reexamine its own policies, some of which have contributed to the situation the Report criticizes. Excessive reliance on drug quantities distorts the sentencing process. Quantity, as the Commission now seems to recognize, is just one factor that may reflect the seriousness of a drug offender's conduct. Other factors, such as the use of violence and the offender's role in the offense, are usually more significant. Even though the mandatory minimum statutes are based on drug quantity, Congress provided no requirement that the guidelines be so based. The Report would have been a good place for the Commission to explore the advantages and disadvantages of moving away from quantity-based guidelines.

4. Relevant conduct. The Report should also have reconsidered relevant conduct. I have elsewhere made the case that relevant conduct is in need of a dramatic overhaul.[5] Here I would simply note that because of the relevant conduct principle, along with the reliance on drug quantity, the guidelines exacerbate the mischief caused by mandatory minimum statutes. The Report says, in effect, that five years for five grams of crack is too severe a mandatory penalty. The Commission could not, of course, impose a lesser sentence on a defendant covered by a mandatory minimum statute. However, consider a defendant convicted of selling 4 grams of crack. The mandatory minimums say nothing about this defendant; it is completely up to the Commission to determine what the sentencing guideline range should be.

The guidelines, however, do two things that extend the reach of the mandatory minimums to such a defendant. First, they use the mandatories as the anchors for guideline offense levels. To avoid "cliffs," the guidelines make sentences for drug amounts that do not trigger mandatory sentences proportional to the mandatories. Thus, the defendant convicted of selling 4 grams of crack, who has no aggravating or mitigating factors and no criminal history, receives a guideline range of 51-63 months. The Commission apparently feels that this is too harsh, but since the mandatory minimums do not require it, the Commission could change the result if it wished to.

Second, the relevant conduct principle, by aggregating drug amounts from alleged offenses for which the defendant has not been convicted, further extends the reach of the mandatory minimums. Thus a defendant convicted of selling one gram of crack, who could receive any guideline range the Commission deems appropriate, is treated as if the mandatory minimum applies if the sentencing court believes that the defendant sold 4 more grams in the same course of conduct. If the Commission truly believes that 5 years for 5 grams is excessive, it could revise the relevant conduct guideline to avoid these results. Again, the Report would have been an ideal place for such a reexamination of Commission policies.

II. THE GUIDELINE AMENDMENTS AND STATUTORY CHANGES

A. Summary

The ink on the Crack Report had barely dried when, in mid-April 1995, the Commission took some bold steps to implement it. Surprising many observers, the Commission, by a 4-3 vote, approved guideline amendments designed to eliminate the differential treatment of powder and crack cocaine based on quantity—in other words, to reduce the 100-to-1 ratio to 1-to-1. Further, it was the Commission's intent that this equality be achieved by lowering the base offense level for crack offenses to the current powder cocaine levels. By the same narrow margin, the Commission also approved a recommendation that Congress revise the mandatory minimum penalties applicable to cocaine. Under the Commission's proposed statute, crack and powder cocaine mandatory minimums would be equalized, again at the levels currently applicable to powder cocaine. Further, the Commission *unanimously* urged Congress to eliminate the unique 5-year mandatory term applicable to simple possession of more than five grams of crack.

B. The Majority View

The Commission majority explains its position basically by relying on arguments advanced in the Report.[6] The majority does not dispute that crack poses unique, in some ways more serious, dangers than powder cocaine. The majority concludes, though, that when the enhancements for aggravating factors already in the guidelines are considered, along with new enhancements the Commission also adopted in April, the dangers of crack are adequately considered without requring a higher base offense level. The majority notes that under the guideline amendments being proposed, crack offenders would receive sentences on average twice a long as powder cocaine offenders with the same amount of drug. In light of the historically high sentences now being imposed on powder cocaine offenders, the majority feels that this is an appropriate treatment of crack.

C. The Dissents

The three dissenting Commissioners emphasize the Report's finding that there are a number of harms more closely associated with crack than with powder

cocaine.[7] These include addictiveness, the more ready marketability to vulnerable members of society, such as the young and the poor, and the violence associated with marketing the drug. Commissioner Goldsmith makes the further point that because of differences in the ways crack and powder cocaine are marketed and used, offenders selling equivalent amounts of the different forms of cocaine may not fairly be characterized as occupying similar roles in the criminal conduct. For example, he notes that a seller of 100 grams of crack is properly seen as a mid-level dealer, while a similar amount of powder cocaine usually marks the offender as a low level retailer.

The dissents note that the Report recognized these harms and suggested that if the guidelines could not incorporate such systemic factors, a quantity ratio of more than 1-to-1 would be appropriate. According to the dissenters, the guideline amendments do not, and cannot, give proper weight to all these aggravating factors about crack, yet the majority fails to explain why a 1-to-1 ratio should be applied. Further, the dissenters claim that the majority has put too much weight on the racial disparities attributable to harsher penalties for crack, arguing that although this situation is regrettable, it stems not from any hidden racism but from the proper consideration of crack as a more dangerous product.

Two of the dissenters restate their support for the Report's conclusion that the 100-to-1 ratio is excessive, but do not propose an alternative ratio. Commissioner Goldsmith, writing separately, does suggest that a ratio of between 5-to-1 and 10-to-1 seems correct.

D. Analysis

Although representing the kind of bold action that eluded their predecessors, there are several things wrong with the Commission majority's efforts to equalize the treatment of powder cocaine and crack. It seems that the Commission failed to think strategically. Its goals in this process should have been twofold. First, it should have been trying to affect current sentencing policies in a positive way. Second, it should have been attempting to lay a foundation for future improvements.

1. A bold proposal, not adequately supported. First, the narrow 4-3 margin dramatically weakened the Commission's position as Congress considered how to respond to the proposals. The Commission should have realized that not only would Congress be unlikely to go along with the proposal to amend the mandatory minimum statutes, but also that there would likely be an effort to reject the proposed guideline amendments. With that in mind, unanimity, or near unanimity, should have been a priority. Even if a 1-to-1 ratio should be the ultimate goal, proposing a somewhat higher ratio, at least as an interim measure, would have been preferable if it would have allowed the Commission to speak unanimously. As it stands, the Commission asked Congress to effect a dramatic change in sentencing policy on which the Commission itself was deeply divided.

Further, on the merits, within the framework established in the Report, the 1-to-1 ratio is problematic. Even to a reader in favor of dramatic change, the majority fails adequately to address the dissenters' points. If, as the majority apparently agrees, crack is more addictive than powder cocaine, and is more harmful in other ways that are not accounted for in the guidelines, why should the ratio be reduced all the way to 1:1? To the extent that quantity of drugs is to influence the sentence, why shouldn't crack's greater harms be punished, gram for gram, more severely than powder cocaine?

In sum, rather than an overly tentative Report followed by surprising bold legislative actions, the Commission's approach should have been the opposite. The Report should have more forcefully made the case against mandatory minimums and the 100-to-1 ratio. The implementation strategy, though, should have been more moderate.

2. A different approach. Alternatively, if there was Commission consensus for bold action, that action should have taken a different form. Some of the policies discussed above—reforming relevant conduct and dramatically deemphasizing quantity in favor of more meaningful aggravating factors—would not only result in better guidelines, but would also begin steering a path away from quantity-based mandatory minimums. Paradoxically, these reforms, which would be more far-reaching than what the Commission in fact proposed, might have attracted less attention and thus have been less politically untenable. Being more complex and subtle, changes in relevant conduct or the extent of the guidelines' reliance on quantity might less easily be reduced to soundbites or campaign slogans. Had the Commission acted differently, Congress might have been less likely to reject guideline amendments for the first time.

CONCLUSION

The Commission deserves a great deal of credit for the quality of its work and the boldness of its proposals. It is especially striking that these events occurred so soon after the new members took office. Even though its specific proposals could have been improved, at least there is now, for the first time in years, real hope that the Commission will be a positive force for change in the coming years.

FOOTNOTES

[1] This is not the same as saying, as some have, that crack is punished 100 times more severely than powder. In

cases involving equivalent amounts of drugs, the typical crack offender receives a sentence 3-8 times longer than the powder cocaine offender. Report, p. 145.

[2] Report, p. 195.

[3] *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (1991).

[4] 28 U.S.C. §991(b)(1)(C).

[5] David Yellen, *Illusion, Illogic and Injustice: Real Offense Sentencing and the Federal Sentencing Guidelines*, 78 Minn. L. Rev. 403 (1993).

[6] *Statement of the Commission Majority in Support of Recommended Changes in Cocaine and Federal Sentencing Policy*, 7 Fed. Sent. R. 315 (1995).

[7] *View Of Commissioner Tacha Joined By Commissioners Goldsmith And Carnes, Dissenting, In Part, From Amendment Five And Related Legislative Recommendations*, 7 Fed. Sent. R. 320 (1995); *View Of Commissioner Goldsmith , Dissenting, In Part, From Amendment Five And Related Legislative Recommendation*, 7 Fed. Sent R. 322 (1995).

[8] Letter from Kent Markus, Acting Assistant Attorney General, to Honorable Al Gore, dated May 12, 1995 (7 Fed. Sent. R. 325 (1995).

READER'S NOTES