

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

UNITED STATES OF AMERICA,

v.

Case No. X:0XcrXXX

FIRST NAME DEFENDANT,

Defendant.

POSITION OF DEFENDANT WITH RESPECT TO SENTENCING

Comes now the defendant, First Name DEFENDANT, by counsel, pursuant to Section 6A1.2 of the United States Sentencing Guidelines as well as this Court’s Sentencing Order, and hereby represents that the defendant has reviewed the Probation Office’s advisory presentence investigation report, as amended, and that he does not dispute any of the facts or factors set out therein. However, Mr. DEFENDANT respectfully asks this Court to impose a sentence that complies with 18 U.S.C. § 3553(a) on the primary basis that the advisory guideline range is not a fair range because of the disparity in sentence between powder and cocaine base.

Determining a Sentence After *Booker*

As a result of the Supreme Court’s decision in *United States v. Booker*, 125 S. Ct. 738 (2005), the sentencing guidelines are now “effectively advisory” in all cases. *Id.* at 757. The result is that a district court must now “consider Guidelines ranges,” but may “tailor the sentencing in light of other statutory concerns as well.” *Id.*

Section 3553(a) has been described in *Booker* and much post-*Booker* case law as containing various “factors” – one of which is the Sentencing Guidelines and the guideline range calculated pursuant to them – that must now be considered in determining a sentence. This is a potentially misleading

oversimplification. Section 3553(a) is actually comprised of two distinct parts: the so-called “sentencing mandate” contained in the prefatory clause of Section 3553(a), and the “factors” to be considered in fulfilling that mandate. The sentencing mandate is an overriding principle that limits the sentence a court may impose.

a. The Section 3553(a) Sentencing Mandate: The “Parsimony Provision”

The basic mandate and overriding principle of Section 3553(a) requires a district court to impose a sentence “*sufficient, but not greater than necessary*,” to comply with the four purposes of sentencing set forth in Section 3553:

- (a) retribution (“to reflect seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense”);
- (b) deterrence (“to afford adequate deterrence to criminal conduct”);
- (c) incapacitation (“to protect the public from further crimes of the defendant”); and
- (d) rehabilitation (“to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner”).

18 U.S.C. § 3553(a)(2).

The sufficient-but-not-greater-than-necessary requirement has been described as the “parsimony provision.” *See, e.g., United States v. Brown*, ___ F. Supp. 2d ___, 2005 WL 318701, at *6 (M.D. Pa. Feb. 10, 2005); *see also Bifulco v. United States*, 447 U.S. 381, 387 (1980) (explaining that statutory construction “rule of lenity” applies to sentencing statutes as well as to substantive criminal offense statutes). Critically, the parsimony provision is not just another “factor” to be considered along with the

others set forth in Section 3553(a). Rather, it sets an independent upper limit on the sentence a court may impose.

b. The Section 3553(a) Factors to Be Considered in Complying With the Sentencing Mandate

In determining what sentence is sufficient but not greater than necessary to comply with the Section 3553(a)(2) purposes of sentencing, the court must consider several factors listed in Section 3553(a). These are (1) “the nature and circumstances of the offense and the history and characteristics of the defendant;” (2) “the kinds of sentences available;” (3) the guidelines and policy statements issued by the Sentencing Commission, including the (now non-mandatory) guideline range; (4) the need to avoid unwarranted sentencing disparity; and (5) the need to provide restitution where applicable. 18 U.S.C. § 3553(a)(1), (a)(3)-(7). Neither the statute itself nor *Booker* suggests that any one of these factors is to be given greater weight than any other factor. However, what is clear is that all of these factors are subservient to Section 3553(a)’s mandate to impose a sentence not greater than necessary to comply with the four purposes of sentencing.

Application of the Section 3553(a) Principles and Factors to This Case

Mr. DEFENDANT pled guilty to two counts of distribution of cocaine base, involving a total weight of approximately 55 grams. The probation office prepared an amended presentence report (“PSR”). The officer first set the base offense level at 32, for 50-150 grams of crack cocaine. *See* U.S.S.G. § 2D1.1(c)(4). After reductions based on eligibility for the “safety valve,” U.S.S.G. § 2D1.1(b)(7) (2 levels); *see* U.S.S.G. § 5C1.2, and for accepting responsibility for the offense, U.S.S.G.

§ 3E1.1 (3 levels), the final offense level is 27. That offense level, when coupled with Mr. DEFENDANT's criminal history category of I, results in an advisory guideline imprisonment range of 70-87 months.¹

As the Court well knows, the sentence called for by the Guidelines is driven largely by the weight of and type of drug. The Guidelines treat the possession of 50 grams of "crack" cocaine the same as they treat possession of 5,000 grams (5 kilograms) of powder cocaine, placing them at a base offense level of 32. *See* U.S.S.G. § 2D1.1(c)(4). That is, an offense involving crack is sentenced 100 times more harshly than an offense involving the same amount of powder (100-to-1 ratio). Had Mr. DEFENDANT's offense involved the same amount of powder at a 1-to-1 ratio, the base offense level would be level 16, *see* U.S.S.G. § 2D1.1(c)(12), and after acceptance of responsibility, the advisory guideline range would be 12-18 months. If the ratio were 20-to-1, the offense level would be 26, *see* U.S.S.G. § 2D1.1(c)(7), and the advisory guideline range would be 37-46 months after adjustments for safety valve eligibility and acceptance of responsibility.

a. Unwarranted Disparity and Respect for the Law

The Court is required to consider relevant policy statements of the Sentencing Commission. 18 U.S.C. § 3553(a)(5). Although not technically policy statements within the meaning of the Guidelines, the Commission has issued a number of reports in which it had concluded that the 100-to-1 ratio is much too high. *See generally* U.S. Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* (Feb. 1995), available at <http://www.ussc.gov/crack/exec.htm>; U.S. Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy*

¹ The PSR recommended that the statutorily required minimum sentence of 120 months be suspended pursuant to U.S.S.G. § 5C1.2. PSR ¶ 71; *see also* 18 U.S.C. § 3553(f).

(April 1997), available at http://www.ussc.gov/r_congress/NEWCRAK.PDF; U.S. Sentencing Commission, *Report to the Congress: Cocaine and Federal Sentencing Policy* (May 2002) (hereafter “2002 Report”), available at http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm; U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Federal Sentencing Reform* (Nov. 2004) (hereafter “Fifteen Year Report”), available at http://www.ussc.gov/15_year/15year.htm.

More specifically, in its 2002 Report, the Commission reported in part the following findings: (1) the current penalties exaggerate the relative harmfulness of crack cocaine; (2) the current penalties sweep too broadly and apply most often to lower level offenders; (3) the current penalties overstate the seriousness of most crack cocaine offenses and fail to provide adequate proportionality; and (4) the current penalties’ severity mostly impacts minorities. Based upon its findings, the Commission unanimously and firmly concluded “that the various congressional objectives can be achieved more effectively by decreasing substantially the 100-to-1 drug quantity ratio.” 2002 Report at v-viii.

The Commission’s consistent conclusion over the past ten years has been that crack is punished too harshly relative to powder. The Court should give great weight to the Commission’s views on this issue, as have other district courts. *See United States v. Harris*, 2005 U.S. Dist. LEXIS 3958 (D.D.C. Mar. 7, 2005) (Robertson, J.) (finding that Sentencing Commission’s findings “are sound authority for the proposition that the sentencing ranges for [the defendants’] crime by the Guidelines are greater than necessary”); *see also United States v. Smith*, ___ F. Supp. 2d ___, 2005 WL 549057 (E.D. Wis. Mar. 3, 2005) (Adelman, J.); *United States v. Thomas*, ___ F. Supp. 2d ___, 2005 WL 602971 (D. Mass.

Mar. 14, 2005) (Ponsor, J.); *Simon v. United States*, 2005 U.S. Dist. LEXIS 4551 (S.D.N.Y. Mar. 17, 2005) (Sifton, J.).

The Court is required to avoid unwarranted disparities in imposing a sentence. 18 U.S.C. § 3553(a)(6). It is also required to impose a sentence that will promote respect for the law. *Id.* § 3553(a)(2)(A). To apply the 100-to-1 ratio undermines these requirements in several ways. First, it creates racial disparity. Crack sentences are imposed disproportionately on minorities, including African-Americans. *See, e.g.*, U.S. Sentencing Commission, *2002 Sourcebook of Federal Sentencing Statistics*, Table 34, Race of Drug Offenses for Each Drug Type (81.4% of persons sentenced for crack offenses are black, whereas only 30.9% of persons sentenced for powder offenses are black), *available at* <http://www.ussc.gov/ANNRPT/2002/SBTOC02.htm>; *see also* 2002 Report at 102-03. But Congress has instructed “that the guidelines and policy statements are [to be] entirely neutral as to the race . . . of offenders.” 28 U.S.C. § 994(d). Even though the Guidelines are not designed deliberately to sentence minorities more harshly, the fact remains that in practice they do. Further, as the Sentencing Commission has concluded, “even the perception of racial disparity . . . is problematic. Perceived improper racial disparity fosters disrespect for and lack of confidence in the criminal justice system among those very groups that Congress intended would benefit from the heightened penalties for crack cocaine.” 2002 Report at 103; *see also* Fifteen Year Report at 113, 115, 117, 132.

Second, applying the 100-to-1 ratio creates unwarranted jurisdictional disparity. Both powder cocaine and crack cocaine are, as they are in the federal system, Schedule II controlled substances under Virginia law. *See* 21 U.S.C. § 812(c) Schedule II (a)(4); Va. Code § 54.1-3448; Va. Code § 18.2-248(C). Unlike in the federal system, however, Virginia, for sentencing purposes, treats crack and

powder the same as to non-“kingpin” offenses such as those involved in Mr. DEFENDANT’s case. *See* Va. Code § 18.2-248(H); *see also* 2002 Report at 78. This fact creates unwarranted sentencing disparities, as two individuals committing the same offense will receive dissimilar sentences depending upon the fortuity of whether the federal government exercises jurisdiction. *See* 2002 Report at 81 (stating that “[b]ecause the states generally have not adopted the federal structure for cocaine offenses, the decision whether to prosecute a crack cocaine offense at the federal or state level can have an especially significant effect for a crack cocaine offender”).

Third, applying the 100-to-1 ratio will create disparity and disrespect for the law when the bases upon which the ratio is predicated have been disproved. For example, while crack is more addictive than cocaine, it is so because of the way it is consumed. When powder is injected, it “puts the user at a similar risk of addiction as smoking cocaine, but only 2.8 percent of powder cocaine users inject the drug.” 2002 Report at 93-94. Still, the Sentencing Commission has concluded that “[t]he addictive nature of crack cocaine . . . independently does not appear to warrant the 100-to-1 drug quantity ratio.” *Id.* at 94. Another justification for harsher penalties, that a “crack baby” will suffer more harm than a baby whose mother ingests powder, appears now to have no scientific validity. As the Commission observed, “[R]ecent research reports no difference between the negative effects from prenatal crack cocaine and powder cocaine exposure, no differential in the drug quantity ratio based directly on this particular heightened harms appears warranted.” *Id.* at 94. Finally, “[a]n important basis for establishment of the 100-to-1 drug quantity ratio was the belief that crack cocaine trafficking was highly associated with violence generally.” *Id.* at 100. However, “[m]ore recent data indicate that *significantly less* trafficking-related violence or systemic violence, as measured by weapon use . . . is associated with crack cocaine trafficking offenses

than previously assumed.” *Id.* (emphasis added). In fact, in 2000, “*three-quarters* of crack cocaine trafficking offenders (74.5%) had *no personal weapon involvement.*” *Id.* (emphasis in original).

Fourth, applying the 100-to-1 ratio does not promote respect for the law when it does not mesh with public perception of the seriousness of the offense. As the Sentencing Commission found when it commissioned a survey ten years ago, “perhaps the most important finding [in regard to drug offenses] is that the general public does not make important distinctions between trafficking in heroin, powder cocaine and crack cocaine” U.S. Sentencing Commission, *Public Opinion on Sentencing Federal Crimes* at 86 (Oct. 1995), available at http://www.ussc.gov/nss/jp_exsum.htm; see *United States v. Wilson*, 350 F. Supp. 2d 910, 918 (D. Utah 2005) (whereas for the most part public opinion converges with Guidelines sentences, “[i]t is important to note a few areas of disagreement between the public’s views and Guidelines sentences[;]” and in particular, “[t]he public failed to support the Guidelines’ differentially harsh treatment of distribution of crack cocaine (as compared to powder cocaine)”) (citing to book published by the two researchers who conducted survey for Sentencing Commission).

Fifth, in dropping below a federal sentencing guideline range for crack in the case of *United States v. Mulvey*, No 03-10075-001 (C.D. Ill. Feb. 11, 2005), U.S. District Judge McDade made the common-sense observation that, “[g]iven the Draconian punishment associated with crack cocaine, to follow the guideline range for this case would go beyond what is needed to serve the purpose of sentencing Respect for the law doesn’t always mean sending people to prison for as long as you can.” Elaine Hopkins, *McDade Sentencing Below Guidelines: Judge Says This Crack Cocaine Case Merited a Discretionary Approach*, Peoria Journal Star, Feb. 12, 2005, available at http://www.pjstar.com/stories/021205/TRI_B5IGJJSI.012.shtml

b. Other Section 3553(a) Factors

Additionally, a sentence lower than the 70-87 months suggested by the advisory guideline range is appropriate in light of the other factors specified in 18 U.S.C. § 3553(a). First, the history and characteristics of Mr. DEFENDANT reveal a high school graduate who has shown propensity to work, having maintained some form of employment since he was 15 years old. Mr. DEFENDANT's criminal history is slight, resulting in a criminal history score of 1 point.

Next, a sentence below the 70-87 month range would reflect the seriousness of the offense, provide just punishment for the offense, and afford adequate deterrence to criminal conduct, as required by 18 U.S.C. § 3553(a)(2)(A) and (a)(2)(B). If the Guidelines propose that a sentence of 12-18 months would satisfy these requirements in the case of someone convicted of selling powder cocaine, a sentence well below the 70-87 month range would do the same in the case of Mr. DEFENDANT. Additionally, Mr. DEFENDANT has never been imprisoned. The sentence he receives from the Court will no doubt have a significant impression on him. Moreover, given that the Court no longer has the option of recommending that defendants in Mr. DEFENDANT's position participate in the "boot camp" program,² which would have likely resulted in a reduction in sentence, a sentence below the suggested range would help to provide just punishment for the offense.

Finally, a sentence of imprisonment below the 70-87 month range would also protect the public from further crimes of Mr. DEFENDANT and provide him with training in an effective manner, as prescribed by 18 U.S.C. § 3553(a)(2)(C) and (a)(2)(D). While imprisoned, Mr. DEFENDANT would

² See Memorandum from Harley Lapin, Director, U.S. Bureau of Prisons, to Federal Judges et al., re. Intensive Confinement Center (ICC) Program (Jan. 14, 2005).

have the opportunity to pursue his interest in electronics and computers through Bureau of Prison programs. When he finishes his term of imprisonment, he will come out with job skills that will enable him to be a productive member of society and decrease the chances that he would return to dealing drugs.

For the reasons stated above, Defendant First Name DEFENDANT respectfully requests that this Court reduce his sentencing range from the current 100-to-1 ratio in order to avoid unwarranted disparity in sentencing, and sentence him below the 70-87 month range suggested in the amended PSR, all in order to impose a sentence required by statute to be “sufficient, but no greater than necessary.”

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Position of Defendant with Respect to Sentencing was mailed this 29th day of March, 2004 to Eric M. Hurt, Assistant United States Attorney, Fountain Plaza Three, 721 Lakefront Commons, Suite 300, Newport News, Virginia 23606 and Janice B. Hyatt, U.S. Probation Officer, 600 Granby Street, Suite 200, Norfolk, Virginia 23510.

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