

2010

The Fair Sentencing Act of 2010: How Fair Is It?

Ryan Carlsen

Follow this and additional works at: <http://lawcommons.luc.edu/pilr>



Part of the [Criminal Law Commons](#)

Recommended Citation

Ryan Carlsen, *The Fair Sentencing Act of 2010: How Fair Is It?*, 16 Pub. Interest L. Rptr. 17 (2010).
Available at: <http://lawcommons.luc.edu/pilr/vol16/iss1/4>

This Feature is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Public Interest Law Reporter by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.

FEATURE ARTICLE

**THE FAIR SENTENCING ACT
OF 2010: HOW FAIR IS IT?**

by RYAN CARLSEN

Prior to Aug. 3, 2010, the possession of five grams of crack cocaine, for which African-Americans were much more likely to be convicted, was punished the same as possession of 500 grams of powder cocaine, for which Caucasians were much more likely to be convicted.¹ In attempt to alleviate this disparity, President Barack Obama signed the Fair Sentencing Act of 2010 into law on Aug. 3, 2010.² This Act reduced the federal sentencing disparity between powder and crack cocaine from 100:1 to 18:1 and eliminated the mandatory minimum sentence for simple possession of crack cocaine.³

The passage of the Act followed decades of debate regarding the justification, or lack thereof, for the harsh mandatory minimum sentences for federal crack cocaine violations established under the Anti-Drug Abuse Act of 1986.⁴ Much of this debate has surrounded the disproportionate impact of federal cocaine sentencing laws on African-Americans, who are significantly more likely than Caucasians or Hispanics to be convicted of crack cocaine offenses.⁵ While asserting that the passing of the Act is a step in the right direction, some argue that the sentencing disparity and mandatory minimum sentences should be eliminated entirely, and that these reforms should apply retroactively to fully remedy the injustices of past policy.⁶

Cases like that of Hamedah Hasan are cited as illustrative of the limited reach of the Fair Sentencing Act's reforms.⁷ Having fled an abusive relationship and left with few options to support her young family, Ms. Hasan, a 21-year-old African-American, moved in with a cousin and acted as an errand girl in his drug operation.⁸ Almost two years after ending her involvement and starting a new life, Hasan was convicted of conspiracy to distribute crack cocaine, held liable for the entire amount of drugs associated with her cousin's drug operation, and sentenced to life in prison.⁹

While her sentence was later reduced to 27 years, a retroactive application of the reforms of the Fair Sentencing Act would leave this sentence unchanged.¹⁰ Had she been convicted of a powder cocaine offense and sentenced on the low end of the guideline range, her sentence would have been 14 years.¹¹

THE EMERGENCE OF CRACK AND CONGRESS' REACTION

Crack is a method of packaging cocaine, and is produced by heating a mixture of powder cocaine (cocaine hydrochloride), baking soda (sodium bicarbonate), and water.¹² The chemical reaction of these ingredients creates a hard, solid material in the form of a rock.¹³ Crack is consumed by applying a flame, vaporizing the material, and inhaling the vapor into the lungs, which allows the drug to quickly enter the bloodstream and reach the brain.¹⁴



In 1984 and 1985, crack began to appear in urban centers such as New York, Miami and Los Angeles, and by 1986, it was widely available in large U.S. cities.¹⁵ Crack was remarkably inexpensive and available in smaller quantities compared to powder cocaine, and created a new drug market in urban America.¹⁶ With the rise in its use came unprecedented media attention.¹⁷

In June 1986, Len Bias, an African-American basketball star, died of a powder cocaine and alcohol overdose.¹⁸ Many in the media and public mistakenly believed that Bias died of a crack overdose, and his death helped fuel widespread apprehensions that crack was not only devastating America's inner cities, but spreading outward from urban areas through its use by juveniles and the poor.¹⁹ Crack suddenly was an "epidemic,"²⁰ and had taken the nation "under siege."²¹

Responding to this media attention, Congress set aside its regular process and expedited the passing of the Anti-Drug Abuse Act of 1986.²² The Act established mandatory minimum sentences for federal drug trafficking crimes and created the 100:1 sentencing disparity between powder and crack cocaine.²³ Five year sentences for individuals convicted of crimes involving five grams of crack cocaine or 500 grams of powder cocaine, and 10 year sentences for indi-

viduals convicted of crimes involving 50 grams of crack cocaine or 5000 grams of powder cocaine were instituted.²⁴

Despite these striking disparities, Congress did not provide a detailed legislative record as to its intent behind the ratios beyond merely stating that other ratios were considered.²⁵ It was apparent, however, that members of Congress believed crack to be more dangerous than powder cocaine because it was extraordinarily addictive, its use led to an increasing rate of violent crime, it caused higher rates of psychosis and death, young people were particularly prone to addiction, and its low cost and ease of manufacture would lead to more widespread use.²⁶

Two years later in 1988, Congress further differentiated between the treatment of crack and powder cocaine under the law by passing the Anti-Drug Abuse Act of 1988.²⁷ The 1988 Act created a five year mandatory minimum and 20 year maximum sentence for simple possession of five grams or more of crack cocaine.²⁸ With that, crack cocaine became the only drug with a mandatory minimum penalty for a first offense of simple possession, while the maximum penalty for simple possession of any other drug remained at one year.²⁹

THE EFFECTS OF THE FEDERAL SENTENCING POLICY

Following the rush to implement these Acts, in 1995 the United States Sentencing Commission began taking a closer look at the distinctions between crack and powder cocaine that were created and the effects of the new penalties imposed.³⁰ The Commission consistently found little justification in the 100:1 disparity and concluded that crack and powder cocaine were the same drug, and their use created essentially the same physiological response.³¹ Furthermore, the Commission consistently concluded that African-Americans comprised the vast majority of those impacted by the severity of the crack penalties and the effect of the new penalties were to punish more harshly lower level involvement rather than high level suppliers.³²

The disparity between demographics of federal crack cocaine offenders is striking. In 2006 African-Americans constituted 81.8 percent of federal cocaine offenders, while Caucasians and Hispanics each constituted less than nine percent.³³ This is in stark contrast to federal powder cocaine offenders, 71.8 percent of whom are Caucasian or Hispanic and 14.3 percent of whom are

African-American.³⁴ These statistics led the Commission to conclude that “sentences appear to be harsher and more severe for racial minorities than others as a result of this law, and hence the perception of unfairness, inconsistency, and a lack of evenhandedness.”³⁵

A Chicago police officer dealing strictly with narcotics for the past nine years, who requested not to be named, stated that crack cocaine was much more prevalent in the African-American communities he worked than powder cocaine.³⁶ Of the individuals he arrested for crack cocaine possession, 90 percent were African-American, and in cases involving conspiracy to distribute crack, he has only arrested five individuals who were not African-American in his career.³⁷ While the majority of these arrests were for state prosecutions, the officer indicated that similar cases in his department are taken over by the FBI for federal prosecutions.³⁸

Daniel Hesler, Staff Attorney with the Federal Defender Program in Chicago for 16 years, and member of the Northern District of Illinois Retroactive Crack Cocaine Committee, has represented defendants in countless federal crack prosecutions, yet admittedly has real difficulty recalling a Caucasian defendant on a crack case.³⁹ According to Hesler, “People of color were getting much, much, longer sentences for cocaine offenses than Caucasians, and everything about it seemed wrong.”⁴⁰

The Commission found that crack cocaine offenders are more concentrated in lower level functions than powder cocaine offenders.⁴¹ In 2005, 55.4 percent of federal crack cocaine offenses involved street level dealers with less than one ounce of the drug, whereas only 7.3 percent of federal powder cocaine offenses were of street level dealers with the same amount.⁴² These numbers appear contrary to the general objective of the 1986 Act to target “serious” and “major” traffickers.⁴³ Cocaine was coming into the country in large quantities in powder form, yet these traffickers received more lenient sentences than those at the street level, where powder was turned into crack.⁴⁴ To Hesler, these results were simply “irrational.”⁴⁵

REFORM TO FEDERAL SENTENCING POLICY

In drafting the Fair Sentencing Act of 2010, its sponsors sought to repair the shortcomings of the 1986 and 1988 Acts.⁴⁶ The 2010 Act increased the

amounts of crack cocaine necessary to trigger mandatory minimum sentences to 28 grams for five years and 280 grams for 10 years.⁴⁷ This effectively reduced the sentencing disparity between powder and crack cocaine from 100:1 to 18:1.⁴⁸ To further combat the negative effects of the previous laws, the 2010 Act eliminated the mandatory minimum sentence for simple possession of crack cocaine and increased monetary penalties for major drug traffickers.⁴⁹

Furthermore, the 2010 Act took more characteristics of the offender and crime into consideration at the sentencing stage.⁵⁰ The Act provides enhancements if violence was involved or if the offender had higher involvement in a drug operation, and adjustments if the offender had a minimal level of involvement or was motivated by a family relationship or threats.⁵¹ While the 2010 Act initially eliminated all sentencing disparity between crack and powder cocaine, the 18:1 ratio was reached as a compromise to get the bipartisan support necessary to pass the bill.⁵² Despite the great support for the Act, Hesler was surprised it passed.⁵³ “Getting a majority on lowering criminal penalties on anything is difficult, no matter how irrational,” he stated.⁵⁴

Despite the significant reforms established in the Fair Sentencing Act, some believe that the Act has not resolved all of the injustices facing federal crack offenders.⁵⁵ Those calling for further reform include the ACLU, Families against Mandatory Minimums, criminal defense attorneys, congressmen, and even U.S. District Judges.⁵⁶ The first step many reformers argue for is to eliminate any disparity in sentencing and treat crack and powder cocaine equally.⁵⁷ Crack and powder cocaine chemically are two forms of the same drug, advocates argue, and they should thus be treated the same way to reflect that.⁵⁸

Often pointed to for justification is a 1996 study published by the Journal of American Medicine that found the physiological and psychoactive effects of cocaine to be similar regardless of whether it is in powder or crack form.⁵⁹ However, some congressmen still believe that harsher penalties are justified due to the more addictive qualities of crack.⁶⁰ These individuals argue that because crack is a more direct method of consumption and leads to a quicker high, users will take more of the drug to sustain their high, which in turn will lead the user to become more addicted.⁶¹

The association of crack with increased levels of violence is also a contested issue.⁶² Proponents of complete elimination of the disparity argue that most violence associated with crack is the result of being part of an illegal market,

similar to violence associated with the trafficking of other drugs.⁶³ The Chicago police officer pointed out that violence will be present when drugs are sold: “Money runs the whole narcotics trade. . .If you cross the wrong person. . .they’re going to do something about it.”⁶⁴

Hesler believes that the economic situation surrounding the crack trade is also an important factor to consider, stating that “there is a correlation between poverty and violence and crack, but that doesn’t mean that crack is causing the violence.”⁶⁵ Those in favor of keeping a disparity, such as House Representative Lamar Smith, however, argue that crack offenders are more violent and more likely to have criminal records.⁶⁶ Today’s lower violent crime rates, according to Representative Smith, are due in part to tougher drug penalties, such as those for crack.⁶⁷

Advocates for reform also believe that the mandatory minimum sentences that remain associated with crack cocaine need to be eliminated.⁶⁸ Judges are not permitted to deviate from the prescribed mandatory minimums and are prevented from making any individualized assessment of the offender’s involvement and background.⁶⁹ Hesler believes that judges are very capable of distinguishing between individuals who have minimal involvement in a drug operation and those who are higher up the chain.⁷⁰ He also believes that Congress’s involvement poses a problem: “Sentencing from afar doesn’t work,” Hesler said. “Judges know who to throw the book at and know who not to.”⁷¹ When asked whether mandatory minimum sentences have any deterrent effect, Hesler responded, “None. Zero.”⁷² The Chicago police officer agreed, noting that all of the individuals he has arrested know the law better than the police do, yet they continue to traffic crack cocaine.⁷³

Finally, those dissatisfied with the Fair Sentencing Act argue that for past injustices to truly be alleviated, the Act’s reforms need to be applied retroactively.⁷⁴ Organizations like Families Against Mandatory Minimums are quick to point out that even if an offender was found to commit a crime involving crack on Aug. 2, 2010, he would still be subject to the 100:1 sentencing disparity that existed before the passing of the Act.⁷⁵ This one-day difference in the timing of the crime could make a difference of many years in prison, and detractors argue that this is contrary to the objectives of passing the 2010 Act.⁷⁶

Those against retroactive application of the sentencing changes argue that attempting to find all of the individuals who would be affected and calculating

the changes in their sentences would cause considerable administrative and litigation burdens.⁷⁷ Hesler encountered a similar situation when the U.S. Sentencing Commission unilaterally lowered the sentencing guidelines for crack offenses in 2007 and applied them retroactively.⁷⁸ While he admits that this caused a huge ruckus in the federal justice system, he strongly believes all of the work was “worth it because the sentences were unfair to begin with.”⁷⁹

While the passage of the Fair Sentencing Act of 2010 has not put to rest calls for reform of federal crack cocaine sentencing policy, it is apparent that concessions were necessary in order to achieve a sentencing scheme more representative of the harms associated with crack. It remains to be seen whether the issues addressed by proponents of further reform will ultimately be addressed by law. Most can agree, however, that the Fair Sentencing Act is a step forward in eliminating the injustices of previous federal crack cocaine sentencing policy.

NOTES

1 Deborah J. Vagins and Jesselyn McCurdy, *Cracks in the System: Twenty Years of the Unjust Federal Crack Cocaine Law*, 2006, available at <http://www.aclu.org/drug-law-reform/cracks-system-20-years-unjust-federal-crack-cocaine-law>.

2 Press Release, American Civil Liberties Union, President Obama Signs Bill Reducing Cocaine Sentencing Disparity (Aug. 3, 2010), available at <http://www.aclu.org/drug-law-reform/president-obama-signs-bill-reducing-cocaine-sentencing-disparity>.

3 *Id.*

4 Ethan Nadelmann, *Obama Takes a Crack at Drug Reform*, THE NATION, Sept. 13, 2010, available at <http://www.thenation.com/article/154164/obama-takes-crack-drug-reform>.

5 Vagins and McCurdy, *supra* note 1.

6 Interview with Daniel Hesler, Staff Attorney, Federal Defender Program, in Chi., Ill. (Sept. 24, 2010); ACLU Press Release, *supra* note 2.

7 Dear Mr. President – Yes, You Can, The Person, <http://www.dearmrpresidentyesyoucan.org/person.html> (last visited Oct. 17, 2010).

8 Dear Mr. President, *supra* note 7; Hamedah Hasan, *Cracks in the System Remain Despite Landmark Cocaine Sentencing Reform*, THE HUFFINGTON POST, Aug. 18, 2010, available at http://www.huffingtonpost.com/hamedah-hasan/cracks-in-the-system-remains_b_685041.html.

9 Dear Mr. President, *supra* note 7.

10 Hasan, *supra* note 8.

11 Letter from Scott Michelman & Jay Rorty, Attorneys, American Civil Liberties Union Foundation, to Barack Obama, President of the United States at 4 (Feb. 11, 2010) available at <http://www.dearmrpresidentyesyoucan.org/2010.02.11%20ACLU%20Letter%20-%20HH%20Petition%20for%20Commutation.pdf>.

12 Vagins and McCurdy, *supra* note 1, at 1.

13 *Id.*

14 *Id.*

- 15 *Id.*
16 *Id.*
17 Marcia G. Shein, *Race and Crack Cocaine Offenses: Correcting a Troubling Injustice Post Booker*, 31-APR CHAMPION 18, 19 (2007).
18 Vagins and McCurdy, *supra* note 1, at 1.
19 *Id.*
20 Shein, *supra* note 17.
21 Vagins and McCurdy, *supra* note 1, at 1.
22 *Id.*
23 Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended at 21 U.S.C. § 801 (2000)).
24 *Id.*
25 Vagins and McCurdy, *supra* note 1, at 2.
26 Shein, *supra* note 17.
27 Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988) (codified as amended in scattered sections of U.S.C.).
28 *Id.*
29 Shein, *supra* note 17.
30 *Id.*
31 *Id.*
32 U.S. SENTENCING COMMISSION, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 8 (2007).
33 *Id.* at 16.
34 *Id.*
35 U.S. SENTENCING COMMISSION, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 192 (1995).
36 Telephone interview with Chicago police officer. (Oct. 16, 2010).
37 *Id.*
38 *Id.*
39 Hesler, *supra* note 6.
40 *Id.*
41 U.S.S.C. 2007 REPORT, *supra* note 32 at 18, 19.
42 *Id.*
43 Vagins and McCurdy, *supra* note 1, at 2.
44 Hesler, *supra* note 6.
45 *Id.*
46 156 CONG. REC. H6198 (daily ed. July 28, 2010) (statement of Rep. Clyburn).
47 Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010) (codified as amended scattered sections of U.S.C.).
48 *Id.*
49 Fair Sentencing Act of 2010, *supra* note 42.
50 *Id.*
51 *Id.*
52 ACLU Press Release, *supra* note 2.
53 Hesler, *supra* note 6.
54 *Id.*
55 Hesler, *supra* note 6; ACLU Press Release, *supra* note 2.
56 ACLU Press Release, *supra* note 2; Julie Stewart, *Well Done Congress, Now Make Fair Sentencing Act Retroactive*, THE HUFFINGTON POST, Aug. 4, 2010, available at <http://www.huf->

fingtonpost.com/julie-stewart/well-done-congress-now-ma_b_671008.html; Hesler, *supra* note 6; Patricia Manson, *U.S. Commission Reduces Cocaine Prison Terms*, CHICAGO DAILY LAW BULLETIN, October 18, 2010, available at http://www.chicagolawbulletin.com/news/get_story_text.cfm?ID=100012817.

57 Hesler, *supra* note 6; ACLU Press Release, *supra* note 2.

58 Hesler, *supra* note 6; Vagins and McCurdy, *supra* note 1, at 5.

59 D.K. Hatsukami & M.W. Fischman, *Crack Cocaine and Cocaine Hydrochloride: Are the Differences Myth or Reality?*, 279 JOURNAL OF AM. MEDICINE, No. 19, Nov. 1996, at 1580.

60 156 CONG. REC. H6198 (daily ed. July 28, 2010) (statement of Rep. Smith).

61 *Id.*; Vagins and McCurdy, *supra* note 1, at 5.

62 Vagins and McCurdy, *supra* note 1, at 5.

63 *Id.*

64 Chicago police officer, *supra* note 36.

65 Hesler, *supra* note 6.

66 156 CONG. REC. H6197 (daily ed. July 28, 2010) (statement of Rep. Smith).

67 *Id.*

68 Hesler, *supra* note 6.

69 *Id.*

70 *Id.*

71 *Id.*

72 *Id.*

73 Chicago police officer, *supra* note 36.

74 Stewart, *supra* note 56.

75 *Id.*

76 *Id.*

77 *Federal Cocaine Sentencing Laws: Reforming the 100-to-1 Crack/Powder Disparity: Hearing Before the Subcomm. on Crime and Drugs of the S. Judiciary Comm.*, 110th Cong. 6-7 (2008)(supplemental statement of A.J. Kramer) available at http://www.fd.org/pdf_lib/AJ%20Supplemental_Testimony_Crack_Reform_Scott_ltr.pdf.

78 Hesler, *supra* note 6.

79 *Id.*