

MANDATORY SENTENCING REFORM: CORRECTING DISPARITY FOR CRACK COCAINE VS. POWDER COCAINE OFFENSES

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ABSTRACT

In recent years policy attention regarding the crisis of the African American male has focused on a variety of areas in which African American males have suffered disproportionately from social ills. These have included education, housing, employment, and health care, among others. Perhaps in no other area, though, have these problems been displayed as prominently as in the realm of crime the criminal justice system. African Americans have been affected in this area in two significant regards. First, African Americans are more likely to be victimized by crime than any other groups. This creates a set of individual and community problems which impede upon other areas of productive activity. Second, the dramatic rates at which African Americans males have come under some form of criminal justice supervision has created a complex set of consequences which affect not only individual victims and offenders, but families and communities as well.

Key words: Department of Corrections, U.S. Sentencing Commission, Racial Disparity, Prison Inmates, and African American Males

INTRODUCTION

The Department of Corrections in various urban Cities establish that living condition within the prison system have never been pleasant or comfortable, but a harsher political climate now threatens to undo many of the reforms achieved through litigation and political advocacy over the past several decades. Congressional action in 1994 prohibited inmates from receiving Pell Grants to continue higher education studies, while many states have passed their own legislation denying inmates access to various forms of recreation or cultural activities. Much of this legislation has been not just mean-spirited but counterproductive as well, by limiting prisoners' access to the acquisition of skills that might be used constructively upon their return to the community. These conditions now disproportionately affect African American males and other minorities due to their overwhelming numbers within the criminal justice system. The state of these disproportions can be seen in the following:

1. 49% of prison inmates are African American, compared to their 13% share of the over population.
2. Nearly one in three (32%) black males in the age group 20-29 is under some form of criminal justice supervision on any given day – either in prison or jail, or on probation or parole.
3. As of 1995, one in fourteen (7%) adult black males was incarcerated in prison or jail on any given day, representing a doubling of this rate from 1985. The 1995 figure for whites males was 1%.
4. A black male born in 1991 has a 29% chance of spending time in prison at some point in his life. The figure for white males is 4%, and for Hispanics, 16%

African American males have been the most severely affected demographic group within the criminal justice system, other minorities have also been disproportionately affected. Hispanics now constitute 17% of the prison population nationally, compared to their 10% share of the total population.

Since 1980, the “WAR ON DRUGS” has been the most significant factor contributing to the rise of prison jail populations. Drugs policies have also had a disproportionate impact on African Americans and have exacerbated the racial disparities that already existed within the criminal justice system. This has come about in two ways: first, drug offenses overall have increased as a proportion of the criminal justice population and, second, the proportion of African Americans among drug offenders has been increasing.

Drug policies and Racial Disparity has in recent years has focused much attention on Federal crack/powder cocaine sentencing disparities. As a result of mandatory sentencing legislation passed by Congress in 1986 and 1988, crack cocaine offenses are punished far more harshly than powder cocaine crimes. Whereas the sale of 500 grams of powder cocaine results in a mandatory five-year prison term, only 5 grams of crack cocaine is required to trigger the same mandatory penalty. Since crack cocaine is manufactured from powder cocaine these sentencing policies create a set of odd consequences. For example, a major dealer in powder cocaine who is

apprehended with 499 grams of the drug will receive at most one year in Federal Prison. But when those 499 grams are converted to crack and distributed at the street level, someone possessing just five grams will receive a mandatory five years in prison.

BACKGROUND

The racial disparities created by these policies have been dramatic, and have resulted both from the sentencing legislation and law enforcement practices. In 1995-96, for example, 86% of persons charged crack trafficking offenses in the Federal system were African American, while blacks represented just 30% of persons charged with powder cocaine offenses. Federal Prosecutors have often contended that the high numbers of black crack prosecutions reflect the proportions of large-scale traffickers in crack, who qualify for federal prosecution because of their substantial role in the drug trade. Data analyzed by the U.S. Sentencing Commission, though, cast doubt on this contention. In the Commission's analysis of crack defendants in 1992, only 5.5% of the defendants were classified as high-level dealers, while 63% were considered street-level dealers or couriers, and 30.8 % were mid-level dealers.

The racial disparities that have resulted from the federal sentencing distinctions for crack and powder cocaine offenses have been well document. The 100:1 quantity disparity has contributed to the disproportionate number of African Americans in prison as well as causing great resentment in the black community. Equalizing penalties for the two drugs at the level of cocaine offenses would reduce some of the racial disparities in incarceration as well as some of the inappropriately lengthy sentences for lower-level offenders.

LITERATURE REVIEW

The 1980's "WAR ON DRUG LAWS" created a staggering sentencing disparity for offenses involving crack versus powder cocaine, filling prisons with low-level offenders and fueling a racially-charged debate over fairness and efficacy of Federal Drug Policy for nearly 25 years.

Under its provisions, possession of just five grams of crack cocaine – most often sold in poor black communities, triggered an automatic five-year prison term. It required 100 times that amount of powder cocaine, the choice of affluent whites, to earn the same mandatory sentence. This disparity eased dramatically as permanent new federal sentencing guidelines for crack cocaine take effect. The guidelines, approved by large bipartisan Congressional majorities in 2010, affect not only new defendants, but will retroactively apply to the sentences of an estimated 12,000 federal inmates, more than 1,000 of whom will be eligible for immediate release in the not to distant future. The reform s reduce the sentencing disparity between powder and crack cocaine quantities from 100-to-1 to 18-to-1, and eliminate mandatory sentences for possession of small amounts of crack. The Bureau of Prisons estimated that the sentence reductions will save the federal government \$200 million over five years.

In 2010, the U.S. Congress passed legislation repealing a mandatory minimum sentence for the first time since the Nixon Administration and reforming the infamous 100-to-one ratio between powder cocaine and crack cocaine. FAMM (Families Against Mandatory Minimums) supported that reform, the Fair Sentencing Act (FSA) , which lowered the 1000-to-one ratio to 18-to-one

and abolished a five-year mandatory minimum sentence for simple possession of crack cocaine. The law produces fairer sentences for approximately 3,000 federal crack offenders each year.

In response to the reform, the U.S. Sentencing Commission altered the crack cocaine sentencing guidelines to reflect the new 18-to-one ratio, and it made these guidelines changes retroactive. Over 22,000 people received sentence reductions based on the retroactive crack guidelines.

DATA AND METHODS

The FSA was a compromise measure that did not correct all the injustices of the crack-powder disparity. The FSA's alteration to crack mandatory minimum sentences were not retroactive – something that only Congress can do. This has left thousands of federal crack cocaine offenders in prison today serving mandatory minimum terms that Congress, the President, and the Country have now repudiated as unfair and racially discriminatory. Additionally, the FSA's 18-to-one ratio does not reflect the fact that crack and powder cocaine are same drug in different forms, and that crack cocaine crimes are still punished more harshly than powder cocaine offenses.

The moderation in federal crack cocaine sentence guideline is one example of a growing movement at the state and federal level to repeal or dilute harsh anti-drug statutes responsible for putting vast numbers of non-violent, largely minority drug offenders behind bars, often for decades. The reforms have gathered steam in part due to a steep decline in crime rates nationwide, which has dampened voters' enthusiasm for "tough-on-crime" polices and politicians. Decades of studies showing the disproportionate impact of harsh drug laws on minority communities have also swayed politicians on both sides of the aisle.

The United States leads all nations in incarceration, with nearly 2.4 million people in prisons and jails, according to the most recent data from the Bureau of Justice Statistics. That is about 25% of all incarcerated in the worldwide, though the U.S. represents only 5% of the global population; federal and state corrections cost the American taxpayer about \$68 billion per year, according to the "PEW CENTER ON THE STATES."

As states slow the arrival of new inmates and speed the way home for those already incarcerated, the savings are adding up. In 2011 at least 13 states, from Texas to Rhode Island, have closed prisons and correctional facilities or are planning to do so, according to a report by the Sentencing Project.

Testifying about mandatory minimum sentences before the Senate Judiciary Committee, September 18, 2013 of this year, " Senator Rand Paul (R-Ky.) emphasized the racially disproportionate impact of the war on drugs. The Senator went on to State the following:

"If I told you that one of three African American males is [prohibited] by law from voting, you might think I was talking about Jim Crow, 50 years ago. Yet today a third of African American males are still prevented from voting because of the war on drugs. The war on drugs has disproportionately affected young black males. The ACLU reports that blacks are four –to- five times more likely to be convicted for drug possession, although surveys indicate that blacks and whites use drugs at about the same rate. The majority of illegal drug users and dealers

nationwide are white, but three-fourths of the people in prison for drug offenses are African American or Latino.”

Paul went on to said: Barack Obama expressed similar concerns before he was elected president. Since then, not so much, although his Attorney General recently took up the theme, almost five years into obama’s presidency. More important, Obama has done little to address the injustices caused by the war on drugs, aside from signing the fair Sentencing Act of 2010. That law, which reduced the irrational sentencing disparity between the smoked and snorted forms of cocaine, had almost unanimous support in congress.

Paul’s Justice Safety Valve Act (S. 619), which he and Patrick Leahy (D-Vt.), Chairman of the Senate Judiciary Committee, introduced last March, would restore some of the discretion that mandatory minimums took from Judges.

“We’re not repealing mandatory minimums, although I probably would, “said Paul.

“What we’re doing is merely allowing a Judge to sentence below a mandatory minimum if certain requirements are met.” Those requirements are the sentencing factors listed in Title 18, Section 3553, which include, along with deterrence and public safety, “ the nature and circumstances of the offense and the history and characteristics of the defendant” as well as” the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment.”

The conclusion of Paul’s testimony left no doubt as to his ultimate goal:

“Each case, I think, should be judged on its own merits. Mandatory minimums prevent this from happening. Mandatory Minimum Sentencing, I think has done little to address the real problem of drug abuse while also doing a great deal of damage by destroying so many lives. I am here to ask today for you to let judges to start doing their jobs. I am here to ask that we begin today the end of mandatory minimum sentencing.”

August of this year (2013), was a historic period in the fight to address the negative impact of mandatory minimum sentencing laws on the African American community, when U. S. Attorney General Eric Holder told the annual conference of the American Bar Association that the Obama administration would take immediate action to address the broken federal sentencing system and reduce federal prison overcrowding in the United States.

For the first time since the inception of mandatory sentencing, the U. S. Department of Justice has admitted that changing mandatory minimum sentencing guidelines would help, not hurt society and that non-violent drug offenders should enter into rehab programs instead of going to prison.

DISCUSSION AND CONCLUSION

“Today, a vicious cycle of poverty, criminality, and incarceration traps too many Americans and weakens too many communities,” said Holder. “However, many aspects of our criminal justice system may actually exacerbate this problem, rather than alleviate it.”

Fast forward to the 21st Century and you can see that yet another form of slavery has been introduced, which has led to the economic benefit of those who own stock in privatized prisons in America.

In an effort to reform mandatory minimum sentencing, Attorney General Eric Holder not only support the Justice Safety Valve Act (S. 619); he also support the Smart Sentencing Act (S.1410), which was introduced by Senators Richard Durbin (D-IL.) and Mike Lee (R-UT.). Their bipartisan legislation would reduce mandatory minimum sentences for drug crimes, expand slightly the existing safety valve, and apply retroactively the Fair Sentencing Act of 2010, which reduced the crack-powder cocaine sentencing disparity.

The centerpiece of Holder's plan is to scale back prosecution for certain drug offenders who have no ties to large – scale organizations, such as gangs or cartels. He states those drug offenders would no longer be charged with offenses that “impose draconian mandatory minimum sentences” According to Attorney General Holder, those drug offenders will now “be charged with offenses for which the accompanying sentences are better suited to their individual conduct, rather than excessive prison terms more appropriate for violent criminals or drug kingpins.”

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