

Racially Disproportionate Outcomes in Processing Drug Cases

By Eric E. Sterling, April 11, 2001

An analysis of how the American criminal justice system processes drug cases establishes a prima facie case of racial discrimination in the processing of such cases. While the numbers change from year to year, roughly 36% of those arrested for drugs offenses are African-American, and roughly 59% of those convicted of those drug offenses are African-American. And of those convicted, African-Americans go to prison more frequently and for longer terms. There is no legitimate factor that can explain such a wide variation. When this data is further understood in terms of rates, the racial disparity is even more glaring.

Human Rights Watch compared the rate of African-Americans going to prison for drug offenses to the rate of whites going to prison for drug offenses. Nation-wide the Black rates was 13 times the white rate using 1996 data from 37 states. On average, 482 of every 100,000 black men sentenced to prison are sent there on drug charges, compared with just 36 of every 100,000 white men. "More blacks were sent to state prison nationwide on drug charges than for crimes of violence," Jamie Fellner, associate counsel for Human Rights Watch, wrote in the report. "Only 27 percent of black admissions to prison were for crimes of violence – compared to 38 percent for drug offenses."

In Illinois, the Black rate was 57 times the white rate. This disparity has resulted in African-Americans dominating the prison populations in many states. African Americans are 90 percent of those who were incarcerated for selling or using drugs in Illinois and Maryland. In New Jersey, and four states in the South --- Louisiana, North Carolina, South Carolina and Virginia --- blacks make up more than 80 percent of those in prison on drug convictions. The law enforcement focus on African-American drug suspects has resulted in 7 percent of all black people living in Texas and Oklahoma living behind bars.

The explanation for this disparity, reported by Associated Press is that, "Experts at the Bureau of Justice Statistics, a division of the U.S. Justice Department, say one reason for the disparity could be that drug abuse among blacks tends to be more chronic and involve harder drugs such as crack cocaine and heroin."

Unfortunately that supposition is inconsistent with the national data on drug use. For example, in 1998 there were 313,467 Black users of cocaine and 721,784 White users of cocaine over the age of 18 who used cocaine at least once in the past month (as measured in the 1998 Federal National Household Survey on Drug Abuse released August 1999).

Those familiar with the criminal justice system have long suspected -- if not been convinced -- that racial discrimination and stereotyping infect decision-making and skew the outcomes. The largest category of cases initiated by the criminal justice

system is that of drug cases. An analysis of drug case processing reveals a pattern of system-wide racial disparity adversely affecting black and Hispanic defendants. This paper points out that this problem profoundly overshadows the well-known problem of Federal crack prosecutions.

FEDERAL CRACK PROSECUTIONS

Over the past decade it has become well-known that Federal crack cocaine defendants are disproportionately black. Such defendants were 88.3% African-American, 7.1% Hispanic, and only 4.1% white in FY 1993, a typical year (U.S. Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy, Feb. 1995, Table 13). Many observers blame this gross disparity on the 1-to-100 ratio of the quantities of crack cocaine versus powder cocaine that trigger Federal mandatory minimum sentences.

The key fact is that most of the thousands of African-American crack cocaine defendants are very low-level, if not the lowest level drug traffickers (Ibid., Tables 17 and 18). Congress enacted the mandatory minimum sentences in 1986 to assure that "the Federal government's most intense focus ought to be on major traffickers. . . the heads of organizations, who are responsible for creating, and delivering very large quantities of drugs" (House Report 99-845, Part 1, pp. 11-12, Sept. 19, 1986) [emphasis added].

Yet only 5.5% of crack defendants, 9.2% of powder cocaine defendants, and 11.2% of all drug defendants were high-level dealers (U.S. Sentencing Commission, Special Report to Congress, Table 18). Every Federal prosecution is the result of investigative and prosecutorial decisions by assistant U.S. attorneys, and DEA special agents, but they are frequently initiated by informants. The thousands of decisions to arrest and prosecute these low-level defendants instead of higher level traffickers reflects the de facto policies and practices of the U.S. Department of Justice. The triggering quantities of the 1986 mandatory minimum statute were set improperly, but at every level of case review, officials of the U.S. Department of Justice have known that they are not prosecuting high-level traffickers as directed by Congress or in conformity with the National Drug Control Strategy. Continuously for more than a decade since Members of Congress complained to the Attorney General about this discriminatory outcome, the Justice Department has prosecuted cocaine traffickers who are predominantly low-level and are overwhelmingly black and Hispanic.

Cumulatively, these Justice Department decisions constitute a pattern or practice of racial discrimination in the choice of targets -- a pattern or practice that has been tolerated by the top management of the DEA and the U.S. Department of Justice, including the Attorney General, and ultimately the President.

NATIONWIDE, AFRICAN-AMERICANS ARE DISPROPORTIONATELY INCARCERATED

In October 1995, The Sentencing Project reported the now well-known statistic that

one-in-three young black men is under correctional supervision or control (Marc Mauer and Tracy Huling, *Young Black Americans and the Criminal Justice System: Five Years Later*, The Sentencing Project, 1995).

It is less well known that the American rate of incarceration is five to ten times that of most European nations -- but most of that extraordinarily high rate is due to the profoundly greater rates of incarceration of African-Americans, particularly drug defendants. The rate of white incarceration in the U.S. is only about 1.5 to 2 times greater than that of most developed nations. Nationally, blacks are incarcerated at a rate 8.14 times that of whites (Darrell K. Gilliard & Allen J. Beck, Ph.D., "Prisoners in 1997," Bureau of Justice Statistics Bulletin, August 1998, Table 13). And in ten states and the District of Columbia, blacks are incarcerated at a rate more than 10 times the rate at which whites are incarcerated. Such states include Pennsylvania, New Jersey, Illinois, and Texas (Marc Mauer, *Intended and Unintended Consequences: State Racial Disparities in Imprisonment*, The Sentencing Project, 1997).

RACIAL DISPARITY IN PROCESSING OF STATE DRUG CASES

Imprisonment has grown dramatically in the U.S., having tripled in the last 15 years. "Drug policies constitute the single most significant factor contributing to the rise in criminal justice populations in recent years, with the number of incarcerated drug offenders having risen by 510% from 1983 to 1993. The number of black (non-Hispanic) women incarcerated in state prisons for drug offenses increased more than eight-fold -- 828% from 1986 to 1991" (Mauer and Huling, 1995, p. 1). The rate of increase in black offenders imprisoned for drug offenses was more than four times greater than the rate of increase for white offenders.

THE UNWARRANTED DISPROPORTIONALITY IN DRUG CASES

In considering the racially disproportionate treatment of African-Americans in drug cases, there are three facts to bear in mind.

First, in general, African-Americans do not use drugs in greater proportions than white Americans. According to the National Household Survey on Drug Abuse measurement of illegal drug use in the past month, in 1988, 1992 and 1993, higher percentages of whites used drugs compared to black Americans. In 1991, and 1993 through 1997, blacks used drugs slightly more frequently than whites (Preliminary Results from the 1997 National Household Survey on Drug Abuse, SAMHSA, U.S. Department of Health and Human Services, Table 11, p. 73).

Second, white Americans are the overwhelming majority of drug users in America. In 1997, for example, there were 10.3 million whites who used illegal drugs in the past month, but only 1.8 million blacks (Ibid. Applying the percentages of table 11 to table 1A). These numbers have not substantially changed since 1988.

Third, at every stage of the criminal justice process, African-Americans are arrested more frequently and punished more harshly than white Americans. This third fact is the result of government policies and actions. There is no legitimate justification for

this fact. There is ample "probable cause" to accuse the justice system of being racially discriminatory in the processing of drug cases. (Arrest data for these categories are not reported for Hispanic persons.)

DRUG USE RATES BY RACE & AGE

The rate of drug use varies quite a bit by age and race. Younger whites are typically more frequent illegal drug users than young blacks, but, among adults, a somewhat higher percentage of black adults use illegal drugs compared to white adults. For legal drugs, whites in most age groups are more likely to use alcohol and cigarettes than blacks. Only for the oldest age group are blacks more likely to be cigarette smokers than whites. Whites are for all age groups more likely to be heavy or "binge" drinkers.

In 1997, young whites used cocaine 1100% more frequently than young blacks. Even in the case of crack cocaine, whites are more frequent users. In 1994, 3.2% of the whites aged 18-25 used crack cocaine, but only 1.8% of the blacks in the same age group. Black drug users, in toto, constitute about 15% of the American drug using population (Letter from ONDCP Director Barry McCaffrey to the Congressional Black Caucus, June 26, 1997).

DRUG ARRESTS

However, blacks are disproportionately arrested for drug offenses compared to their presence in the drug using population. Well over one-third of all adults arrested for drug abuse violations are black.

JUVENILE DRUG ARRESTS

47% of all juveniles arrested for drug offenses in 1992 were black, 54% were white (85,700 juvenile drug arrests. OJJDP Juvenile Offenders and Victims: A National Report, 1995, p. 100). It is noteworthy that from 1973 through 1980 the white arrest rate for drug abuse violations was higher than the rate for blacks. The ten-year decline in youth drug arrests from 1975 to 1985 "can be attributed to a change in the rate at which juveniles, particularly white juveniles, were arrested for marijuana offenses" (Ibid. p. 120). By 1992 the black juvenile arrest rate for drugs was more than 5 times the white rate at more than 1100 per 100,000. (Id.) However, according to the FBI, in 1997 black juveniles constituted 34.0% of the 153,403 juveniles arrested for drug offenses (FBI, Crime in the United States, 1997 Table 43, p. 241).

RACIAL DISPROPORTION IN STATE DRUG CONVICTIONS

In court, where outcomes are largely the result of decisions and actions by persons trained in the law, it might be expected that black defendants would get "equal justice under law" without regard to race. After all, judges regularly decide civil rights questions, public defenders are attuned to the Bill of Rights, and prosecutors are enforcers of the law. However, while blacks constitute about 38% of all those arrested, they now constitute 59% of all those convicted, and 63% of those convicted of trafficking.

There is no legitimate explanation of how the racial rate of conviction varies so remarkably from the racial rate of arrest.

DISPROPORTION IN ALL FEDERAL DRUG PROSECUTIONS

In the Federal courts, drug cases account for 1/3 of the 60,000 cases disposed of (1996 Sourcebook, Table 5.29, p. 450-1). Black and Hispanic defendants are a disproportionately high percent of persons who are convicted of Federal drug offenses.

The use of a communications facility drug offense (21 USC 843(b)) and drug possession offense (21 USC 844) both carry substantially lower penalties than trafficking (21 USC 841). 98.2% of communications facility cases and 97.5% of possession cases are disposed of by guilty pleas, the highest percentage for all Federal crimes but two, suggesting that they are the result of plea negotiations. These cases may also be the result of negotiation between the defense and the prosecution over which charges are indicted -- a way around mandatory minimum sentences, which can be easily triggered by small quantities involved in drug trafficking cases.

Roughly one-in-five Federal drug suspects are not prosecuted by U.S. Attorneys. Whether this number is disproportionately white was not reported (1996 Sourcebook, Table 5.16, p. 437).

Before trial, black Federal drug defendants are more frequently detained. For example, in 1995, 57.9% of white Federal drug defendants and 63.6% of black Federal drug defendants were detained prior to trial (1997 Sourcebook, Table 5.14, p. 390).

STATE DRUG DEFENDANTS: Blacks Sentenced More Frequently and to Longer Terms Than Whites

Not only are blacks convicted more frequently, blacks convicted of drug offenses are sentenced to prison at much higher rates than whites convicted of the same offenses.

Blacks who are sentenced to prison get longer sentences on average than whites sentenced to prison for the same crimes. Black drug trafficking offenders get sentenced to more than one additional year in prison, on average, than white drug trafficking offenders.

PROBATION PAROLE

On December 31, 1995 the number of white prisoners in Federal and State correctional institutions was 455,021, while the number of black prisoners was 544,005. On the same day, the number of whites on parole were 339,938 and the number of blacks was 299,721 (1996 Sourcebook of Criminal Justice Statistics, Imprisoned -- Table 6.26, p. 524; Parole -- Table 6.52, p. 548).

Although the Sourcebook does not provide data on the availability of drug treatment in prison, compared by race; the granting of parole, compared by race; or the revocation of parole, compared by race; it is hard to imagine that the disparity

outlined above is any less.

DRUG CASES: the Largest Category of Cases in the System

Drug cases constitute the largest of all categories of criminal cases as measured by number of arrests. For 1997, for example, there were 1,583,600 arrests for drug offenses compared to 717,720 arrests for all serious violent crimes (murder, rape, robbery, and aggravated assault); 1,472,600 arrests for larceny and theft; 1,477,300 for driving under the influence; and 1,395,800 arrests for non-aggravated assaults.

Drug arrest numbers dwarf arrests for all important classes of crime including 356,000 arrests for burglary; 167,000 arrests for motor vehicle theft; 218,900 arrests for weapons offenses; 101,900 arrests for sex offenses other than rape or prostitution; 414,600 arrests for fraud; and 120,100 arrests for forgery and counterfeiting.

Drug arrests far exceed the number of arrests for every category of less serious offenses (Federal Bureau of Investigation, Crime in the United States, 1997, Uniform Crime Reports, Table 29, p. 222).

What happens in drug cases has an enormous impact on the criminal justice system and what characterizes drug cases is, at every stage, discrimination against African American and Hispanic defendants.

CONCLUDING QUESTIONS

Is it morally acceptable to tolerate racial discrimination as an intrinsic part of the price of fighting drug abuse?

For how long does a society committed to equal justice under law know about this race-based disparity in its "justice system" before changing the laws and practices which yield these results?

Is it morally acceptable or professionally ethical for members of the bar, members of the clergy, journalists, public officials, health care practitioners or drug abuse professionals to tolerate this disparity as inevitable?

For how long will you fail to question the law enforcement managers, prosecutors and judges whose policies, practices and decisions produce these results?