

## **Preparing for Sentencing Hearings in Crack Cocaine Cases**

In light of the recent flurry of activity concerning the disparity between crack and powder cocaine sentences, this memo is intended to provide panel attorneys with a general framework for structuring arguments in preparation for sentencing in crack cocaine cases and support for the position that the court must consider this disparity in imposing sentences which are “not greater than necessary” to achieve the purposes of the sentencing factors set forth in § 3553(a).

In short, in all cases involving convictions for possession or distribution of crack cocaine, defendants should argue that the district court should utilize a 1:1 ratio of crack to powder cocaine to determine the applicable advisory guideline range.

### **Practice Pointers for Arguing for the Utilization of a 1:1 Ratio**

#### **I. Cases Law Which Should Be Cited in a Sentencing Memorandum:**

##### **A. Supreme Court Cases Which Allow for Consideration of the Disparity**

1. *Kimbrough v. United States*, 128 S.Ct. 558 (2007)  
<http://www.scotusblog.com/wp/wp-content/uploads/2007/12/06-6330.pdf>

The Supreme Court stated that federal districts court may consider the disparity between crack and powder sentences and are free to conclude that the 100:1 ratio results in a sentence that is “greater than necessary” to achieve sentencing objectives.

2. *Spears v. United States*, 129 S.Ct. 840 (2009)  
<http://www.supremecourtus.gov/opinions/08pdf/08-5721.pdf>

The Supreme Court held that the district court did have the authority to replace the 100:1 ratio for crack/powder cocaine offenses used in the Sentencing Guidelines with its own ratio of 20:1. It may do so, the Court held, even if the defendant presents no special mitigating circumstances, simply because the sentencing court believes the Guidelines create an unwarranted sentencing disparity at odds with the 3553(a) factors. Thus, the district court may utilize a different ratio based on a categorical policy disagreement with the guidelines rather than a case specific determination that the guidelines would create an excessive sentence in a particular case.

B. District Court Cases Imposing a Categorical 1:1 Ratio in Crack Cases

1. *United States v. Gully*, \_\_\_\_ F.Supp.2d \_\_\_\_, 2009 WL 1370898 (N.D. Iowa 2009).

Held: District Court Judge Mark Bennett found that the appropriate method in all crack cocaine sentencing is to use a 1:1 crack to powder ratio, and then to enhance sentences for individual defendants for offenses that involve weapons, bodily injury or other conduct warranting an enhancement under the 3553(a) factors or defendant-specific factors.

2. *United States v. Lewis*, \_\_\_\_ F.Supp.2d \_\_\_\_, 2009 WL 1591633 (D.D.C. 2009).

District Court Judge Paul Friedman adopted the reasoning of Judge Bennett in *Gully* and held that a 1:1 ratio should be used for all crack cocaine sentencing. After applying the 1:1 ratio, the court should then consider all aggravating factors applicable to an individual case including: violence, injury, recidivism or possession/use of a weapon.

II. **Reference the Fact That the Obama Administration Wants the 100:1 Ratio Eliminated**

A. President Obama wants the ratio to be 1:1

1. See *The Burlington Free Press*, June 25, 2009: “AG Wants Review of Cocaine Sentences”

This article may also be found at:

<http://www2.ljworld.com/news/2009/jun/25/g-wants-review-cocaine-sentences/>

2. See Statement of Assistant Attorney General Lanny Breuer (below) outlining the Administration’s position available at:  
<http://judiciary.senate.gov/pdf/09-04-29BreuerTestimony.pdf>

III. **Set Forth The Department of Justice Position and Argue It Supports a 1:1 Ratio**

1. Assistant Attorney General Lanny Breuer testified that DOJ supports an approach that would eliminate the disparity between crack and powder cocaine sentences, but that would also account for aggravating factors such as violence, injury, recidivism or possession or use of weapons.

See Statement of Lanny A. Breuer, Assistant Attorney General, Criminal Division, United States Department of Justice, Before the United States Senate Committee on the Judiciary, Subcommittee on Crimes and Drugs entitled: “Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity,” (April 29, 2009)  
<http://judiciary.senate.gov/pdf/09-04-29BreuerTestimony.pdf>

2. Note that federal prosecutors are not opposed to a revision of the ratio
  - a. Deputy Attorney General David W. Ogden advised all federal prosecutors that while the DOJ will work to revise the law to eliminate the disparity, they have yet to develop a proposal to do so. So prosecutors should:
    - (i). continue to charge quantities of crack cocaine that trigger mandatory minimums and urge sentencing courts to adhere to those minimums;
    - (ii). inform courts that the Obama Administration believes that Congress and the Sentencing Commission should eliminate the sentencing disparity but that Congress has not yet determined how to achieve an appropriate sentencing scheme for crack offenses, so courts should fashion sentences consistent with the 3553(a) factors;
    - (iii). in an average case, they may indicate that they do not oppose a variance;
    - (iv). they may oppose a variance based on case-specific factors including: violence, firearms or recidivism;
    - (v). prosecutors are not required to concede on appeal that sentencings based on the 100:1 ratio are unreasonable (reasoning that while *Kimbrough* and *Spears* hold that courts can consider the disparity, they don’t require courts to vary from the guidelines);

(Letter from David Ogden entitled *Memorandum For All Federal Prosecutors*, may be found on the Federal Defender Office Website : <http://fpdvermont.org/> within the materials prepared by Maine Federal Defender David Beneman entitled “Crack Powder and Departures” dated July 17, 2009.)

IV. Argue that Utilizing a 1:1 Ratio Is Consistent With the Court's Consideration of the § 3553(a) Factors

A. While the 100:1 ratio was based on assumptions that crack offenses were more likely to involve violence, injury or weapons, because many of those assumptions have now been proven invalid, the appropriate way to account for these factors is when considering the 3553(a) factors. These enhancements should not be considered in determining the correct crack to powder ratio.

1. “The court finds that the appropriate methodology is to use a 1:1 crack-to-powder ratio not just in an individual case or in a “mine-run” crack case, but in all “crack” cases, then to enhance sentences for individual defendants for trafficking offenses that actually involve weapons or bodily injury, or for other conduct warranting enhancement under 18 U.S.C. § 3553(a), as the Sentencing Commission proposed in 1995. . . . Using this methodology, the parties’ arguments about whether or not this particular defendant is merely a street-level dealer or a major trafficker should be accounted for in his sentence, but in the consideration of the 18 U.S.C. § 3553(a), including characteristics of the defendant and circumstances of the offense, rather than in the crack-to-powder ratio.” *Gully*, \_\_\_F.Supp.2d at \_\_\_, 2009 WL 1370898 at \*2.

2. After utilizing the 1:1 ratio to determine the applicable advisory guideline range, the court can then enhance the defendant’s sentence (or decrease it) based on the 3553(a) factors such as “the nature and circumstances of the offense” or “the history and characteristics of the defendant.” *Id.*

V. Other Considerations:

A.. The Sentencing Commission has been urging Congress for years to revise the crack guidelines

See United States Sentencing Commission, Report to Congress: Cocaine and Federal Sentencing Policy 8 (May 2007) available at [http://www.ussc.gov/r\\_congress2007.pdf](http://www.ussc.gov/r_congress2007.pdf), which includes the following findings:

1. crack offenses are associated with less violence than previously assumed
2. the disparity leads to anomalous results in that street level dealers are getting more time than the wholesale distributors who supply them with the powder

used to produce the crack

3. effects of the use of crack and powder are similar
4. the disparity fosters lack of confidence in the criminal justice system because the severe crack sentences are imposed primarily on black offenders

## **VI. Make Sure to Preserve Issues for Appellate Review**

- A. Object to the PSR (prior to and during sentencing)
- B. Object to any sentence which is not based on a 1:1 ratio
- C. Because the statutory mandatory minimum sentences for crack offenses are based on the 100:1 ratio, make sure to preserve this issue in the event that the law should change
  1. Ask the court to note that, if the law on mandatory minimums were to change, the court would sentence the defendant differently.

## **VII. Sentencing in the District Court of Vermont**

### **A. Judge Sessions**

Comments made by Judge Sessions during June 18, 2009 sentencing of Matthew Adams: *United States v. Adams*, 2:07-CR-134-2 (D.Vt. 2009)

1. He will not, at this time, state a crack v. powder ratio to be used in all cases.
2. He will consider the disparity in the crack/powder Guidelines as one of the 3553(a) factors and recognizes his authority to adjust sentencing ranges accordingly to reach an appropriate sentence, *i.e.* one that is not greater than necessary.

### **B. Judge Murtha**

1. Will sentence defendants convicted of crack cocaine offenses on August 12, 2009.
2. We do not yet know what his position will be with respect to the crack v. powder ratio issue.