Appendix C

LEGAL CHALLENGES TO CRACK COCAINE PENALTIES

A. INTRODUCTION

This appendix outlines the constitutional challenges to the federal crack cocaine penalties brought by defendants since passage of the 1986 and 1988 Anti-Drug Abuse Acts and implementation of the sentencing guidelines. In appealing the constitutionality of their sentences for crack cocaine offenses, defendants have argued that the 100-to-1 quantity ratio (*i.e.*, treating one hundred grams of powder cocaine the same as one gram of crack cocaine) violates equal protection and due process guarantees, constitutes cruel and unusual punishment, and is based on a statute that is impermissibly vague. To date, none of these challenges has been successful at the appellate level.[1] These challenges have been directed at both the statutory mandatory minimums and the sentencing guidelines.[2]

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[1] *See, e.g.*, United States v. D'Anjou, 16 F.3d 604 (4th Cir.), *cert. denied*, 114 S. Ct. 2754 (1994)(equal protection); United States v. Harding, 971 F.2d 410, 412-14 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1025 (1993)(equal protection); United States v. Angulo-Lopez, 7 F.3d 1506 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 1563 (1994)(equal protection, cruel and unusual punishment); United States v. Thurmond, 7 F.3d 947 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 1311 (1994)(equal protection, due process); United States v. Frazier, 981 F.2d 92 (3d Cir. 1992)(per curiam), *cert. denied*, 113 S. Ct. 1661 (1993)(equal protection, cruel and unusual punishment, due process, vagueness); United States v. King, 972 F.2d 1259 (11th Cir. 1992)(equal protection); United States v. Jackson, 968 F.2d 158 (2d Cir.), *cert. denied*, 113 S. Ct. 664 (1992)(vagueness); United States v. Simmons, 964 F.2d 763 (8th Cir.), *cert. denied*, 113 S. Ct. 632 (1992)(due process, equal protection, cruel and unusual punishment); United States v. Williams, 962 F.2d 1218 (6th Cir.), *cert. denied*, 113 S. Ct. 264 (1992)(equal protection); United States v. Watson, 953 F.2d 895 (5th Cir.), *cert. denied*, 112 S. Ct. 1989 (1992) (due process, equal protection); United States v. Lawrence, 951 F.2d 751 (7th Cir. 1991); United States v. Pickett, 941 F.2d 411 (6th Cir. 1991)(due process, cruel and unusual punishment); United States v. Turner, 928 F.2d 956 (10th Cir.), *cert. denied*, 112 S. Ct. 230 (1991)(due process); United States v. Avant, 907 F.2d 623 (6th Cir. 1990) (cruel and unusual punishment); United States v. Levy, 904 F.2d 1026 (6th Cir. 1990), *cert. denied*, 498 U.S. 1091 (1991)(vagueness); United States v. Thomas, 900 F.2d 37 (4th Cir. 1990) (equal protection); United States v. Colbert, 894 F.2d 373 (10th Cir.), *cert. denied*, 496 U.S. 911 (1990)(cruel and unusual punishment); United States v. Buckner, 894 F.2d 975 (8th Cir. 1990) (cruel and unusual punishment); United States v. Cyrus, 890 F.2d 1245 (D.C. Cir. 1989) (equal protection, cruel and unusual punishment). *But see* United States v. Davis, No. 93-0234 (N.D. Ga. Aug. 26, 1994)(invalidating heightened statutory penalties for cocaine base as impermissibly vague based on lack of scientific distinction between "cocaine" and "cocaine base.").

[2] *Compare* United States v. Bynum, 3 F.3d 769, (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1105 (1994) (discriminatory impact not proper basis for downward departure); *and* United States v. Haynes, 985 F.2d 65, 70 (2d Cir. 1993) (discriminatory impact affords no basis for downward departure) *with* United States v. Majied, No. 91-00038.

In one state court case, however, the Minnesota Supreme Court invalidated that state's differential penalty structure for crack cocaine and powder cocaine based on equal protection principles in the Minnesota Constitution. That case is discussed briefly.

B. CONSTITUTIONAL CHALLENGES

Defendants challenging the 100-to-1 quantity ratio in the federal system have argued that both the statutes that direct the mandatory minimum sentences for crack offenses and the federal sentencing guidelines are unconstitutional because they deny equal protection or due process, because the mandated penalties constitute cruel and unusual punishment, or because the statutes are unconstitutionally vague. As of the date of this report, all challenges to the constitutionality of the 100-to-1 ratio have failed in the federal appellate courts.[3]

In contrast, the Minnesota Supreme Court, facing similar constitutional challenges to a state provision that enhanced crack cocaine penalties by a 10-to-3 ratio, struck down the enhancement based on the more expansive equal protection guarantees of its state constitution.[4]

1. Equal Protection

a. Federal Equal Protection

As discussed earlier in this report, empirical data show that a much higher percentage of Blacks than Whites are sentenced in federal court under the crack cocaine penalties. Based on these and similar statistics, defendants have argued that the 100-to-1 quantity ratio of powder cocaine to crack cocaine is racially discriminatory, thereby violating the equal protection guarantees of the U.S. Constitution.

In the cases decided to date, most federal courts have refused to find racially discriminatory intent, and have applied "rational basis review" in deciding equal protection challenges to the crack cocaine penalties. In other words, courts applying this standard look only to whether Congress and the Commission had a legitimate purpose for the differential punishment accorded crack cocaine versus powder cocaine and a rational belief that the challenged classification promotes that purpose.

1993 WL 315987 (D. Neb. July 29, 1993), *aff'd*, United States v. Maxwell, 25 F.3d 1389 (8th Cir.), *cert. denied*, 115 S.Ct. 610 (1994)(discriminatory impact not considered by the Sentencing Commission and so affords a basis for downward departure).

[3] *See supra* notes 1-2.

[4] State v. Russell, 477 N.W. 2d 886 (Minn. 1991).

As one court explained, "[a]bsent a racially discriminatory purpose, explicit or inferable, on the part of the law maker or law enforcer, the statutory distinction is subject only to rational basis review."[5] Even if the legislature were aware that the statute would have a racially disparate impact, the statute is not invalid if that awareness was not a causal factor in its enactment.[6]

Applying this standard, federal courts generally have upheld the 100-to-1 quantity ratio by holding that Congress and the Commission had a rational basis for the penalty distinction. In so doing, these courts found that the distinction drawn between crack cocaine and powder cocaine for penalty purposes was not motivated by racial animus or discriminatory intent. Rather, it was related to the legitimate congressional objective of protecting the public against a new and highly potent, addictive narcotic that could be distributed easily and sold cheaply.[7]

One exception is the federal district court case of United States v. Clary[8] out of the Eastern District of Missouri. In that case, the court was constrained by prior Eighth Circuit precedent and found no overt racial discrimination on the part of Congress in adopting the 100-to-1 penalty ratio for crack cocaine. However, the court noted the background of racism in America generally, and specifically noted the history of racism inherent in America's attempt to control crime.[9] It then found that equal protection analysis must consider unconscious racism by legislators and found that a crack sentencing law that burdens Blacks disproportionately is a "de facto suspect classification" that could be traced to unconscious racism. Finding an unconsciously discriminatory classification, the court applied strict scrutiny, which requires a compelling government interest and a law narrowly tailored to address that interest. Under this higher level of scrutiny, it found the statute violated federal equal protection guarantees.

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[5] United States v. Frazier, 981 F.2d 92, 95 (3d Cir. 1992) (citing Personnel Administrator v. Feeney, 442 U.S. 256 (1979) and Washington v. Davis, 426 U.S. 229 (1976)), *cert. denied*, 113 S. Ct. 1661 (1993).

[6] Frazier, 981 F.2d at 95; *see* Feeney, 442 U.S. at 279.

[7] *See, e.g.*, United States v. King, 972 F.2d 1259, 1260 (11th Cir. 1992); United States v. Turner, 928 F.2d 956 (10th Cir.), *cert. denied*, 112 S. Ct. 230 (1991); United States v. Harding, 971 F.2d 410, 412-14 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1025 (1993); United States v. Simmons, 964 F.2d 763, 767 (8th Cir.), *cert. denied*, 113 S. Ct. 632 (1992); United States v. Lawrence, 951 F.2d 751, 755 (7th Cir. 1991); United States v. Williams, 962 F.2d 1218, 1227-28 (6th Cir.), *cert. denied*, 113 S. Ct. 264 (1992); United States v. Watson, 953 F.2d 895, 898 (5th Cir.), *cert. denied*, 112 S. Ct. 1989 (1992); United States v. Thomas, 900 F.2d 37, 39-40 (4th Cir. 1990); United States v. Frazier, 981 F.2d 92 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1661 (1993); United States v. Cyrus, 890 F.2d 1245, 1248 (D.C. Cir. 1989).

[8] 846 F. Supp. 768 (E.D. Mo. 1994).

[9] Clary, 846 F. Supp. at 774-77.

However, seven months later, the Eighth Circuit reversed the district court.[10] The Circuit Court held that the court finding of unconscious racism simply did "not address the question whether Congress acted with a discriminatory purpose." Evaluating the evidence presented to the district court in Clary I, the Eighth Circuit found that the evidence fell short of establishing that Congress acted with a discriminatory intent.[11]

b. State Equal Protection

In contrast to the unsuccessful federal challenges, the Minnesota Supreme Court, in State v. Russell, held that a state law punishing crack cocaine at a 10-to-3 ratio to powder cocaine (*i.e.*, 30 grams crack cocaine punished equivalently to 100 grams powder cocaine) violated the equal protection guarantees of the Minnesota state constitution.[12] The court concluded that because crack cocaine users were predominately Black, the impact of an enhanced penalty would primarily affect them. Given the more generous equal protection interpretation afforded under Minnesota's constitution, actual discriminatory impact was sufficient to strike down the enhanced crack cocaine penalty.[13]

2. Due Process

Defendants have challenged crack cocaine penalties under the due process clause of the U.S. Constitution.[14] In addition to reformulating the equal protection arguments as due process claims, the crux of the due process challenges has been that because crack cocaine and powder cocaine are chemically the same, Congress and the Commission enacted two different penalties for the same drug. Courts have rejected these challenges, finding that even if crack and powder cocaine are two forms of the same drug, crack cocaine differs from the powder form in method of use, potency, purity, and

[10] United States v. Clary, 34 F.3d 709 (8th Cir. 1994).

[11] Clary, 34 F.3d at 713.

[12] 477 N.W. 2d 886.

[13] The Minnesota State Legislature responded to the ruling in Russell by enacting legislation that deleted all separate mention of, and separate penalties for, offenses involving crack cocaine. 1992 Minn. Laws 359. Generally, the provisions raised the statutory maximum penalties for offenses involving cocaine powder to the level that had been proscribed for crack.

[14] U.S. Const. amend. V.

ease of distribution.[15] Some federal courts have rejected due process challenges on the basis that cocaine base is a different drug from cocaine powder.[16]

In rejecting these challenges, however, some courts have criticized the current system. In United States v. Singleterry, 29 F.3d 733, 741 (1st Cir. 1994), *cert. denied*, 115 S.Ct. 647 (1994), the First Circuit rejected a due process challenge to the crack distinction, but nevertheless urged the "proper" authorities to take appropriate action, stating "the absence of a constitutional command is not an invitation to government complacency." Although the court did not find a constitutional violation, it noted that the defendant had "raised important questions about the efficacy and fairness of our current sentencing policies for offenses involving cocaine substances." *Id*. at 741.

3. Cruel and Unusual Punishment

Some defendants have challenged the penalties for crack cocaine offenses claiming that the penalties are so disproportionate as to violate the Eighth Amendment's prohibition against cruel and unusual punishment.

In Solem v. Helm,[17] the United States Supreme Court set out a three-prong test for evaluating whether punishment is cruel and unusual under the Eighth Amendment. The Solem Court looked to "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentence imposed on other criminals in the same jurisdiction; (iii) the sentence imposed for the same crime in other jurisdictions."[18]

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[15] *See, e.g.*, United States v. Simmons, 964 F.2d 763, 767 (8th Cir.), *cert. denied*, 113 S. Ct. 632 (1992); United States v. Watson, 953 F.2d 895, 898 (5th Cir.), *cert. denied*, 112 S. Ct. 1989 (1992); Pickett, 941 F.2d 411, 418 (6th Cir. 1991); United States v. Turner, 928 F.2d 956, 960 (10th Cir.), *cert. denied*, 112 S. Ct. 230 (1991).

[16] *See, e.g.*, United States v. Galloway, 951 F.2d 64 (5th Cir. 1992). *Accord*, United States v. Thomas, 932 F.2d 1085, 1090 (5th Cir.), *cert. denied*, 112 S. Ct. 887 (1991).

[17] 463 U.S. 277, 292 (1983).

[18] *Id*. The Solem analysis, however, has been sharply criticized by a plurality in Harmelin v. Michigan, 111 S. Ct. 2680, 2686 (1991) (plurality opinion), which stated that "Solem was simply wrong; the Eighth Amendment contains no proportionality guarantee." Justice Kennedy, however, counseled in a concurrence that *stare decisis* required "adherence to the narrow proportionality principle that has existed in our Eighth Amendment jurisprudence for 80 years." *Id*. at 2702 (Kennedy, J., concurring).

Generally, federal appellate courts employing the Solem analysis have found the enhanced penalties for offenses involving crack cocaine are rational and not disproportionate.[19] As the Third Circuit wrote in United States v. Frazier:

> There are reasonable grounds for imposing a greater punishment for offenses involving a particular weight of cocaine base than for comparable offenses involving the same weight of cocaine. These grounds include differences in the purity of the drugs, the dose size, the method of use, the effect on the user, and the collateral social effects of the traffic in the drug. Whether the ratio best reflecting these genuine differences should be calibrated at 5-to-1, 20-to-1, or 100-to-1 is a discretionary legislative judgment for Congress and the Sentencing Commission to make.[20]

A recent federal district court opinion from the District of Columbia, United States v. Walls, 841 F.Supp. 24, 31 (D.D.C. 1994), found that application of the 100-to-1 ratio constituted cruel and unusual punishment. In that case, the court refused to apply the statutory mandatory minimum and guideline sentences for crack cocaine to two defendants who were "bit players" in a narcotics conspiracy and whose sentences would have been increased by five and nine times, respectively, over those for cocaine powder. However, the D.C. Circuit has recently rejected an Eighth Amendment challenge to the disparate penalty schemes in United States v. Thompson, 27 F.3d 671, 678 (D.C. Cir. 1994) (also rejecting challenge on Fifth Amendment grounds), *cert. denied*, 115 S.Ct. 650 (1994).[21] An appeal in Walls is pending.

4. Vagueness

Crack cocaine, in the federal criminal code, is defined as "cocaine base." Cocaine base, however, can include cocaine derivatives and substances other than crack cocaine. Coca paste, for example, which is leached from coca leaves in order to process cocaine hydrochloride (cocaine powder), is also a base. Defendants have sought to exploit this difference along with other vagueness

[19] Frazier, 981 F.2d at 95; Simmons, 964 F.2d at 667; Pickett, 941 F.2d at 418; United States v. Avant, 907 F.2d 623 (6th Cir. 1990); United States v. Colbert, 894 F.2d 373, 374-75 (10th Cir.), *cert. denied*, 496 U.S. 911 (1990); United States v. Buckner, 894 F.2d 975 (8th Cir. 1990); Cyrus, 890 F.2d at 1248.

[20] 981 F.2d at 96 (note omitted).

[21] *See* Harmelin v. Michigan, 501 U.S. 957 (1991); Hutto v. Davis, 454 U.S. 370 (1982); United States v. Garrett, 959 F.2d 1005 (D.C. Cir. 1992); United States v. Cyrus, 890 F.2d 1245 (D.C. Cir. 1989).

issues in challenges to the crack cocaine statutes and to the federal sentencing guidelines implementing their mandated enhancements.[22]

Effective November 1, 1993, the Sentencing Commission amended the sentencing guidelines to reflect its understanding of congressional intent: for purposes of the guidelines, cocaine base means crack cocaine.[23]

Despite the differing interpretations concerning which forms of cocaine base should receive the enhanced sentence, no federal appellate court has found the statute (or the guidelines) so vague as to be constitutionally infirm.[24] However, a district court judge in the Northern District of Georgia recently found the statute prescribing penalties for offenses involving cocaine base is facially ambiguous and applied the rule of lenity to hold that the heightened penalties for cocaine base offenses must be ignored.[25] In Davis, the district court found that "cocaine" and "cocaine base" are "synonymous terms referring to the same substance having the same molecular structure, molecular weight, and melting point."[26] The criminal statutes establish one set of penalties for offenses involving

[22] The federal appellate courts have differed in their definitions of "cocaine base." The Ninth Circuit, for example, has held that "cocaine base" means "crack." *See* United States v. Shaw, 936 F.2d 412, 415-6 (9th Cir. 1991).

Other federal circuits have held to the contrary, finding that cocaine base includes but is not limited to crack. *See* United States v. Rodriguez, 980 F.2d 1375, 1378 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 3003 (1993); United States v. Jackson, 968 F.2d 158, 161-62 (2d Cir.), *cert. denied*, 113 S. Ct. 664 (1992); United States v. Williams, 962 F.2d 1218, 1227 (6th Cir.), *cert. denied*, 113 S. Ct. 264 (1992); United States v. Pinto, 905 F.2d 47, 49 (4th Cir. 1990); United States v. Metcalf, 898 F.2d 43, 46 (5th Cir. 1990); *see also* United States v. Jones, 979 F.2d 317, 319-20 (3d Cir. 1992) (crack is a cocaine base that is chemically created from cocaine and has a definable molecular structure different from cocaine salt).

[23] *See* United States Sentencing Commission, Guidelines Manual §2D1.1(c) (Nov. 1, 1993). The amended guideline reads: "'Cocaine base,' for the purpose of this guideline, means 'crack.' 'Crack' is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form."

[24] *See* Frazier, 981 F.2d at 94 (collecting cases); Jones, 979 F.2d at 319-20; Jackson, 968 F.2d at 161-64; United States v. Thomas, 932 F.2d 1085, 1090 (5th Cir.), *cert. denied*, 112 S. Ct. 264 (1991); Turner, 928 F.2d at 960; United States v. Levy, 904 F.2d 1026, 1032-33 (6th Cir. 1990), *cert. denied*, 498 U.S. 1091 (1991); United States v. Van Hawkins, 899 F.2d 852, 854 (9th Cir. 1990); United States v. Reed, 897 F.2d 351, 353 (8th Cir. 1990); United States v. Barnes, 890 F.2d 545, 552-53 (1st Cir. 1989), *cert. denied*, 494 U.S. 1019 (1990); United States v. Williams, 876 F.2d 1521, 1525 (11th Cir. 1989); United States v. Brown, 859 F.2d 974, 975-76 (D.C. Cir. 1988); *see also* United States v. Palacio, 4 F.3d 150 (2d Cir. 1993) (disagreement among circuits as to meaning of a statute does not deny equal protection).

[25] United States v. Davis, 864 F. Supp. 1303, 1309 (N.D. Ga. 1994)

[26] Id. at 1306.

"cocaine" and another, harsher set of penalties for offenses involving 'cocaine base."[27] This, the court found, is a "scientifically meaningless distinction."[28] Therefore, the district court ordered that the heightened penalties for offenses involving cocaine base must be ignored by operation of the rule of lenity.[29]

C. SPECIFIC SENTENCING GUIDELINE ISSUES

The same arguments underlying the constitutional challenges against the crack cocaine mandatory minimum statutes recently have been used to argue for departures from the sentencing guidelines. Generally, appellate courts have rejected downward departures on these bases.[30]

In a successful challenge in the district court in the District of Columbia, United States v. Shepherd, 857 F. Supp. 105 (D. D.C. 1994), the Court found the statutory and guideline sentences for offenses involving crack cocaine unconstitutional as applied, and imposed the penalties required for violations involving cocaine powder. In that case, the court recognized the potential for the manipulation of the system not just by prosecutors, but by law enforcement agents. The court followed the line of cases discussing the notions of "sentencing entrapment" and "sentencing manipulation." *Id*. at 109 (citing cases). The Court specifically noted that the undercover agent in Shepherd previously testified that it was the standard operating procedure of his office to insist that any cocaine they agreed to purchase be cooked into crack – specifically because of the higher penalties. Finding that this process vests effective control of sentencing "not only to the realm of the prosecution but even further to that of the police," the court held the application of the higher crack penalties unconstitutional as a denial of due process. *Id*. at 406.

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[27] 21 U.S.C. § 841.

[28] Davis, 864 F. Supp. at 1309.

[29] The court noted that if it had found that Congress intended to establish harsher penalties only for cocaine base manufactured by means of reaction with sodium bicarbonate (baking soda) and water, he would be forced to invalidate the provisions on equal protection grounds because "there is no rational basis for having heightened penalties for cocaine or cocaine base derived only by one means of manufacture." Davis, slip op. at 13-14.

[30] *See* Bynum, 3 F.3d 769 (4th Cir. 1993) (rejecting basis for departure); Haynes, 985 F.2d 65 (2d. Cir. 1993). *But see* Majied, No. 91-00038, (D. Neb. July 29, 1993)(granting such a departure).