Rhode Island news

Judge rails against drug sentencing

Federal sentencing guidlines treat 5 grams of crack as the equivalent of 500 grams of powder cocaine.

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BY EDWARD FITZPATRICK
Journal Staff Writer

PROVIDENCE -- Federal judges and prosecutors in Rhode Island have joined a national debate over the disparity in prison sentences for crack versus powder cocaine.

U.S. District Judge William E. Smith sentenced a Pawtucket man in September, saying he would not "blindly apply" federal sentencing guidelines that treat 5 grams of crack as the equivalent of 500 grams of powder cocaine. (A packet of sugar weighs about 1 gram).

"The growing sentiment in the district courts is clear," Smith wrote in a 71-page sentencing memorandum. "The advisory guideline range for crack cocaine based on the 100-1 ratio cannot withstand the scrutiny imposed by sentencing courts when [sentencing goals] are applied." Smith said a 20-to-1 ratio "makes the most sense."

But the U.S. Attorney's office for Rhode Island is rallying to the defense of the 100-to-1 ratio. Prosecutors are appealing Smith's sentence, and they're challenging Chief U.S. District Judge Ernest C. Torres' decision to substitute a 20-to-1 ratio in two similar drug cases.

The issue, prosecutors wrote, is whether it's reasonable for judges "to adopt their own across-the-board rules regarding the appropriate crack/powder sentencing ratio, when such rules override Congress' judgment on how severely crack offenses should be punished, and when the proliferation of varying ratios threatens to yield wildly disparate sentences as judges institute their own preferred schemes."

The 100-to-1 ratio does not mean that prison sentences for crack are 100 times longer than those for powder. Rather, the ratio relates to the amount of drug that triggers mandatory minimum sentences. For example, selling 5 grams of crack carries a mandatory minimum of five years, but it takes 500 grams of powder cocaine to trigger the same five-year minimum. Smith said the 100-to-1 ratio results in sentences three to six times longer for crack.

The debate about that disparity is not new. In passing the 1986 Anti-Drug Abuse Act, Congress said crack was more addictive than powder cocaine, more often linked to other serious crimes, and more likely to be used by "vulnerable members of society" because it's cheap, potent and easy to use. Critics challenged those assumptions and called the disparity racist, saying it produces harsher penalties for the black dealer selling crack in Harlem than the white dealer peddling powder cocaine on Wall Street.

The debate flared to life following the January U.S. Supreme Court ruling in United States v. Booker that made federal sentencing guidelines advisory rather than mandatory. Experts say there's been no massive change in sentencing practice since then. But judges in several states, including Rhode Island's three active U.S. District judges, have varied from the sentencing guidelines in crack cases.

Judge Smith joined those ranks Sept. 16 when he sentenced Joshua J. Perry to 10 years in prison for possessing, with intent to distribute, more than 5 grams of cocaine base within 1,000 feet of a school -- in this case, St. Raphael's Academy in Pawtucket.

The Supreme Court had issued its Booker ruling in January, while the jury was deliberating in Perry's case. So once he was found guilty, Perry faced the certainty of a 10-year mandatory minimum sentence because he had a prior felony drug conviction. But the rest was up to Smith. The new advisory sentencing guidelines called for a sentence of 188 to 235 months (15 years and 8 months to 19 years and months).

Through his lawyer, Perry argued that since the jury never specifically determined the drug was crack, he should be sentenced under powder cocaine guidelines, which call for just 33 to 41 months. But Smith said there was sufficient evidence to sentence Perry under the crack guidelines.

LATER, in his analysis, Smith noted that the U.S. Sentencing Commission has been urging Congress to overhaul crack sentencing laws for more than a decade. For example, in 1995 the commission voted 4 to 3 to urge Congress to equalize the penalties for crack and powder cocaine, but Congress rejected the idea.

The commission called for narrowing crack/powder disparity in a 2002 report, and Smith cited four findings in that report: "First, the feared epidemic of crack cocaine never materialized in the way it was envisioned by Congress. Second, the current penalties sweep too broadly and apply too frequently to low-level offenders. . . . Third, the current 100-to-1 ratio overstates the seriousness of most crack cocaine offenses."

"Finally, the commission found that the current penalty structure disparately impacts minorities," Smith wrote. "While the commission conceded that it is difficult to empirically study this issue, approximately 85 percent of the offenders sentenced for crack cocaine violations are black (in the year 2000) and that this leads to, at the very least, a perception that the crack/powder disparity is racially motivated."

Smith said the commission's conclusions "are supported by an overwhelming amount of authority -- empirical, scholarly and otherwise. In fact, it is virtually impossible to find any authority suggesting a principled basis for the current disparity in sentences."

Smith said the debate about the crack/powder disparity is no longer limited to criminal law circles. He referenced an Aug. 7 New York Times article by the authors of Freakonomics, which noted that Congress had passed the crack laws in 1986 amid "the national frenzy that followed the death of Len Bias, the first-round NBA draft pick and a cocaine user." Since then, the authors said, demand for crack has dropped, crack-related violence has fallen, and young people have started shunning the drug.

While the crack/powder disparity "has often been called racist, since it disproportionately imprisons blacks . . . the law probably made sense at the time, when a gram of crack did have far more devastating social costs than a gram of powder cocaine," the article stated. "But it doesn't anymore. Len Bias would now be 40 years old, and he would have long outlived his usefulness to the Boston Celtics. It may be time to acknowledge that the law inspired by his death has done the same."

AS A JUDGE, Smith said he is required to consider sentencing goals. And in Perry's case, he stated, "there is little doubt that the advisory guideline range sentence (188 to 235 months) is substantially greater than necessary to reflect the seriousness of the offense, to promote respect for the law and to provide for adequate general and specific deterrence."

Smith said he recently sentenced a major cocaine dealer, Shawn Montegio, to 188 months for the same crime that Perry was convicted of, except the drug was powder cocaine. While Perry was caught with 29.47 grams of crack, Montegio had 10 kilograms of powder cocaine. "Without doubt, Montegio was a far more serious criminal drug trafficker and a far more serious threat to the community than Perry," Smith wrote. "Yet the guidelines treat them as equivalent. This cannot be justified in any principled way."

Smith concluded that the appropriate drug quantity ratio for Perry was 20 to 1, which would yield an advisory range of 97 to 121 months (8 years and 1 month to 10 years and 1 month). But he noted that the "floor" was set by the mandatory minimum for being a repeat offender, so he sentenced Perry to 10 years.

Smith's ruling has been mentioned in the National Law Journal and in Ohio State University law Prof. Douglas Berman's sentencing blog. And that blog has noted the response of federal prosecutors in Rhode Island.

U.S. Attorney Robert Clark Corrente's office has appealed Smith's ruling. And while briefs haven't been filed yet, prosecutors took aim at Smith's decision when they appealed sentences that Chief Judge Torres issued in two similar cases, involving defendants Shawn Lewis and Sambath Pho. On Nov. 2, Assistant U.S. Attorney Donald C. Lockhart filed a 50-page legal brief in the Lewis and Pho cases, including a section titled "Why Perry was wrongly decided."

"First, the bulk of the Perry decision is devoted to a policy discussion," prosecutors wrote, emphasizing that policy matters should be handled by Congress, not the courts. Also, prosecutors said, "it is simply not true that there is no 'principled justification' for the 100-1 ratio." And, conversely, there's no empirical basis for a 20-1 ratio, they said.

Lewis pleaded guilty in June to possessing more than 50 grams of cocaine base with the intent to distribute, and possessing two handguns as a convicted felon. The guidelines called for 235 to 293 months in prison. But Torres sentenced him Lewis to 188 months. Pho pleaded guilty in June to possessing more than 5 grams of cocaine base with intent to distribute. Sentencing guidelines called for 87 to 108 months. But Torres sentenced Pho to 64 months.

In appealing, prosecutors said, "Conceivably, the district court might have justified non-guidelines sentences by referring to the facts of the particular cases and by applying the criteria in [sentencing goals]. The sole justification that the court gave, however, was that the 100-1 ratio was too harsh and that it preferred a 20-1 ratio instead. That rationale, however well meant, is unacceptable."

PROSECUTORS SAID the 100-to-1 ratio is "embedded in the statutory mandatory minimums and maximums" and is "the direct result of Congress' decision to punish crack offenses more severely than powder offenses."

While the Sentencing Commission's 2002 report called for narrowing crack/powder disparity, it also acknowledged that "differences in intrinsic harms" associated with crack justified punishing crack offenses more severely than powder cocaine offenses, prosecutors wrote. For example, data compiled by

the commission and the Justice Department bore out the conclusion that crack is generally more addictive than powder cocaine, the legal brief stated.

"Reasonable people may disagree over the relative merits of the commission's recommendations and Congress' choices," prosecutors wrote. "It is beyond debate, however, that the authority to classify the gravity of particular offense categories and the severity of punishment rests exclusively with Congress."

Roger Williams University law school Prof. David M. Zlotnick, whose sentencing research is cited in Smith's ruling, said he considers the Perry sentence "rational, fair and just." But he said Smith's ruling could be viewed as "a policy decision" -- as opposed to a purely judicial ruling based on case-specific facts -- that could "provoke a Congressional backlash."

Zlotnick said a backlash would be unwarranted. Since Booker, 61.7 percent of sentences have been within guideline ranges, compared to 65 percent before Booker, he said.

Zlotnick noted that President Bush in 2002 appointed Smith, a longtime friend and political associate of Republican U.S. Sen. Lincoln D. Chafee. And, he said, "The fact that it's a Republican-appointed judge sends the message that this is not some soft-on-crime or liberal wing of the judiciary."

Zlotnick, who has interviewed scores of federal judges about sentencing issues, said, "The overwhelming majority of judges, both Republican and Democrat, believe that the 100-1 ratio is irrational." But following Booker, judges are nervous about a congressional backlash, he said. "So crack provides a crucible for that whole problem."