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The Sentencing Commission Takes on Crack, Again



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We may be entering a new era of drug sentencing policy. For the first time, an effort by the United States Sentencing Commission to reduce the disparity in treatment between crack and powder cocaine offenders by somewhat reducing crack sentences has succeeded. Decisions of the United States Supreme Court, culminating most recently in *Kimbrough v. United States*¹ and *Gall v. United States*,² have clarified and expanded the flexibility federal judges have in sentencing under the post-*United States v. Booker*³ advisory sentencing guidelines. Political leaders have begun to accept the need for relaxation of at least some of the most severe drug sentencing laws.⁴ Scare tactics, like those recently attempted by Attorney General Mukasey in opposing the retroactive application of the Commission's cocaine amendments,⁵ no longer work as well as they did a few years ago. Perhaps the feared label "soft on crime" is beginning to lose a bit of its teeth, enabling more sensible drug sentencing policies to emerge. Whether we have reached a tipping point in attitudes toward drug sentencing remains to be seen, but the atmosphere certainly seems to be changing.

The United States Sentencing Commission deserves a good deal of credit for this recent turn. For over a decade, it has been thoughtfully examining and criticizing the disparate treatment of crack and powder cocaine. Its four reports to Congress on federal cocaine sentencing policy make a powerful case for reform. Until now, however, the Commission has been unable to translate its analysis into effective action. In 1995 the Commission tried to eliminate the disparity, but Congress rejected the effort. This time around, the Commission seems to have learned a great deal from that experience and has become a more effective political actor. Much work remains to be done, and the Commission needs to do more, but the 2007 report and amendments represent an important turning point.

I. A Brief Look Back at the 1995 Report and Amendments

The last time the Sentencing Commission attempted to significantly affect cocaine sentencing policy was in 1995.⁶ In February 1995, responding to a congressional directive, the Sentencing Commission issued its *Special Report to Congress: Cocaine and Federal Sentencing Policy*. The Report

was quite critical of the 100:1 ratio embodied in the federal mandatory minimum statutes but somewhat tentative in its recommendations. Two months later, the Commission took bold action: it narrowly (by a 4-3 vote) approved amendments designed to equalize the treatment of crack and powder cocaine and urged Congress to change the mandatory minimum statutes so that crack and powder cocaine were treated alike, at the lower levels then applicable to powder cocaine. Congress responded by passing legislation rejecting the Commission's amendments, which President Clinton signed in October 2005. Having been so soundly rebuffed, the Commission retreated for over a decade.

II. The 2007 Guideline Amendments

In 2007 the Commission returned to the arena. Unlike in 1995, when the Commission's Cocaine Report preceded its proposed guideline amendments, in 2007 the Commission first issued amendments and then followed with a report. There is no indication that this change was strategically motivated, nor does it seem to have had any effect on subsequent events.

In April 2007 the Commission unanimously adopted an amendment modestly reducing crack cocaine guidelines levels. When the guidelines were originally written, the Commission established guideline ranges that were above applicable mandatory minimum penalties for crack. For example, the guideline range for first-time crack offenses involving 5 or more grams of crack cocaine was 63 to 78 months, while the statutory mandatory minimum was 5 years (or 60 months). Similarly, the guideline range for the 50-or-more-gram level, which has a mandatory minimum of 120 months' imprisonment, was 121 to 151 months. The 2007 amendment reduces the base offense level for crack cocaine offenses so that the sentencing range includes, rather than exceeds, any applicable statutory mandatory minimum. Thus, for first-time offenders at the 5- and 50-gram levels, the guideline ranges after the amendment are 51 to 63 months and 97 to 121 months. Similar reductions are made for crack cocaine amounts below and above mandatory minimum thresholds.

In its press release accompanying the amendment, the Commission "emphasized and expressed its strong view that

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the amendment is only a partial solution to some of the problems associated with the 100-to-1 drug quantity ratio. Any comprehensive solution to the 100-to-1 drug quantity ratio would require appropriate legislative action by Congress.”⁷

This amendment attracted surprisingly little congressional attention and took effect on November 1, 2007. The following month, the Commission voted unanimously to give retroactive effect to this amendment, effective on March 3, 2008.⁸ Although this decision was more controversial, it went through without serious congressional opposition. As a result of these actions, approximately 1,500 inmates were eligible for immediate release and approximately 20,000 inmates could potentially have their sentences reduced in the coming years.

III. The 2007 Cocaine Report

In May 2007, after the crack amendment was promulgated but before the decision on retroactivity, the Sentencing Commission issued *Report to the Congress: Cocaine and Federal Sentencing Policy*. The 2007 Cocaine Report does not break new ground. Rather, it represents an incremental addition to the Commission’s earlier reports on cocaine sentencing. Chapter 1 provides an overview of the two-tiered penalty structure for powder and crack cocaine. The Commission notes the origins of the notorious 100-to-1 drug quantity ratio and compares the penalties for crack cocaine offenses with those applicable to other illegal drugs.

Chapter 1 also contains the Commission’s recommendations to Congress. Specifically, the Commission requests that Congress do the following:

1. Increase the five-year and ten-year statutory mandatory minimum threshold quantities for crack cocaine offenses to focus the penalties more closely on serious and major traffickers as described generally in the legislative history of the 1986 Act.
2. Repeal the mandatory minimum penalty provision for simple possession of crack cocaine under 21 U.S.C. 844.
3. Reject addressing the 100-to-1 drug quantity ratio by decreasing the five-year and ten-year statutory mandatory minimum threshold quantities for powder cocaine offenses, as there is no evidence to justify such an increase in quantity-based penalties for powder cocaine offenses.⁹

These recommendations are essentially the same ones the Commission has made since 1995. Still, they are cogently presented, backed up by a great deal of evidence and analysis. And these recommendations are made stronger by two factors that were absent in 1995: the unanimity of the Commission, and the closely integrated approach taken in the Report and the Recommendations.¹⁰

Chapter 1 also summarizes the Commission’s April 2007 amendment regarding crack. Chapter 2 presents an impressive array of data concerning cocaine offense sen-

tencing. As it did in its 2002 report, the Commission concludes that the data support three major conclusions:

- The majority of powder and crack cocaine offenders perform low-level trafficking functions, although there has been an increase since 2000 in the proportion of cocaine offenders identified as performing a wholesaler function.
- The majority of powder cocaine offenses and crack cocaine offenses do not involve aggravating conduct, such as weapon involvement, bodily injury, and distribution to protected or in protected locations. However, the proportion of cases involving some aggravating conduct has increased since 2000 for both types of cocaine offenses.
- Certain aggravating conduct occurs more often in crack cocaine offenses than in powder cocaine offenses, but still occurs in a minority of cases.¹¹

Chapter 3 is titled “Forms of Cocaine, Methods of Use, Effects, Dependency, Prenatal Effects, and Prevalence.” As in its earlier reports, the Commission notes that crack and powder cocaine cause identical physiological effects, although crack cocaine may present a greater risk of “addiction and personal deterioration.” This is because crack is normally smoked, which causes a more intense sensation than snorting the drug, which is how powder cocaine is usually used. The Commission also cites recent studies indicating that the damaging effects of prenatal exposure to cocaine are the same regardless of the form of the drug and that these effects are “significantly less severe than previously believed.”

Chapter 4 reviews recent trends in drug trafficking. Chapter 5 compares federal law with state cocaine sentencing policies. Chapter 6 discusses recent case law, particularly *United States v. Booker*. The critical Supreme Court decisions in *Rita*,¹² *Gall*, and *Kimbrough* all came after the Report was written.

IV. What’s Next for the Commission?

Much has changed in sentencing since 1995. Most importantly, because of the Supreme Court’s decisions, the Sentencing Commission now writes guidelines that advise and influence but no longer legally bind federal judges. The Sentencing Commission has learned from its past interactions with Congress and is now a more effective political actor. The modest, incremental approach to crack sentencing reform embodied in the 2007 amendments holds promise. Had the Commission taken this approach in 1995, meaningful reform might have begun then.

Having tasted success, the Commission should plot a bolder path forward on drug sentencing reform. There are three major areas that should be their focus.

A. Mandatory Minimums

As noted above, the Commission made several positive recommendations regarding mandatory minimums in its

latest report. Were Congress to follow through on these recommendations by repealing the mandatory minimum for simple possession of crack, increasing the threshold for crack distribution mandatory minimums and decreasing the 100:1 ratio (without lowering the threshold for powder offenses), the federal sentencing landscape would indeed be dramatically transformed.

Still, the Commission demonstrated some lingering timidity that I hope it overcomes in the future. Quantity-based mandatory minimum sentences should be repealed, not reformed. In each of its reports, the Commission seems to inch close to this conclusion but then backs away. The Commission continues to recognize that quantity of drugs is not necessarily the most important factor in determining an appropriate sentence. Yet as long as any quantity-based mandatory minimums remain, the federal sentencing system will remain distorted and unfair. Even as it makes more modest refinements in the guidelines, the Commission should become a clear, consistent voice against mandatory minimums.

B. Quantity-Based Guidelines

In the 2007 amendments, the Commission made a minor declaration of independence from the quantity-driven approach of the mandatory minimums. Of course the drug guidelines remain largely tethered to drug quantity, just at a slightly lower level now in the case of crack. The Commission has noted many times now that Congress's fixation on drug quantity in the mandatory minimums overemphasizes the importance of that factor in creating a sensible sentencing system. Other factors, principally the offender's role in the offense and the use of violence, are more important. The Commission can and should go further. It should draft an alternative guideline approach, using drug quantity only to the extent it really believes appropriate. Judges would continue to be bound by the mandatory minimums, which in some cases might call for significantly longer sentences than those prescribed by the revised guidelines. These unsightly "cliffs"—the much higher sentences mandated by statute for minor increases in drug quantity—would be an important teaching tool.

The original Sentencing Commission's decision to build the guidelines around the quantity-driven mandatory minimums was understandable, if unfortunate. The Commission was concerned that it not be seen as insulting Congress by ignoring the mandatory minimums in the legally binding guidelines. In the post-Booker world, the stakes for such Commission action are lower. Why is it not appropriate for advisory guidelines to take a different approach to drug sentencing than the mandatory minimums? The Commission might even offer alternative approaches, from which judges could choose based on their view of the most important factors in a given

case. In this new era, the Commission should experiment more freely.

C. Relevant Conduct

The interaction between the mandatory minimums, the quantity-based guidelines, and the relevant conduct principle has long been the subject of great criticism.¹³ The guidelines' mandatory inclusion of drug amounts from alleged offenses of which the defendant was not convicted (or was even acquitted) remains as a unique and misguided contribution of the Sentencing Commission. Perhaps after *Kimbrough*, district judges will begin to express some opposition to this approach. Going forward, the Commission should revisit and revise relevant conduct.

V. Conclusion

The Sentencing Commission deserves credit for taking on the crack/powder cocaine disparity again and for successfully guiding through these first modest changes. The excessive penalties applicable to crack, which cause enormous racial disparities, remain a blight on our system of criminal justice. The future of the Federal Sentencing Guidelines remains unclear, as adjustment to the Supreme Court's recent cases continues. What is clear is that the Sentencing Commission has a critical role to play in the months and years ahead. If we are indeed headed toward a possible moderation of the "War on Drugs" penalties, the Commission will be an essential source of research, analysis, and policy advice. The Commission will do a real service if it builds on its recent success and becomes a real national leader on sentencing policy.

Notes

- ¹ 128 S.Ct. 558 (2007).
- ² 128 S.Ct. 586 (2007).
- ³ 543 U.S. 220; 125 S.Ct. 738 (2005).
- ⁴ Former president Bill Clinton recently expressed regret over his administration's failure to end the disparity between crack and powder sentencing, calling it "a cancer." See <http://blogs.usatoday.com/oped/2008/03/bill-clinton-ad.html>.
- ⁵ See, e.g., *Toward Drug Case Justice*, NEW YORK TIMES editorial, Feb. 9, 2008, at 14.
- ⁶ For an analysis of these events, see David Yellen, *Reforming Cocaine Sentencing: The New Commission Speaks*, 8 FED. SENT. R. 54 (1995).
- ⁷ See U.S. Sentencing Commission Votes to Amend Guidelines for Terrorism, Sex Offenses, Intellectual Property Offenses, and Crack Cocaine Offenses, <http://www.ussc.gov/PRESS/re10407.htm>.
- ⁸ See <http://www.ussc.gov/PRESS/re121107.htm>.
- ⁹ Report at 8.
- ¹⁰ The Commission's proposals in 1995 were fairly bold, but they were strikingly at odds with the more cautious tone taken in the 1995 Report. See Yellen, *supra* note 6.
- ¹¹ Report at 11.
- ¹² *Rita v. United States*, 127 S.Ct. 2456 (2007).
- ¹³ See, e.g., David Yellen, *Illusion, Illogic and Injustice: Real Offense Sentencing and the Federal Sentencing Guidelines*, 78 MINN. L. REV. 403 (1993).