

NON-VIOLENT DRUG OFFENDERS

DEPARTMENT OF JUSTICE LOW-LEVEL
DRUG OFFENDER STUDY:
A DEFENSE PERSPECTIVE

Michael Katz*
Caroline Durham**

In the February 4, 1994 *Criminal Law Reporter* the United States Department of Justice released its study of non-violent drug offenders incarcerated by the United States Bureau of Prisons (BOP). The stated purpose was to develop a foundation of knowledge to inform criminal justice policy decisions. Attorney General Janet Reno purportedly ordered the study in an effort to support her opposition to mandatory minimum sentences, and her position that lengthy sentences for drug offenders wastes space in federal prisons that could better be used for violent, repeat criminals.¹

The study provides statistics on overall prison population and growth, comparing drug sentences prior to the advent of the federal sentencing guidelines and mandatory minimum penalties. It identifies a segment of violators which it terms "low-level drug offenders" and looks carefully at a sample of 767 sentenced in 1992, providing information on role-in-the-offense, departures, and mandatory minimum sentences. It also references studies on recidivism rates and the impact of sentence length on recidivism. Finally, it examines the relationship between drug quantity and role-in-the-offense.

The Department of Justice draws no conclusions and makes no recommendations, presumably to avoid compromising the report's objectivity or distracting the reader by focusing on policy questions. It does provide information on the make up of the prison population from which two conclusions are inescapable—first, that the drug guidelines and mandatory minimum sentencing laws are clogging federal prisons with nonviolent offenders who don't need to be there; and, second, that these inmates are an inevitable by-product, if not victims, of a criminal justice system increasingly geared towards the war on drugs.

THE STUDY FINDINGS

The Bureau of Prisons population skyrocketed in the last 13 years from 24,000 in 1980 to over 90,000 in December 1993.² This population is expected to increase to 130,000 by the year 2000. By the end of 1988, the population of the federal prison system was growing by 650 inmates per month, or enough to fill a new medium sized Federal Correctional Institution (FCI) each month. The present rate of growth appears

to be even greater, given that the prison population grew from 76,835 in early June of 1993³ to the current overall figure of 90,000.

The study shows the role drug prosecutions are playing in this population explosion. In calendar year 1992 of 28,754 persons sentenced to prison, over half, or 14,622, were convicted of drug trafficking offenses. In 1980 only 18 percent of BOP's population consisted of drug violators. By mid-1993 drug violators comprised nearly 60 percent or 45,198 out of a total of 76,835 inmates.

The length of drug sentences has greatly increased since the advent of mandatory penalties and the guidelines, which partially explains why BOP's population is increasingly made up of drug offenders. In a comparison between those sentenced in 1985 and 1992, the Department study reveals that drug offenders with zero criminal history points are today serving an average of 61.2 months compared with 24.9 months for their counterparts in 1985. For those with one criminal history point, the average time served in 1992 was 68 months versus 28.3 months in 1985. Hence, 1992 low-level drug offenders were actually serving nearly 2-1/2 times as long as their 1985 counterparts.

This comparison is even more impressive when one considers that 17 percent of the lowest level drug offenders received probation in 1985 whereas their counterparts in 1992 were largely ineligible for probation;⁴ probation "sentences" were not considered in computing the average sentence length.⁵ The passing of probationary sentences for a significant portion of low-level offenders has gone largely unnoticed, and this study does not rectify that oversight.

The guidelines have elevated sentences for drug law offenders relative to other offenders, which also explains why an increasing percentage of the prison population is comprised of drug offenders. The Sentencing Commission's 1992 annual report shows that for persons in Criminal History Category I, the median sentence for drug offenders was 60 months, ahead of kidnapping/hostage taking at 57 months; robbery at 51 months; arson at 36.5 months; racketeering/extortion at 36 months; assault at 24 months; and firearms at 15 months. Only murder, with a median sentence of 170 months, ranked ahead of drug trafficking.

An important substantial point the study made is that a substantial number of people currently being sentenced to federal prison, and hence a substantial percentage of the total federal prison population, are identified as low-level drug offenders; approximately two-thirds are serving mandatory minimum sentences.

In 1992 of the 14,622 persons sentenced for drug trafficking offenses 9,007, or over 61 percent, were in Criminal History Category I. This means that in 1992

* *Federal Defender, D. Colorado.*

** *Research and writing attorney, D. Colorado.*

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of the 28,754 persons sentenced to prison in the federal system nearly one-third were Criminal History Category I drug offenders.

Further, of the 76,835 persons in custody in early June of 1993, the study classifies 16,316, or over 36 percent, as low-level drug offenders. Thus over 21 percent of the total prison population in mid-1993 consisted of low-level drug offenders, and given the rate of prosecution that percentage is increasing.

THE LOW-LEVEL DRUG OFFENDER

The Department of Justice defines a low-level drug offender as one who has been convicted of a drug trafficking offense but has no prior commitment, no history of violence, no known involvement in sophisticated criminal activity, no significant "public safety risk factor,"⁶ and no pending detainer (in the case of U.S. citizens).

This is a highly restrictive definition likely to identify the milder offenders. Nonetheless, using this definition the Department concluded that 36.1 percent of drug violators in BOP facilities in mid-1993 were low-level drug offenders.⁷

To learn more about who they are, the Department sampled 767 of those meeting the criteria of low-level drug offenders sentenced in 1992 and found, compared to high-level drug offenders, that this group is disproportionately female and non-citizen, and had a lower rate of prison misconduct and substance abuse. They are also more likely to be young and married, slightly more likely to have at least 12 years of education and to have been employed full time in the year prior to incarceration.⁸

Nearly two-thirds of all low-level drug offenders currently confined are serving mandatory minimum sentences. Indeed, in the sample of 767 low-level drug offenders 77 percent were involved with sufficient drug quantities to trigger mandatory sentences.

Yet the study also revealed that this is not a group likely to re-offend or to be much of a danger to society. The Department reviewed past research by Harer (1993)⁹ who undertook a three year follow-up of 1,205 BOP inmates released to the community in 1987.¹⁰ This study included 236 drug violators whose Criminal History Category would be I using the Sentencing Commission classification scheme. Harer's study showed the recidivism rate for these first time drug violators was only 19.1 percent (45 individuals); and that none who failed following release from prison were charged with a serious crime of violence. Of those who failed half were rearrested for drug possession or sale; 14 percent for theft or fraud; 12 percent for DWI; 6 percent for simple assault; and 19% for technical parole violations (including miscellaneous non-violent offenses). Because some of these individuals would not meet all the criteria of the more restrictive DOJ definition of low-level drug offender, these results are even more impressive.

It should also be kept in mind that the Harer study presumed violations where there was an *arrest*, and hence may over-represent the degree to which this group re-offended. Further, most of the study group was released on parole supervision which would increase the likelihood that any new violation or offending behavior would be recorded.¹¹

Harer also underscores the strong correlation between prior criminal history and recidivism by showing that those with 11, 12 or 13 Criminal History points were likely to fail 77 percent of the time during their first three years of release from prison.

The Department study references Bureau of Prisons' studies going back to the 1950's which revealed that the amount of time served in prison does not increase or decrease the likelihood of recidivism.¹² This, when coupled with the anticipated low recidivism rate of certain drug offenders, supports the suggestion that low-level drug offenders as a group are being over-punished.

TRADITIONAL CRIMINAL JUSTICE GOALS

What goals does a society mobilized by heightened sensitivity to crime seek to achieve through its criminal justice system? How well are these goals served by the prosecution and incarceration of increasing numbers of low-level drug offenders for ever longer periods of time?

The Department of Justice study identifies a number of traditional sentencing goals such as punishment commensurate to the crime, rehabilitation, incapacitation, and deterrence.¹³ Obtaining "leverage" for law enforcement is also identified as a legitimate goal, as is designing a criminal justice policy that does not pose an excessive economic burden on taxpayers. There can be little disagreement about the legitimacy of these goals, but are they being rationally met?

The first goal, that of punishment commensurate with the crime, is perhaps the hardest to define, quantify, or measure. It is clear from the study that there is virtually no single offense that a first offender can commit, with the exception of murder, that will result in a longer sentence than that imposed for drug trafficking. Anyone who practices in the federal system can give examples of serious crimes of violence where the sentence is a fraction of that imposed upon first-time drug offenders. Without providing anecdotal information, certain "generic" examples can be given. For example, a person convicted of assault with intent to commit first degree murder can receive a sentence of less than five years in prison with acceptance of responsibility; for an assault with intent to commit second degree murder, the sentence can be as low as two and a half years (30 months). A first time offender who commits an aggravated assault which results in serious bodily injury can receive a sentence as low as 21 months if no dangerous weapon was used, or 33 months with

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the use of a dangerous weapon. A bank robber can receive a sentence as low as 30 months, or 41 months if a dangerous weapon was displayed.

By comparison, a first time drug offender caught with 50 grams of crack cocaine must be sentenced to no less than 10 years in prison. That is the assessment of relative harm with which society, or politicians responding to the public mood, regard these offenders. It is hard to believe that an informed public would reach the same conclusions about the relative harm from drug as compared to violent offenses.

What about incapacitation? Of the 16,316 low-level drug offenders identified by the study who made up 36.1 percent of the population of the BOP in mid-1993, over three-quarters (12,727) had no Criminal History points, and 60 percent (9,673) had never even been *arrested* prior to the offense of conviction. Perhaps some of these people may have engaged in criminal activity without having been caught. But when one adds the statistics concerning the percentage and type of recidivist behavior, it becomes very questionable whether incapacitation, as represented by lengthy prison sentence of low-level offenders serves its assumed purpose of protecting the public from additional crimes by the incarcerated offender.

Incarceration also relates to the goal of deterring the individual from committing future crimes. As previously noted Harer's study group did not necessarily meet all the criteria of low-level drug offenders and their low recidivism rate followed much shorter pre-guideline sentences. Hence, if one accepts other BOP studies which demonstrate that the length of sentence does not have an impact on deterrence, coupled with Harer's study of recidivism, it is clear that deterrence can be achieved in the vast majority of cases with much shorter sentences. Furthermore, to the extent that the study indicates that both marital stability and post-release income are strongly related to recidivism rates, it follows that any long prison term that erodes marital stability and reduces employability will likely increase recidivism.¹⁴

Closely related to recidivism is the concept of rehabilitation. Since the advent of the guidelines and the enactment of 18 U.S.C. §3553, there has been a significant change in the goal of rehabilitation.¹⁵ Prior to the Sentencing Reform Act of 1984, sentencing in the federal system was characterized by "coercive rehabilitation" where rehabilitation of the offender was the "overwhelming consideration in sentencing."¹⁶ Congress determined that other goals were not being met by the indeterminate sentencing scheme then in place, and that certainty was required to operate as a meaningful deterrent to crime.¹⁷ Hence, rehabilitation of the offender has become merely incidental to other stated goals.

In any case, no change in prison policy suggests greater rehabilitation with longer sentences. More-

over, the Sentencing Reform Act forbids the use of rehabilitation to justify imprisonment. 18 U.S.C. §3582(a).¹⁸

**INCREASED LEVERAGE FOR PROSECUTORS:
A COSTLY GOAL**

Some prosecutors argue that "minimum sentences are perhaps the single most important law enforcement tool available to prosecutors in targeting and successfully convicting high-level drug dealers."¹⁹

Criminal practitioners know that "cooperation" is the most effective means by which to obtain a reduced sentence and virtually the *only* way to obtain relief from a mandatory minimum sentence. While the Department study does not focus on all drug offenders to determine what percentage receive a downward departure for cooperation, or the size of that departure, it does give an indication of the pervasiveness of downward departures among the low-level drug offender group.

Table 19 of the study combines downward and 5K1.1 departures into one category. Among the control group of 767 the percent receiving this type of downward departure ranged from 19.75 percent to 36.05 percent (depending on role-in-offense) for an overall average of 26.31 percent. While the study does not indicate the size of the average departure in terms of the total percentage reduction of a defendant's sentence, it does reflect departures *averaging* from 25 months up to 84.2 months, depending on the offender's role in the offense.

In other words, the study shows that prosecutors frequently use their leverage and they have a sufficient "cushion" under the guidelines that they can afford to reduce sentences by an average of 2-7 years, presumably without compromising the ability to incapacitate, deter, and punish, or diminishing the seriousness of the offense.

Even with these departures the average sentence in time served for a low-level drug offender today is 2-1/2 times what it was in 1985. The substantial leverage being wielded by federal prosecutors and law enforcement agents is apparent. The cost in terms of individual human life for this increased leverage should also be apparent.

There is also a tremendous financial cost involved in the current practice. The cost of housing an inmate for one year in a BOP facility is approximately \$20,000.²⁰ The economic impact of federal policies which imprison an increasing number of low-level drug offenders, who already comprise one-third of the Bureau of Prisons' population, can be clearly seen. Do the costs justify incarcerating these people for more than twice as long as in 1985? Would an informed public support the incarceration of these people far beyond what incapacitation, deterrence, and rehabilitation requires? Assuming that the prison population were *only* growing by 650 inmates, or one new prison each month (which has been the overall

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growth rate since the end of 1988), would an informed public support the cost of four new prisons each year simply to house new low-level drug offenders?

IMPLICATIONS FOR THE CRIMINAL JUSTICE SYSTEM

Our original question was whether the punishment fits the crime for these low-level drug offenders. Are these the offenders Congress and the Commission sought to target with Draconian guidelines and mandatory minimum sentences? The answer surely is no.

The DOJ study establishes that, as a group, these low-level inmates are not hardened criminals responsible for the violence in our cities. These are not people who have lived a life of crime, nor who ordinarily return to criminal activity after conviction. The study compels the conclusion that drug trafficking offenses involve concerted or joint criminal activity by many individuals playing different "roles" in the scheme.

Presumably these offenses are motivated by profit. Large numbers of people in society are willing to participate in drug related criminal activity for profit who otherwise showed little propensity for criminal activity and might never have run afoul of the criminal justice system. The growing percentage of low-level drug offenders in the prison population suggests that harsh sentencing measures are not having a significant impact on recruitment and participation. There is a seemingly endless supply of these individuals, and general deterrence is not being realized.

While the Department of Justice study is not comprehensive, it is nonetheless compelling in illustrating that the guidelines "over-punish," in any common sense use of the term, low-level drug offenders. Under the guidelines drug *quantity* is the "engine" that drives the sentencing "train." The study indicates that drug amounts are similar regardless of the role the offender plays in the drug trafficking offense.²¹ In fact, those with *peripheral* roles are often involved with more drugs than couriers or street level dealers and almost as much as high-level dealers. Low-level drug offenders are being sacrificed in order to provide law enforcement authorities with leverage in the war on drugs which bears little relation to traditional purposes of sentencing and punishment.

Implicit in the study is that the advent of the mandatory drug sentences and the sentencing guidelines produced a significant shift in power and discretion. Suddenly, the defendant's exposure to prison time rested substantially in the hands of prosecutors and was determined by their charging decisions. Those decisions are frequently based on investigatory needs rather than individual culpability and the corollary need for punishment. Judges were transformed into glorified "clerks" whose role in

sentencing was reduced to computing sentences on a mathematical formula, based primarily on drug quantity, with only limited capacity to take account of traditional notions of fairness and justice.

The DOJ study should raise serious moral and ethical questions concerning disproportionality of punishment. Taken to a logical extreme, would it be appropriate to increase all potential sentences for drug offenders to life in prison in order to secure greater cooperation against increased numbers of suspected drug offenders?

There are also implications for the defense lawyer, whose role has been largely reduced to being a conduit of information between the defendant and law enforcement. It is difficult for a defense lawyer to advise an arguably innocent client to go to trial given the realities of the current sentencing scheme and the power that lies with the prosecutor. Instead, a defense lawyer is frequently in the position of advising clients to confess and "purge their sins" to facilitate cooperation. At risk is the traditional role of the attorney as advocate and litigator, thereby jeopardizing the confidence the public and the client have in an adversarial criminal justice system. Perhaps the DOJ study will encourage more judicial and prosecutorial flexibility for low-level offenders, but the discretion and the political will simply may not exist.

It is time to rethink drug quantity as the primary determinant of the low-level drug offender's sentence. The DOJ study confirms a point now beyond dispute: that drug quantity does not equal culpability or harm. Much greater emphasis needs to be placed on the offender's role in the offense and his criminal history, as these would give a truer assessment of the need for incapacitation and the likelihood of recidivism.

In addition, because rehabilitation might work for this group, it is time to consider permitting substantial downward departures for those factors typically characterizing the low-level group of offenders, even if this means taking into account individual circumstances and offender characteristics. For example, where defendants previously have been able to show that lack of youthful guidance, age or physical condition contributed to their involvement in criminal activity, the guidelines have been reflexively amended to "plug the loophole."²² This direction must be reversed.

Finally, it is time for Congress to abolish mandatory minimum sentences for low-level drug offenders. Otherwise, guideline amendments are useless to the two-thirds of low-level drug offenders presently serving mandatory minimum sentences. This may be the clearest and most important message Congress could hear. Without such changes, the DOJ Report offers only a chronicle of wasted bed space and wasted lives.

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FOOTNOTES

¹ *Many Drug Criminals in Federal Prisons Not Found To Be Violent*, Los Angeles Times, February 5, 1994 at 16A.

² 54 CrL 2106.

³ Id. at 2109.

⁴ Id. at 2118.

⁵ Id. at 2141, Table 29.

⁶ The study uses the public safety risk factors as defined by the Bureau of Prison's Statement on Security Designation and Custody Classification and includes membership of a security threat group, use or possession of a firearm which was intended to influence the commission of an offense, an offense involving aggressive sexual behavior, including child pornography and child prostitution, and an offense indicating a significant threat to a Government official.

⁷ The study further distills low level drug offenders for the skeptic or purist by removing, in stages, those above Criminal History Category I, those who have more than one Criminal History point, and those with *any* prior arrests. They are still able to "qualify" no fewer than one in five persons in prison in 1993 as low-level drug offenders. However, as noted above, this study uses a broader definition of low-level drug offender as it analyzes the data and individual characteristics. 54 CrL 2108.

⁸ Id. at 2103-2104.

⁹ Id. at 3140, Table 37; Harer, Miles D. "Recidivism Among Federal Inmates in 1987: A Preliminary Report, Bureau of Prisons, 1993".

¹⁰ 54 CrL 2116.

¹¹ Because this study primarily excluded non-citizens,

Harer undertook a second follow-up study examining non-citizen drug law offenders and found that only 10.6 percent were rearrested or had a parole revocation in the United States during the three year follow-up period. 54 CrL 2116.

¹² Id. at 2117.

¹³ These goals are largely codified in 18 U.S.C. § 3553, with the exception of rehabilitation, which is "reduced" to simply providing educational/vocational training and medical care.

¹⁴ Id. at 2117 n.26.

¹⁵ Indeed, the only reference to rehabilitation in 18 U.S.C. § 3553 is to provide the defendant with effective educational or vocational training, medical care, or other "correctional treatment."

¹⁶ Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 Wake Forest Law Review 185 (1993).

¹⁷ Id.

¹⁸ Section 3582(a) directs judges in determining whether to impose a term of imprisonment to recognize that "imprisonment is not an appropriate means of promoting correction and rehabilitation."

¹⁹ Jay Apperson, *The Lock-'em-Up Debate, What Prosecutors Know: Mandatory Minimums Work*, The Washington Post, February 27, 1994 at C1.

²⁰ Based on information provided by the Administrative Office of the U.S. Courts as of April 30, 1993.

²¹ This is based on the study of the 767 individuals sentenced in 1992. 54 CrL 2118-19.

²² Symposium, *Conference on the Federal Guidelines: Summary of Proceedings*, 101 Yale L.J. 2053 (1992).