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I. INTRODUCTION

For more than two decades, the federal government has prosecuted crack cocaine offenders under a punishment scheme that has created more controversy and spawned more criticism than any other issue in the realm of federal sentencing. Crack cocaine use skyrocketed in the United States during the 1980s.[2] Drug overdoses and crack-related violence consumed the media, and public outcry put immense pressure on lawmakers to find a solution.[3] In 1986, Congress drastically changed the drug sentencing landscape when it enacted mandatory minimum laws for crack cocaine offenders.[4] This draconian system of punishment imposes a 5-year mandatory minimum sentence for offenders possessing either 5 grams of crack cocaine or 500 grams of powder cocaine.[5] A 10-year mandatory minimum sentence is triggered for offenders possessing 50 grams of crack cocaine or 5,000 grams of powder cocaine.[6] In 1987, the United States Sentencing Commission ("Sentencing Commission" or "Commission") incorporated this 100-to-1 ratio in its Federal Sentencing Guidelines for all cocaine amounts falling outside the mandatory minimums.[7] This sentencing disparity has left judges and sentencing scholars wondering why two forms of the same drug are treated in such disproportionate ways.[8]

Beginning in 2000, the United States Supreme Court began redefining its Sixth Amendment jurisprudence. In *Apprendi v. New Jersey* and *Blakely v. Washington*, the Court held that any fact that increases a defendant's sentence must be proven to a jury beyond a reasonable doubt.[9] The Commission's Guidelines were not discussed at length in either decision, and questions remained about whether the Guidelines' mandatory nature would endure. In 2005, the Court decided

2. *See infra* notes 32-33 and accompanying text.

3. *See infra* note 15 and accompanying text.

4. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified as amended at 21 U.S.C. § 841(b)(1) (2006)).

5. 21 U.S.C. § 841(b)(1)(B)(ii)-(iii) (2006).

6. 21 U.S.C. § 841(b)(1)(A)(ii)-(iii) (2006).

7. *See infra* note 51.

8. *See*, *e.g.*, United States v. Fisher, 451 F. Supp. 2d 553, 559 (S.D.N.Y. 2005) ("[T]here is no rational basis in terms of pharmacological differences, public opinion, or related violence to distinguish crack cocaine from powder cocaine at a ratio of one being one hundred times worse than the other."); Steven L. Chanenson & Douglas A. Berman, *Federal Cocaine Sentencing in Transition*, 19 FED. SENT'G REP. 291, 294 (2007) (noting that "[f]ederal cocaine sentencing policy has been so out of balance for so long").

9. Apprendi v. New Jersey, 530 U.S. 466, 489 (2000); Blakely v. Washington, 542 U.S. 296, 304 (2004).

United States v. Booker and held the once-mandatory Guidelines are now "effectively advisory" since the Guidelines required a judge to impose a sentence within a specific range.[10]

After *Booker*, several district court judges began deviating from the advisory Guidelines range when imposing sentences in crack cocaine cases.[11] The appellate courts frequently overturned these decisions, finding a departure from the 100-to-1 ratio was "unreasonable."[12] Two years after *Booker*, in *Kimbrough v. United States*, the Supreme Court held district court judges could impose a different ratio based on policy disagreements with the crack/powder disparity.[13]

This article examines *Kimbrough's* effect on crack cocaine sentencing. Part I discusses the rise of crack cocaine use in the United States during the 1980s. Part II provides a short history on modern federal sentencing, including the Sentencing Reform Act, the Commission's Guidelines, and its reports to Congress concerning the 100-to-1 ratio. Part III examines the Supreme Court's recent Sixth Amendment jurisprudence through its seminal cases, *Apprendi* and *Blakely*. In Part IV, this article analyzes the Court's *Booker* holding as well as *Kimbrough* and *Gall v. United States*,[14] two cases that clarified *Booker* and its application to crack cocaine cases. Finally, Part V compares the lower courts' roles after *Booker* and *Kimbrough*, suggests that *Kimbrough* may not be the answer to the crack/powder disparity, and explains why Congress may and should revisit the crack punishment scheme.

II. THE EMERGENCE OF CRACK COCAINE

Drug use in America began to rise in the late 1960s, when the social stigmatization previously associated with recreational drug use began to decrease and young, white, middle class Americans made drug use representative of protest and social rebellion.[15] In 1971, drug abuse among soldiers in Vietnam became national news when Congressmen Robert Steele and Morgan Murphy released a controversial report on the rise in heroin use among service members.[16] Drug abuse quickly

10. 543 U.S. 220, 234 (2005).
11. *See infra* notes 206-206 and accompanying text.
12. *See infra* notes 210-212 and accompanying text.
13. 128 S. Ct. 558, 575 (2007).
14. 128 S. Ct. 586 (2007).
15. PBS Frontline, Drug Wars: Thirty Years of America's Drug War, http://www.pbs.org/wgbh/pages/frontline/shows/drugs/cron/ (last visited June 1, 2008).
16. *Id.*

became a major political issue, and in June of 1971 President Nixon declared it "public enemy number one."[17] Before his resignation in 1974, Nixon formed the Drug Enforcement Administration ("DEA") and charged the group with policing the nation's drug problems.[18] The DEA, however, even with the assistance of the Coast Guard and U.S. Customs, had little success in controlling illicit drug activities, and drug shipments managed to slip through the borders and make their way to urban America.[19] Federal policymakers responded with increased funding for law enforcement, asset forfeiture legislation, extradition agreements, and foreign policy initiatives to prevent drug shipments from entering the United States.[20] When Ronald Reagan took office in 1981, he promised a "planned, concerted campaign" against all drugs, "hard, soft or otherwise."[21]

Crack cocaine did not emerge until the early 1970s.[22] By the mid-1980s, however, its use had drastically increased. Crack was cheaper to manufacture than powder cocaine, and users could buy the drug one hit at a time.[23] While New York and Los Angeles were the first cities to see a rise in crack use, the drug quickly made its way into cities in the center of the country.[24] The significant expansion of the market led to competition over crack distribution networks.[25] Crack's low cost made it more marketable in poorer, inner-city neighborhoods where violence was much more prevelant than in the affluent communities where powder was being sold.[26] Street sellers began arming themselves with handguns for self-protection against robberies from rival sellers, and violence erupted.[27] Crack abuse and its related violence seemed to culminate overnight, and the issue quickly consumed the media.

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17. *Id.*

18. *Id.*

19. James A. Inciardi, *The Irrational Politics of American Drug Policy: Implications For Criminal Law and the Management of Drug-Involved Offenders*, 1 OHIO ST. J. CRIM. L. 273, 274 (2003).

20. *Id.* at 275.

21. Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the 'War on Drugs' Was a 'War on Blacks',* 6 J. GENDER RACE & JUST. 381, 387 (2002).

22. *See* James A. Inciardi, *Beyond Cocaine: Basuco, Crack, and Other Coca Products*, 14 CONTEMP. DRUG PROBS. 461, 468 (1987) (finding history suggests crack appeared in the early 1970s).

23. Alfred Blumstein, *The Notorious 100:1 Crack: Powder Disparity--The Data Tell Us that It Is Time to Restore the Balance*, 16 FED. SENT'G REP. 87, 90 (2003).

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

In 1984, the *Washington Post* reported crack addicts in Los Angeles were using their welfare checks to get high,[28] and television networks broadcasted seventy-four drug-related news segments—more than half focusing on crack—during the summer of 1986.[29] *Newsweek* called crack the most significant story since Vietnam and Watergate,[30] and *Time* labeled it the "issue of the year" in 1986.[31] The extensive coverage was justified, with cocaine-related deaths rising from 185 in 1981 to 580 in 1984.[32] Statistics from 700 hospital emergency rooms revealed that roughly 10,000 patients were admitted in 1985 for cocaine-related health problems, a near threefold increase from the 3,300 admitted in 1981.[33] During the 1980s, the federal anti-drug budget amassed close to $13 billion a year, approximately twice the budget of the Environmental Protection Agency.[34] Increased spending, however, was not enough. The war on crack raged on, and Congress desperately sought a solution.

III. MODERN FEDERAL SENTENCING: A BRIEF HISTORY

A. The Sentencing Reform Act

From the late nineteenth century and throughout most of the twentieth century, federal judges were afforded broad discretion when imposing sentences.[35] Judges were free to sentence a defendant up to a legislatively imposed statutory maximum based on their reading of the facts.[36] Appellate review was only triggered when a sentence exceeded the statutory maximum or was based on overt discrimination.[37] This

28. Jay Matthews, *Drug Abuse Takes New Form; Rock Cocaine Is Peddled To the Poor In Los Angeles*, WASH. POST, Dec. 23, 1984, at A15.

29. *See* CHRISTIAN PARENTI, LOCKDOWN AMERICA: POLICE AND PRISONS IN THE AGE OF CRISIS 56 (1999).

30. *Id.* at 56-57.

31. Carol A. Brook, *Mukasey Puts Latest Crack in Truth on Drugs*, CHI. TRIB., Mar. 7, 2008, *available at* http://www.nacdl.org/public.nsf/legislation/Legislation008?Opendocument.

32. Joel Brinkley, *U.S. Says Cocaine Related Deaths are Rising*, N.Y. TIMES, July 11, 1986, at A1.

33. *Id.*

34. Dan Baum, *Tunnel Vision: The War on Drugs, 12 Years Later*, 79 A.B.A. J. 70, 70 (1993). Almost two-thirds of the federal drug budget was used for more law enforcement personnel, prosecutors, and prisons, while about one-third was designated for treatment. *Id.*

35. Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L.J. 377, 391-92 (2005).

36. *Id.* at 392.

37. *See, e.g.*, Michael Goldsmith, *Reconsidering the Constitutionality of Federal Sentencing Guidelines After Blakely: A Former Commissioner's Perspective*, 2004 BYU L. REV. 935, 939 ("Prior to 1984, federal judges enjoyed wide discretion in sentencing offenders. A judge could

practice produced disparate sentences for similar crimes and resulted in a "Wild West" system of sentencing.[38] Consequently, sentencing reformers began calling for a more just system, one that would yield consistency and fairness.[39] Congress responded by passing the Sentencing Reform Act of 1984 ("SRA"),[40] and completely overhauled the prevailing sentencing rubric.[41] The SRA provided, among other provisions, 18 U.S.C. § 3553(a), which instructed federal district judges to consider a variety of factors when imposing a sentence:

> **(a) Factors to be considered in imposing a sentence**—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
> **(1)** the nature and circumstances of the offense and the history and characteristics of the defendant;
> **(2)** the need for the sentence imposed—
> **(A)** to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> **(B)** to afford adequate deterrence to criminal conduct;
> **(C)** to protect the public from further crimes of the defendant; and
> **(D)** to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
> **(3)** the kinds of sentences available;
> **(4)** the kinds of sentence and the sentencing range established for—
> **(A)** the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
> **(5)** any pertinent policy statement [issued by the Sentencing Commission]
> **(6)** the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
> **(7)** the need to provide restitution to any victims of the offense.[42]

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impose any punishment within the statutory maximum and still stand virtually immune from appellate review.").

38. *See* Chanenson, *supra* note 35, at 392.

39. *See, e.g.,* Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 1 (1972).

40. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987.

41. *See* U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING 3-10 (2004), http://www.ussc.gov/15_year/15year.htm.

42. 18 U.S.C.A. § 3553(a) (West 2003).

The SRA also created the Sentencing Commission and gave it the authority to promulgate Sentencing Guidelines.[43]

Before the Commission could promulgate its Guidelines, however, Congress passed the Anti-Drug Abuse Act of 1986 ("Act").[44] Feeling pressure from the public to address the nation's growing drug problem, Congress passed the Act in haste.[45] The Act was intended to target "serious" and "major" drug traffickers, and all but eighteen lawmakers voted in favor of the legislation.[46] For the purposes of this article, the key feature in the Act was a sentencing structure that would later be deemed the federal sentencing world's most controversial punishment scheme—mandatory minimum sentences.[47] The Act contained the infamous "100-to-1" ratio, making the mandatory minimum punishment for offenses involving one gram of crack cocaine the same as offenses involving one hundred grams of powder cocaine.[48] This sentencing scheme prohibits judicial discretion in sentencing below the minimum set, unless the defendant aids the government by providing substantial assistance in the investigation or assistance in the prosecution of another person.[49] The Commission had to consider the mandatory minimum sentencing scheme when it promulgated its Sentencing Guidelines in 1987. Whether the Commission at that time was "fledgling and then-politically weak"[50] or simply concerned with appeasing Congress, it

43. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987.

44. Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified in part as amended in 21 U.S.C. § 841 et seq. (2000)).

45. *See* Chanenson & Berman, *supra* note 8, at 291.

46. *See* PARENTI, *supra* note 29, at 57.

47. *See* Chanenson & Berman, *supra* note 8, at 291. *See also* FAMILIES AGAINST MANDATORY MINIMUMS, HISTORY OF MANDATORY SENTENCES (2005), http://www.famm.org/Repository/Files/Updated short HISTORY.pdf. Mandatory sentences for drug offenses were first adopted by the federal government in 1951 as part of the Boggs Act. *Id.* The Boggs Act was later repealed by the Comprehensive Drug Abuse and Control Act of 1970. *Id.* Both New York and Michigan also enacted mandatory sentences for drug offenses, in 1973 and 1978 respectively. *Id.* In 2002, Michigan repealed its mandatory minimum laws and released over 1,200 prisoners. *Id.* Despite amendments made in 2004 to New York's Rockefeller Drug Laws, the state sentencing scheme is still often criticized. *See*, *e.g.*, Scott H. Greenfield, *Rockefeller Drug Laws Turn 35* (May 9, 2008), http://blog.simplejustice.us/2008/05/09/rockefeller-drug-laws-turn-35.aspx.

48. Specifically, the mandatory minimums set by the Act are 5 grams of crack or 500 grams of powder are punishable by a 5-year mandatory minimum sentence. 21 U.S.C. § 841(b)(1)(B)(ii)-(iii) (2006). In addition, 50 grams of crack or 5,000 grams of powder are punishable by a 10-year mandatory minimum sentence. 21 U.S.C. § 841(b)(1)(A)(ii)-(iii) (2006).

49. "Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." 18 U.S.C. § 3553(e) (2000).

50. *See* Chanenson & Berman, *supra* note 8, at 291.

decided to integrate Congress' mandatory minimum punishment scheme into its Guidelines.[51] The Commission, in fact, went one step further and incorporated the 100-to-1 ratio into the Guidelines for all crack and powder offenses.[52]

B. The Sentencing Guidelines

The Commission's Guidelines took a mechanistic form, using a formulaic procedure to calculate an offender's sentence.[53] The Commission also developed the Guidelines Manual ("Manual") to be used in conjunction with the Guidelines.[54] The Manual includes a Sentencing Table used to determine the Guidelines sentencing range (GSR).[55] The GSR sets the upper and lower limits of an offender's sentence and is ascertained mechanically after a judge considers the offense for which the defendant was convicted and the defendant's prior criminal history.[56] More specifically, once the judge determines the defendant's total "Offense Level," found on the Sentencing Table's vertical axis, and the defendant's "Criminal History Category," found on the horizontal axis, the defendant's GSR is located in the intersecting box on the Sentencing Table.[57]

While the Commission's Guidelines did not completely remove judicial fact-finding from the equation,[58] federal sentencing became Guideline-driven, and judges methodically imposed sentences within the Guidelines range. Departure from the sentencing range was limited,[59] and courts began viewing the Guidelines more like compulsory rules.

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51. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c) (2005); United States v. Armstrong, 517 U.S. 456, 478 (1996) (Stevens, J., dissenting) ("The Sentencing Guidelines extend this [100-to-1] ratio to penalty levels above the mandatory minimums: For any given quantity of crack, the guideline range is the same as if the offense had involved 100 times that amount in powder cocaine.").

52. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c) (2005).

53. Jackie Gardina, *Compromising Liberty: A Structural Critique of the Sentencing Guidelines*, 38 U. MICH. J.L. REFORM 345, 357 (2005) (stating that "[t]he mechanical nature of the guidelines is hard to ignore").

54. U.S. SENTENCING GUIDELINES MANUAL (2007).

55. *Id.* at ch. 5, pt. A.

56. *See generally id.* at ch. 5 (discussing how to determine a sentence).

57. *Id.*

58. For example, the precise quantity of drugs trafficked by the defendant—regardless of what was alleged by the government in the indictment and proved at trial—was a question for judges to determine by a preponderance of the evidence. *See* U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (2007).

59. *See, e.g.,* U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (2007) (listing the "Grounds for Departure").

When faced with a Guidelines challenge, courts found a safe haven in § 3553(b)(1), which provided that the sentencing court "shall impose a sentence of the kind and within the [Guidelines] range," and led many to believe the Guidelines were de facto mandatory.[60] Moreover, courts followed the mandatory minimum scheme, for the most part, without questioning the rationale behind treating offenses for "two forms of the same drug, containing the same active ingredient" in such disproportionate ways.[61]

Defendants sentenced under the 100-to-1 ratio scheme challenged the provisions of the Act and the Guidelines on constitutional grounds, but failed miserably. These failures were highlighted in the Commission's 1995 report that stated, "all federal circuit courts addressing the constitutionality of crack cocaine penalties have upheld the current federal cocaine sentencing scheme, including the 100-to-1 ratio."[62] When faced with such a challenge, the Seventh Circuit in *United States v. Lawrence* stated: "Congress in its wisdom has chosen to combat the devastating effects of crack cocaine on our society, and we believe the disproportionate sentencing scheme that treats one gram of cocaine base the same as 100 grams of cocaine is rationally related to this purpose."[63] The Eighth Circuit came to a similar conclusion in *United States v. Buckner*, where the defendant unsuccessfully argued that the Guidelines' disproportionate treatment of crack and powder cocaine violates the Fifth and Eighth Amendments.[64] Rebuffing the challenge, the court held "the '100 to 1 ratio' of cocaine to cocaine base in the Sentencing Guidelines is rationally related to Congress's objective of protecting the public welfare."[65]

C. The Sentencing Commission Attempts Reform

It took until the mid-1990s to realize the effect the mandatory minimums had on society, and opposition became more and more prevalent. Judges and academics began speaking out against the sentencing scheme,[66] and the Commission began an in-depth

60. 18 U.S.C.A. § 3553(b)(1) (West 2003).

61. *See* Chanenson & Berman, *supra* note 8, at 292.

62. UNITED STATES SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY at ch. 5, p. 118 (1995) [hereinafter USSC 1995 REPORT].

63. 951 F.2d 751, 755 (7th Cir. 1991).

64. 894 F.2d 975, 976 (8th Cir. 1990).

65. *Id.* at 980.

66. United States v. Then, 56 F.3d 464, 467 (2d Cir. 1995) (Calabresi, J., concurring) (noting that "[t]he unfavorable and disproportionate impact that the 100-to-1 crack/cocaine sentencing ratio

examination of the practice. On three separate occasions—in 1995, 1997 and 2002—the Commission issued a report asserting the following: 1) the 100-to-1 ratio was disproportionate to the harms associated with the two drugs; 2) courts could address the harms associated with crack through specific non-drug-related enhancements; and 3) crack penalties fell disproportionately on lower-level participants, most often African-Americans.[67]

In 1995 the Commission issued its first report, drafted in response to a congressional directive to study the cocaine sentencing policy.[68] Shortly after the report was released, the Commission promulgated revised Guidelines and recommended complete equalization of crack and powder sentencing by reducing the quantity levels for crack.[69] The report detailed how each drug is made and the physiological effects of both crack and powder cocaine.[70] The Commission found that crack

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has on members of minority groups is deeply troubling"); United States v. Patillo, 817 F.Supp. 839, 843-44 (C.D. Cal. 1993) (finding it "hard to imagine that . . . a convicted rapist with a long and unsavory history of prior misconduct can be sentenced . . . [to] less than three years" while a first time crack offender with no criminal history could be sentenced to a mandatory minimum of ten years); United States v. Willis, 967 F.2d 1220, 1226 (8th Cir. 1992) (Heaney, J., concurring) (stating that "Congress had no hard evidence . . . to support the contention that crack is 100 times more potent or dangerous than powder cocaine"). *See* Blumstein, *supra* note 23, at 87 (arguing that the 100-to-1 ratio is "particularly distressing because crack defendants are primarily black and powder defendants are primarily white and Hispanic, so the differential treatment can too easily be seen as a manifestation of racial discrimination"). *See also* David A. Sklansky, *Cocaine, Race and Equal Protection*, 47 STAN. L. REV. 1283, 1319 (1995) ("It does not appear the government could provide a racially neutral explanation for treating fifty grams of crack the same as five kilograms of cocaine."); William J. Spade, Jr., *Beyond the 100:1 Ratio: Towards A Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1275 (1996) ("Congress gave no consideration to what ratio would properly account for the characteristics that make crack more dangerous than powder. Indeed, all available evidence indicates that the 100:1 ratio was chosen randomly.").

67. *See* USSC 1995 REPORT, *supra* note 62, at 195-200; UNITED STATES SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 2 (1997) [hereinafter USSC 1997 REPORT]; UNITED STATES SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY at v-viii (2002) [hereinafter USSC 2002 REPORT].

68. *See* USSC 1995 REPORT, *supra* note 62, at v (executive summary).

69. *See* Amendments to the Sentencing Guidelines for United States Courts, 60 Fed. Reg. 25074, 25075-76 (proposed May 10, 1995) (Commission's proposed Guidelines amendments). The Commission stated:

> This amendment equalizes sentences for offenses involving similar amounts of crack cocaine and powder cocaine at the level currently provided for powder cocaine. It also increases punishment for all drug offenses that involve firearms or other dangerous weapons, and authorizes an upward departure for bodily injury . . . . The Commission is recommending separately that Congress eliminate the differential treatment of crack and powder cocaine in the mandatory minimum penalties found in current statutes.

Id. at 25076.

70. USSC 1995 REPORT, *supra* note 62, at vi-vii.

cocaine was easier to manufacture than powder cocaine and found that its "low cost-per-dose" made it more marketable to lower income people.[71] Also, crack users were younger than powder users and more likely to possess a weapon.[72] The Commission also concluded that 38% of crack users were African-American, compared to only 15% of powder cocaine users.[73] "[F]airer sentencing," the Commission stated, could be achieved by applying "guideline enhancements that are targeted to the particular harms that are associated with some, but not all, crack cocaine offenses."[74] Congress dismissed the Commission's recommendations and went so far as to state that changes to the mandatory minimum scheme should reflect greater punishment for crack trafficking, not less.[75]

The Commission's second attempt to revise the 100-to-1 ratio came in 1997,[76] and the response from Congress was much the same. In its follow-up report, the Commission advised Congress, "although research and public policy may support somewhat higher penalties for crack than powder cocaine, a 100-to-1 ratio cannot be justified."[77] The Commission recommended a crack to powder ratio of 5-to-1, after Congress dismissed the Commission's 1995 proposal of complete equalization.[78] Congress essentially ignored this recommendation.[79] Finally, in 2002, the Commission issued its third report.[80] The Commission argued that the 100-to-1 ratio could not be justified given the relative harm of crack use and the fact that the ratio primarily impacted minorities and lower-level defendants.[81] The Commission

71. *Id.* at viii.

72. *Id.* at ix, xi (finding that only 15.1 percent of powder offenders possessed a dangerous weapon, while weapon possession for crack offenders was 27.9 percent).

73. *Id.* at xi.

74. Amendments to the Sentencing Guidelines for United States Courts, 60 Fed. Reg. 25076 (proposed May 10, 1995).

75. Federal Sentencing Guidelines, Amendment, Disapproval, Pub. L. No. 104-38, 109 Stat. 334 § 2(a)(1)(A) (1995).

76. *See* USSC 1997 REPORT, *supra* note 67, at 9.

77. *Id.* at 2.

78. *See id.* In 1997, the Commission did not formally propose new regulations. *See, e.g., id.* ("The Sentencing Commission thereby recommends that Congress revise the federal statutory penalty scheme for both crack and powder cocaine offenses . . . . After Congress has evaluated our recommendations and expressed its views, the Commission will amend the guidelines to reflect congressional intent."); *See* USSC 2002 REPORT, *supra* note 67, at viii (recommending that Congress increase the mandatory minimum threshold quantities for crack offenses and then direct the Commission to modify the guidelines).

79. *See* USSC 2002 REPORT, *supra* note 67, at v.

80. *See* USSC 2002 REPORT, *supra* note 67.

81. *Id.* at v-viii.

proposed a 20-to-1 ratio,[82] and once again Congress provided no response.

IV. THE SUPREME COURT REDEFINES ITS SIXTH AMENDMENT JURISPRUDENCE

The efficiency and uniformity associated with the Guidelines displaced the historical values of the right to a jury trial, due in large part to the imposition of longer sentences based on facts found by the judge rather than the jury. The Court's prior Sixth Amendment jurisprudence recognized a criminal defendant's right to demand that a jury find all factual elements necessary—beyond a reasonable doubt—for conviction of the crime charged.[83] But the constitutional roles of judges and juries became muddled, and the Court began searching for ways to ensure judges retained discretion while also allowing the jury to function in the manner envisioned by the Framers of the Constitution. In *Apprendi v. New Jersey*,[84] the Court began its quest to clarify the constitutional roles of judges and juries in criminal sentencing.

A. Apprendi v. New Jersey

In the early morning hours of December 22, 1994, Charles Apprendi, Jr., "fired several .22-caliber bullets into the home of an African-American family that had recently moved into" his neighborhood.[85] During questioning by police, Apprendi admitted that he shot at the house because its occupants were "black in color" and, for that reason, he did not "want them in the neighborhood."[86] Under New Jersey's hate crime statute, a judge was required to impose a sentence enhancement of "between 10 and 20 years" in prison for a crime committed with racial animus.[87] Under the statute, this relevant conduct determination was a fact for the judge to find rather than the jury.[88]

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82. *Id.* at viii.

83. *See* United States v. Gaudin, 515 U.S. 506, 511 (1995); *In re* Winship, 397 U.S. 358, 364 (1970).

84. 530 U.S. 466 (2000).

85. *Id.* at 469.

86. *Id.*

87. *Id.* at 468-69. More specifically, New Jersey's "hate crime" statute requires an enhanced sentence when "[t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity." *Id.*

88. *Id.* at 491.

Apprendi pleaded guilty to weapons possession charges, which carried a sentence of between 5 and 10 years in prison.[89] As part of the plea bargain, the prosecution reserved the right to seek an enhanced sentence on the basis that the crime was committed with a biased purpose.[90] Such an enhancement would have doubled the sentence otherwise imposed for each of the crimes.[91] The trial judge accepted Apprendi's plea and found by a preponderance of the evidence that Apprendi's crime was motivated by the race of the victims.[92] He sentenced Apprendi to 12 years in prison, 2 years above the maximum sentence authorized for the weapons charge apart from the race enhancement, and Apprendi appealed.[93]

The Appellate Division of the New Jersey Superior Court affirmed, finding the enhancement was a "sentencing factor" rather than an "element" of the underlying crime,[94] and therefore not subject to the jury-trial and proof-beyond-a-reasonable-doubt requirements of the Constitution. The New Jersey Supreme Court also affirmed and Apprendi filed a petition for certiorari with the United States Supreme Court.[95]

Prior to *Apprendi*, the Supreme Court had routinely declined to extend trial phase procedural protections to the post-trial sentencing hearing.[96] Shifting the sentencing law landscape, the *Apprendi* Court stated, "jury protections extend, to some degree, 'to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence.'"[97] The Court, beginning its new era of sentencing jurisprudence, held, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory

89. *Apprendi*, 530 U.S. at 469-70.

90. *Id.* at 470. Apprendi correspondingly reserved the right to challenge the hate crime sentence enhancement as violating the U.S. Constitution. *Id.*

91. *Id.*

92. *Id.* at 471.

93. *Id.*

94. Apprendi v. New Jersey, 530 U.S. 466, 471-72 (2000).

95. *Id.* at 474.

96. *See, e.g.*, United States v. Watts, 519 U.S. 148, 157 (1997) ("[A] jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence."); Witte v. United States, 515 U.S. 389, 398 (1995) ("[T]he Due Process Clause did not require 'that courts throughout the Nation abandon their age-old practice of seeking information from out-of-court sources to guide their judgment toward a more enlightened and just sentence.'"); McMillan v. Pennsylvania, 477 U.S. 79, 93 (1986) (noting that "there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact").

97. *Apprendi*, 530 U.S. at 484 (citing Almendarez-Torres v. United States, 523 U.S. 224, 251 (1998) (Scalia, J., dissenting)).

maximum must be submitted to a jury and proved beyond a reasonable doubt."[98]

B. Blakely v. Washington

Four years after *Apprendi*, the Court continued to redefine the fact-finding roles of judges and juries in sentencing with *Blakely v. Washington*.[99] Ralph Howard Blakely, Jr. married his wife Yolanda in 1973.[100] When his wife filed for divorce in 1998, Blakely kidnapped her from her home in Washington at knifepoint, forced her into a wooden box in the back of his pickup truck, and took her to Montana.[101] He ordered their 13-year-old son to follow in another car, threatening to harm Yolanda with a shotgun if he did not comply.[102] En route to Montana their son escaped, and Blakely and Yolanda stopped at a friend's house.[103] The friend called the police and Blakely was arrested in Montana.[104]

Blakely was charged with first-degree kidnapping, but ultimately plead guilty to second-degree kidnapping involving domestic violence and the use of a firearm.[105] Under Washington law, second-degree kidnapping was a class B felony, punishable by a maximum sentence of 10 years in prison.[106] Washington's mandatory sentencing guidelines required, however, that a judge impose a sentence of no less than 49 and no more than 53 months in prison, unless the judge had "substantial and compelling" reasons to impose a sentence outside that range.[107] The trial judge sentenced Blakely to 90 months—37 months beyond the standard maximum—finding that Blakely had acted with "deliberate cruelty."[108] Blakely appealed, arguing that the additional fact-finding by the judge violated the Court's holding in *Apprendi*—that the jury must determine beyond a reasonable doubt all the facts legally necessary to support the sentence.[109]

98. *Id.* at 490.
99. 542 U.S. 296 (2004).
100. *Id.* at 298.
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. Blakely v. Washington, 542 U.S. 296, 298-99 (2004).
106. *Id.* at 299.
107. *Id.*
108. *Id.* at 300.
109. *Id.* at 301.

The Washington sentencing scheme compelled a judge to make relevant conduct determinations at sentencing, which then mechanically increased an offender's sentence above that authorized by the jury.[110] Indeed, if the jury had found facts that increased Blakely's determinate sentence, the case would have presented no constitutional violations.[111] The facts supporting a finding of "deliberate cruelty" in *Blakely*, however, had not been submitted to a jury, and Blakely had not admitted acting with "deliberate cruelty."[112] The State argued *Apprendi* was inapplicable because the Washington statutory maximum was 10 years, not 53 months.[113] The Court disagreed and held that the "statutory maximum" punishment "is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."[114] Because "deliberate cruelty" was not an element of the crimes to which Blakely pled guilty, the judge was prohibited from using that fact to enhance Blakely's sentence above the 53-month statutory maximum.[115] Continuing to redefine the jury's role in sentencing, the Court stated the judge's constitutional "authority to sentence derives wholly from the jury's verdict,"[116] and "[w]hen a judge inflicts punishment that the jury's verdict alone does not allow," that punishment is unconstitutional.[117]

V. THE COURT TAKES ON THE GUIDELINES: *BOOKER*, *KIMBROUGH* AND *GALL*

Apprendi and *Blakely* clarified the jury's role in determining certain sentencing facts and limited judicial discretion in sentencing. What effect those decisions would have on the Guidelines, however, was a question left unanswered. Indeed, Justice Scalia stated in his *Blakely* opinion, "[t]he Federal Guidelines are not before us, and we express no opinion on them."[118] Enter *United States v. Booker*, [119] the case that would require Justice Scalia and his brethren to express such an opinion.

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110. *Id.* at 298.

111. *See* United States v. Booker, 543 U.S. 220, 273 (2005) (Stevens, J. dissenting).

112. Blakely v. Washington, 542 U.S. 296, 303 (2004).

113. *Id.*

114. *Id. See also* Ring v. Arizona, 536 U.S. 584, 602 (2002) (stating "[a] defendant may not be 'expose[d] . . . to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone'") (quoting Apprendi v. New Jersey, 530 U.S. 466, 483).

115. *Blakely*, 542 U.S. at 304.

116. *Id.* at 306.

117. *Id.* at 304.

118. *Id.* at 305 n.9 (noting the United States, as *amicus curiae*, questioned whether the differences between the Federal Sentencing Guidelines and Washington's statute were

A. United States v. Booker

In *Booker*, the deeply fractured Court produced a total of six opinions, with two dueling 5-4 majorities.[120] Justice Stevens wrote what has been termed the "merits majority" opinion, answering the question of whether the application of the Guidelines violated the Sixth Amendment as articulated in *Apprendi*.[121] The other majority opinion, viewed as the "remedial majority," was written by Justice Breyer and addressed the question of how to remedy the Sixth Amendment violation identified by the Court.[122]

In 2003, a jury found Booker guilty of possessing at least 50 grams of crack cocaine after hearing evidence that he had just over 90 grams in his duffel bag.[123] The facts found by the jury called for a Guidelines sentence of 210-262 months.[124] At sentencing, however, the judge found additional facts.[125] By a preponderance of the evidence, the judge found Booker possessed 566 grams over and above the 92.5 grams found by the jury.[126] Following the Sentencing Guidelines, the judge's findings increased Booker's base level offense from 32 to 36.[127] The four-point difference increased Booker's minimum sentence by 20 years; the change now called for a minimum sentence of 30 years and a maximum of life in prison.[128] The district court judge sentenced Booker to the minimum, 30 years in prison.[129]

The Sixth Amendment issue in *Booker* was all too similar to the issue present in both *Apprendi* and *Blakely*—all three cases excessively delegated determinate fact-finding decisions to the judge, rather than the jury. The *Booker* Court sought to curtail the growing trend that "the judge, not the jury, . . . determined the upper limits of sentencing."[130] In its merits opinion, the Court referenced § 3553(b)(1), which provided that the sentencing court "shall impose a sentence of the kind and within

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constitutionally significant).

119. 543 U.S. 220 (2005).

120. *See* Douglas A Berman, *Conceptualizing Booker*, 38 ARIZ. ST. L.J. 387, 387 (2006).

121. David M. Zlotnick, *The Future of Federal Sentencing Policy: Learning Lessons from Republican Judicial Appointees in the Guidelines Era*, 79 U. COLO. L. REV. 1, 11-12 (2008).

122. *Id.* at 12.

123. United States v. Booker, 543 U.S. 220, 235 (2005).

124. *Id.*

125. *Id.*

126. *Id.*

127. United States v. Booker, 375 F.3d 508, 509 (7th Cir. 2004).

128. *Id.*

129. *Booker*, 543 U.S. at 235.

130. *Id.* at 236.

the range" outlined in the Guidelines.[131] This provision, the Court held, made "[t]he Guidelines, as written . . . mandatory and binding on all judges."[132] Unable to distinguish between the Guidelines and Washington's sentencing scheme in *Blakely*,[133] the Court held that the Guidelines violated the Sixth Amendment.[134]

To remedy the constitutional violation, the remedial opinion found § 3553(b)(1) was "incompatible" with the merits opinion and therefore had to be "severed and excised" from the statute.[135] The Court's holding made the Guidelines "effectively advisory" so that the district courts could, after considering the Guidelines range, tailor a sentence that reflected the broader range of concerns set forth in § 3553(a).[136]

Moreover, the Court held 18 U.S.C. § 3742(e), which addressed the handling of sentence appeals, must also be "severed and excised" because it was inextricably linked with the Guidelines' mandatory sentencing provision.[137] Before the Court's decision in *Booker*, § 3742(e) instructed appellate courts to determine whether a sentence was "unreasonable" with respect to the Guidelines range.[138] After *Booker*, the Court read the remaining provisions of the sentencing appeal statute to instruct appellate courts to determine whether sentences were "unreasonable" with respect to all the factors set forth in § 3553(a).[139]

The Court's holding in Booker created a sentencing muddle.[140] The merits opinion, which invalidated the Guidelines, continued to build on the Court's new Sixth Amendment jurisprudence. The remedial opinion, however, reintroduced the role of judicial fact-finding at sentencing.[141] In the words of one sentencing scholar, "*Booker* declared that the federal sentencing system could no longer rely upon mandated and tightly directed judicial fact-finding, but as a remedy it created a system which now depends upon discretionary and loosely directed judicial fact-

131. *Id.* at 234.

132. *Id.*

133. *Id.* at 235 (stating that "[t]here is no relevant distinction between the sentence imposed pursuant to the Washington statutes in *Blakely* and the sentences imposed pursuant to the Federal Sentencing Guidelines in these cases").

134. *Id.* at 244.

135. United States v. Booker, 543 U.S. 220, 245 (2005).

136. *Id.*

137. *Id.*

138. *Id.* at 261.

139. *Id.* at 260-65.

140. *See* Berman, *supra* note 120, at 387. "Read independently, each majority opinion in Booker seems conceptually muddled; read together, the two Booker rulings seem almost conceptually nonsensical." *Id.*

141. *Id.* at 407.

finding."[142] *Booker* created a host of problems for crack cocaine cases in particular, where courts struggled with the disparate crack/powder sentencing scheme juxtaposed with the "effectively advisory"[143] Guidelines. A number of district court judges had assailed the crack/powder disparity and sentenced offenders under a different ratio—i.e., 10-to-1 or 20-to-1—rationalizing that, after *Booker*, sentencing judges could impose a sentence outside the advisory Guidelines range.[144] The appellate courts ran roughshod over these district court decisions, and often held that a departure from the 100-to-1 ratio was "per se unreasonable."[145]

In the 2006-2007 term, the Court began to clarify "reasonableness." In *Rita v. United States*, the Court was asked to determine whether a sentence within the Guidelines range may be presumed reasonable.[146] *Rita* was decided by an 8-1 vote, and held that courts of appeals may—but are not required to—apply a presumption that a sentence within the Guidelines range is reasonable, although such a presumption is not binding.[147] After *Rita*, appellate courts are to treat a judge's choice of sentence within the range with deference.[148] But *Rita* only began to clarify reasonableness, and many questions remained unanswered. Moreover, district court judges were still grappling with *Booker* and its application to the 100-to-1 ratio.[149] In 2007, the Court took on two cases addressing these issues. In *Kimbrough v. United States*, the issue was whether a sentence outside the Guidelines range was unreasonable when it was based on a policy disagreement with the crack/powder sentencing disparity.[150] In the second case, *Gall v. United States*,[151] the Court was asked whether a below-Guidelines sentence was unlawful absent "extraordinary circumstances."

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142. *Id.*
143. *Id.*
144. *See infra* notes 205-206 and accompanying text.
145. *See infra* notes 210-212 and accompanying text.
146. 127 S. Ct. 2456, 2459 (2007).
147. *Id.* at 2462-63.
148. *Id.* at 2463.
149. *See infra* notes 205-206 and accompanying text.
150. 174 F. App'x 798 (4th Cir. 2006), *cert. granted*, 127 S. Ct. 2933 (U.S. June 11, 2007) (No. 06-6330).
151. 446 F.3d 884 (8th Cir. 2006), *cert. granted*, 127 S. Ct. 2933 (U.S. June 11, 2007) (No. 06-7949). Initially, the Court granted certiorari in a different case involving a below Guidelines range sentence, *Claiborne v. U.S.* Petitioner Mario Claiborne, however, died before the Court could answer the question in his case. Claiborne's case was removed from the docket and replaced with *Gall*. 439 F.3d 479 (8th Cir. 2006), *vacated as moot*, 127 S. Ct. 2245 (2007).

B. Kimbrough v. United States

In September of 2004, Derrick Kimbrough was indicted and charged with various drug crimes and possession of a firearm while engaging in a drug trafficking offense.[152] Kimbrough pleaded guilty to the crimes charged and admitted he was responsible for 56 grams of crack-cocaine and 92.1 grams of powder cocaine.[153] Kimbrough's drug charges called for a base offense level of 32.[154] The district court found Kimbrough testified falsely at his codefendant's trial and increased his offense level to 34.[155] Based on his pre-sentence report, Kimbrough had a criminal history category of II.[156] The Guidelines specified a range of 168 to 210 months for an offense level of 34 and a criminal history of II, and the possession of a firearm charge added a statutory minimum of 60 months.[157] All things considered, Kimbrough faced an advisory Guidelines range of 228 to 270 months, or 19 to 22.5 years.[158]

The district court judge found that a sentence of 19 to 22.5 years was "greater than necessary" to satisfy the purposes of 18 U.S.C. § 3553(a), and further noted that Kimbrough's case highlighted the "disproportionate and unjust effect that crack cocaine guidelines have in sentencing."[159] In justifying the reduction from the Guidelines range of 228 to 270 months, the court reasoned that if Kimbrough had been charged with an equivalent amount of powder cocaine, his sentencing range, including the 5-year mandatory minimum firearm charge, would have been 97 to 106 months.[160] Finding the statutory minimum sentence was "clearly long enough," the district court sentenced Kimbrough to 180 months in prison and 5 years supervised release.[161] The U.S. Court of Appeals for the Fourth Circuit, in an unpublished *per curiam* opinion, vacated the sentence.[162] Citing an earlier and controlling opinion, the Fourth Circuit stated a sentence "outside the Guideline range is per se

152. Kimbrough v. United States, 128 S. Ct. 558, 564 (2007).
153. *Id.* at 564-65.
154. *Id.* at 565.
155. *Id.*
156. *Id.*
157. *Id.*
158. Kimbrough v. United States, 128 S. Ct. 558, 565 (2007).
159. *Id.*
160. *Id.*
161. *Id.* Kimbrough was sentenced to 120 months on each of the three drug counts, to be served concurrently, and an additional 60 months on the firearm charge, to be served consecutively. *Id.* at 565 n.3.
162. *Id.* at 565.

unreasonable" if based on a disagreement with the 100-to-1 sentencing scheme.[163]

The Supreme Court granted certiorari to address whether its holding in *Booker* rendered "advisory" the crack/powder disparity adopted by the Guidelines.[164] *Kimbrough* was decided by a vote of 7-2, and Justice Ginsburg began the opinion by examining the disparate treatment of crack and powder cocaine under federal sentencing laws, and the modifications made to § 3553 after *Booker*.[165] The Court stated, "while [§ 3553(a)] still requires a court to give respectful consideration to the Guidelines, *Booker* 'permits the court to tailor the sentence in light of other statutory concerns as well.'"[166] The Government argued that the 100-to-1 ratio was an exception to the "general freedom that sentencing courts have to apply the [§ 3553(a)] factors . . . because the ratio is a 'specific policy determinatio[n] that Congress has directed sentencing courts to observe.'"[167]

The Government supported its position by arguing that the presence of the 100-to-1 ratio in the 1986 Act prohibits the Commission and the sentencing courts from applying anything other than the ratio.[168] The Court disagreed, and cited the language in the Act, which, in the Court's opinion, provided only minimum and maximum sentences.[169] Distribution of 5 grams or more of crack required a minimum sentence of 5 years and a maximum sentence of 40 years.[170] Possession of 50 grams or more called for a minimum sentence of 10 years and a maximum of life in prison.[171] The statute, the Court stated, "says nothing about the appropriate sentences within these brackets, and we decline to read any implicit directive into that congressional silence."[172]

The Government also argued that Congress' rejection of the Commission's 1-to-1 ratio proposed in 1995 as an amendment to the Guidelines was proof Congress intended the Commission and sentencing

163. *Id.*
164. *Kimbrough*, 128 S. Ct. at 565-66.
165. *Id.* at 566-70 (discussing how each drug is made, a brief history of the mandatory minimum scheme, the Sentencing Commission's reports to Congress, and its 2007 crack amendment).
166. *Id.* at 570.
167. *Id.*
168. *Id.*
169. *Id.* at 571.
170. Kimbrough v. United States, 128 S. Ct. 558, 571 (2007).
171. *Id.*
172. *Id.*

courts to apply the 100-to-1 ratio.[173] The Court recognized Congress' dismissal of the Commission's 1995 proposal, but also noted that it was Congress who requested the Commission recommend a "revision of the drug quantity ratio of crack cocaine to powder cocaine."[174] Moreover, the Court found nothing in Congress' reaction to the Commission's 1995 report that crack sentences—outside the minimum and maximum sentences—must exceed powder sentences by a 100-to-1 ratio.[175]

The *Kimbrough* Court also referenced the Commission's 2007 crack amendment[176] that created a crack/powder ratio varying between 25-to-1 and 80-to-1, depending upon the offense level.[177] Congress, the Court stated, took no action regarding the 2007 "proposed amendment to the Guidelines in a high-profile area in which it had previously exercised its disapproval authority under 28 U.S.C. § 994(p)."[178] Relying on the Commission's findings that the crack/powder disparity produces disproportionately harsh sentences, the Court held "it would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence

173. *Id.* at 572.

174. *Id.*

175. *Id.*

176. *See* UNITED STATES SENTENCING COMMISSION, ANALYSIS OF THE IMPACT OF THE CRACK COCAINE AMENDMENT IF MADE RETROACTIVE (2007), http://www.ussc.gov/general/Impact_Analysis_20071003_3b.pdf (hereinafter USSC 2007 ANALYSIS). On May 1, 2007, the Commission notified Congress it was lowering the Guidelines sentencing ranges for certain crack offenses and offenders. Absent congressional action the Commission announced the amendment would become effective November 1, 2007. *Id.* at 1. The six-month review period yielded no congressional action and the Commission's amendment to the Guidelines for crack cocaine offenses went into effect. On December 11, 2007, the Commission voted unanimously to apply the amendment retroactively, with an effective date of March 3, 2008. UNITED STATES SENTENCING COMMISSION, "READER-FRIENDLY" VERSION OF AMENDMENTS ON RETROACTIVITY EFFECTIVE MARCH 3, 2008 (2008), http://www.ussc.gov/2007guid/030308rf.pdf. The Commission's amendment, however, does not affect the mandatory minimums set by the Anti-Drug Abuse Act of 1986. Other offenders are also excluded. Crack cocaine offenders with a base offense level less than 12 or equal to 43 and those who possessed a crack cocaine quantity greater than 4,500 grams are ineligible to receive a reduced sentence. USSC 2007 ANALYSIS at 5-6. In addition, offenders sentenced under the career offender guideline, § 4B1.1, or the armed career offender guideline, § 4B1.4, are not eligible to receive reduced sentences. *Id.* at 6. As a result of the Commission's amendment, a memorandum prepared in 2007 by the Commission's Office of Research and Data (ORD) estimated 19,500 crack cocaine offenders sentenced between October 1, 1991 and June 30, 2007 would be eligible to file a motion for a reduced sentence. *Id.* at 4-5. According to ORD, the average estimated sentence reduction would be 27 months, with 63.5% of offenders receiving a reduction of 2 years or less, 28.6% receiving a reduction of one year or less, and 7.9% eligible for a reduction of 49 months or more. *Id.* at 23.

177. Kimbrough v. United States, 128 S. Ct. 558, 573 (2007).

178. *Id.*

'greater than necessary' to achieve § 3553(a)'s purpose, even in a mine-run case."[179]

C. Gall v. United States

Brian Gall was part of a ring that distributed the illegal drug known as "ecstasy."[180] Months after joining the enterprise, Gall informed his co-conspirators he was leaving the business.[181] He graduated from college and moved to Arizona where he obtained a construction job.[182] While working in Arizona, Gall was approached by federal agents and questioned about his role in the ecstasy ring.[183] He admitted involvement, and the federal agents initially took no action.[184] A year and a half after the agents' visit in Arizona, and three and a half years after Gall withdrew from the drug ring, he was charged with conspiracy to distribute ecstasy, cocaine and marijuana.[185]

Gall pled guilty to the conspiracy charge, stipulating that he was "responsible for, but did not necessarily distribute himself, at least 2,500 grams of [ecstasy], or the equivalent of at least 87.5 kilograms of marijuana."[186] The Guidelines range for his crime was 30 to 37 months of imprisonment.[187] Gall was sentenced to 36 months' probation—a sentence well below the Guidelines range.[188] After considering the factors outlined in § 3553(a), the district court judge found the "sentence imposed . . . was sufficient, but not greater than necessary to serve the purposes of sentencing."[189] The Eighth Circuit Court of Appeals

179. *Id.* at 575.
180. Gall v. United States, 128 S. Ct. 586, 591-92 (2007).
181. *Id.* at 592.
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*
186. Gall v. United States, 128 S. Ct. 586, 592 (2007).
187. *Id.* at 593.
188. *Id.*
189. *Id.* Probation, according to the district judge, was sufficient because:

> Any term of imprisonment in this case would be counter effective by depriving society of the contributions of the Defendant who, the Court has found, understands the consequences of his criminal conduct and is doing everything in his power to forge a new life. The Defendant's post-offense conduct indicates neither that he will return to criminal behavior nor that the Defendant is a danger to society. In fact, the Defendant's post-offense conduct was not motivated by a desire to please the Court or any other governmental agency, but was the pre-Indictment product of the Defendant's own desire to lead a better life.

Id.

overturned Gall's sentence, concluding that the sentence outside the Guidelines range amounted to "an extraordinary reduction [that] must be supported by extraordinary circumstances."[190] The court found the reduction to probation "unreasonable,"[191] and the Supreme Court granted certiorari.[192]

Gall, like *Kimbrough*, was decided by a 7-2 vote.[193] Justice Stevens delivered the majority opinion and began his analysis by reiterating that *Booker* rendered the Guidelines advisory and limited appellate review to determining reasonableness.[194] When imposing a sentence outside the Guidelines range, the district court must explain the reasoning behind the unusually lenient or harsh sentence and provide sufficient justification.[195] An appellate court may assess the departure from the Guidelines, but may not require "extraordinary circumstances" or employ a rigid mathematical formula to determine whether the district court's justification was appropriate.[196] Both approaches, the Court held, could create an impermissible unreasonableness presumption for sentences outside the Guidelines range and reflect a heightened standard of review, which is inconsistent with the rule that appellate courts are to apply an abuse-of-discretion standard to all sentencing decisions.[197]

The Court held that under the abuse-of-discretion standard, the appellate court must first review the sentence imposed by the district court for procedural errors, and then consider the sentence's substantive reasonableness.[198] The appellate court must consider the totality of the circumstances—including the extent of the variance—and the district court should be given deference in its decision that sufficient factors exist under § 3553(a) to warrant the variance.[199] The Court further stated that an appellate court may not reverse simply because it might reasonably reach a different conclusion.[200]

The *Gall* Court concluded that the Eighth Circuit's *de novo* review was improper because it failed to give deference to the district court's

190. United States v. Gall, 446 F.3d 884, 889 (8th Cir. 2006).
191. *Id.*
192. 446 F.3d 884 (8th Cir. 2006), *cert. granted*, 127 S. Ct. 2933 (U.S. June 11, 2007) (No. 06-7949).
193. Gall v. United States, 128 S. Ct. 586, 591 (2007).
194. *Id.* at 594.
195. *Id.*
196. *Id.* at 594-95.
197. *Id.* at 595-96.
198. *Id.* at 597.
199. Gall v. United States, 128 S. Ct. 586, 597 (2007).
200. *Id.*

"reasoned and reasonable" sentencing decision.[201] Because the district court in *Gall* committed no procedural error, the Eighth Circuit's review was limited to the reasonableness of the sentence, "i.e., whether the District Judge abused his discretion in determining that the § 3553(a) factors supported a sentence of probation and justified a substantial deviation from the Guidelines range."[202]

VI. *KIMBROUGH*: THE AFTERMATH

The *Kimbrough* decision has largely been viewed as a positive step in addressing the disparity caused by the current crack/powder sentencing scheme.[203] While judges must still adhere to the statutory mandatory minimums set forth in the Act, *Kimbrough* authorizes judges to impose sentences outside the Guidelines range based on policy disagreements with the 100-to-1 ratio.[204] But if the *Kimbrough* decision was the Court's way of remedying disparate sentencing in crack and powder cases, its decision may have missed its mark.

A. Crack Cocaine Sentencing Post-Booker

Pre-*Kimbrough*, several district courts relied on *Booker* when deviating from the Guidelines range in crack cases. The rationale was that advisory Guidelines meant district court judges could impose a sentence outside the Guidelines range if they disagreed with the higher penalties associated with crack cocaine. Some courts adopted a 10-to-1 ratio,[205] while others chose a 20-to-1 ratio.[206] At least one court has chosen to maintain the 100-to-1 ratio initially set forth in the Act and

201. *Id.* at 602.

202. *Id.* at 600.

203. *See, e.g.,* Mark Allenbaugh, *A Positive Development in All the Sentencing Insanity: How The Supreme Court and the U.S. Sentencing Commission Have Begun to Correct the Damage Done by the War on Drugs*, FINDLAW, Dec. 19, 2007, http://writ.news.findlaw.com/allenbaugh /20071219.html (stating *Kimbrough* and *Gall* "rightly place [the] power back in the hands of the district court judges most familiar with the facts of the offense and the offender upon whom they are imposing a sentence"); Ellis Cose, *The Harm of 'Get Tough' Policies: The Supreme Court's rulings on federal cocaine sentences could be a turning point—toward justice and righting an old wrong*, NEWSWEEK, Dec. 13, 2007, http://www.newsweek.com/ id/77820 (quoting Marc Mauer of the Sentencing Project speaking about the Commission's 2007 crack amendment and *Kimbrough*: "In this business, you don't get too many good days . . . . Now, two in a row").

204. Kimbrough v. United States, 128 S. Ct. 558, 575 (2007).

205. *See, e.g.*, United States v. Fisher, 451 F. Supp. 2d 553, 562 (S.D.N.Y. 2005).

206. See, e.g., United States v. Stukes, No. 03 CR. 601, 2005 WL 2560244, at *2 (S.D.N.Y. Oct. 12, 2005); United States v. Leroy, 373 F. Supp. 2d 887, 893 (E.D. Wis. 2005); United States v. Castillo, No. 03 CR. 835, 2005 WL 1214280, at *5 (S.D.N.Y. May 20, 2005).

included in the Commission's first set of Guidelines.[207] One judge in the Southern District of New York stated, "there is no rational basis in terms of pharmacological differences, public opinion, or related violence to distinguish crack cocaine from powder cocaine at a ratio of one being one hundred times worse than the other."[208] Another judge in the Eastern District of California took an opposing view: "I don't believe it's appropriate for the Court to specifically reduce a sentence under 18 U.S.C. 3553(a) on the basis that the Congress and the U.S. Sentencing Commission are wrong in establishing different penalties for different types of controlled substances . . . To the extent the difference in penalties are out of whack, it's for the Congress to change them, not this trial court."[209] District court judges saw *Booker* as an opportunity to choose the ratio they deemed appropriate; the appellate courts, however, read *Booker* differently.

After *Booker*, district court decisions deviating from the 100-to-1 ratio were frequently overturned by the appellate courts. In *United States v. Pho*, the First Circuit rejected the district court's adoption of a 20-to-1 crack/powder ratio and characterized the lower court's decision as a "policy judgment, pure and simple," which "usurped Congress's judgment about the proper sentencing policy for cocaine offenders."[210] The Fourth Circuit in *United States v. Eura* came to a similar conclusion when it rejected a district court's 20-to-1 ratio.[211] The appellate court stated, "[a]s much as one might sympathize with the district court's concern regarding the inequities of the 100:1 ratio . . . it simply would go against two explicit Congressional directives to allow sentencing courts to treat crack cocaine dealers on the same, or some different judicially-imposed, plane as powder cocaine dealers."[212] The appellate courts, while stifling any discretion the sentencing judges thought they had concerning the crack/powder disparity, used their review power to limit disparity and maintain the ratio set forth by Congress. Because of the way in which the courts of appeals routinely overturned the district courts' decisions, *Booker* did little to remedy the harms caused by the crack cocaine sentencing scheme.

207. United States v. Medina-Casteneda, 511 F.3d 1246, 1248-49 (9th Cir. 2008).
208. *Fisher*, 451 F. Supp. 2d at 559.
209. *Medina-Casteneda*, 511 F.3d at 1248-49.
210. 433 F.3d 53, 62-63 (1st Cir. 2006).
211. 440 F.3d 625, 633 (4th Cir. 2006).
212. *Id.*

B. Kimbrough's and Gall's Effect on Crack Cocaine Sentencing

The Supreme Court in *Kimbrough* explicitly authorized the district courts to consider the crack/powder disparity when sentencing an offender.[213] After *Gall*, appellate courts may only review the sentence for reasonableness, "i.e., whether the District Judge abused his discretion in determining that the § 3553(a) factors supported [the sentence imposed] and justified a substantial deviation from the Guidelines range."[214] Absent a finding of abuse of discretion, appellate courts must now yield to the district courts' judgments.[215] Under this new system, the potential for excessive disparity in crack cocaine sentencing may be greater than ever.

Judges—even those within the same courthouse—are likely to differ in opinion as to what crack/powder ratio is proper when sentencing an offender. Indeed, the *Kimbrough* Court stated "some departures from uniformity [are] a necessary cost of the remedy we [have] adopted."[216] The Court continued, "district courts must take account of sentencing practices in other courts" and the "disparities must be weighed against the other § 3553(a) factors."[217] Following this reasoning, does the Court expect district court judges to know what ratios all other district courts are applying? Assuming these judges had this information, are they then expected to impose the Guidelines ratio even if they find a departure is warranted, simply to avoid disparity among the courts? It is not hard to imagine this practice resulting in deviations in crack sentencing in cases decided soon after *Kimbrough*—before the level of disparity is realized—and judges deciding cases years from now following the Guidelines more closely, in an effort to remedy what will have become a disparate system. If that is the case, the discretion afforded to judges post-*Kimbrough* becomes moot.

It seems unlikely that judges from different districts will give deference to the ratios being applied in other districts when considering the § 3553(a) factors in a case before them. The more logical outcome is that judges will begin to pursue their own policy agendas. This will undoubtedly result in offenders with identical records who are charged

213. Kimbrough v. United States, 128 S. Ct. 558, 575 (2007).

214. Gall v. United States, 128 S. Ct. 586, 600 (2007).

215. *See id.* at 597 ("[T]he appellate court . . . must give due deference to the district court's decision that the §3553(a) factors, on a whole, justify the extent of the variance. The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court.").

216. *Kimbrough*, 128 S. Ct. at 574.

217. *Id.*

with identical crimes receiving vastly different sentences simply because of the ideological views of the judges hearing their cases. Judges in favor of "get tough" drug policies will be reluctant to apply a downward departure at sentencing, while those that believe the nation's drug laws are in need of reform will take full advantage of the Court's *Kimbrough* holding. A system in which some judges impose harsh penalties and others impose lax sentences for the same crimes is anathema to § 3553(a)(6), which instructs sentencing courts "to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."[218]

While it is too early to tell exactly how judges will apply *Kimbrough*, disparate sentencing is more likely to occur post-*Kimbrough* and *Gall*, as opposed to post-*Booker*. The post-*Booker* appellate check, which prevented substantial disparity, is no longer in play post-*Kimbrough*. Cases decided in the wake of *Kimbrough* and *Gall* illustrate the now-limited role appellate courts have when reviewing a district court's sentence. After *Kimbrough*, *Pho* was abrogated[219] and *Eura* was vacated and remanded, with the Fourth Circuit ultimately affirming *per curiam* the district court's original reduced sentence.[220] The Third, Eighth, Ninth and Eleventh Circuits have also vacated sentences and remanded cases in which they initially held district courts could not consider the crack/powder disparity at sentencing.[221] While some of the circuits have been careful to note that *Kimbrough* does not require judges to consider the crack/powder disparity in all cocaine cases,[222] *Gall* has severely limited the appellate courts' authority to overturn sentences by judges who do.

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218. 18 U.S.C. § 3553(a)(6) (2006).

219. *See Kimbrough*,128 S. Ct. at 558.

220. United States v. Eura, 268 F. App'x. 245, 249 (4th Cir. 2008).

221. *See e.g.*, United States v. Wise, 515 F.3d 207, 223 (3rd Cir. 2008); United States v. Roberson, 517 F.3d 990, 995 (8th Cir. 2008) (stating that pre-*Kimbrough* "neither *Booker* nor § 3553(a) authorizes district courts to reject the 100:1 ratio," but post-*Kimbrough*, the district may consider the disparity caused by the ratio); United States v. Medina-Casteneda, 511 F.3d 1246, 1249 (9th Cir. 2008) (stating on remand that the district court is to consider "whether the disparity between crack and powder cocaine produced a sentence 'greater than necessary' under § 3553(a)"); United States v. Stratton, 519 F.3d 1305, 1306 (11th Cir. 2008) (stating that prior precedent held federal courts were "not at liberty to supplant [Congress's] policy decision" concerning the crack/powder disparity, but recognizing that *Kimbrough* overruled such precedent").

222. *See, e.g.*, *Roberson*, 517 F.3d at 995 (noting "[w]e do not believe . . . *Kimbrough* means that a district court now acts unreasonably, abuses its discretion, or otherwise commits error if it does not consider the crack/powder sentencing disparity"); *Stratton*, 519 F.3d at 1307 (holding "[w]e do not suggest . . . that the district court must impose any particular sentence or that the district court is not free to impose the same sentence after considering the § 3553(a) factors").

The question then becomes, was the Court's *Kimbrough* decision a positive development in addressing the crack/powder disparity? The answer depends on one's view of the disparity. The system that imposes higher penalties on crack offenders has received an enormous amount of criticism. Even those judges who continued to apply the 100-to-1 ratio post-*Booker* often criticized it before concluding it was an issue only Congress could remedy.[223] The Commission's recent crack amendment changing the ratio to one that varies between 25-to-1 and 80-to-1,[224] depending on the offense level, and the Court's holding in *Kimbrough* should reduce the disparity caused by 100-to-1 ratio. Neither the Commission's amendment nor the Court's holding in *Kimbrough*, however, can reduce a new disparity *Kimbrough* actually creates; that is, the disparity resulting from individual judges' policy disagreements with the crack/powder disparity, which will ultimately result in similarly situated offenders receiving different sentences. Thus, *Kimbrough* and *Gall* may eventually lead to a sentencing system whereby disparity is reduced between crack offenders and powder offenders, but it may also foster a system that increases disparity among individual crack offenders.

C. Congress: It's Time

Congress can solve the crack/powder disparity just as easily as it created it—by removing mandatory minimum provisions and providing a ratio that promotes fair and uniform sentencing. But Congress has been reluctant to act, even though the Commission, and in recent years the Supreme Court, have been nudging and prodding. Will *Kimbrough*, and the sentencing muddle it may create, be the straw that breaks Congress' back? If Congress has any interest in curtailing the sentencing disparity arising from increased judicial discretion, now is an opportune time to act. If, however, Congress wishes to avoid interfering in the inevitable power struggle between the courts, there are other reasons to address the crack/powder sentencing scheme.

Since the Act was passed in 1986, the crack market has changed drastically. Crack is no longer in high demand.[225] The decline in street markets, coupled with aggressive policing, has reduced crack-related violence and youth recruitment.[226] Additionally, over two decades later,

223. *See supra* note 211 and accompanying text.
224. *See supra* note 177 and accompanying text.
225. Blumstein, *supra* note 23, at 89.
226. *Id.*

social scientists have studied the effects of mandatory minimums and the crack/powder disparity and have concluded that both have contributed to racial discrimination[227] and overcrowding in prisons.[228] Moreover, studies show harsh drug penalties fall well short of deterring crime and are largely counterproductive.[229]

Of course, these studies have been around for more than a decade, and the Commission presented much of this information to Congress when it issued its 1995, 1997, and 2002 reports.[230] In the past, much of this information was ignored by Congress, but there are reasons to believe Congress may now be listening. During the 2007-2008 legislative session, six crack cocaine reform bills were introduced.[231] And while most of the proposed legislation appears to be at a standstill, crime policy is often politically driven and 2008 was a presidential election year. Perhaps a better indicator of Congress' willingness to change is its handling of the dramatic rise of methamphetamine, which

227. *Id.* ("The 100:1 disparity is widely seen as a blatant demonstration of racial discrimination by the criminal justice system . . . . Similar concerns surround racial profiling in police stops and racial disproportionality in prison, but in neither of these kinds of situations is the disparity so explicitly built into the law.").

228. *See* Marc Mauer and Ryan S. King, *A 25-Year Quagmire: The War on Drugs and Its Impact on American Society*, THE SENTENCING PROJECT, September 2007, at 2, http://www.sentencingproject.org/Admin/Documents/ publications/dp_25yearquagmire.pdf (finding "[d]rug offenders in prisons and jails have increased 1100% since 1980").

229. *See, e.g., id.* at 17 (stating that "there is some evidence that simply warehousing individuals in prison may have a criminogenic effect, as research has found higher rates of recidivism for persons sentenced to prison rather than probation" and suggesting treatment is more cost effective); *See also* PEW Center on the States, *The Impact of Incarceration on Crime: Two National Experts Weigh In*, PEW PUBLIC SAFETY PERFORMANCE PROJECT, Apr. 2008, at 1, *available at* http://www.pewcenteronthestates.org/uploadedFiles/Crime%20Incarceration%20QA.pdf (finding incapacitating drug dealers has little effect on reducing drug dealing in society because "the [drug] market is resilient in responding to the demand, and recruits replacements for those sent to prison").

230. *See supra* note 67 and accompanying text.

231. Fairness in Cocaine Sentencing Act of 2008, H.R. 5035, 110th Cong. (2008) (eliminating the distinction between crack and powder cocaine and removing mandatory minimum provisions); Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2007, S. 1711, 110th Cong. (2007) (reducing the crack/powder disparity by imposing a single mandatory minimum at the current powder cocaine levels); Fairness in Drug Sentencing Act of 2007, S. 1685, 110th Cong. (2007) (raising the 5 year mandatory minimum threshold from 5 to 25 grams of crack and the 10 year threshold from 50 to 250 grams of crack, which reduces the disparity from 100:1 to 20:1); Drug Sentencing Reform Act of 2007, S. 1383, 110th Cong. (2007) (lowering the 10 year threshold for powder from 5 kilos to 4 kilos while increasing the threshold for crack from 50 grams to 200 grams, resulting in a disparity of 4 kilos powder to 200 grams crack); Powder-Crack Cocaine Penalty Equalization Act of 2007, H.R. 79, 110th Cong. (2007) (raising the powder levels to meet the crack levels); Crack-Cocaine Equitable Sentencing Act of 2007, H.R. 460, 110th Cong. (2007) (equalizing the crack and powder penalties at the powder level).

some have termed the "new crack."[232] In 2006, Congress enacted the first comprehensive methamphetamine law, which, surprisingly, focuses less on tougher penalties and more on cutting off access to the ingredients used to manufacture the drug.[233] In a separate bill that never became law, the House Judiciary Committee, by a vote of 31-0, removed the mandatory minimum penalties for methamphetamine included in an earlier version of the legislation.[234] Finally, when the Commission notified Congress it was lowering the Guidelines sentencing ranges for certain crack offenses and offenders, it gave Congress six months to comment on the proposed amendment.[235] The six-month review period yielded no congressional action, and the amendment was adopted and later made retroactive.[236] Congress' silence on this matter may be telling since the amendment specifically addressed the crack/powder disparity.[237]

Congressional action, however, not silence, is the only way to redress the problems caused by the crack/powder sentencing scheme. The time to act is now, Congress. We are waiting.

232. Press Release, U.S. Senate, Schumer: New Stats Show Crystal Meth Quickly Becoming the New Crack—Seizures in New York Up 31% Over Last Year, (April 25, 2004), http://www.senate.gov/~schumer/SchumerWebsite/pressroom/press_releases/2004/PR02593.Crystalmethsunpres042504.html ("Crystal meth is becoming the new crack, and we need tough new penalties that treat it like crack.").

233. Combat Methamphetamine Epidemic Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 (2006).

234. Families Against Mandatory Minimums, Mandatory minimums stripped from federal meth bill, H.R. 3889 (Nov. 10, 2005), http://www.famm.org/ExploreSentencing/FederalSentencing/BillsinCongress/Mandatoryminimumsstrippedfromfederalmethbill.aspx.

235. *See supra* note 176.

236. *See id.*

237. *See supra* note 75 and accompanying text (noting in 1995 Congress explicitly disapproved the Commission's amendment to reduce the 100-to-1 ratio).