



Crack Cocaine Sentencing Policy: Unjustified and Unreasonable

Overview Crack cocaine became prevalent in the mid-1980s and received massive media attention due in part to the death of college basketball star Len Bias (subsequently found to have used powder cocaine on the night of his death and not crack). Crack was portrayed as a violence inducing, highly addictive plague of inner cities, and this media spotlight led to the quick passage of two federal sentencing laws concerning crack cocaine in 1986 and 1988. The laws created a 100:1 quantity ratio between the amount of crack and powder cocaine needed to trigger certain mandatory minimum sentences for trafficking, as well as creating a mandatory minimum penalty for simple possession of crack cocaine. The result of these laws is that crack users and dealers receive much harsher penalties than users and dealers of powder cocaine.

The Difference between Crack and Cocaine Powder Cocaine powder is derived from coca paste, which is in turn derived from the leaves of the coca plant. Crack cocaine is made by taking cocaine powder and cooking it with baking soda and water until it forms a hard substance. These “rocks” can then be broken into pieces and sold in small quantities. Each gram of powder produces approximately .89 grams of crack.

The psychotropic and physiological effects of all types of cocaine are the same, but the intensity and duration of the high differ according to the route of administration. Crack is always smoked and gives a fast, intense high. Powder cocaine is usually snorted, which gives a slower and less intense high. Supporters of the 100:1 quantity ratio say that the intensity of the high created by crack makes crack more addictive than powder and makes its users more violence prone. Experts believe that crack is more likely to be abused because the high is short, which causes users to desire more of the drug, and because it is cheap and widely available. But when powder cocaine is injected it produces a fast, intense high similar to crack.

The United States Sentencing Commission (USSC) was created by Congress in 1984 to develop federal sentencing guidelines that would, among other goals, reduce unwarranted sentencing disparity. In 1995 the Commission concluded that the violence associated with crack is primarily related to the drug trade and not to the effects of the drug itself.¹ Crack is inexpensive and usually sold in small quantities, so it is often sold in open-air markets which are especially prone to violence. Powder is also distributed in this manner, but it is usually sold in larger wholesale quantities behind closed doors—in locations which are inherently more secure. Both powder and crack cocaine cause distribution-related violence, but crack is more often sold in volatile settings.

¹ United States Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policy* (Washington, D.C.: GPO, February 1995), 184-187.

Sentencing Policy Although the two types of cocaine cause similar physical reactions, the sentences that users and sellers of the drugs face are vastly different. For powder cocaine, a conviction of possession with intent to distribute carries a five year sentence for quantities of 500 grams or more. But for crack, a conviction of possession with intent to distribute carries a five year sentence for only 5 grams. This is a 100:1 quantity ratio. Under this format, a dealer charged with trafficking 400 grams of powder, worth approximately \$40,000, could receive a shorter sentence than a user he supplied with crack valued at \$500. Crack is also the only drug that carries a mandatory prison sentence for first offense possession. A person convicted in federal court of possession of 5 grams of crack automatically receives a 5 year prison term. A person convicted of possessing 5 grams of powder cocaine will probably receive a probation sentence. The *maximum* sentence for simple possession of any other drug, including powder cocaine, is 1 year in jail.

In addition to the federal mandatory minimum sentences, 14 states differentiate between crack and powder cocaine. However, none have a quantity ratio as large as the 100:1 disparity in federal law.

Racial Disparity Approximately 2/3 of crack users are white or Hispanic, yet the vast majority of persons convicted of possession in federal courts in 1994 were African American, according to the USSC. Defendants convicted of crack possession in 1994 were 84.5% black, 10.3% white, and 5.2% Hispanic. Trafficking offenders were 4.1% white, 88.3% black, and 7.1% Hispanic. Powder cocaine offenders were more racially mixed. Defendants convicted of simple possession of cocaine powder were 58% white, 26.7% black, and 15% Hispanic. The powder trafficking offenders were 32% white, 27.4% black, and 39.3% Hispanic. The result of the combined difference in sentencing laws and racial disparity is that black men and women are serving longer prison sentences than white men and women.

Legislative History In 1986 and 1988 Congress adopted mandatory sentencing laws on crack in the wake of widespread media attention. These laws were based on the idea that crack is “50 times more addictive” than powder cocaine. Congress doubled that number and came up with the 100:1 quantity ratio currently in effect.² As part of the 1994 Omnibus Violent Crime Control and Law Enforcement Act, the U.S. Sentencing Commission was directed to study the differing penalties for powder and crack cocaine. In 1995, the commission recommended equalizing the quantity ratio that would trigger the mandatory sentences. They also pointed out that the Federal Sentencing Guidelines provide criteria other than drug type to determine sentence lengths, so that violent, dangerous dealers receive longer sentences. Congress rejected the recommendation, which marked the first time it had done so since the establishment of the Sentencing Commission. The President then followed Congress and signed the rejection into law.

² Gary Webb, “Flawed Sentencing the main reason for race disparity,” *Mercury News*, 20 Aug 1996.

Litigation The 100:1 quantity ratio in the federal system has been legally challenged as unconstitutional on the grounds that it denies equal protection or due process, because the penalties constitute cruel and unusual punishment, and because the statutes are unconstitutionally vague. All of these challenges have failed in the federal appellate courts. However, in a state case regarding a statute that enhanced crack cocaine penalties at a 10:3 ratio, the Minnesota Supreme Court struck down the enhancement based on the more expansive equal protection guarantees of its state constitution.³

In the case United States v. Armstrong, four defendants in Los Angeles charged with trafficking crack cocaine filed a motion for discovery or dismissal, alleging that they were victims of “selective prosecution” by race. This motion was made after the federal public defender’s office found that all 24 crack cocaine cases closed in Los Angeles in 1991 involved blacks. The district court and the circuit court upheld the motion, but the federal prosecutor refused to comply. The government then appealed to the Supreme Court, which decided in favor of the government on the grounds that the defendant did not meet the required threshold showing that similarly situated suspects of other races were not prosecuted.

In 1997, the Supreme Court rejected an appeal of a Washington, D.C. case in which an African American man who received a 10 year prison term for distribution of crack contended that the laws were racially biased in their impact. The U.S. Court of Appeals had previously rejected the challenge, stating that Congress has “not acted with a discriminatory purpose in setting greater penalties for cocaine base crimes than for powder cocaine offenses.”

Conclusion The 100:1 quantity ratio in cocaine sentencing causes low-level crack offenders to receive arbitrarily severe sentences compared to high level powder cocaine offenders. The quantity distinction has also resulted in a massive sentencing disparity by race, with African Americans receiving longer sentences than the mostly white and Hispanic powder cocaine offenders. The United States Sentencing Commission recommended revision of the 100:1 quantity ratio in 1995, finding the ratio to be unjustified by the small differences in the two forms of cocaine. Congress ignored the recommendation of the Sentencing Commission though, and refused to change the law. The President went along with the Congressional “tough on crime” stance. In April 1997, the USSC again recommended that the disparity between crack and powder cocaine be reduced, to a ratio of 5:1 by weight. It remains to be seen whether Congress or the Administration will accept this more modest recommendation. Since that time, the Supreme Court has declined to find this law unconstitutional. Ultimately, public opinion will be critical to influencing public policy in this often emotional issue.

³ *State v. Russell*, 477 N.W. 2d 886 (Minn. 1991).

Bibliography

Edwards v. United States, No. 95-3165 (D.C. Cir. 1996).

State v. Russell. 477 N.W. 2d886 (Minn. 1991).

United States Sentencing Commission. *Special Report to Congress: Cocaine and Federal Sentencing Policy*. Washington, D.C.: GPO, February 1995.

For legal positions endorsed by The Sentencing Project, see:

Brief Amici Curiae in Support of the Petitioners, Sloan v. United States, No. 96-8145 (U.S. 1997), Amici Curiae National Legal Aid and Defender Association, National Black Police Association, et al. (11 April 1997).

Brief Amici Curiae in Support of the Petitioners, Sloan v. United States, No. 96-8145 (U.S. 1997), Amici Curiae National Association of Criminal Defense Lawyers, The Sentencing Project, et al. (April 1997).