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ACLU and Sentencing Experts Again Call for Federal Courts to Uphold Judges' Right to Reject 100-to-1 Crack/Powder Sentencing Disparity

by R. Ben Stone, Executive Director
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Judges Across the Nation Refuse to Implement Unfair Sentencing Policy

SIOUX CITY, IA – The American Civil Liberties Union of Iowa, the ACLU Drug Law Reform Project, and a number of prominent criminal law and sentencing experts filed the fourth in a series of friend-of-the-court briefs late yesterday supporting judges' right to depart from the notorious 100-to-1 crack/powder cocaine sentencing disparity imposed by Congress. The case, *U.S. v. Spears*, is being argued in the Eighth Circuit U.S. Court of Appeals.

"The 100-to-1 ratio is a shameful affront to our system of justice," said Ben Stone, executive director of the ACLU of Iowa. "It results in grossly disproportionate sentences for markedly similar conduct."

The ACLU and others argue in the brief, principally authored by Baylor University Professor Mark Osler, that based on the U.S. Supreme Court's 2005 ruling in *Booker v. U.S.*, judges are not only allowed but obligated to exercise reasoned discretion in sentencing, and that doing so may at times result in departure from federal sentencing guidelines. *Booker* held that in order to comply with the U.S. Constitution's Sixth Amendment jury-trial protections, federal sentencing guidelines must remain advisory, not mandatory.

This legal issue is also currently being considered in the Second, Third and Ninth federal judicial circuits. The coalition has filed similar friend-of-court briefs in each of these circuits.

Federal judges across the country in roughly two dozen district courts have issued lower sentences than those suggested by the 100-to-1 ratio, thus refusing to comply with the sentencing guidelines set forth by Congress. The coalition brief notes that federal law stipulates that courts must impose sentences "sufficient, but not greater than necessary"

in order to “avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.”

The 100-to-1 ratio relates to the amount of crack versus powder cocaine necessary to trigger mandatory minimum prison sentences – meaning that possession of one gram of crack cocaine would mandate the same minimum sentence as 100 grams of powder cocaine.

The crack/powder discrepancy has been routinely criticized for its racially discriminatory impact by a wide variety of criminal justice and civil rights groups, including the Leadership Conference on Civil Rights and the NAACP. In 2000, 93.7 percent of defendants convicted of federal crack distribution offenses were black or Hispanic and only 5.6 percent were white, according to Sentencing Commission statistics.

The U.S. Sentencing Commission has three times concluded that there is no empirical basis for the 100-to-1 ratio, initially suggesting the crack/powder discrepancy be disregarded entirely and later recommending that it be set at a 20-to-1 ratio. Congress rejected the initial recommendation in 1995, the only time in history a Sentencing Commission recommendation has gone unheeded.

It is the 20-to-1 ratio recommended by the Sentencing Commission that served as the basis for defendant Spears’s sentence, which the government is currently appealing.

In addition to the ACLU, the coalition brief is joined by Douglas Berman, a Professor of Law at The Ohio State University; Michael M. O’Hear, an Associate Professor of Law at Marquette University and Editor of the *Federal Sentencing Reporter*; David N. Yellen, Dean and Professor of Law at Loyola University; and David M. Zlotnick, an Associate Professor of Law at Roger Williams University.

The coalition brief can be found online at:

<http://www.aclu.org/drugpolicy/sentencing/25731lgl20060601.html>

Briefs submitted in the Second, Third and Ninth federal judicial circuits are available at:

<http://www.aclu.org/drugpolicy/sentencing/25727lgl20060217.html>,
<http://www.aclu.org/drugpolicy/sentencing/25603lgl20060518.html> and
<http://www.aclu.org/drugpolicy/sentencing/23562lgl20060120.html>