Order Code 97-743 A

Federal Cocaine Sentencing: Legal Issues

Updated April 25, 2002

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Federal Cocaine Sentencing: Legal Issues

Summary

The Anti-Drug Abuse Act provided mandatory minimum sentences of imprisonment for possession with intent to distribute powder and crack cocaine. In this statute Congress established a quantitative 100-to-1 sentence ratio between the two (*i.e.*, it takes 100 times as much powder cocaine as crack cocaine to trigger the same sentence). Under this distinction, a person convicted of possession with intent to distribute a pound of powder cocaine (453.6 grams) would serve considerably less time in a federal prison than one convicted of possession with intent to distribute 5 grams of crack. The United States Sentencing Commission incorporated the ratio into its generally binding sentencing guidelines.

Since enactment, it has become apparent that the incidence of this sentencing differential falls disproportionately on African-American defendants. The disparate impact has been attacked without great success on several judicial fronts. Equal protection and due process arguments have floundered on the finding that the distinction was not motivated by racial animus or discriminatory intent, but rather was related to the legitimate government purpose of protecting the public against the greater dangers of crack cocaine. Thus far, defendants have encountered similar difficulties proving the requisite corrupt motivation to establish selective prosecution or sentencing entrapment defenses. Further, the federal appellate courts have found that the stiff minimum sentences for offenses involving crack cocaine are rational and not disproportionate to the seriousness of those offenses. Consequently, they do not offend the cruel and unusual punishment clause of the Eighth Amendment. And the courts have been no more receptive to pleas to mitigate the disparate impact by departing from the severity of the sentencing guidelines.

Instructed to study the situation, the Sentencing Commission promulgated amendments that would equate crack and powder cocaine for sentencing purposes and recommended that Congress drop the 100-to-1 ratio from its own mandatory penalties. Congress rejected both the amendments and the suggestion for equation, but directed the Commission to re-examine the issue and report back recommendations reflecting more moderate adjustments. The Commission subsequently recommended that the penalties be adjusted to a ratio somewhere between 1-to-1 2/3 and 1-to 15. The Commission has made no further recommendations.

Legislative efforts to reduce or eliminate the disparity have thus far come to impasse over two issues: (1) the appropriate ratio and (2) whether and to what extent crack penalties should be reduced or powder penalties enhanced to achieve the proper balance.

Contents

Federal Cocaine Sentencing: Legal Issues

Background

Recognizing the disparity in the sentences which courts imposed on similarly situated defendants, Congress enacted the Comprehensive Crime Control Act of 1984[1](CCCA) to provide, among other things, a comprehensive federal sentencing law for guidance on selecting the appropriate sentence.[2]

One of the amendments to the CCCA, designed to create harsher penalties for drug offenses, was enacted 2 years following the passage of the Act. It provides for mandatory minimum penalties for possession with intent to distribute powder and crack cocaine.[3] The amendment provides for a wide disparity of sentencing between powder cocaine and crack cocaine (*i.e.*, it takes 100 times as much powder cocaine compared to crack cocaine to trigger the mandatory minimum penalties). Under the distinction, a person convicted of possession with the intent to distribute 453.6 grams (one pound) of powder cocaine would serve considerably less time in a federal prison than one convicted of possession with the intent to distribute only 5 grams of crack.[4] The United States Sentencing Commission subsequently incorporated the ratio into the Sentencing Guidelines.[5]

Since the enactment of the amendment, the crack/powder sentencing differential has fallen disproportionately African-Americans. In support of challenges to the law alleging unjustifiable racial discrimination, defendants have submitted statistics which illustrate the disparity in sentencing.[6] While these numbers illustrate the disparities in

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[1]P.L. 98-473, 98 Stat. 1976 (1984).

[2]H.Rept. 98-1030, 98th Cong., 2d Sess., 41 (1984).

[3]Anti-Drug Abuse Act of 1986, P.L. 99-570, 100 Stat. 3207, codified at 21 U.S.C. § 841(b)(1)(A), (B) (offenses involving 50 grams of crack and 500 grams of powder carry the same penalties; so do offenses involving 5 grams of crack or 500 grams powder). Simple possession of crack carries a 5 year mandatory minimum term of imprisonment; there is no mandatory minimum for simple possession of powder, 21 U.S.C. § 844. This is "the only such federal penalty for a first offense of simple possession of a controlled substance." Special Report to the Congress: Cocaine and Federal Sentencing Policy, iii (U.S. Sentencing Commission, February 1995) (Special Report). 65 Crim.L.Rep. (BNA) 2073 (May 7, 1997), also available at www.ussc.gov.

[4]U.S. Sentencing Commission Guidelines Manual, § 2D1.1, (c) Drug Quantity Table 92 (2001).

[5]*Id.*

[6]*See, e.g., United States v. McMurray*, 833 F. Supp. 1454, 1460-61 (D. Neb. 1993), *aff'd*,

(continued...)

prosecutions and sentencing between powder cocaine offenders, who are mostly White, and crack cocaine offenders, who are mostly Black, a majority of the federal courts have concluded that defendants have failed to prove that the enhanced crack penalties resulted from racial discrimination.[7]

The 100-to-1 ratio has come under severe criticism and has caused widespread concern, particularly because the use and sale of crack cocaine appear to follow a racial line, with the result that African-Americans are prosecuted more and subject to the more severe crack penalties.

The Sentencing Commission

In the Omnibus Violent Crime Control and Law Enforcement Act of 1994, Congress directed the U.S. Sentencing Commission to prepare a report on the difference in penalty levels, and include any recommendations for change.[8] Last year, the Commission published a study pursuant to this directive which was critical of the congressional approach to the sentencing of cocaine offenders. After reviewing the varieties of cocaine, examining the health effects of their use, describing the violence associated with how they are marketed, examining the potential for creating dependency, and attempting to measure their effect on crime, the Commission's Report concluded that "a policymaker could infer that crack cocaine poses greater

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[6](...continued)
34 F.3d 1405 (8th Cir. 1994) (Blacks constituted 92.3% of defendants federally prosecuted in "crack" cases in district but only 15.8% of cocaine violations); *United States v. Maske*, 840 F. Supp. 151, 154 (D.D.C. 1993) (during October 1, 1991, and September 30, 1992, Blacks constituted 91.3% of trafficking offenses involving cocaine base, while only 4.1% were White; in contrast, for offenses involving powder cocaine, 38.3% were White, as opposed to 27.7% Black); *United States v. Simmons*, 964 F.2d 763, 767 (8th Cir. 1992) (97% of defendants prosecuted in the Western District of Missouri between 1988 and 1989 were Black); *Minnesota v. Russell*, 477 N.W.2d 886, 887, n.1 (Minn. 1991) (in 1988, 96.6% of those charged with crack offenses were Black, and 79.6% of those charged with powder cocaine offenses were White).

[7]*See, United States v. Lattimore*, 974 F.2d 971, 975 (8th Cir. 1992) ("There is not the slightest bit of evidence which would indicate that Congress or the Sentencing Commission had a racially discriminatory motive in mind when it crafted the Guidelines with extended sentences for crack felonies."); *United States v. Dumas*, 64 F.3d 1427 (9th Cir. 1995) ("We are satisfied Congress was not motivated by racial animus when it enacted the crack/powder cocaine sentencing disparity"); *United States v. Stevens*, 19 F.3d 93, 97 (2d Cir. 1994) ("we join six other circuits that have similarly held that the Guidelines' 100 to 1 ratio of powder cocaine to crack cocaine has a rational basis and does not violate equal protection principles").

[8]P.L. 103-322, § 280006, 108 Stat. 2097. Congress established the Sentencing Commission as an independent, permanent agency in the judicial branch of government, 28 U.S.C. § 991. Composed of seven voting and two non-voting, ex officio members, 28 U.S.C. § 991(a), the Sentencing Commission's mandate, among others, was to develop guidelines for federal criminal offenses that would bring more uniformity to sentencing, 28 U.S.C. § 991(b)(1)(B).

harms to society than powder cocaine."[9] Some of the concerns that led to the adoption of the 100-to-1 ratio by Congress were based upon opinions that crack cocaine is "intensely addictive," it is "causing crime to go up at a tremendously increased rate," the physiological effects of crack cocaine lead to higher rates of psychosis and death, and (because it is cheap) it is available to a broader and more vulnerable part of the population.[10]

After examining the disparity in the sentencing issue, the Commission, following a public hearing on March 14, 1995, voted 4-3 to eliminate the disparity between conditions of possession of crack and powder cocaine.[11] On May 1, 1995, the Commission proposed and sent to Congress an amendment (providing for a 1:1 ratio) to the federal sentencing guidelines that would equate crack and powder cocaine for sentencing purposes.[12] The Commission also specifically suggested that Congress should drop the 100-to-1 ratio from its own mandatory minimum penalties found in current statutes.[13]

Rejection of Initial Recommendations by Congress

With the Commission's recommendations scheduled to become law on November 1, 1995,[14] Congress rejected the 1-to-1 ratio in the proposed amendment on October 30, 1995,[15] but instructed the Commission to provide more study, with the guidance that "the sentence imposed for trafficking in a quantity of crack cocaine should generally exceed the sentence imposed for trafficking in a like quantity of powder cocaine...."[16] On April 29, 1997, the Commission recommended that the penalties to be adjusted should reflect a ratio somewhere between 1 to 1 2/3 and 1-to 15.[17]

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[9]Special Report, p. 195.

[10]*Id*. at pp. 180-81.

[11]United States Sentencing Commission, Amendments to the Sentencing Guidelines for United States Courts; Notice, 60 Fed. Reg. 25074 (May 10, 1995).

[12]*Id.* at 25075-76.

[13]*Id.* at 25076.

[14]*Id.* at 25074.

[15]P.L. 104-38, § 1, 109 Stat. 334. The Senate, on September 29, 1995, rejected the U.S. Sentencing Commission's proposal to reduce the disparity in penalties between crack and powder cocaine when it passed S. 1254 by voice vote. The House of Representatives cleared S. 1254 by voice vote on October 18, 1995, after passing an identical bill (H.R. 2259; H.Rept. 104-272 Sentencing Guidelines for Crack Cocaine) by a vote of 332-83. Both bills had the effect of overturning the U.S. Sentencing Commission's initiative and rejecting its recommendations to ease the penalties for crack cocaine and money laundering.

[16]P.L. 104-38, 109 Stat. 334 *Id*. §2(a)(1)(A).

[17]Special Report to the Congress: Cocaine and Federal Sentencing Policy (U.S. Sentencing Commission, April 1997, available at www.ussc.gov.

During the debate, several African-American members voiced their concern regarding the bills, arguing that the tougher sentencing guidelines for crack possession unfairly targets African-American men.[18] But the proponents said that the tougher sentence for crack has nothing to do with race.[19] The bill sponsor, Representative McCollum, in response to the allegation of bias in the system, said "[I]f we are applying it equally, the law itself is not racist. Perhaps an individual prosecutor might be racist. I believe though that the issue tonight does not have bearing on directly, though we are concerned about it, with what an individual prosecutor might do, but rather what are the guidelines that we are giving them? What are the guidelines of the law, what are the guidelines of the Sentencing Commission, what are the guidelines of The Department of Justice. We can then go back and should go back in our committee work and in our jobs as Members of Congress and as the executive branch in its role in the Department of Justice in ferreting out racial bias and discrimination and improper processing."[20]

Challenges to the Sentencing Disparity

A. Equal Protection.

The Equal Protection Clause commands that "all persons similarly circumstanced shall be treated alike."[21] The constitutional guaranty of "due process" demands that the law shall not be unreasonable, arbitrary, or capricious, and the means selected shall have a real and substantial relation to the object.[22]

In their constitutional arguments challenging the 100-to-1 ratio, the defendants contend that the statutes which provide for the mandatory minimum sentences for crack cocaine and the federal sentencing guidelines are unconstitutional because they violate the "Equal Protection component" of the Fifth Amendment Due Process Clause which causes a disproportionate impact on minorities, who are more likely to use crack cocaine than caucasians.

The dispositive question for the courts to decide is whether the defendant has shown that a racially-based "discriminatory purpose has in some [way] shaped" the adoption of a mandatory minimum sentencing for possession with the intent to

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[18]141 Cong. Rec. H10266-69 (daily ed. Oct. 18, 1995).

[19]*Id.* at H10264-65.

[20]*Id.* at H10275.

[21]*Plyer v. Doe*, 457 U.S. 202, 216 (1982); *Nordinger v. Hahn*, 501 U.S. 1, 10 (1993) ("The Equal Protection Clause ... simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike").

[22]*Nebbia v. People of State of New York, N.Y.*, 291 U.S. 502, 525 (1934); *General Motors Corp. V. Romein*, 503 U.S. 181, 191 (1992) ("the test for due process [is] a legitimate legislative purpose furthered by rational means").

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distribute crack cocaine.[23] In order to establish a valid equal protection claim, it is necessary to show more than a disproportionate impact. For "even if a neutral law has a disproportionate adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose."[24] Thus far, the challenges to the constitutionality of the 100-to-1 ratio have not been very successful in the federal courts of appeals.[25]

When challenging legislation such as the 100-to-1 sentencing disparity which, on its face, is not racially discriminatory, two methods are available to raise an equal protection claim: (1) there is an allegation of discriminatory intent by the plaintiff and if not alleged, the "rational basis" standard will be used to review the challenged legislative scheme to determine "whether it is rationally related to a legitimate governmental purpose"[26] and (2) where the plaintiffs allege and demonstrate that the law was passed with a discriminatory purpose, the courts will review the challenged law under the demanding "strict scrutiny" standard.[27]

Applying this standard, the federal courts generally have upheld the 100-to-1 quantity ratio by holding that Congress and the Commission had a rational basis for mandating harsher penalties for crack cocaine as opposed to powder cocaine. The distinction was not motivated by racial animus or discriminatory intent. Rather, it was "related to the legitimate governmental purpose of protecting the public against the greater dangers of crack cocaine."[28]

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[23]*Personnel Administration v. Feeney*, 442 U.S. 256, 276 (1979).

[24]*United States v. Galloway*, 951 F.2d 64, 65 (5th Cir. 1992).

[25]*See, United States v. Matthews*, 168 F. 3d 1234, 1251 (11th Cir. 1999) cert. denied sub nom. *United States v. Moore*, 528 U.S. 883 (1999) ; *United States v. Pickett*, 941 F.2d 411, 418 (6th Cir. 1991); *United States v. Williams*, 962 F.2d 1218, 1227 (6th Cir. 1992), *cert denied*, 506 U.S. 892 (1992); *United States v. Thurmond*, 7 F.3d 947, 950-53 (10th Cir. 1993), *cert. denied*, 510 U.S. 1199 (1994); *United States v. Clary*, 34 F.3d 709, 713 (8th Cir. 1994), *cert. denied*, 513 U.S. 1182 (1995); *United States v. Byse*, 28 F.3d 1165, 1169 (11th Cir. 1994), *cert. denied*, 513 U.S. 1097 (1995); *United States v. Jimenez*, 68 F.3d 49, 51 (2d Cir. 1995) *cert. denied* 517 U.S. 1148 (1996); *United States v. Moore*, 54 F.3d 92 (2d Cir. 1995) *cert. denied* 516 U.S. 1081 (1996); *United States v. Smith*, 73 F.3d 1414, 1419 (6th Cir. 1996).

[26]*United States v. Stevens*, 19 F.3d 93, 97 (2d Cir. 1994).

[27]*United States v. Singleterry*, 29 F.3d 733, 741 (1st Cir. 1994), *cert. denied*, 115 U.S. 647 (1994). *Compare Minnesota v. Russell*, 477 N.W.2d 886, 889 (Minn. 1991) (the Supreme Court of Minnesota applying a "stricter standard of rational basis review [under the Minnesota Constitution]—where the challenged classification appears to impose a substantially disproportionate burden on the very class of persons whose history inspired the principles of equal protection").

[28]*See, e.g., United States v. Stevens*, 19 F.3d 93, 96-97 (2d Cir. 1994); *United States v. Thurmond*, 7 F.3d 947, 953 (10th Cir. 1993), *cert. denied*, 510 U.S. 1199 (1994); *United States v. Pickett*, 941 F.2d 411, 418 (6th Cir. 1991); *United States v. Williams*, 962 F.2d 1218, 1227-28 (6th Cir. 1992), *cert. denied* 506 U.S. 892 (1992); *United States v. King*, 972 F.2d 1259, 1260 (11th Cir. 1992); *United States v. Harding*, 971 F.2d 410, 412-14 (9th Cir. 1992), *cert. denied*, 506 U.S. 1070 (1993); *United States v. Frazier*, 981 F.2d 92 (3d Cir.
(continued...)

B. Due Process.

The constitutional guaranty of "due process" demands that the law shall not be unreasonable, arbitrary, or capricious, and the means selected shall have a real and substantial relation to the object.[29]

The gist of the due process challenges to the crack cocaine penalties has been that because crack and powder cocaine are chemically the same drug, Congress and the Commission should not have enacted two different penalties. The courts have rejected these challenges stating that even if crack and powder cocaine are derived from the same drug, "[c]ocaine base is a different drug from cocaine, and, because it is prepared for inhalation, concentrates and magnifies the effect of one gram of cocaine to such a degree that dealers profitably can sell it in very cheap yet still-potent quantities....[W]hen cocaine is changed into cocaine base, it becomes a different chemical substance."[30]

Although the court in *United States v. Singleterry*[31] rejected the due process challenge, it urged those with the "proper authority and institutional capacity" not to become complacent stating that "[a]lthough [the defendant] has not established a constitutional violation, he has raised important questions about the efficacy and fairness of our current sentencing policies for offenses involving cocaine substances."[32]

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[28](...continued)
1992), *cert. denied*, 507 U.S. 1010 (1993); *United States v. Thomas*, 900 F.2d 37, 39-40 (4th Cir. 1990).

The Sentencing Commission determined that, whatever greater danger crack might pose, the harm clearly does not justify the current 100-to-1 sentencing ratio. Special Report, pp.195-98. *Cf. Minnesota v. Russell*, 477 N.W.2d 886, 889-90, (Minn. 1991) (applying the Minnesota Constitution, the Supreme Court of Minnesota concluded that evidence of crack's greater harm was insufficient to provide a rational basis for the 10-to-3 sentencing ratio which appeared to be based upon an arbitrary rather than a genuine and substantial distinction).

[29]*Nebbia v. People of State of New York, N.Y.*, 291 U.S. 502, 525 (1934); *General Motors Corp. V. Romein*, 503 U.S. 181, 191 (1992); *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (Although the Fifth Amendment does not contain an Equal Protection Clause, the Supreme Court has held that actions taken by the federal government violate the Due Process Clause of the Fifth Amendment if the same action would offend the Equal Protection Clause of the Fourteenth Amendment.); *Adarand Construction, Inc. v. Pena*, 115 S.Ct. 2097, 2107-108 (1995).

[30]*United States v. Galloway*, 951 F.2d 64, 65 (5th Cir. 1992). *See also, United States v. Simmons*, 964 F.2d 763, 767 (8th Cir. 1992); *United States v. Turner*, 928 F.2d 956, 960 (10th Cir. 1991); *United States v. Lawrence*, 951 F.2d 751, 755 (7th Cir. 1991).

[31]29 F.3d 733 (1st Cir. 1994).

[32]*Id*. at 741.

C. Eighth Amendment Challenges.

The Eighth Amendment has been used by defendants to challenge the penalties for crack cocaine on the basis that they are so disproportionate, they violate its prohibition against cruel and unusual punishment.

The circuits which have ruled on these challenges have generally upheld the stiff minimum sentences required by 21 U.S.C. §841(b).[33] The analysis underlying these decisions is based on *Solem v. Helm*[34] which set out the following three-prong test for courts conducting an evaluation of whether the punishment is cruel and unusual under the Eighth Amendment: the determination "...should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions."[35]

The federal appellate courts which have applied the *Solem* test have found that the stiff minimum sentences for offenses involving crack cocaine are rational and not disproportionate to the seriousness of those offenses, for which Congress concluded that there was a need for a severe penalty structure.[36]

D. Prosecutorial Discretion.

Because most of the state laws have a penalty ratio of cocaine to crack which is much lower than the federal ratio, the choice between federal and state prosecution becomes a very important element in the sentence a defendant will receive if

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[33]*See, e.g., United States v. Cyrus*, 890 F.2d 1245, 1248 D.C. (Cir. 1989) ("There have been only three recognized instances of disproportionality rising to the level of an (E)ighth (A)mendment violation. These involved condemning a man to for a non-homicide crime [Coker v Georgia, 433 U.S. 584 (1976)], imposing life without parole for a nonviolent recidivist who passed a bad check for $100 [*Solem v. Helm*, 463 U.S. 277 (1983)], and sentencing a man in the Philippines to 15 years hard labor for falsifying a government form [*United States v. Weems*, 217 U.S. 349 (1909)]. A ten year sentence for drug possession simply does not approach the same level of gross inequity."); *United States v. Pickett*, 941 F.2d 411, 419 (6th Cir. 1991); *United States v. Hoyt*, 879 F.2d 505, 512-14, amended by 888 F.2d 1257 (9th Cir. 1989); *United States v. Mendoza*, 876 F.2d 639, 641 (8th Cir. 1989); *United States v. Kidder*, 869 F.2d 1328, 1333-34 (9th Cir. 1989).

[34]463 U.S. 277, 290 (1983).

[35]463 U.S. at 292. The Supreme Court also stated that, in non-capital cases, "successful challenges to the proportionality of particular sentences [will be] exceedingly rare." *Id.* at 289-90; *See, Harmelin v. Michigan*, 501 U.S. 957 (1991) (mandatory sentence of life imprisonment without the possibility of parol upon conviction of possession of 650 grams of cocaine found insufficiently disproportionate to constitute cruel and unusual punishment in violation of the Eighth Amendment).

[36]*United States v. Frazier*, 981 F.2d 92, 95 (3d Cir. 1992) *cert. denied* 507 U.S. 1010 (1993); *United States v. Harding*, 971 F.2d 410, 413-14 (9th Cir. 1992), *cert. denied*, 506 U.S. 1070 ((1993); *United States v. Pickett*, 941 F.2d 411, 418 (6th Cir. 1991); *United States v. Avant*, 907 F.2d 623 (6th Cir. 1990); *United States v. Colbert*, 894 F.2d 373, 374-75 (10th Cir.1990).

convicted.[37] Both state and federal jurisdiction exist over most of the drug arrest because they usually involve cooperation between the local police and federal law enforcement authorities. Therefore, where there is joint jurisdiction, the prosecutors have the option to decide whether they will charge the individual under federal or state law. In *United States v. Clary*,[38] Judge Cahill expressed his concern over prosecutorial discretion after reviewing cases of defendants convicted for crack violations in the federal courts of the Eastern District of Missouri during a 3-year period. He stated that the fact that only one White defendant was convicted for crack violations while 55 Blacks and 1 Hispanic were convicted during this period, "raises an inference that unconscious racism may have influenced the decision to severely punish Blacks for violations involving their form of cocaine while hardly touching Whites who utilize another form of the same drug—both are forms of cocaine."[39]

In order to establish selective prosecution based on race, the defendant must show discriminatory effect and purpose.[40] He also bears the burden of showing "that others similarly situated have not been prosecuted."[41] Statistical evidence, alone, which shows a high percentage of African-Americans and Hispanics being prosecuted for possession with the intent to distribute cocaine is not enough to establish selective prosecution.[42] In *United States v. Armstrong*,[43] the Supreme Court decided that the defendant was not entitled to discovery on his selective-prosecution claim because his "study failed to identify individuals who were not [B]lack, [but] could have been prosecuted for the offense for which [he was] charged, [and they] were not...."[44]

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[37]*See*, Appendix: State Crack Cocaine Sentencing Statutes. *See also, United States v. Williams*, 746 F. Supp. 1076, 1080 (D. Utah 1990), *aff'd and remanded*, 963 F.2d 1337 (10th Cir. 1992) ("It is not an exaggeration that the decision by the...police officers to refer a defendant for federal or state prosecution is a substantial and indeed crucial factor in the ultimate sentence that the defendant will receive if convicted. The significance of this decision is magnified by the wide disparity between the mandatory drug crime sentences under federal law as opposed to less severe indeterminate sentences under state law for the same underlying conduct...[I]f these defendants had been convicted in state court they likely would have received a sentence of less than two years. However, because their cases were referred to the U.S. Attorney's office for federal prosecution, and the prosecutions were successful, defendants face a minimum mandatory sentence of ten years....").

[38]846 F. Supp. 768, 791 (E.D. Mo. 1994), *rev'd*, 34 F.3d 709 (8th Cir. 1994), *cert. denied*, 513 U.S. 1182 (1995).

[39]*Id.* at 790.

[40]*Wayte v. United States*, 470 U.S. 598, 608 (1985); *United States v. Dumas*, 64 F.3d 1427, 1431 (9th Cir. 1995).

[41]*United States v. Gutierrez*, 990 F.2d 472, 476 (9th Cir. 1993).

[42]*Id.*

[43]116 S.Ct. 1480 (1996), *cert. denied* 517 U.S. 456 (1996).

[44]*Id*. at 1489.

Although there are limits to a prosecutor's discretion,[45] their decisions are rarely considered violative of the Equal Protection Clause.[46]

E. Sentencing Entrapment.

Sentencing entrapment has been defined as "outrageous official conduct [that] overcomes the will of an individual predisposed only to dealing in small quantities for the purpose of increasing the amount of drugs ... and the resulting sentence of the entrapped defendant."[47]

In *United States v. Shepard*,[48] an undercover law enforcement officer would not purchase cocaine in powder form until it had been converted to crack. The conversion could be accomplished by "cooking" the powder cocaine in a microwave for a few minutes. Consequently, under federal law, the defendant would have been sentenced for 120-135 months for providing crack cocaine to the undercover agent as opposed to 60 months for powder cocaine. The court in taking note of the inevitability of the situation said: "... [T]he agent's purpose in causing the conversion was to expose the defendant to the more severe crack sentence [in order] to double the time she must spend in the penitentiary for the drug offenses... [T]he confluence of the mandatory statutory minimum, the mandatory guidelines, and the actions of the government agent, if implemented, would lead to an unjust result such as to shock the conscience of the Court."[49]

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[45]*United States v. Bayles*, 923 F.2d 70, 72 (7th Cir. 1991) (prosecutorial discretion may be reviewed to ensure decisions not based on prohibited criteria such as race or speech); *United States v. Brown*, 9 F.3d 1374, 1375 (8th Cir. 1993), *cert. denied*, 511 U.S. 1043 (1994) (prosecutorial discretion limited by constitutional constraints including equal protection).

[46]*See, United States v. Dumas*, 64 F.3d 1427, 1431 (9th Cir. 1995) (evidence supported decision to prosecute in federal court rather than state court since decision was guided by neutral criteria [*e.g.*, whether drug quantity exceeded five grams and whether defendant had any gang affiliation]); *United States v. Haynes*, 985 F.2d 65, 70 (2d Cir. 1993) (decision to prosecute in federal rather state court presented no evidence of prosecutorial discretion; fact that defendant might have received lesser sentence had he been prosecuted in state court rather than in federal court could make federal sentences dependent on the law of the state in which the sentencing court was located resulting in federal sentencing that would vary from state to state.); *United States v. Clark*, 8 F.3d 839, 842 (D.C. Cir. 1993) (decision to prosecute in federal rather than Superior Court was insufficient to prove constitutional violation when federal conviction will provide greater sentence).

[47]*United States v. Washington*, 44 F.3d 1271, 1280, n. 29 (5th Cir. 1995). *See, United States v. Staufer*, 38 F.3d 1103, 1107-08 (9th Cir. 1994), where court of appeals reversed a sentence based on finding that the defendant was subjected to sentencing entrapment.

[48]857 F. Supp. 105, 106 (D.D.C. 1994).

[49]*Id.* at 106-107 (the undercover agent testified that it was a "policy" in his office to request the conversion to increase the putative defendant's exposure, *id.* at 109). *See also, United States v. Walls*, 841 F. Supp. 24, 26 (D.D.C. 1994) (agent testified at trial that they specifically demanded that powder cocaine be converted into crack because they knew that crack carried heavier sentences than powder cocaine).

There appear to be several forms of sentencing entrapment. One form consists of an undercover drug enforcement agent's attempt to persuade a suspect to buy or sell drugs in amounts large enough to cause the statutory minimum penalties to apply even though the suspect is unable to afford the statutory quantity. In *United States v. Melendez*[50], the defendant argued that the government's confidential informants offered to sell him cocaine at prices substantially below market prices, thereby leading him to purchase a significantly greater quantity of cocaine than he ordinarily would have been able to purchase given his available funds. He maintained that the $12,500 he had available for the drug deal would have enabled him to purchase, on the open market, only between one-half and three-quarters of a kilogram of cocaine instead of the more than 50 kilograms attributed to him. The appellate court held that the "in excess of five kilograms of cocaine" was properly attributed to him and the court was compelled to impose the statutory minimum sentence of 10 years' imprisonment.[51]

F. Departure From Guideline Sentencing Levels.

Upon a motion by the prosecutor,[52] the court can "depart" from the Sentencing Guidelines when the defendant has provided "substantial assistance" in the investigation or prosecution of others who have committed an offense.[53] Although the motion is made by the prosecutor, the court will determine the extent of the reduction "based upon variable relevant factors" which are set forth in the Sentencing Commission Manual.[54]

Section 3553(e) of Title 18 gives the court the "...authority to impose a sentence below a level established by statute as the minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense."[55] However, the determination of whether the defendant's cooperation merits a motion for reduction of sentence is within the sole discretion of the prosecution.[56]

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[50]55 F.3d 130 (3d Cir. 1995), *aff'd on other grounds,* 518 U.S. 120 (1996).

[51]*Id*. at 135-36.

[52]"...Congress has authorized sentences below a statutory minimum only upon the prosecution's motion; that is, before a court may depart below a statutory minimum, the prosecutor first must determine that the value of the cooperation is sufficiently great to warrant overriding Congress's judgment concerning the minimum appropriate sentence." *United States v. Melendez,* 55 F.3d 130, 134 (3d Cir. 1995), *aff'd,* 518 U.S. 120 (1996).

[53]U. S. Sentencing Commission, Guidelines Manual, §5K1.1 (2001).

[54]*Id.*

[55]18 U.S.C. § 3553(e) (1994).

[56]*United States v. Melendez*, 55 F.3d 130, 134 (3d Cir. 1995), *aff'd*, 518 U.S. 120 (1996) (By requiring a government motion, Congress thus gave the prosecutor the sole key that affords access to a sentence below a statutory minimum); *United States v. Alton*, 60 F.3d 1065, 1071 (3d Cir. 1995) *cert. denied*, 516 U.S. 1015 (1995) (the guideline disparate impact on African-Americans does not justify a downward departure from the guidelines); *United States v. Thompson*, 27 F.3d 671, 679 (D.C. Cir.1994), *cert. denied,* 513 U.S. 1050 unjust an (continued...)

The question raised in *Melendez*[57] was whether a government motion for a departure from the sentencing guidelines is sufficient to authorize a court to impose a sentence beneath the statutory mandatory minimum even though the government has not filed a motion under 18 U.S.C. §3553(e). The Supreme Court affirmed the decisions of the District Court and the Court of Appeals for the Third Circuit and ruled that the defendant could receive a suspension on part of his guidelines sentence of up to 14 years but he still had to serve at least the statutory minimum of 10 years. The Court indicated that a trial judge could go below the statutory minimum to reflect a defendant's cooperation with the government if the prosecutors specifically made such a request; however, this did not happen. A motion requesting departure from "the guidelines" but not mentioning the statutory minimum sentence is not sufficient to satisfy § 3553(e)'s requirement of a motion requesting departure from a statutory minimum.

Most Recent Commission Recommendation

As directed by section two of P.L. 104-38, the U.S. Sentencing Commission on April 29, 1997, recommended narrowing the wide difference in federal sentences for trafficking in crack cocaine and powder cocaine in its report to Congress. "We submit this report in compliance with the 1995 congressional directive that 'the sentence imposed for trafficking in a quantity of crack cocaine should generally exceed the sentence imposed for trafficking in a like quantity of powder cocaine.'"[58]

The recommendation which would reduce the disparity rather than closing it altogether as previously recommended received the endorsement of the President. "[A]lthough research and public policy may support somewhat higher penalties for crack than for powder cocaine, a 100-to-1 quantity ratio cannot be justified", the Commission said in its report. The Commission recommended that for crack cocaine, Congress raise the 5-gram trigger for a five-year mandatory sentence to somewhere between 25 and 75 grams. For powder cocaine, the Commission said the 500-gram threshold for the same sentence should be lowered to a level between 125 and 375 grams.[59] The Commission has made no further recommendations.

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[56](...continued)
otherwise just sentence under the guidelines"); *United States v. Maxwell*, 25 F.3d 1389, 1400-01 (8th Cir. 1994), *cert. denied*, 513 U.S. 1031 (1994) (allowing such a class-wide departure would "impede Congress's policy decision to treat cocaine base more harshly than powder cocaine"); *United States v. Bynum*, 3 F.3d 769, 774-75 (4th Cir. 1993), *cert. denied*, 510 U.S. 1132 (1994) (the guidelines' failure to address the impact of a provision on a class should result in a class-wide downward departure "only when failure to provide it would deprive the class of equal protection; thus, the court rejected the "extraordinary relief").

[57]55 F.3d 130 (3d Cir. 1995), aff'd, 518 U.S. 120 (1996).

[58]65 Crim. L. Rep. (BNA) 2073 (May 7, 1997), available at www.ussc.gov.

[59]*Id.*

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Legislation

In 1986, Senator Robert Dole introduced on behalf of the Reagan administration the Drug-Free Federal Workplace Act of 1986.[60] This proposal (S. 2849) would have provided several mandatory minimum sentences for drug trafficking offenses based on the quantity of the drug involved in the offense. Under the bill, 500 grams of powder cocaine would have triggered a 5-year mandatory minimum, while it would have taken 25 grams of crack to trigger the same 5-year mandatory minimum. This was a 20-to-1 ratio of powder to crack cocaine.

Ultimately, Congress passed and President Reagan signed the Omnibus Anti-Drug Abuse Act of 1986 that set the current mandatory minimum sentences for various quantities of illegal drugs.[61] With respect to cocaine, the law was amended to provide that a 5-year mandatory minimum sentence would be triggered by trafficking in only 5 grams of crack cocaine or by trafficking in 500 grams of powder cocaine – a 100-to-1 ratio.[62] A 10-year mandatory minimum sentence was imposed for trafficking in 50 grams of crack or 5 kilograms of powder cocaine, also a 100-to-1 ratio.[63]

In 1988, Congress passed and President Reagan signed into law the Anti-Drug Abuse Act.[64] In addition to the mandatory minimum penalties enacted in 1986 for the trafficking in crack cocaine and other drugs, this act added a mandatory minimum sentence of 5 years for the simple possession of crack cocaine.[65]

As data from the Sentencing Commission became available during the mid-1990s, many federal and state officials began to doubt whether the 100-to-1 ratio between crack and powder cocaine continued to be justified.

In 1995 and 1997, the Sentencing Commission unanimously concluded that the crack to powder cocaine disparity was no longer justified.[66] They also pointed out that the Federal Sentencing Guidelines provide the criteria other than drug type to determine sentence lengths, so that violent, and dangerous dealers receive longer sentences. Congress rejected the recommendation, which marked the first time it had

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[60]S. 2849, 99th Cong. 2d Sess. § 502 (1986). See United States Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy 117 (1995).

[61]P.L. 99-570, 100 Stat. 3207 (1986).

[62]21 U.S.C. § 841(b)(1)(B)(ii) & (iii).

[63]18 U.S.C. § 841(b)(a)(A)(ii) & (iii).

[64]P.L. 100-690, 102 Stat. 4181 (1988).

[65]21 U.S.C. § 844.

[66]*See* United States Sentencing Commission, Cocaine and Federal Sentencing Policy 198-200 (1995); United States Sentencing Commission, Special Report to the Congress: Cocaine and Federal Sentencing Policy 2 (1997).

done so since the establishment of the Sentencing Commission. On October 30, 1995, President Clinton then followed Congress and signed the rejection into law.[67]

Several bills were introduced in the House and Senate in the 106th Congress which would have equalized the sentencing disparity between crack and powder cocaine.[68] These legislative efforts to eliminate the disparity have continued through the current Congress. In the 107th Congress, S. 1874 was introduced by Senator Jeff Sessions (for himself and Senator Orrin Hatch) on December 20, 2001. Introduced as the Drug Sentencing Act of 2001, the bill would among other things make two changes to the Federal sentencing system for drug offenders: First, it would reduce the disparity in sentences for crack and powder cocaine from a ratio of 100-to-1 to 20-to-1. It would do so by reducing the penalty for crack and increasing the penalty for powder cocaine. Second, the bill would shift some of the sentencing emphasis from the drug quantity to the nature of the criminal conduct as well as the degree of the defendant's involvement.

On February 14, 2001, Representative Charles Rangel introduced H.R. 697, which in effect would amend the Controlled Substances Act and the Controlled Substances Import and Export Act to eliminate specific mandatory minimum penalties

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[67]See "Congress Nixes Amendments to Sentencing Guidelines on Cocaine, Money Laundering", 58 Cr L 1086, October 25, 1995.

[68]H.R. 1241, introduced by Rep. Maxine Waters on March 23, 1999, would amend the Controlled Substance Act and the Controlled Substance Import and Export Act to eliminate mandatory minimum penalties relating to crack cocaine offenses. H.R. 939, introduced by Rep. Charles B. Rangel on March 3, 1999, would essentially have the same effect as H.R. 1241.

In the Senate, S. 146 was introduced by Senator Spencer Abraham on January 19, 1999. Introduced as the Powder Cocaine Sentencing Act of 1999, this bill would adjust the federal policy toward powder cocaine dealers by reducing from 500 to 50 grams the amount of powder cocaine a person must be convicted of distributing in order to receive a mandatory 5 year minimum sentence. The bill also reduced the differential between the amount of powder and crack cocaine required to trigger a mandatory minimum sentence from 100 to 1 to 10 to 1. This would be accomplished by making the ratio of powder cocaine the same as the ratio of crack cocaine for offenses involving the distribution of 50 grams. *See* S. 146, Sec. 2. Sentencing for Violations Involving Cocaine Powder. Under current law, a person would have to distribute 500 grams of powder cocaine before receiving a 5-year mandatory minimum prison sentence, whereas distribution of 5 grams of crack cocaine will cause to be imposed the same mandatory sentence.

On November 5, 1999, Senator Spencer Abraham introduced an amendment (S. Amdt. 2771) to S. 625 (sponsored by Sen. Orrin Hatch to overhaul bankruptcy laws), to stiffen the federal penalty for the sale of powder cocaine, for the purpose of bringing it closer to the penalty for selling crack cocaine. 145 Cong Rec. S14105 (daily ed. Nov. 5, 1999).

The measure would adjust and strengthen the sentence for powder cocaine by triggering the 5-year minimum sentence with the sale of 50 grams. This would narrow the sentencing disparity from the current 100 to 1 ratio down to 10 to 1. The amendment would also increase penalties for the sale of all illegal drugs to minors and for selling them near schools and other places where young people congregate. It would also stiffen penalties for makers of methamphetamine. 145 Cong. Rec. S14463 (daily ed. Nov. 10, 1999).

On November 10, 1999, the Senate agreed to the measure by a vote of 50-49; however, it did not pass the House. *Id.* at S14471.

relating to crack cocaine offenses. This would have the effect of lowering the penalties for crack offenses to those now imposed in powder cases.

On March 20, 2002, H.R. 4026 was introduced by Representatives Roscoe G. Bartlett and referred to the House Judiciary and House Energy and Commere Committees. Introduced as the Powder-Crack Cocaine Penalty Equalization Act of 2002, the bill would amend the Controlled Substances Import and Export Act to eliminate the disparity in sentencing between crack and powder cocaine, with regard to trafficking, possession, importation, and exportation of such substance, by raising the applicable amounts for powder cocaine to those currently applicable to crack cocaine which is a ratio of 100-to-1.

Overview

Critics of the current federal crack cocaine sentencing policies argue that the 100-to-1 quantity ratio is unfair and ineffective. They claim it has led to harsher punishment of small-time crack cocaine dealers than is imposed on more sophisticated powder cocaine dealers who are higher up in the same drug distribution chain. They also argue that the crack penalties are unevenly applied to African-Americans especially in situations which depend upon whether they are prosecuted in state or federal court. At every quantity level, federal defendants convicted of trafficking in crack cocaine receive the same sentences as those who are convicted for trafficking in one hundred times as much powder cocaine. Thus far, defendants have been largely unsuccessful in their challenges at the federal level. *Minnesota v. Russell,* however, is an example of a successful challenge on the state level.

Some of the concerns that led to the adoption of the 100-to-1 ratio by Congress were based upon opinions that crack cocaine is "intensely addictive", it is "causing crime to go up at a tremendously increased rate", the physiological effects of crack cocaine lead to higher rates of psychosis and death, and (because it is cheap) it is available to a broader and more vulnerable part of the population. The proponents of the current cocaine sentencing policies also argue, among other things, that crack is very destructive in the African-American communities and the current policy will help those communities. In their view, the penalties are not racially biased and the fact that a higher number of African-Americans is prosecuted for crack cocaine rather than powder cocaine simply reflects that more of them commit crack cocaine offenses.

The disparate treatment has been attacked without great success on several judicial fronts. Equal protection and due process arguments have floundered on the finding that the distinction was not motivated by racial animus or discriminatory intent, but rather was related to the legitimate government purpose of protecting the public against the greater dangers of crack cocaine, *United States v. Stevens*, 19 F.3d 93, 97 (2d Cir. 1994). Thus far, defendants have encountered similar difficulties proving the requisite corrupt motivation to establish selective prosecution or sentencing entrapment defenses. Moreover, the federal appellate courts have found that the stiff minimum sentences for offenses involving crack cocaine are rational and not disproportionate to the seriousness of those offenses. Consequently, they do not offend the cruel and unusual punishment clause of the Eighth Amendment. And the

courts have been no more receptive to pleas to mitigate the disparate impact by departing from the severity of the sentencing guidelines.

Appendix

STATE CRACK COCAINE SENTENCING STATUTES

STATE	CODE SECTION	Penalty Ratio of Cocaine to Crack
Alabama	ALA. CODE § 13A-12-231(2) (2001)	1:1
Alaska	ALASKA STAT. §11.71.150 (2001)	1:1
Arizona	ARIZ. REV. STAT. ANN. § 13-3415 (2001)	1:1
Arkansas	ARK. CODE ANN. § 5-64-401 (Supp. 2001)	1:1
California	CAL. HEALTH & SAFETY CODE §§ 113512-11351.5, 11370.1 (Supp. 2002) CAL. PENAL CODE §§ 1170.73–170.74 (Supp. 2002)	2:1
Colorado	COLO. REV. STAT. § 18-18-405(3)(a) (Supp. 2001)	1:1
Connecticut	CONN. GEN. STAT. ANN. § 21a-278(a) (2001)	56:1
Delaware	DEL. CODE ANN. tit.16, § 4753A(a)(2) (2001) (trafficking); 4753(a)(possession)	1:1
District of Columbia	D.C. CODE ANN. § 48-904.01 (2001)	1:1
Florida	FLA. STAT. ANN. § 893.135(1)(b) (2001)	1:1
Georgia	GA. CODE. ANN. § 16-13-31 (2001)	1:1
Hawaii	HAW. REV. STAT. §§ 712-1240 TO 712-1246 (1999)	1:1
Idaho	IDAHO CODE § 37-2732(B)(2) (2001)	1:1
Illinois	ILL. REV. STAT. ch. 720, ¶ 570/401a (Smith-Hurd 2001)(manufacture or delivery); ¶ 570/402(a) (possession)	1:1
Indiana	IND. CODE ANN. § 35-48-1 (2001)	1:1
Iowa	IOWA CODE § 124.401(1)(a)(2),(3) (West Supp. 2001)	100:1
Kansas	KAN. STAT. ANN. § 65-4127e (Supp. 2000)	1:1
Kentucky	KY. REV. STAT. ANN. §§ 218A.1411-218A.1412 (Michie 2001)(Trafficking); §§ 218A.1415- 218A.1416 (possession)	1:1
Louisiana	LA. REV. STAT. ANN. § 40.967(A) (West 2001) (manufacture & distribution); § 40:967(F) (possession)(West 2001)	1:1

STATE	CODE SECTION	Penalty Ratio of Cocaine to Crack
Maine	ME. REV. STAT. ANN. 17-A: § 1103(3)(B) (Supp. 2001) (trafficking); 17-A: § 1105 (furnishing) 17-A: § 1107 (possession)	1:1
Maryland	MD. ANN. CODE art. 27, § 286(f) (2001)	90:1
Massachusetts	MASS. ANN. LAWS ch. 94C, § 32E(b) (2002)	1:1
Michigan	MICH. COMP. LAWS ANN. §§ 333.7401-333.7403 (Supp. 2001)	1:1
Minnesota	MINN. STAT. ANN. §§ 152.021-152.025 (Supp. 2002)	1:1
Mississippi	MISS. CODE. ANN. §§ 41-29-139 (Supp. 1999)	1:1
Missouri	MO. ANN. STAT. § 195.222(2) & (3) (Vernon Supp. 2001) (trafficking; § 195.223(2) & (3) (possession)	1:1
Montana	MONT. CODE. ANN. § 45-9-101 (2001) (sale); § 45-9-101 (possession)	1:1
Nebraska	NEB. REV. STAT. § 28-416(7) & (8) (2001)	1:1
Nevada	NEV. REV. STAT. § 453.322 (2000)	1:1
New Hampshire	N.H. REV. STAT. ANN. §318-B:26 (I)(a)(1) (Supp. 2000)	1:1
New Jersey	N.J. STAT. ANN. §2C:35-10 (Supp. 2001)	1:1
New Mexico	N.M. STAT. ANN. §30-31-20 (Michie 2001); §30-31-22 (distribution); §30-31-23 (possession)	1:1
New York	N.Y. PENAL LAW §220.06(5) (2002) §§220.31-44 (sale)	1:1
North Carolina	N.C. GEN. STAT. §90-95(d)(2) (2000)	1:1
North Dakota	N.D. CENT. CODE §19-03.1-23.1 (c) (Supp. 2001)	1:1
Ohio	OHIO REV. CODE ANN. §3719.01 (2001)	1:1
Oklahoma	OKLA. STAT. ANN. tit.63, §2-415(C)(2), (7) (West Supp. 2002)	6:1
Oregon	OR. REV. STAT. §475.992 (Supp. 2001)	1:1
Pennsylvania	PA. STAT. ANN. tit.35, §780-113(f)(1.1), §§821-825 (Supp. 2001)	1:1
Rhode Island	R.I. GEN. LAWS §§21-28-4.01 TO 21-28-4.01.2 (Supp. 2001)	1:1

STATE	CODE SECTION	Penalty Ratio of Cocaine to Crack
South Carolina	S.C. CODE ANN. §44.53-370(d)(e)(2)(Law. Co-op. Supp. 2001) (trafficking in cocaine); §4.53-375 (possession, distribution, and manufacture of crack)	1:1
South Dakota	S.D. CODIFIED LAWS ANN. §22-42-2 (Supp. 2001)	1:1
Tennessee	TENN. CODE ANN. §39-17-417 (2001)	1:1
Texas	TEX. HEALTH 7 SAFETY CODE ANN §481.102 (Supp. 2002)	1:1
Utah	UTAH CODE ANN. § 58-37-8(Supp 2001)	1:1
Vermont	VT. STAT. ANN. tit. 18, §4231 (2001)	1:1
Virginia	VA. CODE ANN. §18.2-248 (Supp. 2001)	1:1
Washington	WASH. REV. CODE ANN. §69.50.401 (Supp. 2002)	1:1
West Virginia	W.VA. CODE §60A-4-401 (2000)	1:1
Wisconsin	WIS. STAT. ANN. §961.41 (West Supp. 2001)	1:1
Wyoming	WYO. STAT. §35-7-1031 (2001)	1:1

The appendix reflects the penalty ratio of cocaine to crack for each state and is included for comparison with the federal penalty ratio which is 100-to-1.

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