

## Fair Sentencing Act Retroactivity: Addressing the Sentencing Disparity of Crack Cocaine vs. Powder Cocaine

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### *History and Background*

College basketball star Len Bias died of a powder cocaine overdose while celebrating his number one draft pick in the 1986 NBA Draft.<sup>1</sup> Because his death was widely, although mistakenly, thought to be due to a crack cocaine overdose, the public and the federal government responded alike -- with panic about the perceived heightened dangers of crack cocaine.<sup>2</sup> This panic served to advance the national war on drugs that was already well underway.

One of the most impactful of the tough-on-crime policies that came from the war on drugs in the 1980s is the unreasonable harshness of sentencing for crack versus for powder cocaine. This originated with the passage of the Anti-Drug Abuse Act (ADAA) in 1986, an under-researched piece of legislation that followed Bias' death.<sup>3</sup> The sentences it created were then formally adopted by the newly-created United States Sentencing Commission (USSC).<sup>4</sup>

The ADAA, among other things, created mandatory minimum sentences for drug trafficking crimes, including cocaine. As it stood under the new law, 500 grams of powder cocaine, but only five grams of crack cocaine, triggered a five-year mandatory minimum. Similarly, five kilograms of powder cocaine, but only 50 grams of crack cocaine, triggered a ten-year mandatory minimum.

Crack cocaine sentencing laws in the ADAA also included a five-year mandatory minimum sentence for simple possession of the drug. Put in perspective, the maximum jail sentence for simple possession of any other drug, including powder cocaine, was one year.

The ADAA created a 100-to-one ratio between the quantity of crack versus powder cocaine needed to trigger mandatory minimum sentencing. This disparity between crack

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<sup>1</sup> Jon Schuppe, "30 Years after Basketball Star Len Bias' Death, Its Drug War Impact Endures," June 19, 2016 <https://www.nbcnews.com/news/us-news/30-years-after-basketball-star-len-bias-death-its-drug-n593731>

<sup>2</sup> Ibid.

<sup>3</sup> H.R. 5484, 99th Congress (1986) <https://www.congress.gov/bill/99th-congress/house-bill/5484>

<sup>4</sup> H.R. 5773, 98th Congress (1984) <https://www.congress.gov/bill/98th-congress/house-bill/5773>

and powder cocaine was driven by fear, instead of by research, of the intensity and perceived dangers of crack cocaine. The public, and members of Congress, believed that crack was more addictive and dangerous to the public due to the fast, intense high that smoking it gives.

Since 1986, the USSC did research on the matter, and in 1995 concluded that the data collected did not indicate a distinction between the two forms of what is an identical substance.<sup>5</sup> The same fast, intense high that was used to justify the 100-to-one ratio is given by injecting powder cocaine.

Therefore, the danger associated with crack cocaine versus powder cocaine instead relates to the trade of the drug, not the drug itself. The USSC subsequently recommended rectifying the unfounded sentencing disparity between the two types.

Crack cocaine and powder cocaine are the same drug, simply sold in different forms. Falsely treating crack cocaine as “50 times more addictive” than powder cocaine, as Congress did more than in creating the 100-to-one quantity ratio, has implications beyond that of mere unfair sentencing.<sup>6</sup> Chief among these is the racial outcome of the sentencing disparity.

### *Racial Impact*

The excessively harsh sentencing laws for crack cocaine versus for powder cocaine are not inherently discriminatory, as many lawsuits have claimed since the ADAA was passed. However, their statistical racial impacts cannot be ignored.

Despite the fact that more than 66 percent of crack cocaine users are white or Hispanic, almost 85 percent of those serving federal sentences for crack cocaine are African American. For powder cocaine sentences, this disparity does not exist. Whites and Hispanics each make up a more equal, or greater, percentage of the federal sentences being served for powder cocaine offenses than do blacks.<sup>7</sup>

Resulting from the unequal effect of crack cocaine sentencing laws, are many undoubtedly negative effects exclusive to black communities. The massive disruption to black communities due to arbitrarily written policies disproportionately prevents these communities from bettering themselves. Not only do lengthy prison sentences for simple possession crimes not make sense fiscally, but they also threaten public safety by increasing potential crime in communities torn apart by these arbitrary laws.

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<sup>5</sup> United States Sentencing Commission, “1995 Report to the Congress: Cocaine and Federal Sentencing Policy,” February 1995 <https://www.ussc.gov/research/congressional-reports/1995-report-congress-cocaine-and-federal-sentencing-policy>

<sup>6</sup> Michael Coyle, “Race and Class Penalties in Crack Cocaine Sentencing,” Prison Policy Initiative <https://www.prisonpolicy.org/scans/sp/RaceandClass.Sentencing.pdf>

<sup>7</sup> Deborah J. Vagins and Jesselyn McCurdy, “Cracks in the System: Twenty Years of the Unjust Federal Crack Cocaine Law,” American Civil Liberties Union, October 2006 [https://www.aclu.org/sites/default/files/field\\_document/cracksinsystem\\_20061025.pdf](https://www.aclu.org/sites/default/files/field_document/cracksinsystem_20061025.pdf)

## *Recent Changes*

Back in 1995, over twenty years ago, the USSC recommended equalizing the ratio between crack and powder cocaine to trigger mandatory minimum sentences.<sup>8</sup> Congress rejected this recommendation and took until fifteen years later to address the issue at all. In 2010, the Fair Sentencing Act (FSA) was signed into law.<sup>9</sup>

This bill was a compromise that, although it did not fully correct the injustices of the harsh, arbitrary federal sentencing of crack cocaine, it was a significant step in the right direction. The FSA reduced the 100-to-one disparity to 18-to-one, and abolished the 5-year mandatory minimum for simple possession of crack cocaine. It also applied only prospectively, not addressing those who had been subjected to unfair sentences prior to the passage of the law.

The USSC responded to this new policy by altering its crack cocaine sentencing guidelines as well to reflect the 18-to-one ratio instead of the 100-to-one. The U.S. Supreme Court ruled 5-4 in *Dorsey v. United States* (2012)<sup>10</sup> that the new, lower sentences under the FSA may be applied to offenders sentenced after the FSA became law, even if their crimes were committed before its enactment. This has resulted in reduced sentences for more than 7,700 federal prisoners.<sup>11</sup>

While the effect of the *Dorsey* decision created a desirable effect, this decision came at the expense of a loose interpretation of existing law, 1 U.S. Code § 109, the General Savings Statute (GSS). The GSS holds that, “The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide.”

As Justice Antonin Scalia wrote in his dissent on the case, because “[t]he [FSA] is silent as to whether these changes apply to defendants who committed their offenses before, but whose sentencing proceedings occurred after, its August 3, 2010, effective date,” “the general saving statute...dictates that the new, more lenient mandatory minimum provisions do not apply to such pre-enactment offenders.”

Here, it becomes clear that full retroactivity of FSA, so that the 18-to-one ratio may apply to all federal prisoners still serving sentences under the 100-to-one ratio, can only be made policy through legislation. This leaves the remainder of the work to be done up to Congress in correcting the unjust disparity between crack and powder cocaine sentencing.

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<sup>8</sup> United States Sentencing Commission, “1995 Report to the Congress: Cocaine and Federal Sentencing Policy,” February 1995 <https://www.ussc.gov/research/congressional-reports/1995-report-congress-cocaine-and-federal-sentencing-policy>

<sup>9</sup> S. 1789, 111th Congress (2010) <https://www.congress.gov/bill/111th-congress/senate-bill/1789>

<sup>10</sup> *Dorsey v. United States*, United States Supreme Court, June 21, 2012 <https://www.supremecourt.gov/opinions/11pdf/11-5683i7k8.pdf>

<sup>11</sup> United States Sentencing Commission, “Preliminary Crack Retroactivity Data Report Fair Sentencing Act,” April 2014 <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/fsa-amendment/20140415-USSC-Crack-Retro-Report-Post-FSA.pdf>

## *Further Initiatives*

Sen. Chuck Grassley (R-Iowa) reintroduced a bill with Sen. Dick Durbin (D-Ill.) in the fall of 2017 which includes a provision for FSA retroactivity. This bill, the Sentencing Reforms and Corrections Act (SRCA), S.1917,<sup>12</sup> garnered significant bipartisan support when it was introduced in the 114th Congress. FreedomWorks issued a letter of support for SRCA as it was introduced both in the 114th Congress<sup>13</sup> and in the 115th.<sup>14</sup>

In the current bill, Section 106, “Application of the Fair Sentencing Act,” states explicitly that a “court that imposed a sentence for a covered offense, may...impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 were in effect at the time the covered offense was committed.” This provision, as part of new legislation, is in line with 1 U.S. Code § 109, and also creates further positive effects of retroactive application of FSA.

FSA retroactivity is one necessary further step toward the correction of the unjust sentencing disparity between crack cocaine and powder cocaine. Additionally, this proposal is modest in comparison to existing proposals to eliminate the disparity altogether.

The Fair Sentencing Act, as it was originally introduced by Sen. Dick Durbin (D-Ill.) in 2009, eliminated the disparity entirely, amending the 100-to-one ratio to one-to-one.<sup>15</sup> This provision was watered down to a reduction in the disparity by the time it was signed into law, to the now-standing 18-to-one crack to powder ratio.<sup>16</sup>

Earlier in 2017, Sen. Rand Paul (R-Ky.) introduced the Reclassification to Ensure Smarter and Equal Treatment (RESET) Act, S.1252.<sup>17</sup> FreedomWorks issued a letter of support for this bill as well, which would eliminate the 18-to-one sentencing disparity, as well as reclassify several low-level felonies as misdemeanors.<sup>18</sup>

## *Current State of Play: The FIRST STEP Act*

The most viable option currently in reforming the crack cocaine versus powder cocaine sentencing disparity comes in attaching the provision from Sen. Grassley’s Sentencing Reform and Corrections Act to the prison reform legislation that has already passed the House. In May of this year, the FIRST STEP Act, H.R. 5682,<sup>19</sup> passed in the House of

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<sup>12</sup> S. 1917, 115th Congress (2017) <https://www.congress.gov/bill/115th-congress/senate-bill/1917>

<sup>13</sup> “Tell Your Senators to Support the Sentencing Reform and Corrections Act, S. 2123,” FreedomWorks, November 3, 2015 <http://d7.freedomworks.org.s3.amazonaws.com/LoS%202015-11-03%20-%20Support%20-%20S%20202123%20Sentencing%20Reform%20and%20Corrections%20Act.pdf>

<sup>14</sup> “Support the Sentencing Reform and Corrections Act, S. 1917,” FreedomWorks, October 4, 2017 [http://d7.freedomworks.org.s3.amazonaws.com/LoS\\_10\\_4\\_2017\\_Sentencing\\_Reform\\_and\\_Corrections\\_Act\\_S.\\_1917\\_0.pdf](http://d7.freedomworks.org.s3.amazonaws.com/LoS_10_4_2017_Sentencing_Reform_and_Corrections_Act_S._1917_0.pdf)

<sup>15</sup> S. 1789, 111th Congress (2009) <https://www.congress.gov/111/bills/s1789/BILLS-111s1789is.pdf>

<sup>16</sup> S. 1789, 111th Congress (2010) <https://www.congress.gov/bill/111th-congress/senate-bill/1789>

<sup>17</sup> S. 1252, 115th Congress (2017) <https://www.congress.gov/115/bills/s1252/BILLS-115s1252is.pdf>

<sup>18</sup> “Support the RESET Act, S. 1252,” FreedomWorks, June 5, 2017

[http://d7.freedomworks.org.s3.amazonaws.com/LoS\\_6\\_5\\_2017\\_RESET\\_Act\\_S.1252\\_0.pdf](http://d7.freedomworks.org.s3.amazonaws.com/LoS_6_5_2017_RESET_Act_S.1252_0.pdf)

<sup>19</sup> H.R. 5682, 115th Congress (2018) <https://www.congress.gov/bill/115th-congress/house-bill/5682>

Representatives by an overwhelming bipartisan margin, 360-59.<sup>20</sup> Only two Republicans voted against the measure.

Currently, the bill, which has a Senate companion, S. 2795,<sup>21</sup> carried by Sens. John Cornyn (R-Texas) and Sheldon Whitehouse (D-R.I.) awaits action in the upper chamber. In order for Congress to follow through on one of President Trump's legislative priorities for the year, a deal must be made with Sens. Grassley and Durbin to add certain provisions from SRCA to the legislation to ensure their essential support.

Retroactivity of FSA is ripe for this job. Crack cocaine and powder cocaine are the same drug in different forms -- two sides of the same coin -- and should be treated as such. The negotiations around the FIRST STEP Act present a real opportunity to do this.

Allowing application of FSA retroactively would simply allow, but would not mandate, courts to more fairly re-sentence drug offenders whose cases do not warrant the excessive mandatory minimums set under outdated and unfounded Anti-Drug Abuse Act. This reform is a common sense one that would dramatically reduce the fiscal burden of over-incarceration, while at the same time maintaining a strong standard of public safety for American communities.

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<sup>20</sup> "Final Vote Results for Roll Call 215," U.S. House of Representatives Roll Call Votes 115th Congress - 2nd Session (2018) <http://clerk.house.gov/evs/2018/roll215.xml>

<sup>21</sup> S. 2795, 115th Congress (2018) <https://www.congress.gov/bill/115th-congress/senate-bill/2795>