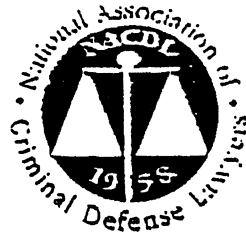


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**WRITTEN, PUBLIC COMMENTS FOR THE RECORD
 REGARDING THE UNITED STATES SENTENCING COMMISSION'S
 FEBRUARY 1995 REPORT TO CONGRESS,
 AND FUTURE CONGRESSIONAL RECOMMENDATIONS,
 ON THE CURRENT 100-1 FEDERAL SENTENCING DISPARITY
 BETWEEN "CRACK" AND POWDER COCAINE OFFENSES**

By Gerald E. Goldstein, for
 the National Association of Criminal Defense Lawyers

APRIL 10, 1995

EXECUTIVE DIRECTOR

On behalf of the National Association of Criminal Defense Lawyers (NACDL), I want to thank the Commission for the opportunity to submit for the record the following public comment on the Commission's February 1995 special report to Congress regarding the current 100-1 "crack" versus powder cocaine sentencing disparity, and the Commission's intention to submit to Congress recommendations on May 1, 1995 -- for case-specific, guidelines adjustment-oriented models for modification of the federal sentencing policy as it relates to cocaine offenses.

I.

NACDL Applauds the Commission's Work and Urges Commission Action in Full Accordance With the Report's Comprehensive Research

The members of NACDL, front-line defenders of the People's rights and liberties, have long recognized and pushed for reform of the irrational and unfair federal requirements that impose a mandatory minimum sentence of at least five years for the first-time possession of more than five grams of cocaine "base" ("crack"), while imposing a minimum sentence of probation for the possession of the same quantity of cocaine hydrochloride (powder cocaine). The mandatory sentence for possession of 50 grams of crack is ten years. While for this same penalty, a defendant would need to be convicted of possessing 100 times as much powder cocaine. A defendant with no prior convictions who is found guilty in federal court of possessing 70 grams of powder cocaine with the intent to sell it faces between 21 and 27 months in prison. Meanwhile, a like conviction involving the same amount of crack cocaine would qualify for a sentence more than five times as long -- between 10 and 12 1/2 years. From both the market-value and the potential punishment perspectives, powder cocaine, and not crack, is in fact the more profitable drug.¹

As the report states: the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986), created the basic framework of mandatory minimum penalties that currently apply to federal drug offenses. This Act establishes two tiers of mandatory prison terms for those convicted as first-time drug distributors -- a five year and a ten-year minimum sentence. Under the terms of the statute, the different minimums are triggered depending on the quantity and

¹ See, e.g., Table 19 in *Special Report to Congress: Cocaine and Federal Sentencing Policy*, United States Sentencing Commission 173 [herein the February 1995 report or the report] ("Street-Level Value of Drug Quantity By Drug Type and Base Offense Level") (reflecting, for example, that in order for one to reach a quantity-oriented, "base offense level" for sentencing purposes of "20," one must either have been convicted of \$21,400 worth of powder cocaine, or else, \$230 worth of crack; likewise, to reach the highest base offense level, "38," one must be convicted of either \$16,050,000 worth of powder cocaine, or else \$172,500 worth of crack).

the type of drug involved. This 1986 Act gave birth to the federal criminal law sentencing distinction between cocaine "base" and other forms of the same drug. The quantity thresholds triggering the penalties create the 100-1, crack versus powder cocaine sentencing ratio.

As the report also well notes: the 1986 Act "was expedited through Congress. As a result, its passage left behind a limited legislative record."² While many individual members delivered floor statements about the Act, Congress dispensed with most of the typical legislative process, including committee hearings. And no committee produced the standard committee report on the legislation reflecting actual analysis of the Act's provisions.³ The legislative history thus does not include any discussion of the Act's 100-1 crack versus powder cocaine quantity-based sentencing disparity.⁴

But we do know this:

The sentencing provisions of the Act were initiated in August 1986, following the July 4th congressional recess during which public concern and media coverage of cocaine peaked as a result of the June 1986 death of NCAA basketball star Len Bias.⁵

A few weeks after Bias's death, on July 15, 1986, the United States Senate's Permanent Subcommittee on Investigations held a hearing on crack cocaine. During the debate, Len Bias's case was cited 11 times[] in connection with crack.⁶

Eric Sterling, who for eight years served as counsel to the House Judiciary Committee and played a significant staff role in the development of many provisions of the Drug Abuse Act of 1986, testified before the United States Sentencing Commission in 1993 that the "crack

² *Id.* at 116.

³ See *id.* at 116-117. See also, e.g., 132 Cong. Rec. 26,462 (Sept. 26, 1986) (statement of Sen Mathias) ("Very candidly, none of us has had an adequate opportunity to study this enormous package. It did not emerge from the crucible of the committee process.").

⁴ February 1995 report, *supra* note 1, at 117.

⁵ *Id.*

⁶ *Id.* at 123 (citing transcript of the "Crack Cocaine" hearing before the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, United States Senate, 99th Congress).

cocaine overdose death of NCAA basketball star Len Bias" [] was instrumental in the development of the federal crack cocaine laws. During 1986 alone, there were 74 evening news segments about crack cocaine, many fueled by the belief that Bias died of a crack overdose.⁷

Not until a year later, during the trial of Brian Tribble who was accused of supplying Bias with the cocaine, did Terry Long, a University of Maryland basketball player who participated in the cocaine party that led to Bias's death, testify that he, Bias, Tribble, and another player snorted powder cocaine over a four-hour period. Tribble's testimony received limited coverage.⁸

And still, for almost a decade now, this irrational and unfair system of cocaine sentencing disparity -- child of hysteria and haste -- has existed without comprehensive examination. There have been many victims of this system over the years. And they have been among the most vulnerable, at-risk members of our society: the poor, the young and the minority.

NACDL accordingly applauds the Commission for its February 1995 report's comprehensive research, and for the report's unequivocal conclusion that the current 100-1 sentencing ratio between crack and powder cocaine offenses is too high, irrational and unfair. Further, though, NACDL respectfully urges the Commission to act in accordance with the facts canvassed in the report. While NACDL commends the Commission for the studied research reflected in the February 1995 report, NACDL submits that the Commission should immediately follow the data referenced in the February 1995 report to the data's full, logical conclusion: there is no rational justification for any sentencing disparity between powder and crack cocaine; racism and unfounded suspicion should be removed from the federal sentencing law; the sentencing guidelines' (and statutory) ratio between powder and crack cocaine should be 1-1, with *all* cocaine offenses being subject to the same penalties as those now in effect for powder cocaine.

⁷ *Id.* (citing testimony of Eric Sterling before the United States Sentencing Commission on proposed guideline amendments, public comment, March 22, 1993).

⁸ *Id.*

II.

There Is No Rational Basis for Any Disparity Between Crack and Powder Cocaine

Although several courts have generously deferred to the congressional cocaine sentencing conclusion -- i.e., assuming that Congress *must* have had some reason for its creation of the crack versus powder cocaine sentencing disparity -- the research and analysis of the Commission's report shows that any assumed congressional "rationale" must be regarded as simply unfounded, and erroneous. The abbreviated, murky legislative history does not provide a consistently cited "rationale" for the crack versus powder cocaine penalty structure.⁹ But, as the Commission's report rightly points out, to the extent Congress can be viewed as having perhaps thought about support for its statutory conclusion to create a 100-1 crack versus powder cocaine sentencing disparity, it's conclusion rests upon mere "assumptions": assumed qualities of addictiveness; speculative correlations to other, serious crimes; conjured special psychological effects of this newly discovered bogey-man called crack; fears of heightened risks to youths; and the supposedly peculiar "purity and potency," market incentives, and ease of movement qualities of crack.¹⁰

A.

Regarding "Pure and Potent," and Ease of Movement and Administration Assumptions

Yet, as the Commission's report clarifies: the mood altering ingredient in both powder and crack is the same -- cocaine. "Pure and potent" cocaine powder can be *easily* moved and administered, and it can be easily transformed into crack by combining the powder with baking soda and heat.

The difference in effect between the two varieties of cocaine lies in the way the drug is *ingested*. Cocaine powder is generally sniffed or snorted through the nostrils or dissolved in water and administered intravenously, whereas crack is usually smoked in a pipe. The onset of drug effects is slowest for swallowing and sniffing, and fastest for smoking and injection. Intravenous injection deposits drugs directly into the user's bloodstream, for fast transmission to the user's brain.

⁹ See *id.* at. 121.

¹⁰ See generally *id.* at 118.

B.

Regarding Medical and Addiction Assumptions

Of course, the use of drugs, including all forms of cocaine, impacts upon the public health of the United States.¹¹ But speculation and Congress-inspiring sports celebrity deaths aside,¹² according to *emergency medical experts*: there is no objective scientific data to support the oft-cited assumption that crack is more addictive or dangerous than the powder cocaine from which it is derived. In fact, studies disclose that the most frequent route of administration for cocaine-related deaths is through *injected*, water-dissolved, powder cocaine -- not by the smoking of crack.¹³ Crack cannot be injected.

Likewise, the injection of cocaine powder -- and not the smoking of its derivative, crack -- increases the social threat of infections (including HIV and hepatitis).

And as the Commission report also notes, although the national estimate of (crack and powder) cocaine-exposed infants according to some studies is notable at between two to three percent, cocaine is actually used less frequently during pregnancy than are all sorts of other drugs, both "licit" and "illicit."¹⁴

¹¹ Still, as the report points out, studies by organizations including the Drug Abuse Warning Network (DAWN) and the Rand Foundation reflect that the casual use of cocaine has *decreased* since 1988; and that fewer Americans are now using cocaine than in the 1980's. *Id.* at 46-47. In fact, in terms of drug-based causes of hospital emergency room visits, cocaine ranks behind *alcohol*. *Id.* at 41.

¹² In addition to the assumed crack-related death of the Boston Celtics's first-round basketball draft pick, Len Bias, Congress was moved by the drug-related death of Cleveland Browns football player Don Rogers. "Recalling [these deaths], members of Congress [supporting the proposed 1986 Act] repeatedly described the dimensions of the drug problem in such dramatic terms as 'epidemic.'" *Id.* at 121.

¹³ See, e.g., *id.* at 44-45. But it is also important to recognize, as the Commission has in its report, that "[a]mong cocaine-related deaths, concurrent use with *alcohol* was the most deadly combination." *Id.* at 45 (emphasis added).

¹⁴ See, e.g., *id.* at 52 (citing *inter alia* D. Gomby & P. Shiono, *Estimating the Number of Substance-Exposed Infants, The Future of Children* 22 (Spring 1991)). As the report has well-recognized: fetal *alcohol* syndrome, a known cause of central nervous system abnormalities, is a more serious drug-related problem among newborns in the United States than fetal cocaine syndrome (whether caused by crack or powder -- there is no way to

C.

Regarding Assumptions About "Special Psychological Effects"

Certainly, when cocaine use becomes uncontrolled, an individual's links to the social and economic world disintegrate. As the report reflects, some studies even find that physical, psychological, and behavioral changes in an individual can begin soon after the person begins to use cocaine. But there is nothing peculiarly pernicious about crack cocaine.

When users of cocaine, powder or crack, become dependent upon the drug, their family and social lives typically disintegrate. And the most "at risk" users -- the unemployed -- frequently are asked, or forced, to leave their family or friendship units. For example, as the report notes: in a study of voluntary inpatients in a hospital unit, 18.7 percent of the 245 study participants disclosed that they had been asked or forced to leave their social units; and of these individuals, more than half (51.1%) became homeless.¹⁵ Research shows that those who are drug abusers and become homeless will likely abuse alcohol and other drugs. And homeless shelters in New York City, for example, have reported that the current most frequently abused drug among the shelter residents is cocaine -- but again, both crack and powder.¹⁶ Yet, as the Commission's report suggests, it seems as likely that cocaine abuse is a reflection of sociological and psychological illness as it is likely that (as some members of Congress might be seen to have assumed in 1986) such use causes such illness.

Further, the report's discussion of psychopharmacological-driven crime data is telling. For example, alcohol-related homicides are considered to be psychopharmacological-driven at a considerably more significant rate than any other drug -- including cocaine (of either the powder or crack variety).¹⁷ And at least one influential study concludes that "to date, there has been no systematic research linking crack cocaine use with increased

distinguish the particular variety of the drug used by the effects on the infant); and a much more significant percentage of newborns in this country are reported to suffer from fetal tobacco-exposure or fetal marijuana-exposure, than from fetal cocaine syndrome. *Id.*

¹⁵ *Id.*, at 58 (citing B. Wallace, *Crack Addition: Treatment and Recovery Issues*, Contemporary Drug Problems 74 (Spring 1990)).

¹⁶ *Id.* at 58-59 (citing W. Breakey & P. Fischer, *Homelessness: The Extent of the Problem*, Journal of Social Issues 40 (1990)).

¹⁷ See e.g., *id.* at 98-99 (citing P. Goldstein, *Drugs and Violent Crime, Pathways to Criminal Violence*, table 2, 665 (Neil A. Weiner et al., eds. 1989)).

[psychopharmacological driven] violence."¹⁸

D.

Regarding Market-Value Assumptions

As stated above, the market-value assumption about crack cannot withstand analysis. The report recognizes this:

Individuals at the top of the drug distribution chain make considerably more money than others [lower down] in the organization. [] DEA data for 1992 indicate domestic wholesalers can purchase a kilogram of powder cocaine from Columbian sources for \$950-\$1,235. Powder cocaine from other source countries such as Bolivia and Peru generally is more expensive, typically selling for \$1,200-\$2,500 and \$2,500-\$4,000 a kilogram, respectively. * * * [A] kilogram of powder cocaine can be sold wholesale, after dilution, for \$11,000-\$42,000, and can be marketed, after further dilution, in gram quantities for \$17,000-\$173,000. These figures, not considering distribution expenses, produce profits of \$16,000-\$171,000 per kilogram of powder cocaine.¹⁹

And yet, the 100-1 sentencing disparity between crack and powder cocaine results in market-oriented sentencing irrationality: for example, in order for one to reach the quantity-oriented base offense level of "20," one must either have been convicted of \$21,400 worth of powder cocaine, or else, a mere \$230 worth of crack.²⁰

¹⁸ J. Fagan, *Intoxication and Aggression*, in M. Tonry & J.Q. Wilson *Drugs and Crime* (1990)), quoted in *id.* at 99.

¹⁹ The report, *supra* note 1, at 87 (citing *inter alia*, United States Department of Justice, *Drug Enforcement Administration, Source to the Street: Mid-1993 Prices for: Cannabis, Cocaine, Heroin* 6 (Sept. 1993)).

²⁰ See Table 19, *id.* at 173.

E.

*Regarding Assumptions About Correlations to
Other, Serious Offenses*

The report notes that at least one major study has concluded that it is the frequency with which one sells a cocaine product, and not the selling of cocaine in its *smokeable form*, that seems to best explain any violence associated with cocaine distribution.²¹ Several researchers agree: "[T]he primary association between [crack] cocaine and violence is systemic. It is violence associated with the black market and distribution."²² And as also noted in the February 1995 report, studies reflect that systemic violence of this sort is found in analyses of powder cocaine, and presumably other illicit drug markets as well.²³

F.

Regarding Assumptions About Other Heightened Risks

Already-existing guideline enhancements sufficiently account for any additional harm that may actually be found associated with cocaine offenses. Federal sentencing guidelines account for the involvement of firearms, or other dangerous weapons; serious bodily injury, or death; the use or employment of juveniles; leadership roles played by one in the commission of an offense; prior criminal histories; and other aggravating factors. Additional, sweeping, "built-in" sentencing enhancements reflecting crack cocaine's presumed, peculiar, always-aggravating qualities are unnecessary, unfair, and -- in the creation of irrational, increased incarceration time -- economically inefficient in their undue cost of tax dollars, as well.

For example, with regard to the issue of youth, especially youth gang related activity: as the report reflects, noted researchers have concluded that it is "the underlying culture of the gangs in a particular area that accounts for the violence more than anything else."²⁴ And as the report reflects, other

²¹ See the report, *supra* note 1, at 95 (quoting K. Chin & J. Fagan, *Violence as Regulation and Social Control in the Distribution of Crack*, in M. de la Rosa, B. Gropper, and E. Lambert (eds.), *Drugs and Violence: Causes, Correlates and Consequences* 36 (1990)).

²² United States Sentencing Commission, *Hearing on Crack Cocaine* (Nov. 1993).

²³ See, e.g., February report, *supra* note 1, at 97-98.

²⁴ Testimony of Dr. J.H. Slotnick before the United States Sentencing Commission, *Hearing on Crack Cocaine* (Nov. 1993), at 70, quoted in *id.* at 104. See also E. Walsh, "Chicago Street Gang

researchers have drawn like conclusions about the various, complex, non-crack-oriented social factors underlying gang and inner-city cultural violence -- such as "the increasing social and economic disorganization of the nation's inner cities beginning in the 1980's, and the mounting proliferation of more powerful guns" ²⁵ Indeed, as the Commission's report points out: researchers tend to agree that from a historical perspective, crack cocaine is not unique. For example, as Professor Paul J. Goldstein testified before the Commission, the national homicide rate has "changed very little over the last 25 years." Indeed, in 1992, the homicide rate was lower than in 1980, when systemic violence arising out of the newly developing powder cocaine market was about at its peak, and lower than in 1933 -- at the end of alcohol prohibition. ²⁶

G.

Recap Regarding Assumptions

Although some courts have generously deferred to Congress with regard to the 100-1 sentencing disparity between crack and powder cocaine -- i.e., assuming that Congress must have had some "reasons" for creating this disparity -- the Commission's report shows that any such assumed "rationales" are but flawed, erroneous assumptions. In short, the 100-1 crack versus powder cocaine sentencing disparity is shown by the Commission's report to be irrational, unwarranted, unfair, and economically inefficient -- when assessed under the very terms assumed to have been assumed by Congress.

III.

Race Matters

Certainly given the irrational 100-1 cocaine sentencing policy, the racial ramifications of this sentencing policy invoke strong questions about our Nation's constitutional conceptions of equal protection, fundamental fairness and the People's right to be free from illogical, excessively disproportionate punishment.

Study Shows Fearful Toll of Powerful Weapons, " Wash. Post A 4 (Nov. 29, 1993) (citing study conducted by Carolyn Rebecca Black and Richard Black, which concluded that gang turf battles in many areas were more likely to lead to homicides than were drug trafficking disputes).

²⁵ Statement of Steven Belenko in J. Fagan, *Intoxication and Aggression*, in M. Tonry & J.Q. Wilson, *Drugs and Crime* (1990), at 27, quoted in February 1995 report, *supra* note 1, at 105.

²⁶ February report, *supra* note 1, at 108 (citing J. Inciardi & A. Pottieger, *Crack-Cocaine Use and Street Crime*, *Journal of Drug Issues* (1994), at 65).

The evidence does reflect that crack cocaine is significantly different from powder cocaine in one respect: crack sentences are almost exclusively meted out to African-Americans, while most powder cocaine sentencees are Caucasian-Americans (the latter group being also the predominant group in Congress, in the federal Judiciary, and in the upper economic echelons of the populace generally).

Indeed, as this Commission knows and has recognized in its report, of all the defendants sentenced for crack cocaine offenses in the federal system, approximately 90% are African-American. In 1992, for example, 92.6% were African-American; and *all* of the persons sentenced in the federal system for simple possession of crack cocaine were African-American.

Certainly, in the light of the sentencing policy irrationality reflected in the report and referenced above, such "statistics" raise grave concerns about the grossly negative impact of this 100-1 policy on African-Americans -- given our society's supposedly equal, constitutional democracy. These African-Americans are subject to serving long mandatory minimum sentences for simple possession of small amounts of crack cocaine, while those typically Caucasian first time offenders convicted of possession of a much greater quantity of cocaine powder are subject to minimal sentences (even probation).

IV.

Sentencing Irrationality and Socio-Economic Inefficiency

NACDL points out that the irrational, unfair sentencing disparity between crack and powder cocaine offenses carries serious macro-economic costs in addition to the costs such a policy extracts from individual sentencees and, in turn, from our Nation's fundamental conceptions of justice. Increased mandatory minimums of the irrational sort existing under the current system of cocaine sentencing take substantial amounts of taxpayer dollars to fund; dollars that could be more usefully and rationally applied, e.g., to the *future* of this country -- to education or national debt interest payments.

V.

NACDL Urges the Commission to Recommend Retroactive Application of a 1-1 Crack/Powder Cocaine Sentencing Ratio

The current cocaine sentencing system has been allowed to exist for too long, at great costs to individual lives and great cost to taxpayers. NACDL encourages the Commission to recommend to Congress a 1-1 ratio between crack and powder cocaine sentences. Further, NACDL strongly urges the Commission to recommend that this change be given immediate, retroactive effect.

It is not the fault of the victims of this flawed and racist eight-year old policy -- those sentenced under the crack 100-1 automatic enhancement policy -- that this policy came into existence and was allowed to exist for a significant period of time. They should be peculiarly and irrationally punished under this pernicious regime no longer. They should not be forced to continue the unreasonable forfeiture of their lives to this clearly flawed system of cocaine sentencing. The similarly situated should be similarly situated. This is a priceless fundamental value.

Further, though, the taxpayers deserve retroactive relief. They should be given the monetary relief associated with a retroactively applicable implementation of a more equitable, efficient cocaine sentencing policy. Indeed, any institutional costs associated with such retroactive application of a 1-1 cocaine sentencing ratio are obviously and substantially less than the costs associated with the continued subsidized irrationality of incarcerating those convicted of crack offenses, who should by all rights be serving but the sentence they would have received had they been but convicted of a powder cocaine offense. At the very least, such sanity and fairness would make room for the incarceration for the truly violent offenders among us, and perhaps even save us all the tax costs of a new prison or two.

VI.

Conclusion of NACDL Comments

Again, NACDL applauds the comprehensive research reflected in the Commission's report, and is grateful to the Commission for this opportunity to offer comments about the report and the Commission's forthcoming recommendations to Congress on cocaine sentencing policy. NACDL respectfully encourages the Commission to follow through on the implications of its study -- to recommend to Congress an immediate and retroactively applicable establishment of a fair and rational, 1-1 cocaine sentencing ratio, with all cocaine offenses being subject to the same penalties as those in effect for powder cocaine.

Gerald H. Goldstein

Gerald Harris Goldstein is a native of San Antonio, Texas. He graduated from Tulane University in 1965 then attended the University of Texas School of Law. He graduated in 1968 and has devoted his practice since that time to the representation of those accused of crime. He is admitted to practice before the state courts of Texas and numerous federal district courts, U.S. Courts of Appeals and the United States Supreme Court. He is certified as a criminal law specialist by the State Bar of Texas Board of Legal Specialization. In addition to his practice he serves as an Adjunct Professor of Law at the University of Texas School of Law and lectures frequently on criminal law and procedure at continuing legal education seminars throughout the United States. He has served as appellate counsel in numerous death penalty cases and has been counsel of record for NACDL as *amicus curiae* in several important controversies before the U.S. Supreme Court. His law firm, Goldstein, Goldstein and Willey, devotes approximately fifteen percent of its time to *pro bono* work. He is currently the President of NACDL.

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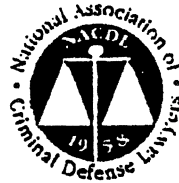
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