



U.S. Department of Justice

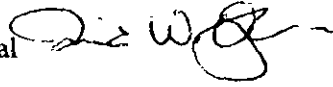
Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

May 1, 2009

MEMORANDUM FOR ALL FEDERAL PROSECUTORS

FROM: David W. Ogden
Deputy Attorney General 

SUBJECT: Department Policies and Procedures
Concerning Sentencing for Crack Cocaine Offenses

In 1986, Congress passed the Anti-Drug Abuse Act, which substantially increased penalties for drug trafficking and established three levels of maximum and minimum sentences based on the type and quantity of drug involved. In setting the quantities required to trigger higher sentencing ranges, the Act used a 100:1 ratio for powder and crack cocaine. Thus, the threshold for a sentence of ten years to life imprisonment is five kilograms of powder but 50 grams of crack, and the threshold for a sentence of five to forty years of imprisonment is 500 grams of powder but five grams of crack. 21 U.S.C. § 841(b). The United States Sentencing Commission incorporated the 100:1 ratio into the sentencing guidelines for cocaine offenses. *See* USSG §2D1.1(c) (1987). In the past 15 years, the Sentencing Commission has studied the effect of the 100:1 ratio on the criminal justice system and has urged Congress to revisit the ratio based on, among other things, statistics relating to the relative health risks posed by powder and crack and statistics about the violence associated with each different version of cocaine. In 2007, the Commission amended the guidelines to reduce the offense levels applicable to crack cocaine offenses, while maintaining sentencing ranges that are consistent with the statutory mandatory minimums. Guidelines, App. C, amend. 706, 711.

The President and Attorney General believe Congress should eliminate the sentencing disparity between crack cocaine and powder cocaine. (See attached testimony of Assistant Attorney General Lanny A. Breuer, setting forth the Administration's position.) The Attorney General has asked me to form and lead a working group on federal sentencing and corrections policy to develop proposals for tough, predictable, and fair sentencing laws that will eliminate the disparity, but that will also contain appropriate enhancements for those who use weapons in drug trafficking crimes, use minors to commit those crimes, injure or kill someone in relation to a drug trafficking offense, or are involved in other aggravating conduct. That effort is underway.

We will work with Congress and the Sentencing Commission to implement a revised system. While our policy is to seek a revision of the law to eliminate the disparity, we have not yet developed a comprehensive proposal to do so. Additionally, no change has been enacted as

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legislation by Congress or as amended guidelines by the Sentencing Commission. Accordingly, prosecutors should be guided by the following principles in crack cocaine cases:

Charging Decisions

Until and unless Congress makes changes to the current statutes, courts are bound by statutory mandatory minimums, and prosecutors should urge sentencing courts to adhere to them (absent the applicability of the safety valve, 18 U.S.C. § 3553(f), or a motion for a departure based on substantial assistance, 18 U.S.C. § 3553(e)). Prosecutors should continue to charge threshold quantities of crack cocaine required to trigger mandatory minimum sentences (and higher maximum sentences) where those quantities are readily provable.¹

Sentencing Hearings

The advisory guidelines of course remain in effect, and courts must continue to calculate the guidelines range for crack offenses as before. The guidelines are advisory under *United States v. Booker*, 543 U.S. 220 (2005), and courts must impose sentences that are sufficient, but not greater than necessary, to achieve the purposes of sentencing, after consideration of the factors set forth in 18 U.S.C. § 3553(a). Sentencing courts have the legal authority to disagree with policy judgments reflected in the current guidelines, and that authority includes the discretion to substitute a lesser crack/powder ratio. See generally *Spears v. United States*, 129 S. Ct. 840 (2009) (per curiam); *Kimbrough v. United States*, 552 U.S. —, 128 S. Ct. 558 (2008).

Prosecutors should inform courts that the Administration believes Congress and the Commission should eliminate the crack/powder disparity, but that Congress has not yet determined whether or how to achieve a more appropriate sentencing scheme for crack and powder offenses. Until Congress acts, courts must exercise their discretion under existing case law to fashion a sentence that is consistent with the objectives of 18 U.S.C. § 3553(a). Prosecutors should be governed by the facts and circumstances of individual cases and existing law. They may indicate that they will not object to a reasonable variance in an average case. As appropriate, prosecutors may oppose a variance based on case-specific aggravating facts (such as the use of violence, the presence of firearms, or recidivism) under the factors set out at 18 U.S.C. § 3553(a). United States Attorneys should ensure that prosecutors seek supervisory guidance

¹ Most courts of appeals have held that statutory minimum terms under the drug statute do not implicate the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and, accordingly, the court at sentencing must determine the drug quantity involved in the offense and must apply any applicable mandatory minimum, whether or not the government has charged that quantity or proved it to the jury (or obtained an admission during the guilty plea colloquy). See, e.g., *United States v. Webb*, 545 F.3d 673, 678 (8th Cir. 2008); *United States v. Kelly*, 519 F.3d 355, 363 & n.3 (7th Cir. 2008). In contrast, the Second and Ninth Circuits have held that threshold quantities must be alleged in the indictment in order to trigger the mandatory minimums under Section 841. See *United States v. Gonzalez*, 420 F.3d 111 (2d Cir. 2005); *United States v. Velasco-Heredia*, 319 F.3d 1080 (9th Cir. 2003).

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within their offices in making these determinations to ensure consistent and appropriate sentencing recommendations concerning such variances. These principles should also be used in negotiating plea agreements in crack cocaine cases.

Motions for Sentence Correction Under Federal Rule of Criminal Procedure 35(a)

This effort to seek legislative reform does not provide a legal basis for a court to revisit a sentence under Federal Rule of Criminal Procedure 35(a), which authorizes district courts, within seven days after the sentencing hearing, to "correct a sentence that resulted from arithmetical, technical, or other clear error." See Fed. R. Crim. P. 35, advisory comm. note (1991) ("very narrow" provision "is not intended to afford the court the opportunity to reconsider the application or interpretation of the sentencing guidelines or for the court simply to change its mind about the appropriateness of the sentence").

Appeals

Nor does this effort to seek legislative reform require prosecutors to concede on appeal that sentences for crack offenses that were based on the application of existing law are unreasonable. *Kimbrough* and *Spears* make clear that district courts have broad discretion under 18 U.S.C. § 3553(a)(6) to consider "any unwarranted disparity created by the crack/powder ratio" and to weigh that factor against the other Section 3553(a) factors. *Kimbrough*, 128 S. Ct. at 574. Nothing in those decisions requires courts to vary from the guidelines range in sentencing crack offenders. Prosecutors who believe that it may be appropriate to confess error in a particular case should consult with the Appellate Section before conceding error. See USAM § 9-2.170.

Motions for Sentence Reduction under 18 U.S.C. § 3582(c)(2)

An otherwise-final sentence may be modified only in limited circumstances, most notably where the Sentencing Commission has revised a guideline and declared the amendment retroactive. See 18 U.S.C. § 3582(c)(2). Such circumstances have not occurred. Thus, this effort to seek legislative reform does not provide legal authority for a retroactive reduction in sentence.

Since March 2008, many inmates convicted of crack offenses have been eligible for sentencing reductions pursuant to Amendment 706, which reduced the offense levels for crack offenses. With the exception of the Ninth Circuit, every appellate court to address the issue has held (and the Department agrees) that a court that grants a reduction in sentence based on a retroactive application of Amendment 706 may not vary below the offense level indicated by the Commission's policy statements. See, e.g., *United States v. Starks*, 551 F.3d 839 (8th Cir. 2009); *United States v. Dunphy*, 551 F.3d 247 (4th Cir. 2009); *United States v. Rhodes*, 549 F.3d 833 (10th Cir. 2008); but see *United States v. Hicks*, 472 F.3d 167 (9th Cir. 2007). Accordingly, the

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change in Department policy does not authorize reductions in previously imposed crack cocaine sentences beyond those authorized by 18 U.S.C. § 3582(c)(2) and USSG §1B1.10 and Amendments 706 & 713.

Collateral Review

This effort to seek legislative reform also provides no grounds for a defendant to claim any legal error in the sentence, let alone an error that would be cognizable on collateral attack. As every court of appeals has concluded, defendants whose convictions are final have no right to resentencing under *Booker* on collateral review under 28 U.S.C. § 2255. See *Cirilo-Muñoz v. United States*, 404 F.3d 527, 532-533 (1st Cir. 2005); *Guzman v. United States*, 404 F.3d 139, 141-144 (2d Cir. 2005); *Lloyd v. United States*, 407 F.3d 608, 613-616 (3d Cir. 2005); *United States v. Morris*, 429 F.3d 65, 66-67 (4th Cir. 2005); *United States v. Gentry*, 432 F.3d 600, 602-605 (5th Cir. 2005); *Humphress v. United States*, 398 F.3d 855, 860-863 (6th Cir. 2005); *McReynolds v. United States*, 397 F.3d 479, 481 (7th Cir. 2005); *Never Misses A Shot v. United States*, 413 F.3d 781, 783-784 (8th Cir. 2005); *United States v. Cruz*, 423 F.3d 1119, 1121 (9th Cir. 2005); *United States v. Bellamy*, 411 F.3d 1182, 1188 (10th Cir. 2005); *Varela v. United States*, 400 F.3d 864, 867-868 (11th Cir. 2005); *In re Fashina*, 486 F.3d 1300, 1306 (D.C. Cir. 2007).

Attachment