Oral Argument Not Yet Scheduled

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 96-3053

United States,
Appellee,
vs.
Marlon Marshall,
Appellant.

On Appeal from the
United States District Court
For the District of Columbia
95-Cr.-0201

Suggestion for Hearing en Banc

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CONCISE STATEMENT OF ISSUE FOR *EN BANC* REVIEW AND ITS IMPORTANCE

Due to the great significance nationally of the racial disparity in sentencing of defendants convicted of distributing crack cocaine, Appellants request that the Court *en banc* determine, in light of the findings of the U.S. Sentencing Commission in 1995 and April 1997, and recent actions in Congress, that 21 U.S.C. § 841 (b)(1) violates the Equal Protection Clause of the Fifth Amendment to the U.S. Constitution insofar as it imposes grossly disparate sentences on defendants convicted of distributing crack as opposed to powder cocaine.

Previously panels of this Court have concluded in *United States v. Cyrus*, 890 F.2d 1245 (D.C. Cir. 1989), *United States v. Thompson*, 27 F.3d 671 (D.C. Cir.), *cert. denied*, 115 S.Ct. 650, 130 L.Ed.2d 554 (1994), and *United States v. Johnson*, 40 F.3d 436 (D.C. Cir. 1994), *cert. denied*, 131 L.Ed.2d 297 (1995), that Congress had a rational basis for imposing sentences for distributing crack that are 100 times more severe than those imposed for distributing powder cocaine. Although every other federal appeals court has come to a similar conclusion at some time in the past 10 years,[1] in light of the findings of the Sentencing Commission and subsequent Congressional resistance to a change in the penalties for distribution and possession of crack cocaine, judges on several of those courts have concluded that judicial action is necessary to protect Fifth Amendment rights.

In *United States v. Then*, 56 F.3d 464, 468 (2d Cir. 1995), Judge Calabresi noted in his concurrence that the evidence amassed by the Sentencing Commission

> might change the constitutional status of the current ratio. If Congress, for example, 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

[1] *See, e.g., United States v. James*, 78 F.3d 851 (3d Cir.), *cert. denied*, 117 S.Ct. 128, 136 L.Ed.2d 77 (1996); *United States v. Moore*, 54 F.3d 92 (2d Cir. 1995), *cert. denied*, 116 S.Ct. 793, 133 L.Ed.2d 742 (1996); *United States v. Singleterry*, 29 F.3d 733 (1st Cir.), *cert. denied*, 115 S. Ct. 647, 130 L. Ed.2d 552 (1994); *United States v. Byse*, 28 F.3d 1165 (11th Cir. 1994), *cert. denied*, 115 S.Ct. 767, 130 L.Ed.2d 663 (1995); *United States v. Coleman*, 24 F.3d 37 (9th Cir.), *cert. denied*, 115 S.Ct. 261, 130 L.Ed.2d 181 (1994); *United States v. D'Anjou*, 16 F.3d 604 (4th Cir.), *cert. denied*, 114 S.Ct. 2754, 129 L.Ed.2d 871 (1994); *United States v. Thurmond*, 7 F.3d 947 (10th Cir. 1993), *cert. denied*, 114 S.Ct. 1311, 127 L.Ed.2d 662 (1994); *United States v. Reece*, 994 F.2d 277 (6th Cir. 1993); *United States v. Lattimore*, 974 F.2d 971 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1819, 123 L. Ed.2d 449 (1993); *United States v. Harding*, 971 F.2d 410 (9th Cir. 1992), *cert. denied*, 113 S.Ct. 1025, 122 L.Ed.2d 170 (1993); *United States v. Galloway*, 951 F.2d 64 (5th Cir. 1992).

> 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.

Noting that the U.S. Supreme Court has held facially neutral statutes to be violative of equal protection where the legislature "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" *Id.* (quoting *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279, 99 S. Ct. 2282, 60 L. Ed.2d 870 (1979)(emphasis added)), Judge Calabresi said challenges to § 841(b)(1) and U.S.S.G. 2D1.1 would not be barred by a finding that Congress and the Sentencing Commission lacked discriminatory intent when they initially adopted the 100:1 ratio.

Similarly, after enumerating the 1995 Sentencing Commission's findings, Judge Nathaniel R. Jones, concurring in *United States v. Smith (Lewis J.)*, 73 F.3d 1414 (6th Cir. 1996), stated:

> with the benefit of this further examination, I regard the premises which drive our constitutional analysis of the 100:1 ratio with great suspicion. Each of these premises is subject to challenge, and we must not ignore this fact. I urge my colleagues to don a more realistic set of lenses. Otherwise, we risk substantial harm to the integrity of our constitutional jurisprudence. Continued use of the law to perpetuate a result at variance with rationality and common sense — even in a war on drugs — is indefensible.

Writing for the Eight Circuit, Judge Heaney reluctantly concluded:

> This author continues to believe that the sentencing disparity is unconstitutional for the reasons stated in my concurring opinion in *United States v. Willis*, 967 F.2d 1220, 1226 (8th Cir. 1992)(J. Heaney, concurring). Recognizing the binding effect of this court's prior decisions, however, I simply reiterate that belief and encourage the court to reconsider this important issue *en banc*.

United States v. Herron, 97 F.3d 234, 240 n. 9 (8th Cir. 1996).

Other courts have found ways to avoid imposition of the harsh mandatory-minimum sentences under U.S.S.G. 2D1.1 by narrowly reading the guideline definition of cocaine base as applying only to crack, and not other base forms of the drug. *See, e.g., James, supra*, (Government failed to prove by preponderance of evidence cocaine base James sold was crack); *United States v. Muñoz-Realpe*, 21 F.3d 375 (11th Cir. 1994).

Arguing that district judges in this circuit should be permitted to grant downward departures to defendants under U.S.S.G. 5K2.0 because the mandatory-minimum sentences

imposed by U.S.S.G. 2D1.1 on individuals convicted of possessing crack cocaine violate the requirements of 18 U.S.C. § 3553(a), Judge Wald stated, referring to the *1995 Cocaine Policy Report*:

> The agency itself admitted that the rule was arbitrary, capricious, unfair, and violative of a federal statute, and then documented that admission with credible evidence…. It seems to me the ultimate triumph of form over substance to base prison sentences on guidelines which have now been repudiated as irrational by the authors of those guidelines themselves.

United States v. Anderson, 82 F.3d 436, 450 (D.C. Cir. 1996)(Wald, J., dissenting).

Appellant will argue that the legislative history of the so-called crack penalty warrants application of a more stringent standard than rational basis analysis. However, even if this Court were to conclude that the rational basis test is appropriate, it should be guided by the Sentencing Commission's determination, based on the legislative history, empirical data amassed by the Commission and the Office of National Drug Control Policy, and the findings of independent medical researchers reported in the *Journal of the American Medical Association*, that there is no rational basis for the crack penalty. *See*, Hatsukami and Fischman, *Crack Cocaine and Cocaine Hydrochloride: Are the Differences Myth or Reality?*, J.A.M.A., Vol. 276, No. 19, Nov. 20, 1996, 1580 (referred to below as *"JAMA"*)(*reproduced at App. M.* [2]*)*

[2] References to Appellant's appendix will be in the form "App." followed by a tab letter and, where appropriate, a page number. References to the record will be in the form "R." followed by a page number. References to the trial transcript will be in the form "Tr." followed by a date and page number.

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES, **APPELLEE,** vs. **MARLON MARSHALL,** **APPELLANT.**	No. 96-3053 (95-Cr.-0201)

SUGGESTION FOR HEARING EN BANC

STATEMENT OF THE CASE

Marshall was indicted August 10, 1995 on one count of unlawful distribution of more than five grams of cocaine base or "crack" cocaine in violation of 21 U.S.C§§ 841 (a)(1) and 841(b)(1)(B(iii). R. 3. App. B. He was arraigned August 16, 1995.

The trial began January 18, 1996. After the Government rested, Defense Counsel announced that he would not call any witnesses. Following final arguments and instructions January 25, 1996, the jury returned a guilty verdict on the one-count indictment. R. 6. The Trial Court sentenced Marshall April 10, 1996 to 135 months in prison and four years of supervised probation following his release. R. 7. The Judge sentenced him at the low end of the range "because the guidelines are so out of whack with what they ought to be," and he lacked authority to depart downward. Tr. 4/10/96, 41-42. Marshall filed a timely Notice of Appeal April 15, 1996.[3] *Id.*

STATEMENT OF FACTS

The facts underlying this case are relatively straightforward. Based on information provided by an informant, Drug Enforcement Administration agents initiated an investigation in which the informant made a series of phone calls to a pager number from the DEA Washington Field Office beginning May 10, 1994. The calls were returned and the informant, under the

[3] A more complete Statement of the Case may be found in Appellant's Brief at 1 – 5.

supervision of Agent Frank Suarez, negotiated to purchase 62 grams of crack cocaine May 16, 1994. Before the transaction took place the dealer told the informant he could deliver only 42 grams of crack. In the transaction outside a McDonald's at Minnesota Avenue and Dix Street, S.E., the informant and undercover DEA Agent Arthur Miller received 35.46 grams of crack in exchange for $1,350.

In another round of phone calls beginning May 24, 1994 the informant arranged to make a second purchase of 62 grams the next day. The informant and Miller met the dealer at Pennsylvania and Branch avenues, S.E., but the dealer told the informant he would not complete the transaction because it was too "hot" in the area, meaning police were present. The dealer rejected Miller's attempts to move the transaction to a nearby restaurant, and the operation ended for the day.

Although one surveillance officer claimed to have overheard Marshall tell another man to put the drugs back in the car before the May 25 meeting with Miller and the informant, neither of the other surveillance officers testified that Marshall made contact with anyone other than the putative buyers. No government witness claimed to have seen Marshall in possession of narcotics that day.

Investigators made several attempts into June 1994 to initiate another transaction with the dealer, but calls to the pager number were never again returned.[4]

[4] A more complete Statement of Facts may be found in Appellant's Brief at 6 – 10.

ARGUMENT

THE MANDATORY-MINIMUM SENTENCING SCHEME APPLIED TO PERSONS CONVICTED OF DISTRIBUTING COCAINE BASE VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FIFTH AMENDMENT

Sec. 841(b)(1) is among a very small number of federal laws under which defendants receive mandatory-minimum sentences with regularity.[5] The sentencing provisions were added in 1986 to target so-called drug kingpins for mandatory sentences ranging from 10 years to life in prison without possibility of parole. *Cocaine and Federal Sentencing Policy*, U.S. Sentencing Commission, February 1995, 118, (referred to below as the "*1995 Cocaine Policy Report*"). "[M]anagers of the retail level traffic," dealing in "substantial street quantities," were considered "serious traffickers" subject to mandatory-minimum sentences ranging from five to 10 years. *Id.*

Marshall, who initially promised to sell the informant 62 grams of crack but could deliver only 35.46 grams, according to government witnesses, falls into neither category. He should be considered nothing more than a low-level street dealer.

The primary factor that triggers the mandatory-minimum sentence is the quantity of drugs involved, and Congress established different minimum quantities for each type of drug based on its assessment of the relative danger each drug posed. For example, distribution of only 50 grams of crack cocaine, (100 to 500 doses) would subject a first-time drug offender to the 10-year minimum sentence, while distribution of 5 kilograms (25,000 to 50,000 doses) of powder cocaine would be required to subject a first-time offender to the same penalty. A person would have to distribute at least one kilogram of heroin to receive a 10-year mandatory sentence. Individuals who have more than two previous drug convictions must be sentenced to life without parole.

Under the statute, a person convicted of distributing only 5 grams of crack (10 to 50 doses), who is a first offender, must receive a five-year minimum sentence, while it takes

[5] Four statutes, § 841, 21 U.S.C. § 844 dealing with possession of controlled substances, 21 U.S.C. § 960 dealing with importation and exportation of controlled substances, and 18 U.S.C. § 924(c) providing enhanced penalties for using or carrying firearms in connection with drug trafficking or violent crimes, accounted for 94 percent of cases in which mandatory-minimum sentences were imposed by federal courts from 1984-90. *Mandatory Minimum Penalties in the Federal Criminal Justice System*, U.S. Sentencing Commission, August 1991, at 10 (referred to below as the "*Mandatory-Minimum Report*").

distribution of 500 grams of powder cocaine (2,500 to 5,000 doses) to reach that threshold. A heroin distributor would receive a five-year minimum sentence for 100 grams. Individuals in this category who have one or more prior drug convictions must serve at least 10 years; there is no mandatory life sentence for multiple offenders.

Thus, the penalties for distribution of crack cocaine are 100 times as severe as those for distribution of powder cocaine, and 20 times as severe as those for distribution of heroin.

Historical Background of the 100:1 Ratio

The Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986), established the mandatory-minimum penalties applicable to federal drug trafficking crimes and the 100:1 quantity ratio between powder and crack cocaine. The original house bill, H.R. 5484, 99th Cong., 2d Sess., would have established a 50:1 ratio, and a bill introduced on behalf of the Reagan Administration, S. 2849, 99th Cong., 2d Sess., would have set the ratio at 20:1. *1995 Cocaine Policy Report* at 116-17. The Commission reported that there was little debate over the 1986 act, no legislative committee prepared a report analyzing its key provisions, and it was expedited through Congress in an election year, largely due to public opinion and media coverage of the death of NCAA and University of Maryland basketball star Len Bias in June 1986, *Id.*, and Cleveland Browns football player Don Rogers. *Id.* at 121. In fact, Bias died of cocaine intoxication caused by snorting powder cocaine. *Id.* The legislative history includes no discussion of the 100:1 ratio, *Id.* at 117, although Florida Sen. Lawton Chiles, a leader in the fight for stringent crack penalties, said the 100:1 ratio was needed "because of the especially lethal characteristics of this form of cocaine." *Id.* at 120.

The Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988), extended the mandatory-minimum penalties in § 841(b)(1) to conspiracies and attempts, and amended 21 U.S.C. § 844 to include mandatory-minimum sentences for simple possession of crack, but no other narcotics. *Id.* at 123. A first offender convicted of possessing five grams of crack would receive a minimum five-year sentence. The original versions of the 1988 act did not include mandatory-minimums for possession of crack; these were added through amendments from the floor in

both chambers despite Justice Department opposition. Proponents of the new crack possession penalty "argued that the supply of [crack] 'cocaine' was greater than ever. Second, it was argued that crack cocaine 'causes greater physical, emotional, and psychological damage than any other commonly abused drug.' Finally, . . . it was argued that 'crack [cocaine] has been linked to violent crime.' " *Id.* at 125 (footnotes omitted).

Thus, it is clear that in enacting the crack penalty in 1986 and extending it in 1988, Congress acted without due deliberation. It hurried bills to the floor with limited committee review and no reports analyzing their impact and effectiveness, and it arbitrarily established the 100:1 ratio. Then, in applying that arbitrary quantity ratio to prosecutions for possession of crack, it disregarded the advice of the federal agency most directly involved in law enforcement.

The Sentencing Commission found that the first media mentions of crack occurred in 1984, and that by 1986 considerable media coverage was devoted to it. It said one report dubbed crack "America's drug of choice," at a time when statistical evidence indicted that 95 percent of cocaine users preferred to snort powder cocaine. *1995 Cocaine Policy Report, supra*, at 122. This Court might well conclude that when Congress hastened to pass anti-drug legislation in 1986 and 1988 it, like the public generally, was operating on lack of information and misinformation about crack.

Five years after implementation of the "crack penalty," the Sentencing Commission raised a red flag in its *Mandatory-Minimum Report*, warning of the racially disparate impact of the 1986 amendments to § 841(b)(1). Then, in February 1995, it sounded a more strident warning in the *Cocaine Policy Report*, calling for a complete re-examination of cocaine sentencing policy. In May 1995, it began the process of effectuating change in the area over which it had jurisdiction, the Sentencing Guideline addressing simple possession of powder and crack cocaine, U.S.S.G. 2D1.1.

Congress, entering a presidential election year and fearing that it would be perceived as soft on drug crime, for the first time in the history of the Sentencing Guidelines, rejected a Sentencing Commission recommendation to amend the guidelines.

The 100:1 Disparity in Sentences for Two Forms of the Same Drug Violates the Fifth Amendment

The Fifth Amendment guarantees that "no person shall be . . . deprived of . . . life, [or] liberty . . . without due process of law." This provision includes the right to equal protection of the law, *Bolling v. Sharpe*, 347 U.S. 497 (1954), which is "a direction that all persons similarly situated should be treated alike." *Plyler v. Doe*, 457 U.S. 202, 216 (1982). In cases like the one at bar, where a law has a grossly disproportionate impact on one racial group, that mandate of the Fifth Amendment is not being carried out.

The Appropriate Level of Judicial Review

The Court's initial task when confronted with a claim that a statute, such as 21 U.S.C. § 841(b)(1), violates the Equal Protection Clause is to determine the appropriate standard of review. The U.S. Supreme Court has enumerated three levels of review: strict scrutiny, rational basis analysis, and an intermediate level of scrutiny.

Strict scrutiny will be applied "when the governmental act classifies people in terms of their ability to exercise a fundamental right" or "distinguishes between persons, in terms of any right, upon some 'suspect' basis." Ronald D. Rotunda & John O. Nowak, *Treatise on Constitutional Law*, ¶ 18.3, at 15 (3d Ed. 1992). When strict scrutiny is appropriate, courts will not defer to decisions of other branches of government, but will "independently determine the degree of relationship which the classification bears to a constitutionally compelling end. . . ." and "will require the government to show a close relationship between the classification and promotion of a compelling or overriding interest." *Id.* As this Court recognized in *Johnson, supra*, 40 F.3d at 439, under strict scrutiny it would "be obliged to ask, in accordance with reigning constitutional doctrine, whether the statute is narrowly tailored to serve a compelling state interest."

The lowest level of review, the rational basis test, is applicable when a law does not restrict exercise of a fundamental right or "use a criterion for classification which itself violates a fundamental constitutional value." *Treatise on Constitutional Law, supra*, at 13. The Court need

only ask "whether it is conceivable that the classification bears a rational relationship to an end of government which is not prohibited by the Constitution." *Id.* at 14.

The Supreme Court developed an intermediate level of review for use when laws do not involve facially invidious classifications, but "nonetheless give rise to recurring constitutional difficulties." *Plyler, supra*, 457 U.S. at 217. In such cases, courts must determine whether the classification in the law can "fairly be viewed as furthering a substantial interest of the state." *Id.* at 217-18. The burden is on the government to show that the disparate treatment, in this case the 100:1 ratio of powder to crack cocaine, reasonably relates to fulfilling the law's purpose. *Id.* at 224. In 1995 and again in April the Sentencing Commission strongly asserted that the 100:1 ratio does not further such an interest.

For the reasons stated below, Appellants believe the appropriate standard of review is strict scrutiny or, alternatively, intermediate scrutiny. But, even if the Court were to apply the rational basis test, the 1995 and 1997 *Cocaine Policy Reports* and the findings of the *JAMA* researchers provide ample evidence that the 100:1 ratio embodied in § 841(b)(1) is not rationally related to the Government's interest in combating distribution and use of crack cocaine and, therefore, violates the Equal Protection Clause of the Fifth Amendment.

The Crack Penalty Should Be Subject to Strict Scrutiny

Experience with the application of § 841 since the mandatory-minimum provisions were added by the Anti-Drug Abuse Act of 1986 demonstrates that they have had a grossly disparate impact on racial minorities. More than 95 percent of individuals convicted in 1993 in federal court of distributing crack were members of minority groups — 88.3 percent were black. *1995 Cocaine Policy Report, supra*, at 156. That year 84.2 percent of defendants charged in federal court with possession of crack were black. *Id.* The disproportionate impact is made more problematic when considering that, of individuals reporting crack use in 1991, 52 percent were white and only 38 percent were black. *Id.* at 38-39. These statistics contributed to the Sentencing Commission's 4-3 vote in 1995 to recommend elimination of the sentencing disparity entirely and its unanimous vote earlier this year that "although research and public policy may support

somewhat higher penalties for crack than for powder cocaine, a 100-to-1 quantity ratio cannot be justified." *Cocaine and Federal Sentencing Policy*, U.S. Sentencing Commission, April 1997, 2. App. L.

By contrast, among defendants convicted in federal courts in 1993 of distributing powder cocaine, 32 percent were white and 27.4 percent were black. In cases where defendants were convicted of possession, 58 percent were white and 26.7 percent were black. *Id.* at 156. In the 1991 survey of drug use, 75 percent of whites reporting cocaine use, 15 percent of blacks and 10 percent of Hispanics said they used powder cocaine at least once during the year. *Id.* at 38. These statistics prompted the Sentencing Commission to conclude that "The 100-to-1 crack cocaine to powder cocaine quantity ratios is a primary cause of the growing disparity between sentences for Black and White federal defendants." *Id.* at 163.

The U.S. Supreme Court has accepted statistical proof of disparate racial impact as demonstrating intent to discriminate in several contexts. *See McCleskey v. Kemp*, 481 U.S. 279, 283 (1986)(citing *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960), *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886)).

Enforcement of the Crack Penalties Demonstrates a Pattern of Discrimination

In *McCleskey* the Supreme Court refused to strike down Georgia's death penalty process as a denial of equal protection under the 14th Amendment, based on statistics showing that black homicide defendants were sentenced to death in disproportionately large numbers, especially when their victims were white. *Id.* at 286-7. The Court concluded that the imposition of juries into the sentencing process alleviated any racially discriminatory intent government officials might have exercised in legislation establishing the death penalty or in selecting cases in which to seek execution. The Court stated that "the nature of the capital sentencing decision, and the relationship of the statistics to that decision are fundamentally different from the corresponding elements" in cases where the Court has accepted statistics as proof of discriminatory intent. *Id*, at 294.

There are no such randomizing factors as juries in the process of deciding which drug cases to pursue in federal court. Each U.S. Attorney may have different policies concerning which cases to pursue. The U.S. Attorney in the Central District of California, including Los Angeles, does not prosecute crack cases involving less than 50 grams. *1995 Cocaine Policy Report*, at 139. In D.C., the U.S. Attorney has a similar policy for cases brought in federal court. *Id.* at 143 n. 94. Despite this policy, Appellant was prosecuted in federal court even though he sold only 35.46 grams of crack to an undercover DEA agent.

According to the Sentencing Commission, "While the exercise of discretion by prosecutors and investigators has an impact on sentences in almost all cases to some extent, because of the 100-to-1 quantity ratio and federal mandatory-minimum penalties, discretionary decisions in cocaine cases often have dramatic effects." *Id.* at 138. Had the U.S. Attorney adhered to it 50-gram-minimum policy and tried Appellant in D.C. Superior Court, under D.C. Code § 33-541(a), he would not have been subject to a mandatory-minimum sentence, much less a sentence in excess of 13 years in prison.

Hearings on H.R. 2259, 104th Cong., 1st Sess., a bill to block the 1995 federal sentencing guideline amendments, provided evidence supporting the contention that racial discrimination enters into the process. During floor debate on the bill, Rep. Waters stated, "In Los Angeles, the U.S. district court prosecuted no whites, none, for crack offenses between 1988 and 1994. This is despite the fact that two-thirds of those who have tried crack are white, and over one-half of crack's regular users are white." 141 Cong. Rec., H10275 (daily ed. October 18, 1995).

Prosecutorial discretion in selecting cases to pursue under the crack mandatory-minimums is more like *Gomillion, supra*, and, *Yick Wo, supra,* cases in which statistical evidence showed that application of facially-neutral statutes by government official had disparate racial impact, than it is like *McCleskey, supra*. Therefore, this Court should find, based on the empirical data amassed by the Sentencing Commission and the *JAMA* authors, that § 841(b)(1) deprives individuals convicted of distributing five grams or more of crack of equal protection of the laws in violation of the Fifth Amendment.

Congress' Refusal To Eliminate the Crack Penalty Should Be Viewed as Evidence of Its Intent To Discriminate

As this Court noted in *Johnson, supra*,

> When determining whether such invidious discriminatory purpose exists, courts may look to "the totality of the relevant facts," including the disparate impact. . . . Circumstantial evidence of racially discriminatory legislative purpose may also include the historical background of the legislative scheme, the specific sequence of events leading up to the enactment, a departure from the normal *procedural* sequence, a *substantive* departure from a routine decision or rule, contemporary legislators' statements, and the "inevitability or foreseeability of the consequence of the law."

40 F.3d at 439-40 (citing *United States v. Clary*, 34 F.3d 709, 711 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 1172, 130 L.Ed.2d 1126 (1995)(emphasis in original, internal citations omitted).

Even if, in the face of the mass of evidence set forth in the *1995 Cocaine Policy Report*, the Court continues to believe that statistical proof of disparate impact is insufficient to demonstrate racial motivation in applying § 841(b)(1), the Sentencing Commission's discussion of the legislative history provides further proof of discriminatory intent. *1995 Cocaine Policy Report*, at 111-26. *See, supra* at 5. In 1986, Congress adopted the 100:1 ratio by amendments from the floor to bills proposing much smaller disparities in treatment of the two forms of cocaine, and without deliberation over whether such stringent penalties for crack distribution were justified. Two years later it imposed mandatory-minimum sentences for simple possession of crack, even though no such sentences are imposed for possession of any other illegal drug. Thus, in 1986 Congress departed from the normal procedural sequence to impose stringent penalties for distribution of crack, and in 1988 it departed from the normal substantive schema of the drug laws to impose unique penalties for possession of crack.

The same myths that drove the debate and legislative action more than a decade ago fueled the successful effort to block implementation of the proposed sentencing guidelines that would have eliminated the 100:1 ratio for defendants convicted of possession of small amounts of crack. In floor debate over H.R. 2259, Rep. Shaw of Florida stated:

> It was an amendment I put into the law, . . . [W]e found the instant addictive nature of this substance was absolutely debilitating. We also found that where it was being used most, and where it was creating its worst problems were in minority areas because of the cheapness of it. . . . We set quantities we felt that would qualify people as dealers; not users but

> dealers, people who were going in and exploiting the poor people and stealing their lives and their future by selling them crack cocaine.

141 Cong. Rec., *supra,* at H10260.

In his concurring opinion to the *1997 Cocaine Policy Report*, Sentencing Commission Vice Chairman Michael Gelacak responded that:

> Black Americans know that the penalties for crack cocaine fall primarily upon the youth of their communities and they do not countenance the present penalty structure. There is a vast difference between wanting to rid your neighborhoods of crack users and dealers and wanting members of your community treated more harshly than others using and trafficking in the same substance in a different form.

Id. at 3 (emphasis in original).

It was eminently foreseeable that the 100:1 ratio's primary impact would be on members of minority groups, even if Congress did not set out to target those groups.

Although the Sentencing Commission presented Congress strong evidence that sentences imposed under § 841(b)(1)(A)(iii) and (B)(iii) have a grossly disparate impact on minority criminal defendants and that the 100:1 quantity ratio is constitutionally deficient, Congress demonstrated no inclination to seriously reconsider the mandatory-minimum sentencing structure in § 841. Several bills were introduced in the 104th Congress to alter the ratio, but they languished in committee until the term ended late last year.

In late April the Sentencing Commission sent Congress its *1997 Cocaine Policy Report* voicing the Commission's unanimous suggestion that U.S.S.G. 2D1.1 be amended to establish a much smaller crack/powder ratio, perhaps 1:5 rather than 1:100, and that the trigger quantities for both forms of cocaine be adjusted. It suggested that the trigger amount of crack be increased from 5 grams to between 25 and 75 grams for a five-year mandatory-minimum sentence, and that the trigger amount of powder be reduced from 500 grams to between 125 and 375 grams. *Id.* at 2. However, mindful of its experience in 1995, in which Congress overrode a guideline amendment recommendation for the first time, the Commission did not propose an amendment to implement its recommendation. Instead, because the ratio embodied in the Sentencing Guidelines is based on the ratio established by § 841(b), *Id.* at 3, it stated:

> We urge Congress to adopt a ratio within the quantity ranges we have recommended to address the problem as soon as possible, as hundreds of people will continue to be sentenced each month under the current law. After Congress has evaluated our recommendations and expressed its views, the Commission will amend the guidelines to reflect congressional intent.

Id. at 9

Since the 105th Congress convened in January two bills have been introduced in the House and two in the Senate, but none has been reported out of committee, and none includes a retroactivity clause.[6] Therefore, the general saving statute, 1 U.S.C. § 109, would prevent defendants, like Appellant, sentenced prior to amendment of § 841(b), from being eligible for a sentence reduction, even though the Sentencing Commission likely would reduce sentences of individuals convicted of simple possession who received mandatory-minimum terms under U.S.S.G. 2D1.1. *See Anderson*, 82 F.3d at 441.

Furthermore, the Commission's 1995 amendment proposal forced Congress to act to block a change in the crack penalty for simple possession. Because the Commission did not propose an amendment to U.S.S.G. 2D1.1 in May 1997, Congress is under no deadline for taking action on this issue. Amendments to the Sentencing Guidelines for United States Courts, 62 Fed. Reg. 26616 (1997) (proposed May 1, 1997).

In such situations, where the criteria this Court enumerated in *Johnson, supra*, are met, courts must step in to ensure that the requirements of the Equal Protection Clause are followed.

There Are No Adequate Justifications for the Sentencing Disparity

Justifications for the 100:1 Ratio

The justifications given in Congress in 1995 for blocking the sentencing guideline amendments were the same ones given in support of the 1986 and 1988 anti-drug abuse legislation that established the mandatory-minimum sentencing scheme. Rep. McCollum of Florida, who as

[6] S. 209, 105th Cong., 1st Sess., introduced Jan. 28, 1997, and H.R. 332, 105th Cong., 1st Sess., introduced January 7, 1997, would set the trigger levels for cocaine powder at five grams for a five-year mandatory-minimum sentence and 50 grams for a 10-year mandatory-minimum sentence. S. 260, 105th Cong., 1st Sess., introduced Feb. 4, 1997, would reduce the trigger levels for cocaine powder to 100 grams for a five-year mandatory-minimum sentence and 1 kilogram for a 10-year mandatory-minimum sentence. H.R. 2031, 105th Cong., 1st Sess., introduced June 24, 1997, would repeal 21 U.S.C. § 841(b)(1)(A)(iii) and (B)(iii), making the trigger levels for crack cocaine the same as the current levels for powder cocaine.

chairman of the Subcommittee on Crime led floor debate against the guideline amendments, stated: "The fact of the matter is we have minimum mandatory sentences for the crack crystal form of cocaine, which is the most deadly, most addictive, most dangerous, most widely used, and the one we want to get at the most." 141 Cong. Rec., *supra*, H10259.

Rep. Bryant of Tennessee added that "Crack cocaine accounts for many more emergency room visits than powder cocaine, and importantly crack is cheap. It is popular among teenagers, and it is most likely to be associated with violent crimes, burglaries, carjackings, drive-by shootings, whatever." *Id.* at H10266. Other concerns voiced by Rep. Pryce of Ohio were that "crack dealers have more extensive criminal records than other drug dealers and they tend to use young people to distribute the drug at a greater rate." *Id*. at H10256.

Thus, congressional opponents of reducing the 100:1 ratio claimed that crack is unique because: 1) it is more addictive than powder cocaine and, seemingly, heroin; 2) it poses a greater health hazard to users; 3) marketing it in single-dose amounts makes it more accessible, particularly to inner-city youth; 4) it leads to more violent crime; and 5) dealers use youths as distributors.

Empirical Evidence Contradicts Most Justifications for the 100:1 Ratio

Crack and Addiction

Powder cocaine is ingested, snorted or injected, and crack cocaine is administered almost exclusively by inhalation (smoking). Among individuals reporting cocaine use at least once in 1991, 76 percent said they snorted powder cocaine, about 28 percent reported smoking crack, 10.5 percent injected powder and 10.8 percent ingested powder. *1995 Cocaine Policy Report, supra*, at 36. Unlike heroin, barbiturates, and alcohol, cocaine is not physiologically addicting in either form, but cocaine can cause psychological dependence. *Id.* at 24-25. According to the report, injecting powder cocaine and smoking crack have comparable psychotropic impact and are the methods of use most likely to lead to addiction. *Id.* at 28. *See, also, JAMA, supra*, at 1581-3. The Sentencing Commission noted that more people smoke crack than inject powder and that the former would be more attractive to first-time users, but it did not take into account that nearly

three times as many people snort powder cocaine, which is also easy to use and far more attractive than intravenous use. *Id*, at 183. In explanatory notes accompanying the proposed guideline amendments, the Sentencing Commission stated that the relatively greater chance of addiction due to crack use "is not a reliable basis for establishing longer penalties for crack cocaine, because powder cocaine may be injected and injection is even more likely to lead to addiction than is smoking." Amendments to the Sentencing Guidelines for United States Courts, 60 Fed. Reg. 25,077 (1995).

Emergency Room Treatment and Deaths

In 1991, 38.2 percent of cocaine-related emergency room admissions involved smoking crack, 17.5 percent involved injected powder cocaine and 11.3 percent involved snorting cocaine, making it appear that crack is the most likely form of cocaine to cause injury requiring medical treatment. *1995 Cocaine Policy Report*, *supra*, at 184. But, nearly three times as many people use crack as inject powder; thus, a larger percentage of intravenous cocaine users seek hospital treatment. This is borne out when deaths due to cocaine use are considered. Intravenous use of powder caused 12.7 percent of cocaine-related deaths, and smoking crack caused 4.3 percent. *See JAMA, supra*, at 1584 (intravenous use of powder cocaine accounted for the largest number of emergency room visits documented in the 1992 DAWN study and to the greatest number of self-reported overdoses in a 1988-90 study done in Miami, Fla.). As the death of basketball star Len Bias indicates, snorting powder cocaine can be fatal as well. According to the *1995 Cocaine Policy Report*, use of alcohol or heroin in conjunction with cocaine in either form greatly increases the risk of death. *supra.*

Availability in Single Doses Encourages Use by Inner-City Youth

Members of Congress repeatedly stated that crack is "cheap" and, therefore, affordable by the poor and young children because crack can be bought in single doses for $5 to $20, but powder cocaine is usually sold in units of one gram at street prices of $65 to $150. *Id.* at 85. Sentencing Commission Vice Chairman Gelacak characterized this argument as being "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." *1997 Cocaine Policy Report, Concurring Op.* at 2. Data provided by the Sentencing Commission in 1995 indicates that a gram of crack, two to five doses, costs about the same amount as a gram of powder cocaine, which is also two to five doses, making the former no less expensive.

A critical fact never mentioned in Congressional debate is that use of cocaine in both forms has been declining steadily among adults and young people. *1995 Cocaine Policy Report, supra*, at 35. Among high school students who reported using cocaine, the number who used the drug at least once in a year declined 72 percent from 1986 to 1994, and reported crack use declined 54 percent over the same period. From 1987-93 the number of young adults reporting cocaine use at least once in the year declined 71 percent, and the number reporting crack use declined 58 percent. At the same time, the number of casual users of crack and powder cocaine declined, the number of "hard core" users remained constant, and the latter consumed two-thirds of the cocaine in all forms in 1992. *Id.* at 46-47. According to a recently-released study, "young inner city users are starting to disdain crack as a 'ghetto drug'; Miami sources describe crack use as 'unfashionable' among youth, particularly with African Americans in inner city areas, and often those who continue to use crack try to hide it from their peers." *Pulse Check: National Trends in Drug Abuse*, Office of National Drug Control Policy, Summer 1997, 7 (*referred to below as Pulse Check*).

Thus, the availability of crack cocaine can hardly be viewed as opening up vast new markets of casual users, or leading increasing numbers of them down the road to addiction. The *Pulse Check* report indicated, on the other hand, that heroin and methamphetamine use is increasing. *Id.* at 3.

Crack and Crime

The Sentencing Commission data indicates that use of crack cocaine does not produce more psychotic or compulsive crime than use of powder cocaine, and that use of alcohol often results in more violent crime while use of heroin results in more economic crime. *1995 Cocaine Policy Report* at 98-102. The Commission found that crack users, unlike heroin users, tend to sell

narcotics to support their habits. One study showed that only 2 percent of male crack users engaged in property crime to obtain money for drugs while 34 percent of male heroin users committed thefts and other property crimes to support their drug use. *Id.* at 107.

Violent crime associated with crack cocaine is predominantly systemic, "violence associated with the black market and distribution." *Id.* at 95. It is related to economic regulation and control of the marketplace. But, because many crack dealers also sell powder cocaine it is difficult, if not impossible, to determine the level of violence associated with crack specifically. *Id.* Furthermore, along with its finding that heroin use is growing, the *Pulse Check* report found that "crews" similar to those that developed markets for crack in the 1980s and early 1990s are now distributing heroin and that they resort to violence as they stake out territories. *Id*. at 5.

Based on expert testimony, the Sentencing Commission stated that "Whatever conclusions are drawn about current levels of systemic violence in the crack cocaine market relative to levels for the current powder cocaine market, researchers have tended to agree that, from a historical perspective, crack cocaine is not unique." *1995 Cocaine Policy Report, supra*, at 108.

Youths in the Distribution Chain

According to the Commission, researchers in New York City found great similarity between retail sellers of crack and powder cocaine: that they were primarily poor, minority youths under 18 years old. *Id.* at 68. Although many sell both forms of cocaine, more sell crack. *Id.* at 83. But, the report noted, "Recent research suggests that the use of teenagers to sell crack cocaine may have plateaued, particularly as retail profits decrease and as social norms develop against 'crack heads' and those who sell to them." *Id.*

Furthermore, the *Pulse Check* report found little difference in the makeup of the distribution chain for heroin and both forms of cocaine. *Id.* at 4-6, 8

After evaluating all of these factors, the Sentencing Commission concluded that "sufficient policy bases for the current penalty differential do not exist." *Supra*, 60 Fed. Reg. at 25,076.

Court Action Based on Empirical Data Is Required

The anecdotal information on which Congress acted in 1986 and 1988 has been replaced by a decade's accumulation of empirical data that largely negate the assumptions on which the 100:1 ratio was based, as Judge Wald pointed out in her dissent in *Anderson*. 82 F.3d at 449 n. 6. Therefore, as Judge Calabresi noted in *Then, supra*, 56 F.3d at 468, and Judge Heaney noted in *Herron, supra*, 97 F.3d at 240 n. 9, in light of the failure of political entities to take corrective action to protect minority populations from the discriminatory effects of § 841(b)(1), the courts must re-examine the constitutionality of the crack penalty. In doing so, this Court is not bound to uphold the statute merely because Congress had a rational basis when it initially adopted the 100:1 quantity ratio.

CONCLUSION

For the reasons stated above, Marlon Marshall requests that this Court *en banc* declare the mandatory-minimum sentences for distribution of cocaine base embodied in 21 U.S.C. § 841(b)(1) violative of the Equal Protection Clause of the Fifth Amendment, vacate his sentence and remand his case to the District Court for resentencing under the applicable U.S. Sentencing Guidelines for powder cocaine.

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CERTIFICATE OF SERVICE

I, Robert S. Becker, counsel for Marlon Marshall, certify that on July 17, 1997 I served a true copy of the attached Suggestion for Hearing en Banc by first-class mail on counsel listed below.

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