

EXECUTIVE SUMMARY

INTRODUCTION

This is the first of a series of reports the United States Sentencing Commission will be issuing as we approach the 15th anniversary of the effective date of the federal sentencing guidelines. The purpose of this report is to contribute to the ongoing assessment of federal cocaine sentencing policy by Congress and others in the federal criminal justice system. This report updates and supplements much of the research and data presented in the United States Sentencing Commission's *1995 Special Report to Congress: Cocaine and Federal Sentencing Policy* [hereinafter the 1995 Commission Report] and referred to in the Commission's *1997 Special Report to Congress: Cocaine and Federal Sentencing Policy* [hereinafter the 1997 Commission Report]. The Commission submits this report pursuant to both its general and statutory authority under 28 U.S.C. §§ 994-995 and its specific responsibility to advise Congress on sentencing policy under 28 U.S.C. § 995(a)(20).

At the time that the Commission was developing the initial sentencing guidelines, Congress responded to a national sense of urgency surrounding drugs generally and crack cocaine specifically by enacting the Anti-Drug Abuse Act of 1986 [hereinafter the 1986 Act]. The 1986 Act created the basic framework of statutory mandatory minimum penalties currently applicable to federal drug trafficking offenses generally. (*See* Chapter 1.)

In considering the mandatory minimum penalties for cocaine offenses, Congress differentiated between powder cocaine and crack cocaine and, concluding that crack cocaine was more dangerous, established significantly higher penalties for crack cocaine offenses. The 1986 Act implemented this differential by requiring 100 times less crack cocaine than powder cocaine to trigger five and ten-year mandatory minimum penalties. As a result of the 1986 Act, 21 U.S.C. § 841 (b)(1) provides the following penalties for a first-time cocaine trafficking offense:

<u>5 grams</u> or more of crack cocaine	= five-year mandatory minimum penalty
or	
<u>500 grams</u> or more of powder cocaine	
<u>50 grams</u> or more of crack cocaine	= ten-year mandatory minimum penalty
or	
<u>5,000 grams</u> or more of powder cocaine	

The Commission responded to the 1986 Act by incorporating the statutory 100-to-1 drug quantity ratio into the sentencing guidelines and extrapolating upward and downward to effectively set sentencing guideline penalty ranges for all drug quantities. Because of the statutory and guideline differentiation between crack cocaine and powder cocaine, the sentencing guideline range based solely on drug quantity is three to over six times longer for crack cocaine offenders than powder cocaine offenders with equivalent drug quantities, depending on the exact quantity of drug involved. In great part because of the difference in quantity-based penalties, in

2000 the average sentence for a crack cocaine offense was 44 months longer than the average sentence for a powder cocaine offense, 118 months compared to 74 months.

On May 1, 1995, by a four-to-three vote, the Commission submitted to Congress an amendment to the sentencing guidelines that, among other things, would have equalized the guideline penalties for powder cocaine and crack cocaine offenses based solely on drug quantity. Pursuant to 28 U.S.C. § 994(p), however, Congress passed and the President signed legislation disapproving the guideline amendment. The legislation further directed the Commission to submit to Congress new recommendations regarding changes to federal cocaine sentencing policy and set forth several specific factors for consideration. The Commission issued the 1997 Commission Report setting forth for congressional consideration a range of alternatives for revisions to the federal statutory penalty scheme for cocaine offenses. Congress has not acted on those recommendations.

FINDINGS

In completing this updated report, the Commission (i) reviewed findings from recent research literature (*see* Chapters 2 and 3), (ii) conducted an extensive empirical study of federal cocaine offenders sentenced in fiscal year 2000 and compared those results with the findings in the 1995 Commission Report (*see* Chapters 4 and 5), (iii) surveyed state cocaine sentencing policies (*see* Chapter 7), (iv) solicited public comment on the appropriateness of current federal cocaine sentencing policy (*see* Appendix D for a summary of written public comment), and (v) held three public hearings at which it received testimony from the medical and scientific communities, federal and local law enforcement officials, criminal justice practitioners, academics, and civil rights organizations (*see* Appendix E for a summary of public hearing written statements).

Using this information and data, the Commission (1) considered the general purposes of sentencing that Congress referred to in the Sentencing Reform Act (*see* 18 U.S.C. § 3553(a)(2)); (2) identified specific congressional concerns regarding cocaine use and distribution, particularly those set forth in the legislation disapproving the Commission's 1995 amendment and in the legislative history of the relevant penalty provisions, particularly of the 1986 Act; and (3) evaluated the current federal cocaine penalty structure in light of those general and specific objectives. The Commission makes the following findings (*see* Chapter 8):

1. The Current Penalties Exaggerate the Relative Harmfulness of Crack Cocaine

- Cocaine in any form produces the same physiological and psychotropic effects (*see* Chapters 2 and 8), but powder cocaine, because it usually is snorted, poses a lesser risk of addiction to the typical user than crack cocaine. Precisely quantifying this difference in addictiveness is impossible, but this difference independently does not appear to warrant the 100-to-1 drug quantity ratio.
- The negative effects of prenatal crack cocaine exposure are identical to the negative effects of prenatal powder cocaine exposure and are significantly less

severe than previously believed. (*See* Chapters 3 and 8.) In fact, the negative effects from prenatal cocaine exposure are similar to those associated with prenatal tobacco exposure and less severe than the negative effects of prenatal alcohol exposure. Accounting for prenatal cocaine exposure in quantity-based penalties is further complicated by other factors such as prenatal care, socioeconomic status, nutrition, and other health problems that may negatively affect child development. Sentencing proportionality would be better achieved by imposing enhanced sentences directly on the small minority of offenders who distribute any type of controlled substance knowingly to pregnant women.

- Recent data indicate that the epidemic of crack use by youth never materialized to the extent feared. (*See* Chapters 4, 6, and 8). Crack cocaine use among students and young adults historically has been low, particularly in relation to powder cocaine use. In addition, Commission sentencing data indicate that youth do not play a major role in crack cocaine trafficking at the federal level. Sentencing proportionality would be better achieved by imposing enhanced sentences on the small minority of offenders who sell controlled substances of any type to juveniles, conduct drug distribution in areas likely to be frequented by juveniles (*e.g.*, near schools and playgrounds), or use juveniles in drug distribution activities.

2. Current Penalties Sweep Too Broadly and Apply Most Often to Lower Level Offenders

- Commission data indicate that, in part motivated by the small drug quantities required to trigger the statutory minimum penalties, a significant proportion – over one-quarter – of federal crack cocaine offenses involved relatively small drug quantities (less than 25 grams) (*see* Chapters 4, 7, and 8). In contrast, only 2.7 percent of federal powder cocaine offenses involved less than 25 grams of the drug, perhaps because the statutory minimum penalties would not apply to such a small quantity of powder cocaine.
- The fact that a significant proportion of federal crack cocaine offenders are responsible for relatively small drug quantities is problematic because they receive especially disparate penalties. (*See* Chapter 8.) According to the Department of Justice, defendants convicted of trafficking less than 25 grams of powder cocaine received an average sentence of 13.6 months, just over one year. In contrast, defendants convicted of trafficking an equivalent amount of crack cocaine received an average sentence of 64.8 months, over five years. The “penalty gap” widens even further for offenders with the lowest drug quantities *and* the least criminal history. The Commission believes that sentencing differentials of this magnitude are inappropriate particularly for this category of least culpable offenders.

- Contrary to the general objective of the 1986 Act to target federal law enforcement and prosecutorial resources on “serious” and “major” traffickers, two-thirds of federal crack cocaine offenders were street-level dealers. (*See* Chapters 4 and 8.) Only 5.9 percent of federal crack cocaine offenders performed trafficking functions (*e.g.*, manager, supervisor) most consistent with the functions described in the legislative history of the 1986 Act as warranting a five-year penalty, and 15.2 percent performed trafficking functions (importer, high-level supplier, organizer, leader, wholesaler) most consistent with the functions described as warranting a ten-year penalty. Not only may these figures indicate a failure to focus scarce federal law enforcement resources on serious and major traffickers, but they also indicate that the current penalties exaggerate the culpability of most crack cocaine offenders, based solely on trafficking function.

3. Current Quantity-Based Penalties Overstate the Seriousness of Most Crack Cocaine Offenses and Fail to Provide Adequate Proportionality

- The current penalty structure was based on many beliefs about the association of crack cocaine offenses with certain harmful conduct – particularly violence – that are no longer accurate. (*See* Chapters 4 and 8.) In 2000, for example, three-quarters of federal crack cocaine offenders had no personal weapon involvement, and only 2.3 percent discharged a weapon. Therefore, to the extent that the 100-to-1 drug quantity ratio was designed in part to account for this harmful conduct, it sweeps too broadly by treating *all* crack cocaine offenders *as if* they committed those more harmful acts, even though most crack cocaine offenders in fact had not.
- Because the current penalty structure accounts for certain assumed harmful acts in the quantity-based penalties, there are no specific sentencing enhancements in the primary drug trafficking guideline targeting offenders who actually commit those acts (with the exception of a 2-level enhancement for possession of a dangerous weapon) (*see* Chapter 8). As a result, the current penalty structure fails to provide adequate sentencing proportionality, because there is no sentencing differential between crack cocaine offenders who actually commit those harmful acts and those who do not. In other words, the current penalty structure results in inappropriate sentencing uniformity for the most serious offenders.

4. Current Penalties' Severity Mostly Impacts Minorities

- The overwhelming majority of offenders subject to the heightened crack cocaine penalties are black, about 85 percent in 2000 (*see* Chapters 5 and 8). This has contributed to a widely held perception that the current penalty structure promotes unwarranted disparity based on race. Although this assertion cannot be scientifically evaluated, the Commission finds even the perception of racial disparity problematic because it fosters disrespect for and lack of confidence in the criminal justice system. Moreover, to the extent that the 100-to-1 drug quantity ratio is shown to result in unduly severe penalties for most crack cocaine offenders, the impact of that severity falls primarily upon black offenders.

RECOMMENDATIONS

Based on these findings, the Commission again unanimously and firmly concludes that the various congressional objectives can be achieved more effectively by decreasing substantially the 100-to-1 drug quantity ratio (*see* Chapter 8). The Commission recommends that Congress generally adopt a three-pronged approach for revising federal cocaine sentencing policy as follows:

- (1) increase the five-year mandatory minimum threshold quantity for crack cocaine offenses to at least 25 grams and the ten-year threshold quantity to at least 250 grams (and repeal the mandatory minimum for simple possession of crack cocaine).
- (2) direct the Commission generally to provide appropriate sentencing enhancements in the primary drug trafficking guideline to account specifically for (a) involvement of a dangerous weapon (including a firearm); (b) bodily injury resulting from violence; (c) an offense under 21 U.S.C. §§ 849 (Transportation Safety Offenses), 859 (Distribution to Persons Under Age Twenty-One), 860 (Distribution or Manufacturing in or Near Schools and Colleges), or 861 (Employment or Use of Persons Under 18 Years of Age); (d) repeat felony drug trafficking offenders; and (e) importation of drugs by offenders who do not perform a mitigating role in the offense.
- (3) maintain the current statutory minimum threshold quantities for powder cocaine offenses (understanding that the contemplated specific guideline sentencing enhancements would effectively increase penalties for the more dangerous and more culpable powder cocaine offenders).

If, for example, Congress increased the five-year mandatory minimum threshold quantity for crack cocaine offenses to 25 grams, the sentencing guidelines would incorporate such a change by assigning offenses involving 25 to 100 grams of crack cocaine a base offense level 26. Offense level 26 provides a sentencing guideline range that corresponds to a five-year mandatory

minimum penalty (63 to 78 months for defendants with minimal or no criminal history). Based on information received from federal law enforcement representatives, the Commission believes that this base offense level range of 25 to 100 grams more closely reflects serious traffickers as described in the legislative history of the 1986 Act and would result in a penalty structure significantly more consistent with the penalty structure of other major drugs of abuse.

Congress may well use approaches other than the historic quantity-based method of calculating federal sentencing penalties to determine the appropriate sanction for crack cocaine offenses. An alternative approach would delineate the societal harms associated with crack cocaine and compare them to the harms and effects associated with the use of other prohibited substances, such as methamphetamine and heroin.

Appendix A shows how the guidelines' Drug Quantity Table would incorporate an increase in the five-year mandatory minimum threshold quantity for crack cocaine offenses to 25 grams. Appendix A also shows how the sentencing enhancements accounting for the various aggravating factors listed above might be incorporated into the primary drug trafficking guideline. Particularly important to the consideration of powder cocaine penalties, the Commission recommends that the proposed enhancements apply across all drug types, including powder cocaine.

The recommendations, if adopted, would narrow the difference between average sentences for crack cocaine and powder cocaine offenses from 44 months to approximately one year. (*See* Appendix B.) Specifically, the Commission estimates that the average sentence for crack cocaine offenses would decrease from 118 months to 95 months, and the average sentence for powder cocaine offenses would increase from 74 months to 83 months. Importantly, the guideline sentencing range based solely on drug quantity for crack cocaine offenses still would be significantly longer (approximately two-to-four times longer) than powder cocaine offenses involving equivalent drug quantities, depending on the precise quantity involved.