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Summer Doldrums Issue

Cracking Up.

Pretend there was an illegal drug called cocaine. In the suburbs, dealers sold it in plastic baggies. In the city, dealers it sold in small glass vials.

Law enforcement officials noticed more crime and violence associated with the sale of cocaine in the city than the suburbs. The police and prosecutors encouraged politicians to pass laws making the punishment far greater for possession of cocaine in vials rather than baggies. The legislators made the punishment 100 times greater.

These laws punished the predominately black urban possessors far more severely, and more often, than the affluent white suburban possessors. Due to an expensive and ineffective war on drugs, politicians loathed to remedy the obvious racial inequity.

Then, a President, who recently gutted social services affecting the black community, felt insecure about the appearance of the cocaine disparity. He told his Attorney General and Drug Czar to fashion a remedy. His advisors then crafted a remedy as superficial as possible, because the war on drugs still benefited the administration.

Of course, this is all fantasy. The container carrying cocaine does not determine a possessor's sentence. Instead, the distinction is based upon whether cocaine is powder or hardened into a rock.

However, we now know this is a distinction without a difference. A peer-reviewed article in the Journal of the American Medical Association (Nov. 1996), found no pharmacological difference between crack and powder.

Therefore, isn't the above example apt? Is any distinction justified?

A current proposal, from Janet Reno and Barry McCaffrey to President Clinton, would change the five-year mandatory minimum punishment from 5 grams of crack and 500 grams of powder to 25 grams of crack and 250 grams of powder. There is no proposal to change the amounts for ten-year minimums, or the ranges within the sentencing guidelines. This is a cynical position.

Currently, a first time offender, possessing 5 grams of crack cocaine has a base offense level of 26. Absent a role adjustment, firearm possession, or violence, many defendants are not subject to a mandatory minimum anyway under U.S.S.G. §5C1.2 (Limitation on Applicability of Statutory Minimum in Certain Cases). That section also provides for a two-level reduction. So absent any change in the law, many first-time defendants are not affected by the mandatory minimum anyway.

For those not affected by §5C1.2 (known as the safety valve), the effect of the proposal is still minimal. A base level 26, for a Criminal History Category I, is 63-78 months. The difference between 63 months and the mandatory minimum is only 3 months. Anyone above a Category I Criminal History Category, is unlikely to have a range below the mandatory minimum anyway.

Even assuming a three-level reduction for acceptance of responsibility, the difference between the low end, of 46 months, and the mandatory minimum is 14 months. Although a significant amount of time, it affects a limited number of cases.

There will probably be some move to change the guideline ranges, if the proposal on the five-year minimum is made law. But, to keep the

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guidelines uniform (i.e. consistent with the remaining ten-year minimum), these changes are unlikely to be more than a reduction of a few months.

The real miscarriages of justice involve the higher quantities of crack. There are many cases, in which a first-time offender is holding or carrying over 50 grams of crack for another. In my practice, I have represented two different young single mothers who were effectively terminated of their parental rights by ten-year mandatory minimums in such cases.

The most sardonic aspect of the proposal lowers the threshold for powder from 500 grams to 250 grams. I have never defended a federal criminal case that involved only 250 grams of powder cocaine. I have had many cases involving single digit gram quantities of crack.

There remains a double standard for prosecutions of small quantities of powder and crack. The proposal will not change that, even slightly.

Reversible Errors

United States v. Mertilus, 111 F.3d 870 (11th Cir. 1997) (Safety valve applies to a telephone count).

Sanders v. United States, 113 F.3d 184 (11th Cir. 1997) (A pro se petitioner's out-of-time appeal will be treated as a motion for extension of time).

United States v. Gonzalez, 113 F.3d 1026 (9th Cir. 1997) (A court must hold a hearing when the defendant claims his plea was coerced).

United States v. Duarte-Higarenda, 113 F.3d 1000 (9th Cir. 1997) (The court failed to question a non-English speaking defendant over a jury waiver).

United States v. Main, 113 F.3d 1046 (9th Cir. 1997) (In an involuntary manslaughter case, the harm must be foreseeable within the risk created by the defendant).

United States v. Williams, 113 F.3d 1155 (10th Cir. 1997) (The defendant's actions during trial warranted a competency hearing).

United States v. Taylor, 113 F.3d 1136 (10th Cir. 1997) (1. The court did not assure a proper waiver of counsel; 2. A firearm found in shared home was not shown to be possessed by the defendant).

United States v. McPhail, 112 F.3d 197 (5th Cir. 1997) (*Bailey* claim upheld on a writ).

United States v. Halton, 113 F.3d 43 (5th Cir. 1997) (Mail fraud and tax fraud counts must be grouped).

United States v. Bradfield, 113 F.3d 515 (5th Cir. 1997) (Evidence supported an instruction on entrapment).

United States v. Tackett, 113 F.3d 603 (6th Cir. 1997) (The court failed to find that government resources were wasted for obstruction enhancement).

United States v. Herrerra-Solano, 114 F.3d 48 (5th Cir. 1997) (A prior probated felony was not an aggravated felony in an illegal reentry case).

United States v. Armistead, 114 F.3d 504 (5th Cir.), cert. denied, 1997 WL 562084 (1997) (There was an ex post facto application of a guideline provision).

United States v. Pipkin, 114 F.3d 504 (5th Cir. 1997) (The defendant did not knowingly structure a currency transaction).

United States v. Thomas, 114 F.3d 403 (3d Cir. 1997) (Insufficient evidence of a conspiracy, when it was not shown that defendant knew cocaine was in bag he was to retrieve).

United States v. Romero, 114 F.3d 141 (9th Cir. 1997) (After an acquittal for possession, an importation charge was barred by collateral estoppel).

United States v. Wicklund, 114 F.3d 151 (10th Cir. 1997) (A murder for hire required a receipt or promise of pecuniary value).

United States v. Paguio, 114 F.3d 928 (9th Cir. 1997) (1. Evidence that the defendant previously applied for a loan was prejudicial; 2. A missing witness' self-incriminating statement should have been admitted).

United States v. Wallace, 114 F.3d 652 (7th Cir. 1997) (A court should not have limited a downward departure just because the defendant already received credit for accepting responsibility).

United States v. Zelaya, 114 F.3d 869 (9th Cir. 1997) (An express threat of death was not foreseeable to the accomplice-defendant).

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