UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
FILE NO. X:XXCRXXXX

UNITED STATES OF AMERICA	:	
	:	
vs.	:	**FIRST WAVE CASE**
	:	
XXXXXX XXXXXX XXXX	:	

(1) "Not Eligible" as alleged by the Probation Office.

(2) "With Objections" as noted herein.

The Defendant, through counsel, moves this Honorable Court to reduce her sentence pursuant to 18 U.S.C. § 3582(c)(2) because the United States Sentencing Commission has made Amendment 706 — which amends the drug quantity table set forth in U.S.S.G. § 2D1.1 to reduce the sentencing ranges for offenses involving cocaine base — retroactive.

FACTUAL AND PROCEDURAL BACKGROUND

The Defendant, a XX year old African American woman, was named in xxxx counts of a xxx count indictment alleging that she and one XXXXXXX XX XXXXXXXXX conspired to distribute and did distribute cocaine base. From XXXXX, XXXX, until XXXX, XXXX, Defendant was, literally, a street-level crack user and dealer. With one exception, she sold "user" quantities of crack cocaine to support her habit. As found by the district court, and explained below,

she "only sold drugs so she could use them herself." In this case, Defendant sold user quantities of crack to two confidential informants working at the behest of the XXXXXXXXXX, North Carolina, Police Department.

The relationship between Defendant and the informants began with the informants making several small buys from her. After establishing their relationship with Defendant--a person the sentencing court found to be of "very limited mental capacity"--the confidential informants pressed her to purchase two ounces of crack (more than 50 grams). Defendant told the informants that she did not have that much crack. Ultimately, she placed a call to a crack supplier, at the request of the informants, to "help" them in the purchase of two ounces of crack. Defendant contacted XX XXXXXXXX who agreed to provide the two ounces of crack for $1,800. This last transaction occurred on XXXXXX XX, XXXX, and resulted in the arrests of both Defendant and her codefendant. Thereafter, both were prosecuted in federal court.

Defendant entered a plea of guilty to count xxx of the indictment, the count charging the two-ounce transaction which occurred on XXXXXX XX, XXXX. Further, she agreed that she was responsible, under 21 U.S.C. § 841(a) and U.S.S.G. § 2D1.1, for at least 50 but no more than 150 grams of cocaine base "crack." At Defendant's sentencing hearing, using the stipulated crack amount,

the Court determined that her Total Offense Level was 29 and her Criminal History Category was IV, resulting in a recommended guideline range of 121-151 months. The Court, however, imposed a sentence of 120 months. In fashioning this sentence, the Court stated:

> The court is of the opinion that this defendant has very limited mental capacity. The court also believes that she only sold drugs so she could use them herself. The Court informed the parties that 50 months was sufficient punishment in this case, and imposed a sentence as low as it possibly could due to the statutory minimum sentence.

Judgment Statement of Reasons at 3.

Under the guidelines applicable at the time of Defendant's sentencing hearing, more than 50 grams but less than 150 grams of crack resulted in a Base Offense Level of 32. U.S.S.G. § 2D1.1(c)(4) (effective November 1, 2005). Under the current version of the guidelines, this same amount of crack results in a Base Offense Level of 30. U.S.S.G. § 2D1.1(c)(4) (effective March 3, 2008). Thus, Defendant's Base Offense Level has been lowered from 32 to 30 by virtue of the November 1, 2007, amendment to the drug quantity table.

Amendment 706, which altered the drug quantity table set forth in U.S.S.G. § 2D1.1 to reduce the sentencing ranges for offenses involving cocaine base, went into effect on November 1, 2007. See U.S.S.G., app. C., amdt. 706. On December 7, 2007, the Sentencing

Commission voted to make Amendment 706 retroactive by including it in U.S.S.G. § 1B1.10(c)'s list of retroactive amendments. The inclusion of Amendment 706 in U.S.S.G. § 1B1.10(c) went into effect on March 3, 2008. U.S.S.G. § 1B1.10 (Supp. Mar. 3, 2008). District courts may modify a defendant's term of imprisonment when the Sentencing Commission makes an amendment to the guidelines retroactive and the specific amended guideline was a component part forming the basis of the defendant's guideline range. 18 U.S.C. § 3582(c)(2)[1].

Had Defendant been sentenced under the current version of the guidelines, her Total Offense Level would be 27 and her Criminal History Category would remain Category IV, resulting in a recommended guideline range of 100-125 months. Even under this new range, a sentence at the low of the range would constitute twice as much punishment as the sentencing court deemed sufficient for

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[1] The court may not modify a term of imprisonment once it has been imposed except that —

. . . .

(2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. [§] 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in [18 U.S.C. §] 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

Defendant after considering the factors set forth in 18 U.S.C. § 3553(a). Despite the sentencing court's informed judgment and the Sentencing Commission's reduction in the crack penalties under the guidelines, the governing statute mandated a minimum sentence of 120 months. 21 U.S.C. § 841(b)(1)(A).

SUMMARY OF THE ARGUMENTS

For the reasons that follow, Defendant challenges on constitutional grounds the statutory mandatory minimum sentence imposed upon her. Due to Congress' continued failure to address the discriminatory, irrational, and unwarranted sentencing disparity resulting from the enforcement of those federal criminal statutes imposing the same penalty for a quantity of cocaine base as for 100 times as much cocaine hydrochloride, this Court should invalidate the cocaine base penalties as in violation of the Equal Protection component of the Due Process Clause. As exemplified by Defendant's case, trafficking in fifty grams or more of cocaine base subjects a defendant to a mandatory ten-year sentence, while trafficking in five kilograms or more of cocaine hydrochloride is required to trigger the same sentence. 21 U.S.C. § 841(b)(1)(A) (2000). Congress is on notice, and has been on notice since at least 1995, that the cocaine base mandatory minimums dictated by this 100-to-1 ratio are not rationally related to any lawful

governmental purpose, as it apparently believed in 1986 and 1988 when it enacted the penalty differential into law.

Defendant asserts two separate constitutional challenges in this memorandum. First, the 100-to-1 ratio, while accorded facial validity when originally codified in Title 21 of the U.S. Code, is in fact so arbitrary that it may no longer be sustained even under the rational basis test. Second, Congress' failure to eliminate the 100-to-1 ratio, prolonged and sustained in the face of scientific and statistical evidence that conclusively demonstrates this sentencing scheme unjustifiably subjects African American drug offenders to more severe punishment, evinces purposeful discrimination.

THE SENTENCING COMMISSION'S REPORTS TO CONGRESS

In 1995, the Sentencing Commission published the first[2] of four reports documenting the impact that the crack/powder ratio has

[2]U.S. Sent. Comm'n, Special Report to the Congress: Cocaine and Federal Sentencing Policy (1995), available at, http://www.ussc.gov/crack/exec.htm (hereinafter "1995 Report"). The three subsequent reports are: U.S. Sent. Comm'n, Special Report to the Congress: Cocaine and Federal Sentencing Policy (1997), available at, http://www.ussc.gov/r_congress/NEWCRACK.PDF (hereinafter "1997 Report"); U.S. Sent. Comm'n, Report to the Congress: Cocaine and Federal Sentencing Policy (2002), available at, http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm (hereinafter "2002 Report"); and, U.S. Sent. Comm'n, Report to the Congress: Cocaine and Federal Sentencing Policy (2007), available at, http://www.ussc.gov/r_congress/cocaine2007.pdf (hereinafter "2007 Report").

had upon cocaine offenders. Because Congress created the Sentencing Commission to function as its "expert agency" on matters pertaining to federal sentencing policy, Rita v. United States, 127 S. Ct. 2456, 2463 (2007), the Commission's various reports on crack cocaine sentencing, submitted to Congress, demonstrate Congressional awareness of the problems recounted in those reports. The information culled from the Commission's reports and included herein amounts to a very small portion of the information actually provided to Congress by the Commission in its reports. It goes without saying that Congress possesses the empirical evidence marshaled by the Commission, and more importantly, Congress must be deemed to have conducted its business over these past many years with actual knowledge of the effect of the 100-to-1 ratio on cocaine offenders.

In the mid-1980s, cocaine base or "crack" surfaced on the national drug scene. Crack was first mentioned in the press by the Los Angeles Times in 1984, with media coverage increasing thereafter. 1995 Report at 122. Congress, in its attempt to battle the perceived upcoming drug epidemic driven by crack, hastily passed the Anti-Drug Abuse Act of 1986. Pub. L. No. 99-570, 100 Stat. 3207 (1986) (hereinafter "1986 Act").

The 1986 Act established, among many things, mandatory minimum penalties for drug trafficking offenses, and in particular, those

involving crack and powder cocaine. Congress made a distinction between cocaine base and other forms of cocaine, creating the 100-to-1 ratio. 1995 Report at 116. Congress' intent, as it related to cocaine, was to target quantities of this drug typically associated with what it believed were "major" (more than 50 grams of crack and more than 5,000 grams of powder) and "serious" (more than 5 grams of crack and more than 500 grams of powder) traffickers. Id. at 118. For "major" traffickers, the minimum imprisonment floor was set at ten years and for "serious" traffickers, it was set at five years. Id. Despite Congress' intended targets, the effect of this legislation was mostly felt by certain distinct groups in society. "It is interesting that about 95 percent of those that are charged with crack cocaine violations are black and other minorities." United States v. Petersen, 143 F. Supp. 2d 569, 575 (E.D. Va.), affm'd, 27 Fed. Appx. 193 (4th Cir. 2001) (unpublished), cert. denied, 535 U.S. 1026 (2002) (citations omitted).

As the 1986 Act was rushed through Congress, very little information made its way into the congressional record. "Of particular relevance to this report," noted the Commission in 1995, "the legislative history does not include any discussion of the 100-to-1 powder cocaine/crack cocaine quantity ratio *per se*." 1995 Report at 117. However, it is evident that other ratios were discussed, including 50-to-1 and 20-to-1, the latter ratio

suggested by then-Senate Majority Leader Bob Dole at the behest of the Reagan Administration. Id. Many Senators present during the floor debate on the 1986 Act "commented that the bill was hastily prepared, rather than the product of a deliberative process, and was not enacted through the traditional committee procedure." Petersen, 143 F. Supp. 2d at 573.

Not long before Congress began drafting the 1986 Act, public anxiety about crack increased due to the death of promising basketball player Len Bias. A college All-American at the University of Maryland, Bias was the second player chosen in the first round of the 1986 NBA draft by then-House Speaker Tip O'Neal's home team, the Boston Celtics. Bias' death was quickly and erroneously attributed to a crack overdose, which was magnified by the media's constant coverage[3]. 1995 Report at 122. The negative attention crack received as a result of Bias' death, although crack played no role in causing Bias' death, was the driving force behind the accelerated manner in which Congress developed the crack/powder

[3]Although Bias died from cocaine intoxication, the method of his ingesting cocaine was unknown at the time of his death. Even so, Maryland's Assistant Medical Examiner was quoted by the media as saying that Bias probably died of "free-basing" cocaine. Not until a year later during the trial of Bias' supplier, Brian Tribble, did Terry Long, a Maryland basketball player who participated in the cocaine party leading to Bias' death, testify that he, Bias, Tribble and another player snorted powder cocaine over a four hour period. This information received scant media coverage. 1995 Report at 122-3.

sentencing disparity. For example, in 1994, Representative William Hughes reflected on the events surrounding the enactment of the 1986 Act:

> In 1986, during the fervor of the war on drugs and with a lack of substantive information about a new type of cocaine substance, crack, Congress enacted penalties for crack cocaine that have proven unwarranted, unjust and do not achieve the goal of removing big time dealers.

140 Cong. Rec. H, 2593 (Apr. 21, 1994).

Congress believed that crack was more dangerous than powder cocaine and should be treated differently for sentencing purposes. 1995 Report at 118. In addition to Congress' factually baseless belief that "major" crack dealers traffic in more than 50 grams of crack and that "serious" crack dealers traffic in more than 5 grams of crack, Congress determined that crack warranted more heightened penalties than powder cocaine based on five additional false or marginally valid assumptions:

> First, crack cocaine was viewed as extraordinarily addictive[.] Second, the correlation between crack cocaine use and the commission of other serious crimes was considered greater than that with other drugs[.] Third, the physiological effects of crack cocaine were considered especially perilous, leading to psychosis and death. Fourth, members of Congress felt young people were particularly prone to using crack cocaine[.] Finally, there was a great concern that crack's "purity and potency," the costs per dose, the ease with which it is manufactured, transported, disposed of, and administered, were all leading to widespread use of crack.

Id. (footnotes omitted). These assumptions were made when crack hysteria was at its peak. Congress apparently wanted to calm the public concern over the "crack epidemic" that was fueled by the intense and inaccurate media coverage. As a result, "[t]he legislative history can be searched in vain for empirical evidence to support the assumptions upon which Congress acted." Petersen, 143 F. Supp. 2d at 574.

To address the public's continued concern with crack cocaine more specifically, Congress passed the Anti-Drug Abuse Act of 1988. Pub. L. No. 100-690, 102 Stat. 4181 (1988) (hereinafter the "1988 Act"). The major change wrought by the 1988 Act, as it pertained to cocaine, was expanding the mandatory minimum penalties as they applied to crack offenses. The 1988 Act amended 21 U.S.C. § 844 to make crack cocaine the only drug carrying a mandatory minimum penalty for a first offense of simple possession. 1995 Report at 123. When the 1988 Act was first introduced, however, the mandatory minimum penalties for possession of crack were not included. The penalties were added by floor amendments in both the House and Senate, even though the Department of Justice opposed the amendments. 1995 Report at 124.

The mandatory minimum penalties in the 1988 Act were much more harsh for simple possession of crack than for any other drug. As the Sentencing Commission explained, "[i]t was thought that the

possession of as little as five grams of crack cocaine was an indicator of distribution rather than personal use." 1995 Report at 125. While the 1986 Act had already created a large disparity between crack and powder sentences, the 1988 Act increased that negative impact. As the amendments were debated, three false or marginally valid reasons surfaced for expanding the severe crack penalties for simple possession:

> First ... the supply of "cocaine" was greater than ever. Second ... crack cocaine "causes greater physical, emotional, and psychological damage than any other commonly abused drug." Finally, repeating the concern expressed during consideration of the 1986 Act ... "crack [cocaine] has been linked to violent crime."

Id. (citing 134 Cong. Rec. H7, 704 (Sept. 16, 1988)). It must be stressed that the vague assumptions upon which Congress acted in passing both the 1986 Act and the 1988 Act, were and are simply that: vague assumptions. As the Commission aptly concluded, "[t]aken as a whole, the abbreviated, somewhat murky legislative history simply does not provide a single, consistently cited rationale for the crack-powder cocaine penalty structure." 1995 Report at 121.

With the 1986 Act, Congress created a distinction between crack and powder cocaine for purposes of mandatory sentencing. More extreme mandatory minimum penalties for crack possession were

established with the 1988 Act. The developments in federal drug legislation addressing crack cocaine did not cease here.

By 1994, it was becoming apparent even to Congress that the crack/powder disparity was yielding unfair sentences and required reexamination. When Congress passed the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994), it included a provision directing the Commission to study the cocaine sentencing scheme. This provision required the Sentencing Commission to "submit a report to Congress ... address[ing] the differences in penalty levels that apply to different forms of cocaine and include any recommendations that the Commission may have for retention or modification of such differences in penalty levels." 108 Stat. at 2097.

The Sentencing Commission's report, released in February 1995, found "[t]he factors that suggest a difference between the two forms of cocaine do not approach the level of a 100-to-1 quantity ratio." 1995 Report at xiv. The "Commission firmly conclude[d] that it cannot recommend a ratio differential as great as the current 100-to-1 quantity ratio[,]" and suggested to Congress that the ratio "be re-examined and revised." Id. at 196-7. Several months later, the Commission proposed an amendment which, if enacted, would have eliminated any distinction between crack and

powder cocaine for purposes of sentencing. See 60 Fed. Reg. 25,074, 25,075-77 (proposed May 1, 1995).

The House Judiciary Committee noted in a report that "the current 100-to-1 quantity ratio may not be the appropriate ratio," but nevertheless recommended disapproval of the Sentencing Commission's crack/powder equivalency amendment. H.R. Rep. No. 104-272, at 4 (1995). In signing the legislation to prevent the equal ratio amendment from taking effect, Pub. L. No. 104-38, 109 Stat. 334 (1995), President Clinton conceded that "[s]ome adjustment [to the crack/powder sentencing disparity] is warranted." Statement on Signing Legislation Rejecting U.S. Sentencing Commission Recommendations, 2 Pub. Papers 1700 (Oct. 30, 1995). Accordingly, while the legislative directive to the Commission insisted that sentences for crack traffickers "should generally exceed" those for powder traffickers, Congress once again directed the Sentencing Commission to "submit to Congress recommendations (and an explanation therefor [sic]), regarding changes to the statutes and sentencing guidelines governing sentences" for crack offenders. 109 Stat. at 334.

The Sentencing Commission responded in April 1997 with a second report reaffirming that "a 100-to-1 quantity ratio cannot be justified." 1997 Report at 2. The Commission recommended that Congress reduce the crack/powder sentencing disparity to yield a

drug quantity ratio of 5-to-1. Id. at 9. Regarding statutory mandatory minimums, the Commission suggested to Congress a two-fold approach:

> The Sentencing Commission thereby recommends that Congress revise the federal statutory penalty scheme for both crack and powder cocaine offenses. Selecting the appropriate threshold for triggering the five-year mandatory minimum penalties is not a precise undertaking, but based on the best available research and the goals detailed above, the Commission recommends for Congress's consideration a range of alternative quantity triggers for both powder and crack cocaine offenses. For powder cocaine, the Commission concludes that the current 500-gram trigger for the five-year mandatory minimum sentence should be reduced to a level between 125 and 375 grams, and for crack cocaine, the five-gram trigger should be increased to between 25 and 75 grams.

1997 Report at 9. Implicit within these recommendations was the Commission's conclusion that refuted Congress' belief that dealing in five grams of crack constituted "serious" distribution.

This suggestion for a substantial reduction of, rather than the elimination of, the 100-to-1 ratio caught the attention of the President, the Attorney General, and the Director of National Drug Control Policy, all of whom subsequently urged Congress to implement a slightly higher 10-to-1 ratio instead. See Christopher S. Wren, Reno and Top Drug Official Urge Smaller Gap in Cocaine Sentences, N.Y. Times, July 22, 1997, at A1.

Finally, the Commission also reexamined the mandatory minimum penalties for simple possession of crack. Its recommendation in

this regard was unequivocal. "The Commission reiterates it unanimous finding that the penalty for simple possession of crack cocaine should be the same as for the simple possession of powder cocaine." 1997 Report at 10. Congress, however, took no action to implement any of the Commission's proposals.

Five years later, in May 2002, the Sentencing Commission released its third report to Congress on federal cocaine sentencing policy. In this Report, it concluded, unsurprisingly, that no new evidence altered its previous recommendations. Defendant quotes at length from this Report, since as explained below, the Commission drew the same conclusions in its 2007 Report:

> In 1986, Congress responded to a national sense of urgency surrounding drugs generally and crack cocaine specifically, expedited the usual legislative process, and enacted the Anti-Drug Abuse Act of 1986. The 1986 Act created the basic framework of statutory mandatory minimum penalties currently applicable to federal drug trafficking offenses generally, and the legislative history indicates that Congress targeted "serious" and "major" drug traffickers for five and ten-year mandatory minimum sentences, respectively.
>
> The 1986 Act also established the 100-to-1 drug quantity ratio between powder cocaine and crack cocaine offenses that lies at the heart of the ongoing debate over the federal sentencing policy for cocaine offenses. As a result of both the statutory and guideline 100-to-1 drug quantity differentiation between the two forms of cocaine, the sentencing guideline range for crack cocaine offenses based solely on drug quantity is three to over six times longer than powder cocaine offenses involving equivalent drug quantities, depending on the exact quantity of drug involved. In addition, the average sentence for crack cocaine offenses (118 months) is 44

months – or almost 60 percent – longer than the average sentence for powder cocaine offenses (74 months), in large part due to the effects of the 100-to-1 drug quantity ratio.

The legislative history is ambiguous as to whether Congress intended the penalty structure for crack cocaine offenses to fit within the general two-tiered, five and ten-year penalty structure for serious and major traffickers created by the 1986 Act. The legislative history is clear, however, that Congress considered crack cocaine much more dangerous than powder cocaine and, therefore, those who trafficked crack cocaine warranted significantly higher punishment.

* * * * * *

Much has been learned about crack cocaine and crack cocaine offenders in the intervening years. Crack cocaine was a relatively new phenomenon at the time Congress was considering the 1986 Act, having been mentioned first in the major media by the Los Angeles Times only two years earlier on November 25, 1984. Some of the information available to Congress in retrospect proved not to be empirically sound. For example, recent studies report that prenatal exposure to crack cocaine produces identical effects as prenatal exposure to powder cocaine and is far less devastating than previously reported.

Recent information also indicates that some of the conclusions reached in 1986 regarding the prevalence of certain aggravating conduct in crack cocaine trafficking may no longer be accurate. For example, establishment of the 100-to-1 drug quantity ratio was in part based on reports that crack cocaine offenses were highly associated with violence. Anecdotal evidence and Commission sentencing data indicate, however, that the violence has abated considerably. In 2000, almost three-quarters (74.5%) of federal crack cocaine offenders had no weapon involvement. Even when weapons were present, rarely were they actively used (2.3% of crack cocaine offenders).

* * * * * *

> The advent of the more finely calibrated sentencing guideline system, which provides a more just and targeted mechanism to account for a number of aggravating factors, may in and of itself warrant some reconsideration of the severity of the mandatory minimum penalties.
>
> After carefully considering all of the information currently available – some 16 years after the 100-to-1 drug quantity ratio was enacted – the Commission firmly and unanimously believes that the current federal cocaine sentencing policy is unjustified and fails to meet the sentencing objectives set forth by Congress in both the Sentencing Reform Act and the 1986 Act. The 100-to-1 drug quantity ratio was established based on a number of beliefs about the relative harmfulness of the two drugs and the relative prevalence of certain harmful conduct associated with their use and distribution that more recent research and data no longer support.

2002 Report at 90-1 (footnotes omitted, emphasis added).

The Commission recommended that Congress adopt a drug quantity ratio of "not more than 20-to-1." Id. at 107. With regard to the mandatory minima established for possession of crack, the Commission found that this "unique" penalty, under which an offender who simply possesses five grams of crack receives the same five-year mandatory minimum penalty as an offender who distributes five grams of crack, "results in significantly disproportionate sentencing." 2002 Report at 109 (footnote omitted, emphasis added). "The Commission again strongly urges Congress to repeal the mandatory minimum penalty for simple possession of crack cocaine." Id.

The Commission's 2002 Report also reminded Congress that the mandatory minimum penalties brought about by the 1986 Act's 100-to-1 ratio predated the promulgation of guidelines. Thus, in 1986, Congress had but one tool in its toolbox with which to implement cocaine sentencing policy: A sledge hammer.

> [A]t the time Congress was considering the 1986 Act, the sentencing guidelines authorized by the Sentencing Reform Act of 1984 were still being developed by the Commission. Consequently, to effect its will that crack cocaine trafficking offenses be punished much more severely than powder cocaine trafficking offenses, Congress had only one instrument directly available to differentiate penalties for the two forms of cocaine: mandatory minimum penalties. Congress therefore used this mechanism and provided substantially different trigger drug quantities for the mandatory five and ten-year penalties for trafficking powder cocaine and crack cocaine.

2002 Report at 91. With the "advent of the more finely calibrated sentencing guideline system, which provides a more just and targeted mechanism to account for a number of aggravating factors," the Commission questioned the necessity of mandatory minimum penalties based on the 100-to-1 ratio. Id. A Senate Judiciary subcommittee held a hearing to discuss the Commission's 2002 findings and recommendations, but no legislation to modify any of the cocaine penalties ever materialized.

In May 2007, the Sentencing Commission released its fourth report to Congress, noting that the crack/powder disparity "continues to come under almost universal criticism from

representatives of the Judiciary, criminal justice practitioners, academics, and community interest groups." 2007 Report at 2. In advance of the 2007 Report's release, the Commission voted to amend the Sentencing Guidelines. Hamstrung by Congress' failure to act upon its previous recommendations to eliminate or to modify the mandatory statutory penalties for cocaine, the Commission approved a two-level reduction in the base offense levels for crack within the drug quantity table of U.S.S.G. § 2D1.1(c). "[T]he problems associated with the 100-to-1 drug quantity ratio," the Commission observed, "are so urgent and compelling that this amendment is promulgated as an interim measure [i.e. an "emergency" amendment] to alleviate some of those problems." U.S.S.G. app. C., amdt. 706, supp. to app. C at 229 (2007).

In the five years since publishing its 2002 Report, the Commission found little had changed with regard to the disparate treatment brought about by the five and ten year mandatory minimum sentences for crack offenders. 2007 Report at 2-4. With no change in the data since 2002, the Commission reiterated its 2002 proposals:

> Current data and information continue to support the core findings contained in the 2002 Commission Report, among them:
>
> > (1) The current quantity-based penalties overstate the relative harmfulness of crack cocaine compared to powder cocaine.

> (2) The current quantity-based penalties sweep too broadly and apply most often to lower level offenders.
> (3) The current quantity-based penalties overstate the seriousness of most crack cocaine offenses and fail to provide adequate proportionality.
> (4) The current severity of crack cocaine penalties mostly impacts minorities.
>
> Based on these findings, the Commission maintains its consistently held position that the 100-to-1 drug quantity ratio significantly undermines the various congressional objectives set forth in the Sentencing Reform Act.

2007 Report at 7-8.

The Commission's amendment reducing the crack Base Offense Levels in the drug quantity table of guidelines by two levels went into effect November 1, 2007, with the tacit approval of Congress.

One month later, in December, 2007, the Supreme Court handed down its opinion in Kimbrough v. United States, 128 S. Ct. 558 (2007), holding that district court judges were free to disagree with guideline ranges for crack offenders and impose less severe sentences if they determined the crack/powder disparity would yield sentences "greater than necessary" to achieve the objectives of sentencing. Id. at 564, 575 (quoting 18 U.S.C. § 3553(a)). In reaching this conclusion, the Court undertook a lengthy analysis of Congress' rationale behind the crack/powder ratio, highlighting the Commission's findings that the disparity was, in fact, unsupportable. Id. at 566-69.

Almost immediately after the Supreme Court's decision in Kimbrough, the Sentencing Commission announced that its amendment reducing the crack penalties under the guidelines would be given retroactive application. See Press Release, U.S. Sent. Comm'n, "Commission Votes Unanimously to Apply Amendment Retroactively for Crack Cocaine Offenses; Effective Date for Retroactivity Set for March 3, 2008" (Dec. 11, 2007), available at http://www.ussc.gov/PRESS/rel121107.htm. The Commission described its retroactive application of Amendment 706 as "only a partial step in mitigating the unwarranted sentencing disparity that exists between Federal powder and crack cocaine defendants." Id. (emphasis added).

In February 2008, both the Senate and the House convened hearings on the crack/powder sentencing disparity. The Subcommittee on Crime and Drugs of the Senate Judiciary Committee held one hearing February 12, 2008. See http://judiciary.senate.gov/hearing.cfm?id=3089. The Subcommittee on Crime, Terrorism and Homeland Security of the House Judiciary Committee held its hearing on February 26, 2008. See http://judiciary.house.gov/hearings/hear_022608.html. Following those hearings, the Sentencing Commission's retroactivity amendment went into effect March 3, 2008, again with the tacit approval of Congress. However, no action has been taken on the proposed legislation to eliminate or ameliorate the disparity in the mandatory minimums.

ARGUMENT

I. The Crack/Powder Disparity Fails the Rational Basis Test.

When examining equal protection challenges to the crack/powder ratio in cases where no suspect class was involved, the Fourth Circuit has applied rational basis review. See, e.g., United States v. Thomas, 900 F.2d 37 (4th Cir. 1990); United States v. D'Anjou, 16 F.3d 604, 612 (4th Cir. 1994). When applying this standard, the court "seek[s] only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose." Plyler v. Doe, 457 U.S. 202, 216 (1982).

Under rational basis review, a presumption of validity "will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985). Further, "the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." Id. In other words, Congress has the right to be wrong, provided it mends its erroneous ways when confronted with the error. But, "[t]he state may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." Id. at 446. Finally, because Defendant is challenging federal legislation, it is important to note that "if a classification would be invalid under the Equal Protection Clause

of the Fourteenth Amendment, it is also inconsistent with the due process requirement of the Fifth Amendment." Johnson v. Robinson, 415 U.S. 361, 366 (1974). With this precedent in mind, the 100-to-1 penalty ratio is arbitrary and irrational and, as such, violates Defendant's constitutional rights.

Defendant concedes, as she must, that the 1986 Act as adopted is facially neutral and that its passage did not reflect, at that time, purposeful discrimination or otherwise violate the Due Process Clause. She further concedes that Congress genuinely, though erroneously, believed that a rational basis existed for adopting the specific 100-to-1 crack/powder sentencing ratio in the mid-1980s, notwithstanding the uncharacteristic abandonment of the deliberative process with which it passed the 1986 Act.

Defendant acknowledges binding, adverse precedent.[4] In denying a similar Due Process challenge in 1990, the Fourth Circuit observed in Thomas:

> Congress could rationally have concluded that distribution of cocaine base is a greater menace to society than distribution of cocaine powder and warranted greater penalties because it is less expensive and, therefore, more accessible, because it is considered more addictive than cocaine powder and because it is specifically targeted toward youth.

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[4]Although acknowledging binding adverse precedent, Defendant asserts, as set forth in this memorandum, good faith arguments for the "modification or reversal of existing law." N.C. Rule Prof. Conduct 3.1.

Thomas, 900 F.2d at 39-40.

Relying exclusively upon its above-quoted language in Thomas, the Fourth Circuit has declined all subsequent invitations to revisit its initial rational basis determination concerning the crack/powder ratio. See, e.g., United States v. Hayden, 85 F.3d 153, 157-58 (4th Cir. 1996) (Sentencing Commission reports concluding that the disparity is unwarranted "[do] not change our earlier holdings.") The voluminous evidence that has been amassed in the eighteen years since Thomas was decided refutes its "rationality" holding. This is clear based on the Commission's work and more recent Supreme Court precedent.

The Court recently examined the limited legislative history of the 1986 Act and described Congress' rationale for the crack/powder disparity as follows:

> Congress apparently believed that crack was significantly more dangerous than powder cocaine in that: (1) crack was highly addictive; (2) crack users and dealers were more likely to be violent than users and dealers of other drugs; (3) crack was more harmful to users than powder, particularly for children who had been exposed by their mothers' drug use during pregnancy; (4) crack use was especially prevalent among teenagers; and (5) crack's potency and low cost were making it increasingly popular.

Kimbrough, 128 S. Ct. at 567 (citing 2002 Report at 90). The Court highlighted the Sentencing Commission's findings that these reasons were factually flawed and did not warrant the 100-to-1 ratio Congress chose to adopt. Id. at 568. The Court's recognition of

the fallacies of the crack/powder disparity demonstrates that Thomas is no longer good law.

The proper scope of Thomas' holding is that there was a rational basis for adopting the crack/powder disparity in 1986, taking into consideration what Congress believed to be true at that time. The Fourth Circuit has never addressed by published decision whether the continued enforcement of the 100-to-1 ratio, taking into consideration what Congress now knows about the faulty assumptions upon which it was (and is) based is a due process/equal protection violation under rational basis review. Nor has it addressed whether strict scrutiny should apply and whether it fails strict scrutiny review, given Congress' knowledge of the disparate impact on African Americans, the subject of Defendant's second argument beginning on page 52 below.

As the following discussion illustrates, each of the five principal grounds identified in Kimbrough which underlie the disparate treatment of crack and powder cocaine offenders, as well as Congress' guesswork associated with the amount of crack "serious" or "major" dealers traffic, has been repudiated by subsequent research, much of it compiled in the four Reports to Congress issued by the Commission and relied upon by the Court in Kimbrough. As in Kimbrough, Congress' enactment of the disparity should be examined in light of subsequent Sentencing Commission

findings, recent Supreme Court decisions, and Congress' tacit approval of the Commission's retroactive Amendment 706. After doing so, it becomes clear that the disparity is no longer founded on a rational basis.

A. Rationale #1: Crack is Highly Addictive.

The first Congressional rationale identified by the Court in Kimbrough was that Congress believed that "crack was highly addictive." Id. Crack and powder cocaine cause identical physiological and psychotropic effects regardless of the method of ingestion. 2007 Report at 62-64. In any form, cocaine is potentially addictive. Id. at 65. While snorting powder cocaine is less addictive than smoking crack or injecting powder, "powder cocaine that is injected is more harmful and more addictive than crack cocaine." U.S. Sent. Comm'n., *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 132 (2004). The risk and severity of addiction to drugs are significantly affected by the way they are ingested, but no drug other than crack is punished more severely based on the most common method of ingestion. 2007 Report at 65.

The 2007 Report indicated "[i]t is widely accepted that snorting cocaine is often the first manner in which many users begin using cocaine." Id. at 66. Thus, the envisioned scenario

where a person begins her drug abuse with crack from the outset and becomes instantly addicted to the substance is uncommon, contrary to Congress' original belief.

Cocaine base was given a far larger mandatory minimum sentence than powder in part because it was believed to be more addictive. The Sentencing Commission's reports demonstrate the falsity of this premise and correctly note that "addictiveness" is related more closely to the methods of consuming cocaine and not to the form of cocaine ingested. As noted above, a user who injects powder cocaine faces a greater risk of addiction as compared with the user who smokes crack. Thus, both crack and powder can be administered in a manner more conducive to addiction than snorting. Congress, unfortunately, did not tailor the statute to distinguish between methods of administration, but enacted the penalties based only on the form of cocaine involved in the offense.[5] In light of this knowledge, it is clear that the 100-to-1 ratio based upon the belief that crack was more addictive than powder is irrational.

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[5]In an analogous sense, one could rhetorically consider, as did Sentencing Commissioner Michael S. Gelacak, why a legislative body would treat two forms of the same drug differently when the evidence shows little, if any, reason for doing so. "It is a little like punishing vehicular homicide while under the influence of alcohol more severely if the defendant had become intoxicated by ingesting cheap wine rather than scotch whiskey. That suggestion is absurd on its face and ought be no less so when the abused substance is cocaine rather than alcohol." 1997 Report, Concurring Opinion of Mr. Gelacak at 2.

B. Rationale #2: Crack Use Promotes Violence.

The second congressional rationale for the sentencing disparity was the notion that "crack users and dealers were more likely to be violent than users and dealers of other drugs[.]" Kimbrough, 128 S. Ct. at 567 (citing 2002 Report at 90). However, "the Commission found that crack is associated with "significantly less trafficking-related violence ... than previously assumed." Id. at 568 (citing 2002 Report at 100). When studying both crack offenders and crack offenses, the Commission's data demonstrate that the ratio cannot be sustained under the belief that crack use or trafficking promotes violence.

In 2000, the Commission found that a super majority (two-thirds) of crack offenses took place without any weapon involvement. 2002 Report at 100. Significantly, "three-quarters of federal crack cocaine offenders (74.5%) had no personal weapon involvement." Id. Furthermore, the Commission found that "when weapons were present, they rarely were actively used. In 2000, only 2.3 percent of crack cocaine *offenders* used a weapon. ... Bodily injury of any type occurred in 7.9 percent of crack cocaine offenses in 2000." Id. In other words, in 2000, 97.7% of the crack offenders never used a weapon. Finally, when one understands how expansively the Commission defined "violence," it becomes clear that crack offenses are some of the least violent.

The Commission defined violence as occurring "when *any* participant in the offense made a credible *threat*, or caused any actual physical harm, to another person." 2007 Report at 37 (second emphasis added). As can be seen by this definition, the Commission equated threats of violence with actual violence, and considered an offense a violent offense when any single participant in the offense made a credible threat or caused actual harm. Even with "violence" defined in this manner, the Commission's continuing study of crack usage indicated violence "decreased in crack cocaine offenses from 11.6 percent in 2000 to 10.4 percent in 2005." Id. In nearly 90% of the crack offenses (89.6% to be exact), no violence occurred. Id. at 38, fig. 2-20.

In crack cases in 2005, death occurred in only 2.2% of cases, any injury occurred in only 3.3% of cases, and a threat was made in 4.9% of cases. 2007 Report at 38. Thus, 94.5% of cases involved no actual violence, and 89.6% involved no violence or threat of violence. Only 2.9% of crack offenders in 2005 used a weapon. Id. at 33. Further, there has been a reduction in violence associated with crack since 1992. According to the Commission, this is consistent with the aging of the crack cocaine user and trafficker populations. Id. at 83, 87. "By the early 1990s ... the relationship between crack and unwelcome social outcomes had largely disappeared.... After property rights were established and

crack prices fell sharply reducing the profitability of the business, competition-related violence among drug dealers declined." Roland G. Fryer, Jr., Paul S. Heaton, Steven D. Leavitt, Kevin M. Murphy, National Bureau of Economic Research, *Measuring the Impact of Crack Cocaine* (May 2005), available at: http://pricetheory.uchicago.edu/levitt/Papers/FryerHeatonLevittMurphy2005.pdf.

Congress created the 100-to-1 ratio, in part, because it believed those persons involved in the use and/or distribution of crack were much more disposed to engage in violent activity. However, Sentencing Commission data dispels that notion. Crack offenders are not likely to be engaged in dangerous behavior. Therefore, the radically higher penalty for crack cannot be said to be rationally related to the purpose of eliminating or preventing violence.

C. Rationale #3: Crack is More Harmful to One's Health.

The third congressional rationale identified in Kimbrough was the assumption that "crack was more harmful to the user than powder particularly for children who had been exposed by their mothers' drug use during pregnancy." 128 S. Ct. at 567 (citing 2002 Report at 90). During the late 1980s and early 1990s, the media covered the phenomenon of "crack babies" extensively. United States v. Cherry, 50 F.3d 338, 343 (5th Cir. 1995). "Crack babies" are

infants born to mothers who used crack during their pregnancy. 1995 Report at 54. However, Commission data confirmed that a mother's use of crack during her pregnancy was no more harmful to the child than a mother's use of powder. 2002 Report at 94.

The negative effects of prenatal crack cocaine exposure are identical to the negative effects of prenatal powder cocaine exposure, which are significantly less severe than previously believed, are similar to prenatal tobacco exposure, less severe than heroin or methamphetamine exposure, and far less severe than prenatal alcohol exposure. The 2005 National Survey of Drug Use and Health estimated that of infants exposed to illicit drugs in utero, 7% were exposed to powder cocaine, 2% were exposed to crack cocaine, 73% were exposed to marijuana, and 34% were exposed to unauthorized prescription drugs. 2007 Report at 68-71. Further, a recent study found no differences in growth, IQ, language or behavior between three-year-olds who were exposed to cocaine in the womb and those who were not. *See* Kilbride, Castor, Cheri, *School-Age Outcome of Children With Prenatal Cocaine Exposure Following Early Case Management*, Journal of Developmental & Behavioral Pediatrics, 27(3):181-187, June 2006.

The term "crack babies" is largely "misleading because of the inability to determine whether the fetus' prenatal exposure was due to crack cocaine or some other form of cocaine." 1995 Report at 50-

51. Furthermore, "the negative effects of prenatal crack cocaine exposure are identical to the negative effects of prenatal powder cocaine exposure." Kimbrough, 128 S. Ct. at 568 (citing 2002 Report at 94). Surprising to many was the Commission's determination, based upon available medical evidence, that crack use by a mother during pregnancy had approximately the same detrimental effect on the fetus as did cigarette smoking. Even more surprising was the Commission's conclusion that a mother's alcohol use during pregnancy caused greater harm to her unborn child than either crack use or tobacco use. "[T]he negative effects from prenatal exposure to cocaine are very similar to those associated with prenatal tobacco exposure and less severe than the negative effects of prenatal exposure to alcohol." 2002 Report at 95.

The Commission found these facts "further complicate[] accounting for the harms of prenatal cocaine exposure by quantity-based criminal penalties, particularly penalties that purport to distinguish between different forms of cocaine in part because of those perceived harms." Id. Consequently, "no differential in the drug quantity ratio based directly on this particular heightened harm appears warranted." 2002 Report at 94. And, if the foregoing findings are not sufficient to justify radically reducing or equalizing the crack/powder ratio, the Commission noted Congress' erroneous assumption regarding the health concerns of pregnant

crack abusers was flawed from the outset. "[R]ecent research indicates that the negative effects of prenatal cocaine exposure are significantly less severe than believed when the current penalty structure was established." 2002 Report at 95.

The "crack baby" epidemic so widely reported in the media never materialized. Unfortunately, an unrelated health epidemic did appear on the national scene in the 1980s: "Acquired Immune Deficiency Syndrome" or AIDS. One method of "acquiring" this syndrome was by an addict's use of an infected hypodermic needle to inject drugs.

One reason cocaine is smoked more often than it is injected is that smoking is safer given the risk of infection from sharing needles. Id. at 66. The danger to public health associated with needles, including the spread of AIDS and hepatitis, is more severe than the threat to public health posed by smoking crack. "People who inject cocaine can experience severe allergic reactions and, as with all injecting drug users, are at increased risk for contracting HIV and other blood-borne diseases." National Institute on Drug Abuse, *NIDA InfoFacts: Crack and Cocaine*, available at: http://www.nida.nih.gov/Infofacts/cocaine.html.

By 2004, opioid painkiller deaths outnumbered the total of deaths from heroin or cocaine. Testimony of Dr. Leonard J. Paulozzi, Medical Epidemiologist, Centers for Disease Control and

Prevention, before Committee on Energy & Commerce, U.S. House of Representatives (Oct. 24, 2007) available at: http://www.cdc.gov/washington/testimony/2007/t20071024.htm. Emergency room admissions are highest, and approximately equal, for alcohol and all forms of cocaine combined. 2007 Report at 77-78. The highest rate of treatment admissions per individual drug is for alcohol abuse, followed by marijuana, heroin, crack cocaine, methamphetamine, and powder cocaine. Id. at 79. Cocaine addiction appears to be more treatable than heroin or alcohol addiction. See, e.g., Drug and Alcohol Services Information Report, *Admissions with 5 or More Prior Episodes: 2005* (of people seeking treatment in 2005 who had 5 or more prior treatment episodes, 37% were addicted to opiates, 36% to alcohol, and only 16% to cocaine). According to one study, it is more difficult to quit using nicotine or heroin than to quit using cocaine, withdrawal symptoms are more severe for alcohol and heroin than for cocaine, and the level of intoxication is greater for alcohol and heroin than for cocaine. Phillip J. Hilts, *Relative Addictiveness of Drugs*, New York Times, Aug. 2, 1994 (study by Dr. Jack E. Henningfield of the National Institute on Drug Abuse and Dr. Neal L. Benowitz of the University of California at San Francisco ranked six substances based on five problem areas).

When Congress enacted the 100-to-1 ratio, it was operating under many false beliefs, one of which was that crack use was more harmful than the use of other illicit substances or even legal drugs. But Congress was wrong about the role crack played in prenatal exposure or child development. Likewise, Congress was wrong to believe that crack was more harmful to a user when compared to the abuse of other legal and illegal drugs. And since that time, the Commission has provided Congress its reports detailing that Congress' beliefs concerning the public health risks associated with crack use were grossly overestimated. This basis, therefore, cannot serve to legitimate the 100-to-1 ratio.

D. Rationale #4: Teenage Crack Use Would Skyrocket.

Congress' fourth reason for the imbalanced crack/powder ratio, as explained in the Kimbrough opinion, was the fear that crack use "was especially prevalent among teenagers." 128 S. Ct. 567. By its research, however, the Commission learned, as it did about Congress' erroneous prediction concerning the crack baby epidemic, that "the epidemic of crack cocaine use by youth never materialized to the extent feared." 2002 Report at 96. The Commission reported "[b]etween 1994 and 1998, on average less than 0.4 percent of [18- to 25-year old adults] reported using crack cocaine within the past 30 days." Id. Furthermore, in "1998 the rate of powder cocaine use

among young adults was almost seven times as high as the rate of use of crack cocaine." Id.

> From 1987 to 2000, on average less than 1.0 percent of high school seniors reported crack cocaine use within the past 30 days.... During that same period, *the rate of powder cocaine use by high school seniors was almost twice as high*, but averaged only 1.9 percent. The low rate of crack cocaine use by young people also is consistent with Commission sentencing data indicating that in 2000 only 0.5 percent of federal crack cocaine offenses involved the sale of the drug to a minor.

Id. (emphasis added). Among high school seniors, marijuana is by far the most popular drug reported to be used and "is generally two and a half to four times greater in prevalence than the next most frequently reported drug, methamphetamine-amphetamine. Marijuana is approximately nine to twelve times more prevalent than powder cocaine and eighteen to twenty-six times more prevalent than crack cocaine." 2007 Report at 73. When "[c]omparing the rates of the two forms of cocaine, powder cocaine was reported about twice as frequently as crack cocaine." 2007 Report at 75.

In the National Survey on Drug Use and Health, from 2000 to 2005, marijuana is reported as the most prevalent drug of choice by young Americans. The rates of reported use of crack cocaine, powder cocaine, heroin, or methamphetamine/amphetamine are substantially lower. Among these drugs, powder cocaine is used the most frequently, "2.6 percent in 2005. The rate of reported powder

cocaine use is approximately eight to ten times more often than is crack cocaine use." 2007 Report at 76.

When enacted, the 100-to-1 ratio was perceived to be rationally related to the legitimate government purpose of preventing a crack epidemic among American youth. The Commission's data, though, point to a far different conclusion. When considering drug abuse by young adults, the facts would justify higher sentences for powder cocaine, not crack. Punishing a crack offender one hundred times more severely than a powder offender to stave off the widespread use of crack by 18 to 25 year olds is simply irrational when research indicates that that young adult population uses powder eight to ten times more often than crack.

E. Rationale #5: Crack's Potency and Cost.

Finally, the Kimbrough opinion explains that Congress' final rationale to support the 100-to-1 ratio was based on the belief that "crack's potency and low cost were making it increasingly popular[.]" 128 S. Ct. 567. The fear-driven assumption that this country's urban areas would become overrun with crack addicts dependent upon a new powerful and inexpensive drug was widespread in Washington. When enacted, the ratio was arguably related to the government's goal of preventing nationwide crack addiction. Yet, again, Sentencing Commission data provide no foundation for this goal, making the disparity irrational.

In its 2002 report, the Commission reported, "data from the [National Household Survey on Drug Abuse] indicate that the number of persons using powder cocaine in the month prior to the survey peaked at about 5.7 million in 1985 and trended largely downward to 1.4 million in 1992." 2002 Report at 68. Powder cocaine use has "remained fairly stable since then with a slight increase in recent years to 1.7 million in 1998." 2002 Report at 68. On the other hand, those reporting to have used crack in the past month, have "remained fairly stable at a significantly lower level, averaging 569,000 users for the period of 1988 to 1998." 2002 Report at 68.

Causation underlying the change in any human behavior is often difficult to ascertain with precision. But, putting aside the question of "why," the Commission's research found that cocaine use in the United States began to fall even before Congress passed the 1986 Act. "[E]vidence indicates that cocaine use declined during the late 1980s and early 1990s.... In fact, the decline in cocaine use began prior to the establishment of the current federal cocaine sentencing structure." 2002 Report at 72. With cocaine use declining prior to the establishment of the 100-to-1 ratio, it cannot be claimed that this latter sentencing structure created the decline. The disparity adopted in part to limit the access to a perceived cheap, potent, and popular drug was not only unfounded,

but also unnecessary as Americans' cocaine use had begun to decrease even before the enhanced penalties for crack became law.

F. The Rationale Regarding "Serious" and "Major" Dealers.

As stated above, Congress' intent behind the 1986 Act's mandatory minimum penalties, as it related to cocaine, was to target quantities of this drug typically associated with what it believed were "major" (more than 50 grams of crack and more than 5,000 grams of powder) and "serious" (more than 5 grams of crack and more than 500 grams of powder) traffickers. 1995 Report at 118. In setting these quantity thresholds, Congress labored under two false assumptions: (1) that the chosen threshold amounts actually reflected the culpability of "serious" and "major" traffickers as defined by Congress; and (2) that parallel crack and powder importation networks were responsible for the presence of cocaine within the United States and neither form of the drug, therefore, affected the other's availability. Defendant will address these false assumptions in turn.

1. The Threshold Amounts Sweep Too Broadly.

Though legislative history is sparse, floor statements made by House and Senate members indicated Congress intended to punish "major" cocaine traffickers by setting a mandatory ten year sentencing floor and "serious" cocaine traffickers by a lesser five year floor. 2002 Report at 6. A committee report issued by a

House subcommittee, considering a predecessor bill to the 1986 Act, determined that these determinate baselines would provide a more focused approach for federal law enforcement. "One of the major goals of this bill is to give greater direction to the DEA and the U.S. Attorneys on how to focus scarce law enforcement resources." H.R. Rep. No. 99-845, pt. 1, at 11-2 (1986). The subcommittee went on to define what it meant by "serious" and "major" drug traffickers. "Major" traffickers are "the manufacturers or the heads of organizations who are responsible for creating and delivering very large quantities;" "serious" traffickers are "the managers of the retail traffic, the person who is filling the bags of heroin, packaging crack cocaine into vials ... and doing so in substantial street quantities." Id. at 12 (emphasis added).

In its 1997 Report, the Commission, after consulting with many federal law enforcement, medical, and substance abuse agencies, as well as considering its own data, concluded that the five gram trigger for the crack five-year mandatory sentence was unwarranted. "Five grams of crack cocaine is indicative of a retail or street-level dealer rather than a mid-level dealer. Accordingly, the Commission concludes that the five-gram trigger should be increased to better target mid-level dealers." 1997 Report at 5.

The Commission found cocaine trafficking fit a pyramidal paradigm in that few "smugglers" at the top supplied slightly more

numerous "high-level" dealers below them with increasing numbers of participants each level down as one progresses through "mid-level dealers," "retail sellers," and "users." 2007 Report at 84. Based upon Congress' description of who it meant to target as "major" and "serious" traffickers, smugglers and high-level dealers fit the "major" definition while mid-level dealers fit the "serious" definition. The Commission's evidence established, however, that federal law enforcement efforts did not focus on the kingpins or even the mid-level dealers but instead upon the low-level offenders. This was true for three reasons.

First, smugglers and high-level dealers are the most difficult to interdict and are the fewest in number. Further, "successful prosecution of major importers is difficult in part because they employ large numbers of 'low-level, unskilled labor' such that the organization is not greatly affected by seizures and arrests." 2007 Report at 85.

Second, and somewhat related to the preceding reason, low-level crack dealers, the greatest labor force by numbers in the pyramid, are easy to identify and prosecute. When one considers that the laws of the several states generally are much less punitive with regard to crack offenders--no state has adopted the federal 100-to-1 ratio for establishing mandatory minimum penalties--low level dealers are diverted from state courts, where

they would otherwise receive little, if any, prison time, to federal court where they face mandatory minimum sentences. "Because the states generally have not adopted the federal penalty structure for cocaine offenders, the decision whether to prosecute at the federal or state level can have an especially significant effect on the ultimate sentence imposed on an individual crack cocaine offender.... The Department of Justice reports that the comparative laws in a jurisdiction also play an important role in determining whether a particular case is brought in federal or state court." 2007 Report at 107 (footnote omitted). Commission data clearly supports this phenomenon.

That law enforcement activity is driven by drug quantity rather than Congress' directive to prosecute the most culpable traffickers is beyond dispute. Instead of focusing on the members at the top of the drug pyramid, federal law enforcement, consistent with Defendant's case herein, target low-level dealers trafficking in quantities just over the five and ten year thresholds.

> The distribution of offenders across base offense levels is similar for both drug types. The overwhelming majority of both powder cocaine (85.5%) and crack cocaine (91.2%) offenders receive base offense levels of 26 or greater (that is, drug quantities at or above the five-year mandatory minimum threshold quantity). For both powder cocaine (19.7%) and crack cocaine offenders (26.7%), base offense level of 32 (which corresponds to the threshold quantities for the ten-year statutory mandatory minimum) is received most often, followed by base offense level 26 (18.8% of powder cocaine offenders and 20.9% of crack

> cocaine offenders). This base offense level distribution tends to support testimony that federal law enforcement targets offenses at the point they involve the minimum quantity thresholds for prosecution.

2007 Report at 25 (footnotes omitted).

Third, the triggering quantities chosen by Congress for "major" and "serious" crack offenders, 50 grams and 5 grams, did not comport with actual quantities distributed by high-level and mid-level dealers, respectively. "[A]mong crack cocaine offenders there is little distinction across [managerial] function in exposure to some mandatory minimum penalties.... Additionally, the majority (73.4%) of street-level dealers, the most prevalent type of crack cocaine offenders, were subject to mandatory minimum penalties." 2007 Report at 29. For crack offenders prosecuted in federal court, the single greatest population consists of street-level dealers. "Crack cocaine offenders also are concentrated in lower level functions. In contrast to powder cocaine, however, crack cocaine offenders continue to cluster only in the street-level dealer category." 2007 Report at 21. In 2000, 66.5% of the crack offenders brought into federal court were street-level dealers. Id.

2. Crack is a Domestic Product.

Congress' second rationale for "serious" and "major" traffickers fairs no better. In consultation with the Drug

Enforcement Administration and other law enforcement agencies, the Commission found that all powder cocaine in the United States is imported from South and Central America and channeled through "source cities" to wholesale and resale distributors. 1995 Report at 66; 1997 Report at 4-5. On the other hand, "crack cocaine rarely, if ever, is imported into the United States. Instead, powder cocaine is imported, with some of it later converted into crack cocaine." 1995 Report at 66.

Because the overwhelming majority of crack, if not all of it, is manufactured in the United States from imported powder, a penalty structure imposing more severe imprisonment for crack offenders effectively puts the cart before the horse. Or, as more eloquently stated by Carmen Hernandez last year, then president of the National Association of Criminal Defense Lawyers, this

> penalty scheme not only skews law enforcement resources toward lower level crack cocaine offenders, it punishes them more severely than their powder cocaine suppliers, creating an effect known as "inversion of penalties." The 500 grams of cocaine that can send one powder cocaine defendant to prison for five years can be distributed to 89 street level dealers who, if they convert it to crack cocaine, could make enough crack cocaine to trigger the five year mandatory minimum sentence for each defendant. This penalty inversion causes unwarranted sentencing disparity, as does the unequal number of mitigating role reductions granted to crack cocaine defendants.

2007 Report at App. B-8. The organization Families Against Mandatory Minimums (FAMM), spoke to this same "inversion of

penalties" effect. FAMM "stated that the 100-to-1 drug quantity ratio punishes low-level crack cocaine offenders far more severely than the wholesale drug suppliers who provide the low level offenders with the powder cocaine needed to produce the crack cocaine. FAMM added that among all drug defendants, crack cocaine offenders are most likely to receive a sentence of imprisonment and receive longer periods of incarceration." 2007 Report at App. C-6.

Given the foregoing evidence refuting Congress' bases for treating crack offenders more severely, no rational basis exists to support a greater mandatory sentence imposed upon a street-level (non-"serious") crack dealer than would be imposed upon the "major" supplier from whom the street-dealer obtained her powder.

Kimbrough sets forth the many purported reasons Congress first adopted the 100-to-1 ratio. Certainly prior to the 1995 Report, Congress was entitled to the benefit of any doubt that each of these reasons were rationally related to a legitimate government purpose. However, all of Congress' reasons for the disparity have been refuted through scientific data by Congress' "expert agency." Additionally, as pointed out by the Court in Kimbrough, the Commission has gone even one step further, unconditionally concluding "that the disparity fails to meet the sentencing objectives set forth by Congress." 128 S. Ct. at 567 (citing 2002 Report at 91).

Defendant concedes it is not enough to assert an equal protection violation by simply demonstrating that Congress has erred. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981). However, Congress' continued inaction to remedy the 100-to-1 ratio in the face of the overwhelming evidence that "the legislative facts on which the classification is based could not be reasonably conceived to be true by the governmental decision maker" is such a violation. Vance v. Bradley, 440 U.S. 93, 111 (1937).

In July of this year, the Commission published a preliminary report on crack cocaine retroactivity sentences after the 2007 amendments. U.S. Sent. Comm'n, Preliminary Crack Cocaine Retroactivity Data Report, July 2008; available at, http://www.ussc.gov/USSC_Crack_Cocaine_Retroactivity_Data_Report_09_July_08.pdf (hereafter "2008 Preliminary Report"). Specifically, the report analyzes statistics of the most common reasons sentencing courts have been providing when denying crack defendants' motions for a retroactive two-level reduction. The reason most often given for denying a reduction stems from defendants' underlying cases not having involved crack cocaine in the sentencing process. Id. at 13. The second-most denied category of offenders pertains to those who are deemed ineligible under U.S.S.G. §1B1.10 because a statutory mandatory minimum controls the sentence. Id.

Consequently, for those offenders whose original sentence was based upon crack in some material way, any beneficial time reductions, brought about by the application of the retroactive amendment, are either truncated or eliminated in most of the statutory mandatory minimum cases. Crack defendants originally sentenced around either the five- or ten-year statutory mandatory minimum, the majority of crack offenders in federal custody, cannot receive a full two level reduction when doing so would place them below the statutory mandatory minimum. This, notwithstanding the fact that crack defendants serving longer sentences who receive the full two level reduction were often trafficking in far greater quantities of crack. The net result is to reward the more culpable.

As the Supreme Court acknowledged in Kimbrough, "because sentencing courts remain bound by the mandatory minimum sentences prescribed in the 1986 Act, deviations from the 100:1 ratio could result in sentencing 'cliffs' around quantities that trigger the mandatory minimums." 128 S.Ct. at 573. The two-level reduction implemented to provide some relief to crack defendants has ultimately created irrational sentencing disparities within this similarly situated group. For those many defendants within the class eligible for a two-level reduction but whose sentence reductions are cut short or even eliminated by a statutory

mandatory minimum, the irrationality of 100-to-1 ratio becomes more perverse. Defendant's case is a prime example.

Defendant's suggested guideline range at the time of her sentencing hearing was 121-151 months. For reasons separate and apart from the irrationality of the 100-to-1 ratio, the district court imposed a sentence of 120 months. Thereafter, the court informed the parties that it believed a sentence of 50 months, nearly 60% below the mandatory threshold, would be sufficient to comply with Congress' articulated purposes of sentencing. The simple application of the provisions contained in the guidelines' current drug quantity table now results in a recommended range of 100-125 months. Even under this new range, a sentence at the low of the range would constitute twice as much punishment as the district court deemed sufficient for Defendant after considering the factors set forth in 18 U.S.C. § 3553(a). If the district court had considered a recommended guideline range based upon a 25-to-1 ratio, the lowest ratio contained within the current drug quantity table tacitly approved by Congress,[6] Defendant's range would have been 70-87 months. The district court would have varied below the bottom end of this range by twenty months. Defendant's recommended guideline range based upon a like amount of cocaine

[6] See note 7 at page 77 below.

powder would have been 24-30 months, from which the district court could have varied lower more based upon her mental capacity and other factors.

However, while no rational basis exists to maintain the statutory mandatory minimum penalties based on the 100-to-1 ratio, those mandatory minimums block any of these paths to a sentence that actually comports with 18 U.S.C. § 3553(a). ("[T]he Commission maintains its consistently held position that the 100-to-1 drug quantity ratio significantly undermines the various congressional objectives set forth in the Sentencing Reform Act.") 2007 Report at 8.

In a recent district court decision, the court expressed its opinion that the time to remedy the unfair treatment of offenders brought about by the crack mandatory minimums was long overdue. United States v. Grant, 524 F. Supp. 2d 1204, 1215-16 (C.D. Cal. 2007). In Grant, the district court held that any law which requires all defendants in a multi-party criminal offense to receive the statutory mandatory minimum without any regard to the defendants' differing roles is a violation of the Due Process Clause. Id. Therefore, it held that applying the crack mandatory minimums to codefendants with limited roles in the actual crime was unconstitutional. Id.

In reaching its conclusion, the court surveyed the criticism surrounding the mandatory minimums specifically. Id. at 1215. The court noted that the Sentencing Commission, the Federal Judicial Center, the American Bar Association, and several original architects of the mandatory minimums have all concluded "that mandatory minimums are fundamentally inconsistent with the goals of sentencing reform." Id.

The opinion went further to say "no branch of the government has done anything to address the complaints." Id. at 1215-1216. The court criticized the Judicial Branch's apparent lack of fortitude saying, "the precedents established in cases involving issues arising under Section 841(b) approach a point of saying that a sentencing process by which the law itself produces manifestly unjust sentences ... is still 'due process' if it bears the imprimatur of Congress[,]" id. at 1215, and adding, "[t]he courts' inaction to date appears to indicate that justice is not their concern." Id. at 1217. While discussing the potential of mandatory minimums violating the Due Process rights of peripheral offenders, the court explained:

> no matter how well intentioned or how lawful the acts of the other branches of government may be ... when the combined effects of their actions produce sentencing results that are as systematically arbitrary, capricious, unjust, inequitable and sometimes unconscionable, as the above referenced studies have shown them to be, courts

> are not only obligated to intervene under the Due Process Clause, but to do so in a timely manner.

Id. at 1218.

Defendant urges this Court to heed the timely words of Judge Letts in Grant and invalidate Defendant's mandatory 120 month sentence. While Congress has the right to be wrong, with that right comes the obligation to correct the wrong in a timely fashion when presented with verifiable evidence of its error. For Congress to allow any legislation to persist in the face of proof that its underlying premises and assumptions are false is no different than Congress passing constitutionally infirm legislation in the first instance. The mandatory minimum sentences for crack cocaine offenses brought about by the 100-to-1 ratio cannot be justified as rationally related to any legitimate governmental purpose and must be invalidated.

II. The Crack/Powder Disparity is Subject to Strict Scrutiny.

The Sentencing Commission's reports to Congress are replete with evidence confirming that the crack/powder disparity lacks any rational basis to justify its continued application to cocaine offenders as a whole. Nevertheless, Congress has failed to modify the statutory 100-to-1 ratio. As disconcerting as this may be, the Commission's reports disclose an even more pernicious consequence of the 100-to-1 ratio, its impact on African Americans in

particular. In addition to the Commission's data refuting any rational basis to maintain the 100-to-1 ratio, the Commission has reported to Congress its quantifiable findings that the crack penalties impact African Americans in an unjustifiable and disproportionate way. Yet Congress sits idly by. Defendant asserts that Congress' perpetuation of an irrational sentencing scheme through years of inaction, with the full knowledge that such a scheme also adversely impacts a minority class, is tantamount to enacting unconstitutional legislation based on racial animus.

As set forth above, the Commission published the first of four reports in 1995 documenting the impact of the 100-to-1 drug quantity ratio. The Commission observed that "Whites accounted for 30.8 percent of all convicted federal drug offenders, Blacks 33.9 percent, and Hispanics 33.8 percent." 1995 Report at 156. However, "crack cocaine offenders were 88.3 percent Black" while "[p]owder cocaine cases involve sizeable proportions of Whites (32.0%), Blacks (27.4%), and Hispanics (39.3%)." Id.

Among those convicted of simple possession of powder cocaine, "58 percent ... were White, 26.7 percent were Black, and 15 percent were Hispanic." Id. Among simple crack possessors and traffickers, however, there was a noticeable racial disparity: "10.3 percent were White, 84.5 percent were Black, and 5.2 percent were Hispanic." Id. These finding are especially disturbing

considering "nearly 90 percent of the offenders convicted in federal court for crack cocaine distribution are African-American while the majority of crack cocaine users is White." 1997 Report at 8.

Over time, the percentage of African Americans convicted of a crack offense has marginally declined. However, the 2007 Report illustrates that the racial disparity is still staggering: African Americans made up "91.4 percent [of crack offenders] in 1992, 84.7 percent in 2000, and 81.8 percent in 2006." 2007 Report at 15. Furthermore, the most recent statistics confirm that this is still a problem. In 2007, powder cocaine defendants were 15.8 percent White, 27.3 percent Black, and 55.6 percent Hispanic. U.S. Sent. Comm'n, Sourcebook of Federal Sentencing Statistics (2007). However, 82.7 percent of crack cocaine defendants were Black, while only 8.8 percent were White and 7.9 percent were Hispanic. Id. The most recent sentencing data indicate that the median sentence for powder offenders is 63 months, while the median sentence for crack offenders is close to double that figure, 120 months. Id.

The 1995 Report clearly addressed the cause of the disparity and outlined possible solutions. Citing U.S. Department of Justice data, the Sentencing Commission explained:

> The main reason that Blacks' sentences were longer than Whites' during the period from January 1989 to June 1990 was that 83% of all Federal offenders convicted of

> trafficking in crack cocaine in guideline cases were Black, and the average sentence imposed for crack trafficking was twice as long as for trafficking in powdered cocaine.

1995 Report at 192 (citing U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Sentencing in the Federal Courts: Does Race Matter? (Nov. 1993)). The report also suggested that if crack and powder cocaine offenders were sentenced identically, "the Black/White difference in sentences for cocaine trafficking would not only evaporate but would slightly reverse." Id. The report found that "the vast majority of those persons most affected by such an exaggerated ratio are racial minorities." Id.

Although no data exists regarding the racial makeup of crack traffickers, data is available regarding the racial makeup of crack users. Of those reporting crack use at least once in the reporting year, "52 percent were White, 38 percent were Black, and 10 percent were Hispanic." 1995 Report at 38. This data is even more relevant considering that those persons who admitted the use of crack necessarily admitted possession of the substance and crack is the only drug with a mandatory minimum sentence for simple possession. See 21 U.S.C. § 844(a) (2000).

The Sentencing Commission acknowledges that the overwhelming number of those adversely affected by the ratio are African American. It bears repeating that "nearly 90 percent of the

offenders convicted in federal court for crack cocaine distribution are African American while the majority of crack cocaine users is White." 1997 Report at 8. Despite the lack of data regarding the racial makeup of traffickers, all other data indicate a decidedly disparate racial impact.

In Personnel Admin. of Mass. v. Feeney, 442 U.S. 256 (1979), the Supreme Court held that a facially neutral statute challenged as discriminatory must be assessed under a two-prong test. First, a court must ask "whether the statutory classification is indeed neutral," that is, not based upon race, gender, or some other suspect class. Id. at 274. Defendant concedes, as she has throughout, that the statutory crack/powder minimums at issue here are facially neutral. Second, if the classification is neutral, a court must then ask "whether the adverse effect reflects invidious ... discrimination" based upon a suspect class. Id. This second prong requires a showing that a "discriminatory purpose has, at least in some measure, shaped the ... legislation." Id. at 276.

Helen Feeney was not a veteran. She was a Massachusetts state employee and the unfortunate victim of government down-sizing. After twelve years' employment with the Massachusetts Civil Defense Agency, she lost her job when the department was eliminated. Ms. Feeney filed suit in federal court alleging that the absolute preference formula established by Massachusetts, which gives hiring

preferences to less qualified veterans over better qualified non-veterans, was unconstitutional. In particular, Ms. Feeney claimed that the absolute preference inevitably operates to exclude women from consideration for the best Massachusetts civil service jobs and thus unconstitutionally denies them the equal protection of the laws. Id. at 264. A three-judge district court panel, one judge concurring and one judge dissenting, agreed with Ms. Feeney and concluded that a veterans' hiring preference is inherently nonneutral because it favors a class from which women have traditionally been excluded, and that the consequences of the Massachusetts absolute-preference formula for the employment opportunities of women were too inevitable to have been "unintended." Id. at 261.

The Supreme Court reversed. In looking at the purpose of the absolute preference law, the Court found the Massachusetts hiring preference was not neutral. The Court then sought to discover whether some discriminatory purpose formed the basis for the preference. Although the facts disclosed that 95% of the veterans were men, the Court was quick to point out that the none of the armed services presently exclude women from their ranks. Although women did not, earlier in this country's history, enjoy the opportunity to become members of the military, that has changed. There is nothing illegitimate about states rewarding their citizens

with employment favoritism in return for defending the country. "When the totality of legislative actions establishing and extending the Massachusetts veterans' preference are considered, the law remains what it purports to be: a preference for veterans of either sex over nonveterans of either sex, not for men over women." Id. at 280.

As the Fourth Circuit has held, Congress did not have a discriminatory purpose when it passed the 1986 Act. See United States v. Thomas, 900 F.2d 37, 39-40 (4th Cir. 1990) (Congress instituted the sentencing disparity because it believed crack to be more dangerous than powder). Since that time, however, exhaustive research has been presented to Congress documenting the racial impact of the crack sentencing scheme and the discrimination flowing therefrom. While the Supreme Court stated that discriminatory purpose "implies that the decisionmaker ... selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group[,]" Feeney, 442 U.S. at 279 (emphasis added), the Court explained that discriminatory purpose was not rooted in this implication alone. In Feeney and the two cases that preceded it, the Court indicated that the "discriminatory purpose" determination has no bright line but requires a multifaceted

approach that necessarily involves examining the history and purpose of the law being challenged.

In Washington v. Davis, 426 U.S. 229, 232 (1976), the Court was called upon to resolve the validity of a qualifying test ("Test 21") given to recruits applying for police officer positions with the District of Columbia Metropolitan Police Department. Two respondents in Davis (plaintiffs below in the district court) complained that their applications to become officers had been rejected, and that they had been racially discriminated against, primarily based on Test 21 which excluded a disproportionately high number of black applicants. Id. at 233.

The district court found that, to be accepted by the Department and to enter an intensive 17-week training program, an applicant first had to satisfy some preliminary requirements. The police recruit was required to pass "certain physical and character standards, to be a high school graduate or its equivalent, and to receive a grade of at least 40 out of 80 on Test 21, which is an examination that is used generally throughout the federal service, which was developed by the Civil Service Commission, not the Police Department, and which was designed to test verbal ability, vocabulary, reading and comprehension." Id. at 234-5 (internal quotations omitted). The district court observed that the respondents did not claim any intentional discrimination or

purposeful discriminatory acts by the Department but only claimed that Test 21 bore no relationship to a police officer's job performance, that it had a highly discriminatory impact in screening out black candidates, and was culturally slanted toward white candidates. Id. at 235.

Both sides filed motions for summary judgment. The validity of Test 21 was the sole issue before the district court on the parties' motions for summary judgment and the test was sustained by the district court. In finding no discriminatory purpose behind Test 21, the district court dismissed the allegation of cultural favoritism noting that Test 21 was not developed by the Department and was used throughout the government. Further, it found that Test 21 need not be a useful indicator of job performance because it played a more important role in setting a competency threshold for prospective police officers. "The District Court ultimately concluded that the proof is wholly lacking that a police officer qualifies on the color of his skin rather than ability and that the Department should not be required on this showing to lower standards or to abandon efforts to achieve excellence." Id. at 236 (internal quotations and footnote omitted).

Respondents appealed to the court of appeals. The appellate court, with one dissent, reversed the district court saying, in part, that the lack of discriminatory intent in designing and

administering Test 21 was irrelevant. The critical fact, in the eyes of the appellate court, was that a far greater proportion of blacks failed the test than did whites. This "disproportionate impact," standing alone and without regard to whether it indicated a discriminatory purpose, was sufficient to establish a constitutional violation. Id. at 237.

The Supreme Court granted certiorari and, finding that the court of appeals erroneously applied the statutory legal standard applicable to Title VII of the Civil Rights Act of 1964 instead of the correct constitutional standard, reversed the court of appeals' decision. The Court began its discussion by surveying it past cases dealing with racial discrimination under the Equal Protection Clause of the Fourteenth Amendment and the Due Process Clause of the Fifth Amendment. It looked to its precedent with regard to the "jury exclusion" cases, cases where various statutes were aimed at preventing black citizens from serving on grand and petite juries, and to the political gerrymandering cases, cases where legislative districts were drawn to include or exclude certain persons. From this background the Court came to two conclusions. First, a statute's "disproportionate impact" upon a suspect class, standing alone, is insufficient to make out a prime facie case for racial discrimination. Second, the lower courts must look to all of circumstances surrounding the legislation, including any disparate

impact that may be present, understanding that a statute's discriminatory purpose is rarely self-evident.

> Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact in the jury cases for example, the total or seriously disproportionate exclusion of Negroes from jury venires may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds. Nevertheless, we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.

Davis, 426 U.S. at 242.

Turning to the merits of the case, the Court found those reasons put forward by the district court correctly resolved the case. While Test 21 did adversely affect a greater proportion of blacks, the test was neutral on its face and its purpose–the establishment of a high level of competence and ability--was within the power of the Department to pursue.

On the heels of the Davis opinion came the Court's decision in Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1976). At the time, Arlington Heights was a northwest Chicago suburb primarily zoned R-3 for detached single-family

homes. The village experienced substantial growth during the 1960's but, according to the 1970 census, only 27 of the Village's 64,000 residents were black. Id. at 255. Within the village and near its center was a religious order, the Clerics of St. Viator ("Order"), that owned an 80-acre parcel of land. Part of this site was occupied by the Order, but much of the site was vacant. In 1959, the village first adopted a zoning ordinance and zoned all the land surrounding the Viatorian property R-3. Id.

In 1970, the Order decided its vacant land could be better used if developed to provide for low- and moderate-income housing. The Order sought out a nonprofit developer experienced in the use of federal housing subsidies under the National Housing Act, 12 U.S.C. § 1715z-1, and found the Metropolitan Housing Development Corporation ("MHDC"). The Order and MHDC negotiated a deal such that the Order would sign a 99-year lease and an accompanying sales agreement for a 15-acre site in the southeast corner of the Viatorian property. MHDC would become the lessee immediately, but the sale was contingent upon MHDC's securing zoning clearances from the village and housing assistance from the federal government. If MHDC could not satisfy either contingency, both the lease and the contract of sale would lapse. Id.

MHDC thereafter applied to the village to rezone the 15-acre parcel from R-3 single-family to R-5 multiple-family so it could

build 190 clustered townhouse units for low- and moderate-income residents. The village denied MHDC's rezoning request and MHDC, joined by other plaintiffs, brought suit in federal court alleging, in part, that the denial of their rezoning request was racially discriminatory in violation of the Fourteenth Amendment. Id.

The district court, agreeing with the two arguments advanced by the village, ruled against MHDC following a bench trial. The trial court found first that the area always had been zoned single-family, the neighboring citizens had built or purchased there in reliance on that classification, and rezoning threatened to cause a measurable drop in property value for neighboring sites. Second, the trial court found the village's apartment policy, adopted in 1962 and amended in 1970, called for R-5 zoning primarily to serve as a buffer between single-family development and land uses thought incompatible, such as commercial or manufacturing districts. Since the MHDC property did not meet this requirement, as it adjoined no commercial or manufacturing district, rezoning the site to R-5 would be improper under the land use ordinance. Id. at 258-9.

The court of appeals, over a dissent, reversed. It did agree with the district court that the village was not motivated by racial discrimination in denying the rezoning request; the village simply wanted to follow the zoning requirements consistently. However, the appellate court did determine that the village's

refusal to rezone would have a disproportionate impact on blacks. In reaching this conclusion the court of appeals looked to the village's land use plan in "historical context and ultimate effect." Id. at 260. The court found that the area was enjoying rapid growth in employment opportunities and population, but it continued to exhibit a high degree of residential segregation. The court found also that the village had been "exploiting" this situation by allowing itself to become a nearly all white community. Since the village had no other current plans for building low- and moderate-income housing, and no other R-5 parcels in the village were available to MHDC at an economically feasible price, the court held the denial of MHDC's rezoning request had racially discriminatory effects and could be tolerated only if it served compelling interests. Neither the buffer policy nor the desire to protect property values, according to the court of appeals, met this exacting standard. Id. at 260. The Supreme Court granted the village's certiorari petition and reversed the court of appeals.

The Court did not reject the court of appeals "historical context and ultimate effect" analysis, it instead refined that analysis. In examining the basis of any legislation for indicia of discrimination, the Court provided this guidance:

> Davis does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.

Id. at 265-6 (emphasis added, footnotes omitted). Turning to the merits, the Court looked more closely to the evolution and application of the village's land use plan for any evidence of discrimination.

> The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. The specific sequence of events leading up the challenged decision also may shed some light on the decisionmaker's purposes. For example, if the property involved here always had been zoned R-5 but suddenly was changed to R-3 when the town learned of MHDC's plans to erect integrated housing, we would have a far different case. Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.

Id. at 267 (citations and footnotes omitted). The Court then focused upon the statements by the village board members, as

reflected in the official minutes, that dealt almost exclusively with the zoning aspects of the MHDC petition, and the zoning factors relied upon by the board members which were not novel criteria in the village's rezoning decisions. Further the Court found there was no reason to doubt that there had been reliance by property owners on the maintenance of single-family zoning in the vicinity for land values. Most importantly, however, was that the village originally adopted its R-5 buffer policy long before MHDC entered the picture and had applied the policy too consistently for the Court to infer discriminatory purpose from its application.

Like the test in Davis, the zoning ordinance in Arlington Heights was neutral on its face. And while both Davis and Arlington Heights involved governmental rules, broadly speaking, Arlington Heights differed in that the decisionmaker there took affirmative steps in accordance with the rule that caused a disparate impact upon a minority group. But, like Davis, the decisionmaker's purposes in Arlington Heights in acting as it did was within the village's power if applied evenhandedly.

Feeney, Davis, and Arlington Heights make clear that the historical background of the irrational 100-to-1 ratio and Congress' refusal to address the disparate impact it has had on blacks in this country is an evidentiary source, and the best evidentiary source in the case at bar, available to this Court.

The four Commission reports have corrected all the erroneous assumptions that crack is more detrimental to society than powder and these reports have repeatedly recommended modifying the 100-to-1 ratio. If one is generous and takes 1995, the year of the Commission's first report, as the year Congress was "put on notice" concerning the discriminatory effect the crack penalties have had on black Americans, Congress has failed to take corrective action for over thirteen years now. With the full knowledge of the crack/powder sentencing disparity's adverse disparate impact upon African Americans, Congress has chosen to "reaffirm[ ] a particular course of action at least in part 'because of'" those effects. Feeney, 442 U.S. at 279.

Although caution advises against drawing specific conclusions from congressional silence, not all instances of legislative inactivity merit this treatment. See, e.g., Bob Jones Univ. v. United States, 461 U.S. 574, 599 (1983) (when Congress is aware of a ruling of an administrative agency, its acquiescence may be implied by its inaction). And as Feeney explains, "[w]hat a legislature or any official entity is 'up to' may be plain from the results its actions achieve, or the results they avoid." Feeney, 442 U.S. at 279.

Despite its knowledge of the 100-to-1 ratio's disparate impact, Congress is perpetuating that impact by refusing to modify

the statutory ratio. By turning a blind eye to the discriminatory sentences resulting from the crack penalties, Congress, as the decisionmaker, is effectively reaffirming a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon African Americans. Evidence of purposeful discrimination through Congressional inaction on this issue is more obvious when considering Congress "substantively departed" from the normal legislative processes in rushing the 1986 Act into law. This is particularly true since "the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached." Arlington Heights, 429 U.S. at 267.

The Fourth Circuit has not, by published opinion, ever addressed the argument advanced by Defendant herein. Her argument is substantially similar to the reasoning of the district court in Petersen. There, the court observed that when the 1986 Act was originally passed, it did not implicate equal protection concerns. Petersen, 143 F. Supp. 2d at 581. However, the court noted that the Fourth Circuit had "not addressed how the inaction of Congress after the publication of the Sentencing Commission reports ... affects the equal protection analysis." Id. at 582. It bears mention that Petersen was written in 2001 when the Commission had published only the first two of its four reports.

Judge Payne began his discussion in Petersen by pointing out that appellate courts had made observations similar to his. In particular, Petersen referenced a Second Circuit case, United States v. Then, 56 F.3d 464 (2nd Cir. 1995), in which Judge Calabresi's concurring opinion noted:

> If Congress though it was made aware of both the dramatically disparate impact among minority groups of enhanced crack penalties and of the limited evidence supporting such enhanced penalties, were nevertheless to act affirmatively and negate the Commission's proposed amendments to the Sentencing Guidelines (or perhaps were even just to allow the 100-to-1 ratio to persist in mandatory minimum sentences) subsequent equal protection challenges based on claims of discriminatory purpose might well lie. And such challenges would not be precluded by prior holdings that Congress and the Sentencing Commission had not originally acted with discriminatory intent.

Petersen, 143 F. Supp. 2d at 581, (quoting, Then, 56 F.3d at 468 (Calabresi, J., concurring) (emphasis added)).

Judge Payne continued by citing Sixth and Seventh Circuit judges who published concurring opinions echoing the concerns of Judge Calabresi. Seventh Circuit Judge Cudahy pointed out that an argument rejecting the rational basis test "may be distinct from an argument based on discriminatory intent." United States v. Reddrick, 90 F.3d 1276, 1284 (7th Cir. 1996) (Cudahy, J., concurring). Judge Jones of the Sixth Circuit opined that because of new information and the persistent application of the 100-to-1

ratio, "the time has come for the court to re-examine its supporting analysis [of the disparity]." United States v. Smith, 73 F.3d 1414, 1418 (6th Cir. 1996) (Jones, J., concurring). He admonished his colleagues, saying, "[a]s judges we should no longer remain wedded to that which experience shows is neither rational nor fair." Id. "Continued use of the law to perpetuate a result at variance with rationality and common sense – even in a war on drugs - is indefensible." Id. at 1422.

Judge Payne acknowledged that disparate impact upon a suspect class alone is not enough to find an equal protection/due process violation within a facially neutral statute. The disparate impact "must ultimately be traced to a racially discriminatory purpose." Davis, 426 U.S. at 240. Judge Payne asserted that the 100-to-1 ratio "has a disparate impact that became foreseeable, if, indeed, not conclusively demonstrated, with the publication of the first Commission report in 1995." Petersen, 143 F. Supp. 2d at 583. The court posited that Congress' failure to remedy this disparate impact "would establish an equal protection violation, or at least ... shift the burden to the United States to prove that the inaction of Congress ... is not what it appears to be." Id.

Judge Payne concluded with sentencing data showing that, as of 2001, "the penalty is no longer rationally justified" and "is having a disparate impact upon black ... defendants." Id. at 586.

Based upon that data, coupled with congressional inaction, Judge Payne "would find that the equal protection clause is offended." Id. Judge Payne's opinion in Petersen laid the foundation for the Fourth Circuit to resolve, by published opinion, the constitutional challenge made then by Mr. Petersen and made now by Defendant. On appeal, however, the Fourth Circuit in an unpublished, per curiam opinion, rejected Mr. Petersen's argument simply by referencing its earlier decision in Hayden.

Defendant believes the time to apply strict scrutiny to the crack/powder ratio's disparate effects is overdue. Petersen was decided in 2001. Congress has now failed to remedy the crack/powder disparity despite the Supreme Court's decision in Kimbrough, the Commission's publication of two additional reports, and its own acquiescence in allowing the Commission's crack reduction to take effect. At this point, Congress' failure to act evinces a discriminatory purpose in the same fashion as if it were to reenact the 100-to-1 ratio "because of" its adverse effects on African Americans. Looking at the issue from a different standpoint, the 100-to-1 ratio is demonstrably unconstitutional because, considering all of the circumstances, "the discrimination is very difficult to explain on nonracial grounds[.]" Davis, 426 U.S. at 242. Therefore, Defendant urges this Court to apply strict scrutiny to the crack/powder sentencing ratio.

Under strict scrutiny review, a classification will "be upheld only if it is necessary and not merely rationally related to accomplishment of permissible state policy." McLaughlin v. Florida, 379 U.S. 184, 196 (1964). Even if the classification is necessarily related to the accomplishment of a compelling government interest, it is constitutional "only if [it is] narrowly tailored to further compelling governmental interests." Grutter v. Bollinger, 539 U.S. 306, 331 (2003). The Congressional logic underlying the 100-to-1 ratio can no longer be seen as rationally related, much less necessary to a compelling government interest. Had Congress believed the 100-to-1 ratio contained in the current mandatory minimums was necessary to accomplish sound federal drug policy, it would not have allowed the Commission to lower the crack guidelines. Congress' own action, or inaction depending upon how one views it, rebuts the necessity of the 100-to-1 ratio.

Similarly, the 100-to-1 ratio contained in the mandatory minimum legislation is far from narrowly tailored. The mandatory minimums for crack apply to simple possession, "the only federal mandatory minimum penalty for a first offense of simple possession of a controlled substance." 2007 Report at 4. This means "an offender who simply possesses five grams of crack cocaine receives the same five-year mandatory minimum penalty as a trafficker of other drugs." Id. How can a five year mandatory sentence for a

Black American who simply possesses 5 grams of domestically manufactured crack for personal use be seen as serving some narrowly-tailored governmental interest when a White or Hispanic American receives the same sentence for distributing 500 grams of powder which can be converted into enough crack to support 89 other five-year mandatory offender sentences? The Court should apply strict scrutiny to the crack penalties and shift the burden to the government to show, if at all possible, "that the inaction of Congress ... is not what it appears to be." Petersen, 143 F. Supp. 2d at 583.

III. REMEDY.

With the conclusion that the 100-to-1 ratio is indefensible under either rational review or strict scrutiny, the question arises as to the appropriate remedy. Defendant asserts that two possible options exist. Using the Supreme Court's severability analysis, this Court "must decide whether or to what extent" the crack penalty statutes in question "as a whole" must be invalidated outright. United States v. Booker, 543 U.S. 220, 245 (2005). If outright invalidation is not appropriate, this Court must decide whether portions of the penalty statutes should be modified to substitute some lower ratio for them to comply with constitutional demands. Id.

To conduct this analysis, as instructed by the Booker remedial majority, the primary task is to "seek to determine what Congress would have intended in light of the Court's constitutional holding." Id. at 246 (citation and quotation marks omitted). Similar to the analysis in Booker, Defendant explains both (1) why Congress would likely prefer the excision of the mandatory minimum penalties contained within the 1986 and 1988 Acts, to the total invalidation of those Acts, and (2) why Congress would likely prefer the total invalidation of the mandatory minimum penalties premised upon the 100-to-1 ratio to mandatory minimum penalties premised upon some other ratio of the Court's choosing. Id. at 247.

Congress obviously intended, in fact enacted, statutes that penalize crack violations more severely than powder violations by establishing minimum sentencing floors based on drug quantity thresholds differing by a factor of 100. Like the Sentencing Reform Act at issue in Booker, most of the 1986 and 1988 Acts are perfectly valid. "And we must refrain from invalidating more of the statute than is necessary. Indeed, we must retain those portions of the Act that are (1) constitutionally valid, (2) capable of functioning independently, and (3) consistent with Congress' basic objectives in enacting the statute[.]" Id. at 258-9 (internal citations and quotations omitted).

Fortunately for the Court in Booker, it had before it a well-chronicled act of Congress. The same cannot be said for the present Acts. Because of the "murky" legislative history, which in turn prompted the Kimbrough majority to speculate about the reasons for the crack-powder disparity, and since Congress' purported rationale has been refuted by the Commission's research, this Court should simply invalidate the mandatory minimum penalties and the 100-to-1 ratio upon which they are premised. Eliminating the ratio altogether was the first proposal forwarded to Congress by the Commission. See 60 Fed. Reg. 25,074, 25,075-77 (proposed May 1, 1995).

Although reasonable minds can and do differ concerning what, if any, disparate treatment to accord crack versus powder offenses, the elimination of the ratio, and thereby the mandatory minimums, would place the ball squarely back in Congress' court. With a clean slate, the House and Senate may then hold hearings, review the scientific data, introduce new legislative proposals, debate these proposals, negotiate, compromise, and ultimately agree on whether any ratio is appropriate, and if so, what it should be. In short, Congress may then exercise the deliberative process best befitting that body which has not taken place with regard to crack mandatory minimums in any meaningful way thus far.

Alternatively, this Court could base a mandatory minimum penalty upon a ratio of its own choosing. While the Commission has been steadfast in its conclusion that mandatory minimum penalties based upon the 100-to-1 ratio are indefensible, it has never consistently proposed, or identified, any single alternative ratio. The post-Amendment 706 drug quantity table, which resulted simply from a two-level across the board reduction applicable to crack Base Offense Levels between 12 and 43, drives this point home. "[A]s a result of the 2007 amendment, ... the Guidelines now advance a crack/powder ratio that varies (at different offense levels) between 25 to 1 and 80 to 1." Kimbrough, 128 S. Ct. at 573. Tacitly approved by Congress, the new drug quantity table ultimately incorporates widely disparate ratios.[7]

Without any discernable consensus on what ratio, if any, may be better tailored to Congress' sentencing goals, as set forth in 18 U.S.C. § 3553(a)(2), Defendant believes Congress would prefer the elimination of the 100-to-1 ratio rather than have the Judicial Branch usurp its legislative function of setting federal cocaine sentencing policy. "Having concluded once again that the 100-to-1

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[7]Those ratios, at each of the following Base Offense Levels, are: 33:1 at level 38; 33:1 at level 36; 30:1 at level 34; 33:1 at level 32; 70:1 at level 30; 57:1 at level 28; 25:1 at level 26; 80:1 at level 24; 75:1 at level 22; 67:1 at level 20; and 50:1 at levels 18 and below.

drug quantity ratio should be modified, the Commission recognizes that establishing federal cocaine sentencing policy, as underscored by past actions, ultimately is Congress's prerogative." 2007 Report at 9. Defendant, therefore, respectfully requests this Court strike the 100-to-1 quantity distinction between cocaine hydrochloride and cocaine base "crack" and thereby eliminate the higher cocaine base mandatory minimum penalties which are based on that ratio.

CONCLUSION

Due to Congress' continued failure to address the discriminatory, irrational, and unwarranted sentencing disparity resulting from the enforcement of those federal criminal statutes imposing the same penalty for a quantity of cocaine base as for 100 times as much cocaine hydrochloride, this Court should invalidate the cocaine base minimum penalty applied to Defendant as violating the Equal Protection component of the Due Process Clause.

Respectfully submitted this the 1st day of August, 2008.

/s/ Eric D. Placke
ERIC D. PLACKE
Assistant Federal Public Defender

/s/ Thomas N. Cochran
THOMAS N. COCHRAN
Assistant Federal Public Defender
301 North Elm Street, Suite 410
Greensboro, North Carolina 27401
(336) 333-5455 (voice)
(336) 333-5463 (fax)

CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2008, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to Mr. XXXXXXX XXXXXXX, U.S. Attorneys Office. Further, I have emailed a copy of this document to AUSA XXXXXXX and USPO XXXXX XXXXXX.

/s/ Eric D. Placke
Attorney for Defendant