Sentencing Levels for Crack and Powder Cocaine: *Kimbrough v. United States* and the Impact of *United States v. Booker*

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Summary

Pursuant to the Anti-Drug Abuse Act of 1986, Congress established basic sentencing levels for crack cocaine offenses. Congress amended 21 U.S.C. § 841 to provide for a 100:1 ratio in the quantities of powder cocaine and crack cocaine that trigger a mandatory minimum penalty. As amended, 21 U.S.C. § 841(b)(1)(A) establishes a mandatory minimum 10-year term of imprisonment and a maximum life term of imprisonment for offenses involving 5 kilograms of cocaine or 50 grams of cocaine base. In addition, 21 U.S.C. § 841(b)(1)(B) establishes a mandatory five-year term of imprisonment for offenses involving 500 grams of cocaine or 5 grams of cocaine base.

Federal sentencing guidelines established by the United States Sentencing Commission (the Guidelines) reflect the statutory distinctions. Until 2005, the Guidelines were binding. The judge had discretion to sentence a defendant, but only within the narrow sentencing range that the Guidelines provided. The Supreme Court in *United States v. Booker* declared that the Guidelines must be considered advisory rather than mandatory. Instead of being bound by the Guidelines, sentencing courts must treat the federal guidelines as just one of a number of sentencing factors set forth in 18 U.S.C. § 3553(a) (which include the need to avoid undue sentencing disparity).

In the aftermath of *Booker*, some courts had concluded that although the then-effective Guidelines treated 1 gram of crack like 100 grams of powder cocaine, a judge who did not believe that crack cocaine is 100 times worse than powder cocaine may impose a lower sentence than the one recommended by the Guidelines—at least so long as the sentence did not go below the mandatory minimum. However, many appellate courts disagreed, believing that the sentencing court's discretion was more circumscribed. In 2007, the Supreme Court addressed this issue in *Kimbrough v. United States*, and held that a federal court may impose a sentence below that called for under the Guidelines' then-existing 100:1 ratio, based on its conclusion that the ratio is greater than necessary or may foster unwarranted disparity.

The crack/powder disparity issue may be resolved either administratively or legislatively. The U.S. Sentencing Commission has recommended that Congress adjust the statutory ratio, and its 2007 amendments to the Guidelines eliminated the 100:1 ratio for future sentencing guideline purposes (except at the point at which the statutory mandatory minimums are triggered). The Sentencing Commission also decided to make these amendments retroactively applicable, thus allowing eligible crack cocaine offenders who were sentenced prior to November 1, 2007, to petition a federal judge to reduce their sentences. Although these amendments alter the crack/powder disparity within the sentencing guidelines, a change to the statutory 100:1 ratio found in 21 U.S.C. § 841(b)(1) would require legislation. As of the date of this report, two bills have been introduced in the 111th Congress, H.R. 18 and H.R. 265, to eliminate the disparity in cocaine sentencing.

Contents

Background 1
United States v. Booker 3
Booker and the Crack Defendant 6
Kimbrough v. United States 9
Spears v. United States 11
2007 Amendment of the Sentencing Guidelines 12
Retroactivity Decision 14
Caselaw Applying the Retroactive Crack Cocaine Amendments 15
Legislation in the 111th Congress 17

Appendixes

Appendix. Drug Quantity Table (Before and After Amendment) 18

Contacts

Author Contact Information 19
Acknowledgments 19

Background

United States v. Booker[1] declared that the once-binding federal sentencing guidelines (the Guidelines) set by the United States Sentencing Commission are now only advisory.[2] Until 2007, the Guidelines reflected a statutory scheme that made crack cocaine defendants subject to the same sentence as those defendants trafficking in 100 times more powder cocaine; thus, the sentences for crack cocaine offenses were three to over six times longer than those for offenses involving equivalent amounts of powder cocaine.[3] In the immediate aftermath of *Booker*, several courts addressed the question of whether the 100:1 ratio produces disparities that justify a sentence lower than that recommended by the Guidelines. The Supreme Court resolved that issue in *Kimbrough v. United States*, by holding that a federal trial court may impose a sentence below that called for under the Guidelines' then-existing 100:1 ratio, based on its conclusion that the ratio is greater than necessary or may foster unwarranted disparity.[4]

The pre-*Booker* era for federal sentencing began with the Sentencing Reform Act of 1984,[5] which established a sentencing system under the United States Sentencing Commission's federal sentencing guidelines.[6] The previous system tailored sentences to the individual defendants. Judges were given broad ranges within which they could, at their discretion, sentence a defendant.[7] The sentence was supposed to be based on the defendant's character as much as his conduct. Thereafter, the discretion given to the judge was passed on to the Parole Commission to determine how much of the judge's sentence the defendant ultimately served.[8] Under the Guidelines, the judge's role at sentencing was more uniform and unvaried.[9] The judge could inquire into a number of factors, including the defendant's conduct and criminal history. The judge then weighed each factor according to the Sentencing Commission's mandate and calculated an offense level for the defendant.[10] The judge had discretion to sentence the defendant but, with little ground for departure, only within the narrow sentencing range that the Guidelines provided for each offense level.[11] The Sentencing Reform Act also abolished the Parole Commission's role.[12]

[1] 543 U.S. 220 (2005).

[2] *Id*. at 245-46.

[3] *E.g.*, U.S.S.G. §2D1.1(c)(1)(November 1, 2006)(both 150 kilograms of powder cocaine and 1.5 kilograms of cocaine base were assigned a base offense level of 38); the same ratio continued throughout §2D1.1(C) for lesser amounts and lower base offense levels). Amendments that became effective on November 1, 2007, adjusted the ratios, U.S.S.G. §2D1.1(c)(1) (November 1, 2007).

[4] *Kimbrough v. United States*, 552 U.S. ___, 128 S. Ct. 558 (2007).

[5] Sentencing Reform Act of 1984, 28 U.S.C. § 991(b)(1) (1988).

[6] 23 U.S.C. § 995(a)(20) (1988).

[7] 28 U.S.C. § 995(b) (1988).

[8] 28 U.S.C. § 995(a)(9-10) (1988).

[9] 28 U.S.C. § 994(w) (1988).

[10] 28 U.S.C. § 991(a)(1) (1988).

[11] *See* 18 U.S.C. §3553(b) (the statute specifies what departures are allowable in cases where "there exist an aggravating or mitigating circumstance of a kind, or to a degree not adequately taken into consideration by the Sentencing Commission in formulating the guidelines").

[12] P.L. 98-473, §218(a)(5), 98 Stat. 2027 (1984).

Crack cocaine became prevalent in the mid-1980s and received widespread media attention following the death of the University of Maryland all-American basketball player, Len Bias, from the use of cocaine.[13] Crack cocaine was portrayed as a violence-inducing, highly addictive plague of inner cities, and this notoriety led to the quick passage of a federal sentencing law concerning crack cocaine in 1986.[14] This legislation created two mandatory sentencing ranges for drug offenses.[15] The lower bracket spanned periods of imprisonment ranging from a mandatory minimum of 5 years to a maximum of 40 years; the higher bracket spanned periods ranging from a mandatory minimum of 10 years to a maximum of life.[16] Congress prescribed the threshold quantities of both crack and powdered cocaine required to bring a particular offense within either bracket.[17] Despite the chemical identity of crack and powder cocaine, Congress set widely disparate threshold quantities for the two drugs, requiring 100 times more powder cocaine than crack cocaine to trigger inclusion in a particular range.[18] The rationale offered was that many considered crack much more addictive than powder cocaine, and they feared a wave of violent crimes spawned by drug users as well as the health threats to infants born to addicted mothers.[19] The Sentencing Commission also incorporated this ratio into the drug guidelines, although it later concluded that the 100:1 powder to crack ratio produces sentences that are greater than necessary to satisfy the purposes of punishment because it exaggerates the relative harmfulness of crack cocaine; the majority of crack offenders have low drug quantities, low criminal histories, and no history of violence. The Sentencing Commission also concluded that a ratio providing for sentences that are greater than necessary creates an unwarranted disparity, inappropriate uniformity, racial disparity, and disrespect for the law.[20]

Over the years, Congress has had second thoughts about the disparity in drug sentences. To achieve a more equitable balance, as part of the Violent Crime Control and Law Enforcement Act of 1994, Congress enacted a safety valve provision, which provided an avenue for lowering mandatory minimum sentences in a limited category of drug cases.[21] During the same year, Congress directed the Sentencing Commission to study the crack-to-powder ratio and submit

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[13] *Washington Post*, June 20, 1986, p. A-1, article by Keith Harriston and Sally Jenkins.

[14] The sentencing differential for crack and powder cocaine offenses had its origin in the Anti-Drug Abuse Act of 1986, P.L. 99-570, 100 Stat. 3207 (1986) (codified in pertinent part at 21 U.S.C. § 841). The act speaks of "cocaine base," not crack. *See* 21 U.S.C. § 841(b)(1)(A)(iii). The guidelines, however, define cocaine base to mean crack cocaine. *See* United States Sentencing Guidelines (U.S.S.G.) § 2D1.1, n.D (November 1, 2007).

[15] *See id.* § 1002 (codified at 21 U.S.C. § 841(b)(1)).

[16] *See id.*

[17] *See id.*

[18] *See id.* Congress set the threshold quantities for the lower range at 500 grams of powder cocaine and 5 grams of cocaine base and the threshold quantities for the higher range at 5 kilograms and 50 grams, respectively. Thus, for sentencing purposes, Congress treated 1 unit of crack cocaine on the same level as 100 units of powder cocaine. Relative to the difference between crack and powder cocaine—powder cocaine is derived from coca paste, which is in turn derived from the leaves of the coca plant—crack cocaine is made by taking cocaine powder and cooking it with baking soda and water until it forms a hard substance. These "rocks" can then be broken into pieces and sold in small quantities. Each gram of powder cocaine produces approximately .89 grams of crack. United States Sentencing Commission, *Cocaine and Federal Sentencing Policy* (May 2002).

[19] *See* United States Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policy*, pp. 117-118 (1995).

[20] *See* United States Sentencing Commission, *Cocaine and Federal Sentencing Policy*, Executive Summary, pp. v-viii (May 2002).

[21] *See* 18 U.S.C. § 3553 (f); *see also United States v. Matos*, 328 F.3d 34, 38-42 (1st Cir. 2003) (a description of the operation of the safety valve).

recommendations relative to whether the ratio should be retained or modified.[22] The Sentencing Commission recommended revision of the 100:1 quantity ratio in 1995, finding the ratio to be unjustified by the small differences in the two forms of cocaine.[23] Congress rejected the recommendation of the Sentencing Commission and did not change the law.[24]

Two years later, the Sentencing Commission issued a follow-up report.[25] In this report, the commission reiterated its position that the 100:1 ratio was excessive.[26] It recommended that the 100:1 ratio be reduced to 5:1 by increasing the threshold quantities for offenses involving crack cocaine and decreasing the threshold quantities for offenses involving powder cocaine.[27] Again, Congress took no action and did not amend the law.

In 2001, the Senate Judiciary Committee asked the Sentencing Commission to revisit its position regarding the 100:1 ratio, and in the subsequent year, the Sentencing Commission issued its third report.[28] In this report, the commission again proposed narrowing the gap that separated crack cocaine offenses from powder cocaine because (1) the severe penalties for crack cocaine offenses seemed to fall mainly on low-level criminals and African Americans, (2) the dangers posed by crack could be satisfactorily addressed through sentencing enhancements that would apply neutrally to all drug offenses, and (3) recent data suggested that the penalties were disproportionate to the harms associated with the two drugs.[29] Unlike the previous report, the Commission did not recommend a reduction in the powder cocaine threshold. The Commission did recommend elimination of the five-year mandatory minimum for simple possession of crack cocaine. Congress considered the substance of the Commission's 2002 report but took no action.

Judges have long been critical of the automatic prison terms, commonly referred to as mandatory minimum sentences, which were enacted pursuant to the Anti-Drug Abuse Act of 1986 in part to stem the drug trade.[30] The combination of Democratic leadership of Congress and growing Republican support for a modest change, along with the election of President Barack Obama, may prompt a review of the cocaine sentencing laws in the 111th Congress.[31]

United States v. Booker

Prior to the Supreme Court's decision in *United States v. Booker*,[32] the case law was generally cognizant of the seriousness in the sentencing disparities between crack and powder cocaine but

[22] *See* Violent Crime Control and Law Enforcement Act of 1994, P.L. 103-322, § 280006, 108 Stat. 1796, 2097 (1994).

[23] *See* Notice of Submission to Congress of Amendments to the Sentencing Guidelines, 60 *Fed. Reg.* 25,075-25,076 (May 10, 1995).

[24] *See* P.L. 104-38, §1, 109 Stat. 334, 334 (1995).

[25] *See* U.S. Sentencing Commission, *Cocaine and Federal Sentencing Policy* (1997) (1997 Report).

[26] *Id.* at 2.

[27] *Id.* at 2, 5, 9.

[28] *See* United States Sentencing Commission, *Cocaine and Federal Sentencing Policy* (2002), pp.2-3 (2002 Report).

[29] *Id.* at v-viii.

[30] *New York Times*, January 9, 2007, pg. 12.

[31] The Obama-Biden Plan, Civil Rights Agenda, *available at* http://change.gov/agenda/civil_rights_agenda ("Obama and Biden believe the disparity between sentencing crack and powder-based cocaine is wrong and should be completely eliminated.").

[32] 543 U.S. 220 (2005).

regularly deferred to Congress's policy judgments.[33] This undertaking led to a series of decisions that upheld the 100:1 ratio against a variety of challenges, which included the Equal Protection Clause[34] and the rule of lenity.[35] It was also decided that under the mandatory guidelines system that was popular before *Booker*, neither the Sentencing Commission's criticism of the 100:1 ratio nor its unacknowledged 1995 proposal to eliminate the differential provided a valid basis for leniency in the sentencing of crack cocaine offenders.[36]

In *Booker*, the Supreme Court consolidated two lower court cases and considered them in tandem, *United States v. Fanfan*[37] and *United States v. Booker*.[38] Booker was arrested after officers found in his duffle bag 92.5 grams of crack cocaine. He later gave a written statement to the police in which he admitted selling an additional 566 grams of crack cocaine.[39] A jury in the United States District Court for the Western District of Wisconsin found Booker guilty of two counts of possessing at least 50 grams of cocaine base with the intent to distribute it, in violation of 21 U.S.C. § 841(b)(1)(A)(iii).[40] At sentencing, the judge found by a preponderance of the evidence that Booker had distributed 566 grams in addition to the 92.5 grams that the jury found; the judge also found that Booker had obstructed justice.[41] In the absence of the judge's additional findings, Booker would have only faced a maximum sentence of 262 months under the United States Sentencing Guidelines.[42] The judge, however sentenced Booker to 360 months, based on the Guidelines' treatment of the additional cocaine and the obstruction of justice.[43] The United States Court of Appeals for the Seventh Circuit affirmed the conviction but overturned the sentence.[44]

Narcotic agents arrested Fanfan when they discovered 1.25 kilograms of cocaine and 281.6 grams of cocaine base in his vehicle.[45] A jury in the District of Maine found that he possessed "500 or more grams" of cocaine with the intent to distribute, in violation of 21 U.S.C. § 846. At sentencing, the court determined that Fanfan was the "ring leader of a significant drug conspiracy," which, combined with his criminal history, resulted in a sentence of 188 to 235 months under the Guidelines. However, four days before the June 28, 2004, sentencing hearing,

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[33] *See, e.g., United States v. Eirby*, 262 F.3d 31, 41 (1st Cir. 2001); *United States v. Singleterry*, 29 F.3d 733, 741 (1st Cir. 1994) ; *United States v. Anderson*, 82 F.3d 436, 440-41 (D.C. Cir. 1996); *United States v. Dumas*, 64 F.3d 1427, 1429-430 (9th Cir. 1995).

[34] *See, e.g., United States v. Graciani*, 61 F.3d 70, 74-75 (1st Cir. 1995) ; *United States v. Bingham*, 81 F.3d 617, 630-31 (6th Cir. 1996); *United States v. Thomas*, 86 F.3d 647, 655 (7th Cir. 1966).

[35] *See, e.g., United States v. Manzueta*, 167 F.3d 92, 94 (1st Cir. 1999); *United States v. Herron*, 97 F.3d 234, 238-39 (8th Cir. 1996); *United States v. Canales*, 91 F.3d 363, 367-69 (2d Cir. 1996).

[36] *See United States v. Andrade*, 94 F.3d 9, 14-15 (1st Cir. 1996); *United States v. Sanchez*, 81 F.3d 9, 11 (1st Cir. 1996); *United States v. Booker*, 73 F.3d 706, 710 (7th Cir. 1996); *United States v. Alton*, 60 F.3d 1065, 1070-71 (3d Cir. 1995); *United States v. Haynes*, 985 F.2d 65, 70 (2d Cir. 1993)(each discussing the possibility of a downward departure under U.S.S.G. § 5K2.0). *See generally*, CRS Report 97-743, *Federal Cocaine Sentencing: Legal Issues*, by Paul Starett Wallace Jr.

[37] 2004 WL 1723114 (D. Me. June 28, 2004), *cert. granted*, 542 U.S. 956 (2004).

[38] 375 F.3d 508 (7th Cir. 2004), *cert. granted*, 542 U.S. 956 (2004).

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.* at 510.

[43] *Id.*

[44] *Id.* at 515.

[45] *United States v. Fanfan*, 2004 WL 1723114 (D. Me. June 28 2004).

the Supreme Court decided *Blakely v. Washington*,[46] holding that as part of a state sentencing guideline system, a Washington state judge could not find an aggravating fact authorizing a higher sentence than the state statutes otherwise permitted. The sentencing judge in *Fanfan* considered the effect that *Blakely* may have on the federal sentencing Guidelines and recalculated the Guidelines based only on the possession of 500 grams and imposed the 78 month maximum for that range.

The Supreme Court granted certiorari in *Booker* and *Fanfan* in an effort to give some guidance to lower courts that had begun a variety of applications of the *Blakely* decision to federal prisoners. For example, in *Booker*, the Seventh Circuit found that the federal sentencing guidelines violate the Sixth Amendment in some situations.[47] The Fifth Circuit, on the other hand, concluded that *Blakely* did not apply to the Guidelines because to do so would create a separate "offense" for each possible sentence for a particular crime.[48] The Second Circuit, without resolving the issue, certified questions to the Supreme Court regarding the application of *Blakely* to federal sentences pursuant to the Guidelines.[49]

The Supreme Court issued a majority opinion in two parts. The first part, written by Justice Stevens for a 5-4 majority (Justices Scalia, Souter, Thomas, and Ginsburg) decided that the Guidelines violate the Sixth Amendment and are thus unconstitutional because they require a judge to increase a sentence above the maximum guideline range if the judge finds facts to justify an increase. They said a defendant's right to trial by jury is violated if a judge must impose a higher sentence than the sentence that the judge could have imposed based on the facts found by the jury.[50] Pursuant to 18 U.S.C. § 3553(b), the Guidelines were mandatory and thus create a statutory maximum for the purpose of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which had condemned mandatory judicial fact-finding for purposes of imposing a sentence beyond the statutory maximum.[51] The Court had applied *Apprendi*'s reasoning to a state sentencing guideline system in *Blakely v. Washington*, and the rationale applied with equal force to the federal guideline system in *Booker*.[52] Under the then current administration of the Guidelines, judges, rather than juries, were required to find sentence determining facts, and thus the practice was unconstitutional.

The second part, written by Justice Breyer for a different 5-4 majority (Justices Rehnquist, O'Connor, Kennedy, and Ginsburg) remedies this defect by holding that the Guidelines are

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[46] 542 U.S. 296 (2004).

[47] *United States v. Booker*, 375 F.3d 508, 509 (7th Cir. 2004), *judgment of the Court of Appeals aff'd and remanded; judgment of the District Court vacated and remanded*, 543 U.S. 160 (2005).

[48] *United States v. Pineiro*, 377 F.3d 464 (5th Cir. 2004).

[49] *United States v. Penaranda*, 375 F.3d 238 (2d Cir. 2004).

[50] For example, the then-effective Guidelines required a defendant convicted by a jury of possession with intent to distribute five grams of crack cocaine to be sentenced within a guideline range of 63 to 78 months. Prior to *Booker*, the Guidelines required a judge to increase the sentence beyond that prescribed range if the judge found additional facts (e.g., the presence of a gun, additional drug quantities, or a leadership role in the illegal activity). Each of these factual findings required a new higher sentencing range. The Court said a judge may not go over the sentence at the top of the Guideline range authorized by the jury—in this case 78 months—unless the jury finds the necessary facts for the higher range or the defendant admits to them.

[51] 543 U.S. at 221. *Apprendi* held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." 530 U.S. at 490.

[52] *Id.* at 244.

advisory, thereby making it necessary for the courts to consider the Guidelines along with other traditional factors when deciding on a sentence, and also finding that the appellant courts may review sentences for "reasonableness." Driven by the Court's first holding, it "excises" (through severance and excision of two provisions) 18 U.S.C. § 3553(b)(1) and §3742(e) from the Sentencing Reform Act and declares the Guidelines are now "advisory."[53] Pursuant to § 3553(a), district judges need only to "consider" the Guideline range as one of many factors, including the need for the sentence to provide just punishment for the offense (§ 3553(a)(2)(A), to afford adequate deterrence to criminal conduct (§ 3553(a)(2)(B), to protect the public from further crimes of the defendant (§ 3553(a)(2)(C)), and to avoid unwarranted sentencing disparities among similarly situated defendants (§3553(a) (6)).[54] The Sentencing Reform Act, absent the mandate of § 3553(b)(1), authorizes the judge to apply his own perceptions of just punishment, deterrence, and protection of the public, even when these differ from the perceptions of the United States Sentencing Commission.[55] The Sentencing Reform Act continues to provide for appeals from sentencing decisions (regardless of whether the trial judge sentences are within or outside of the Guideline range) based on an "unreasonableness" standard (18 U.S.C. §§ 3553(a)[56] and 3742(e)(3)).[57]

Booker and the Crack Defendant

After *Booker*, the federal courts wrestled with whether they may or must impose sentences below the Guidelines' ranges in crack cocaine cases in view of the United States Sentencing Commission's conclusions and recommendations, the facts and circumstances of the case, the history and characteristics of the defendant, and the command of 18 U.S.C. § 3553(a)(2)(6) to avoid unwarranted sentencing disparity. Typically, the federal courts follow a three-step sentencing procedure in which they determine "(1) the applicable advisory range under the Sentencing Guidelines; (2) whether, pursuant to the Sentencing Commission's policy statements, any departures from the advisory guideline range clearly apply; and (3) the appropriate sentence in light of the statutory factors to be considered in imposing a sentence."[58]

An appellate court held that the federal courts are not compelled to lower a sentence recommended by the Guidelines based on the sentencing differential for crack cocaine versus

[53] *Id.* at 246-247.

[54] *Id.* at 260.

[55] *Id.* at 234.

[56] The primary directive in Section 3553(a) is for sentencing courts to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph 2." Section 3553(a)(2) states that such purposes are (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.

In determining the minimally sufficient sentence, § 3553(a) further directs sentencing courts to consider the following factors: (A) "the nature and circumstances of the offense and the history and characteristics of the defendant" (§ 3553(a)(1)); (B) the penological needs to be served by the sentence (§3553(2)); (C) "the kinds of sentences available" (§ 3553(a)(3)); (D) "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" (§ 3553(a)(6)); and (E) "the need to provide restitution to any victims of the offense." (§ 3553(a)(7)).

[57] 543 U.S. at 261.

[58] *United States v. Beamon*, 373 F. Supp.2d 878 (E.D. Wis. 2005).

powder cocaine.[59] On the other hand, in more than a few cases, *Booker* has led to lower sentences than those suggested by the 100:1 ratio ranges established in the Guidelines. To wit:

- *United States v. Nellum*, 2005 WL 300073 (N.D. Ind. February 3, 2005) (in crack case where the guideline range was 168-210 months, imposing sentence of 108 months where given the particular circumstances of the case—Nellum's age, the likelihood of recidivism, his status as a veteran, his strong family ties, his medical condition, and his serious drug dependency—the Court did not view this disparity as being "unwarranted"; using age/recidivism information from the Sentencing Commission; declining to address 100:1 crack-powder issue but considering the fact that drug weight escalated based on controlled buys).
- *United States v. Clay*, 2005 WL 1076243 (E.D. Tenn. 2005) (taking all the factors into consideration, including the congressional mandate that sentences for crack offenses be stiffer than for cocaine offenses, the Court found that the following factors outweigh the significant weight that it had determined to give to the sentencing guidelines advisory range, regardless of whether it considers the range to be 235 to 293 months [based on judicial fact-finding] or 188 to 235 months [based on jury fact-finding]; the defendant's history and characteristics as set forth; his criminal history category overstates his criminal history and weighs in his favor against the likelihood that he will commit another offense; the fact that he withdrew from the conspiracy and led a productive life for one year prior to his arrest in this case weighs in his favor against the likelihood that he will commit another offense; and the unjustified disparity in the 100:1 quality ratio for punishment between cocaine base or crack and powder cocaine; based on a careful consideration of all the factors listed in 18 U.S.C. § 3553(a), the Court found that a reasonable sentence for the defendant was 156 months on each count to run concurrently, a sentence that is sufficient, but not greater than necessary, to serve the purpose of sentencing established by Congress).
- *United States v. Williams*, 372 F. Supp.2d 1335 (M.D. Fla. 2005) (District Court's discretion is not limited to the sentence that the government advocates; instead, the court will consider the sentencing guidelines on an advisory basis in the context of statutory factors in 18 U.S.C. § 3553. The Court was mindful of the substantial criticism of the sentencing disparity between powder cocaine and crack cocaine—the same drug in different forms. The Court was also aware of the evidence suggesting that this disparity has a discriminatory impact on African Americans, of whom Williams is one—the 17-year sentence is a substantial term for a relatively minor offense).
- *Simon v. United States*, 361 F. Supp.2d 35 (S.D.N.Y. 2005) (in imposing sentence lower than what advisory guideline range called for based on 600 grams of crack, considering disparity between crack and powder as principal factor, but also considering the defendant's age, medical condition, procedural history of case, and sentence of co-defendant).
- *United States v. Moreland*, 366 F. Supp.2d 416 (S.D.W.Va. 2005), *vac'd in part*, 437 F.3d 424 (4th Cir. 2006) (satisfied that the defendant was neither a "repeat violent offender" nor "drug trafficker," a sentence of 10 years in prison, followed

[59] *United States v. Gipson*, 425 F.3d 335, 337 (7th Cir. 2005).

by an eight-year term of supervised release rather than the advisory Guideline sentence of 30 years to life for distributing five grams or more of cocaine base was appropriate and reasonable for achieving the goals in § 3553(a)).

In some cases, after considering the factors set forth in 18 U.S.C. § 3553(a), the courts found a different ratio, either 20:1 or 10:1, more compatible with the statutory command of 18 U.S.C. § 3553(a)(6) to weigh the need to avoid unwarranted disparities:

- *United States v. Smith*, 359 F. Supp.2d 771 (E.D. Wis. 2005) (defendant subject to Guidelines recommended range of from 121 to 151 months and a statutory mandatory minimum was sentenced to 18 months based upon the government's motion for a substantial assistance departure, a 20:1 ratio [supported by the Sentencing Commission's 2002 report], the defendant's employment history, community service, family responsibilities, and good conduct since commission of the offense).
- *United States v. Leroy*, 373 F.Supp.2d 887 (E.D. Wis. 2005) (substituting a 20:1 ratio for the 100:1 ratio used in the Guidelines, but otherwise imposing a sentenced recommended by them, the court imposed a sentence at the bottom a 70-87 month range [rather than one within 100-125 range the Guidelines called for with the 100:1 ratio in place]).
- *United States v. Castillo*, 2005 WL 1214280 (S.D.N.Y. May 20, 2005) (substituting a 20:1 ratio for the 100:1 ratio used in the Guidelines, the court imposed a sentence at the bottom of the 87-108 month range rather than 135-168 month range the Guidelines otherwise recommended).
- *United States v. Perry*, 389 F.Supp.2d 278 (D.R.I. 2005) (finding that use of a 20:1 ratio would result in a 97-121 month range rather than the Guidelines' 188 - 235, but bound by a 10-year mandatory minimum, the court sentenced the defendant to 120 months' imprisonment).
- *United States v. Fisher*, 451 F.Supp.2d 553 (S.D.N.Y. October 11, 2005) (substituting a 10:1 ratio for the 100:1 ratio with an increase in light of 18 U.S.C. § 3553(a)(2)(C)(public protection), the court imposed a sentence of 121 months rather than one within the 235-293 month Guidelines range).
- *United States v. Stukes*, 2005 WL 2560244 (S.D.N.Y. October 12, 2005) (the court opted for a sentence within the 33-41 month range [20:1 ratio], rather than the Guidelines' recommended range of 51-63 months [100:1 ratio]).
- *Clairborne v. United States*, cert. granted, 127 S.Ct. 551 (2006). Mario Clairborne was convicted of possession of 5.03 grams of crack cocaine in federal court and was subject to a five-year mandatory minimum sentence for the offense. But in light of Claiborne's lack of a criminal history and the absence of violence associated with his offense, the district court judge applied a safety-valve exemption from the mandatory minimum. The Court was to review the sentence which represented a departure below the federal Sentencing Guideline to determine whether it was reasonable, and to decide whether it was consistent with *United States v. Booker* 543 U.S. 220 (2005), to require that a substantial departure from the Guidelines be justified by extraordinary circumstances, but the lower court's decision was vacated as moot when the Court was advised that Clairborne had died, 127 S.Ct. 2245 (2007).

The Appellate courts were not so inclined to ignore the Guidelines. For instance, the First Circuit held that the district court could not discard the guideline range and construct a new sentencing range,[60] but could take into account, on a case-by-case basis, "the nature of the contraband and/or the severity of a projected guideline sentence."[61] The First Circuit described the disparity as a "problem that has tormented enlightened observers ever since Congress promulgated the 100:1 ratio" and "share[d] the district court's concern about the fairness of maintaining the across-the-board sentencing gap associated with the 100:1 crack-to-powder ratio."[62] But to recapitulate, said the First Circuit, "we hold that the district court erred ... when it constructed a new sentencing range based on the categorical substitution of a 20:1 crack-to-powder ratio for the 100:1 embedded in the sentencing guidelines."[63] A panel in the Fourth Circuit agreed:

> [t]he principal question ... is whether a district court in the post-*Booker* world can vary from the advisory sentencing range under the guidelines by substituting its own crack cocaine/powder cocaine ratio for the 100:1 crack cocaine/powder cocaine ratio chosen by Congress. For the reasons stated below, we conclude a court cannot.... [The] sentencing court must identify the individual aspects of the defendant's case that fit within the factors listed in 18 U.S.C. § 3553(a) and in reliance on those findings, impose a non-Guideline sentence that is reasonable ... in arriving at a reasonable sentence, the court simply must not rely on a factor that would result in a sentencing disparity that totally is at odds with the will of Congress.[64]

The Fourth Circuit decision formed the basis for its later unpublished opinion in *Kimbrough v. United States*.[65]

Kimbrough v. United States

Norfolk, Virginia police arrested Derrick Kimbrough after they came upon him in the midst of what appeared to be a curbside drug sale. At the time, they discovered more than $1,900 in cash, 56 grams of crack cocaine, and more than 60 grams of powder cocaine in his car.[66] They also recovered a loaded hand gun for which Kimbrough was holding a full magazine clip.[67] Kimbrough subsequently pleaded guilty[68] to federal charges for trafficking in more than 50 grams

[60] *United States v. Pho*, 433 F.3d 53, 64-65 (1st Cir. 2006).

[61] *Id.* at 65.

[62] *Id.*

[63] *Id.* at 64.

[64] *United States v. Eura*, 440 F.3d 625, 627, 634 (4th Cir. 2006). Among some of the district courts, *United States v. Doe*, 412 F.Supp.2d 87 (D.D.C. 2006), it was also observed that sentencing courts lack the authority to impose a sentence below the applicable Guidelines range solely based on perceived disparities attributable to the crack cocaine/powder cocaine sentencing differential; *see also United States v. Tabor*, 365 F. Supp.2d 1052 (D.Neb. 2005) (No need for a departure, said the court, under pre-*Booker* theory, and no reason to vary or deviate from the crack cocaine Guidelines based on defendant's possession with intent to distribute 50 or more grams of crack cocaine, thereby making him eligible imprisonment for 10 years to life under 21 U.S.C. § 841(b)(1)(A)); *United States v. Valencia-Aguirre*, 409 F.Supp.2d 1358 (M.D. Fla. 2006).

[65] 174 Fed.Appx. 798 (4th Cir. May 9, 2006), cert. granted, 127 S.Ct. 2933 (2007).

[66] Brief for the United States at 10-11, *Kimbrough v. United States*, No. 06-6330 (2007)(U.S. Brief).

[67] *Id.* at 11.

[68] 174 Fed.Appx. at 798.

of crack,[69] trafficking in cocaine powder,[70] conspiracy to traffic in crack,[71] and possession of a firearm during and in furtherance of a drug trafficking offense.[72] He faced mandatory minimum terms of imprisonment of 10 years on the crack trafficking charge and of 5 years on the gun charge.[73] The applicable sentencing guidelines called for a sentence of imprisonment in the range of 168 to 210 months on the drug charges with an additional 60 months on the gun charge (to be served consecutive to the drug charges for a range of imprisonment of 228 to 270 months).[74] Kimbrough's attorney apparently urged a departure from the Guideline's recommended sentence based on the Sentencing Commission's dissatisfaction with the 100:1 ratio, Kimbrough's military service, the absence of any prior felony conviction, his employment record, and the suggestion that federal involvement represented an instance of "sentence shopping" in what was otherwise a state case.[75]

Under the facts before it, the district court considered the sentence recommended by the Guidelines "ridiculous."[76] It sentenced Kimbrough to the statutory minimum of 180 months in prison (10 years on the drug charges and 5 years on the gun charge).[77] It did so in part because of the sentencing disparity for crack and powder cocaine.[78] However, the Fourth Circuit Court of Appeals vacated and remanded the sentence, consistent with its holding in *Eura* that "a sentence that is outside the guidelines range is per se unreasonable when it is based on a disagreement with the sentencing disparity for crack and powder offenses."[79] On June 11, 2007, the Supreme Court agreed to consider whether the district court abused its discretion when it determined that in Kimbrough's case the sentencing range recommended by the Guidelines would be greater than

[69] 21 U.S.C. § 841(a),(b)(1)(A)(iii).

[70] 21 U.S.C. § 841(a),(b)(1)(C).

[71] 21 U.S.C. §§ 846, 841(a),(b)(1)(A)(iii).

[72] 18 U.S.C. § 924(c)(1)(A)(i).

[73] 21 U.S.C. § 841(b)(1)(A), 18 U.S.C. § 924(c)(1)(A)(i).

[74] *Kimbrough v. United States*, 174 Fed.Appx. at 798-99.

[75] Brief of Petitioner at 9-10, *Kimbrough v. United States*, No. 06-6330 (2007)(Petitioner's Brief). As for the sentence shopping contention, drug trafficking is a crime under federal law and the laws of each of the states. Consequently, most drug offenses can be tried in either state or federal court. In *United States v. Armstrong*, 517 U.S. 456 (1996), the defendant argued unsuccessfully that the Constitution precluded an alleged practice under which minority crack defendants were being federally prosecuted, while similarly situated white defendants faced only less severe state prosecution. There the Court observed that a selective prosecution claimant "must demonstrate that the federal prosecution policy had a discriminatory effect and that it was motivated by a discriminatory purpose. To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted." *Id.* at 465. Federal crack prosecutions have apparently been particularly prevalent in the Fourth Circuit, see e.g., "Retroactivity for crack sentence cuts debated," *The National Law Journal* at 4 (October 22, 2007)(citing Sentencing Commission statistics indicating that should the Commission's recent crack cocaine amendments be made retroactive the Fourth Circuit would have almost twice as many eligible prisoners as the next highest Circuit and over nine times as many as the largest Circuit). Nevertheless, this hardly demonstrates selective prosecution. Moreover, since state sentencing practices differ from state to state, requiring compatibility of federal and state sentencing patterns within a given state would be at odds with the Guidelines' underlying premise of uniform, nationwide federal sentencing practices.

[76] Petitioner's Brief at 11.

[77] *Kimbrough v. United States*, 174 Fed.Appx. at 799.

[78] *Id.* The district court apparently cited Kimbrough's military and employment records, the fact he had no prior felony convictions, and "the court specifically relied upon the fact that 'the Sentencing Commission has recognized that crack cocaine has not caused the damage that the Justice Department alleges it has and on its recognition of the disproportionate and unjust effect that crack cocaine guidelines have in sentencing.'" Petitioner's Brief at 11 (internal citations omitted).

[79] *Id.*

necessary to serve the penological purposes described in 18 U.S.C. § 3553(a)(2) and should not be controlling in light of the instruction in 18 U.S.C. § 3553(a)(6) to consider the need to avoid unwarranted disparity among similarly situated defendants.[80]

On December 10, 2007, the Supreme Court reversed the Court of Appeals in a 7-to-2 ruling. Writing for the majority, Justice Ginsburg held that although a district judge must respectfully consider the Guidelines range as one factor (among many) in determining an appropriate sentence, the judge has discretion to depart from the Guidelines based on the disparity between the Guidelines' treatment of crack and powder cocaine offenses.[81] As the *Booker* decision had made clear that the Sentencing Guidelines—which include the cocaine Guidelines—are to be advisory only, the Fourth Circuit Court of Appeals had erred in holding the crack/powder disparity "effectively mandatory," the Court explained.[82] Furthermore, the Supreme Court concluded that the 180-month sentence imposed on Kimbrough is reasonable given the particular circumstance of Kimbrough's case and that the district judge did not abuse his discretion in finding that the crack/powder disparity is at odds with the objectives of sentencing set forth in 18 U.S.C. § 3553(a)(2).[83]

Spears v. United States

In a case that had been remanded by the Supreme Court for further consideration in light of *Kimbrough*, the Eighth Circuit Court of Appeals held that district courts "may not categorically reject the [crack-to-powder] ratio set forth by the Guidelines," and "[n]othing in *Kimbrough* suggests the district court may substitute its own ratio for the ratio set forth in the Guidelines."[84] On January 21, 2009, the Supreme Court issued a per curiam opinion that summarily reversed the appellate court's decision on remand, finding that the judgment conflicted with *Kimbrough*.[85] The Court stated that "with respect to the crack cocaine Guidelines, a categorical disagreement with and variance from the Guidelines is not suspect" and reiterated that *Kimbrough* stands for the proposition that district courts have the "authority to vary from the crack cocaine Guidelines based on *policy* disagreement with them, and not simply based on an individualized determination that they yield an excessive sentence in a particular case."[86] The Supreme Court explained,

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[80] *Kimbrough v. United States*, cert. granted, 127 S.Ct. 2933 (2007).

[81] *Kimbrough v. United States*, 552 U.S. ___, 128 S. Ct. 558, 564 (2007). In an opinion issued on the same day as *Kimbrough*, the Supreme Court in *Gall v. United States*, 552 U.S. ___, 128 S. Ct. 586, 596 (2007) opined that while district courts must treat the Guidelines as the "starting point and the initial benchmark," they are not the only consideration. Furthermore, the Court rejected the need for requiring district judges to demonstrate that "extraordinary" circumstances justify a sentence outside the Guidelines range. *Id.* at 595.

[82] *Id.*

[83] *Id.* at 576.

[84] United States v. Spears, 533 F.3d 715, 717 (8th Cir. 2008).

[85] Spears v. United States, 555 U.S. ___, 2009 U.S. LEXIS 864, No. 08-5721 (Jan. 21, 2009). Justice Kennedy would have granted the petition for certiorari. Justice Thomas dissented without opinion. Chief Justice Roberts wrote a dissenting opinion, joined by Justice Alito, in which he agreed that "there are cogent arguments that the Eighth Circuit's decision was contrary to" *Kimbrough*, but he did not feel that "any error is so apparent as to warrant the bitter medicine of summary reversal." *Id.* at *12 (Roberts, C.J., dissenting). He also commented: "*Apprendi*, *Booker*, *Rita*, *Gall*, and *Kimbrough* have given the lower courts a good deal to digest over a relatively short period. We should give them some time to address the nuances of these precedents before adding new ones. As has been said, a plant cannot grow if you constantly yank it out of the ground to see if the roots are healthy." *Id.* at *15.

[86] *Id.* at *5. (emphasis in original)

> As a logical matter, of course, rejection of the 100:1 ratio, explicitly approved by *Kimbrough*, necessarily implies adoption of some other ratio to govern the mine-run case. A sentencing judge who is given the power to reject the disparity created by the crack-to-powder ratio must also possess the power to apply a different ratio which, in his judgment, corrects the disparity. Put simply, the ability to reduce a mine-run defendant's sentence necessarily permits adoption of a replacement ratio.[87]

In releasing the opinion in *Spears v. United States*, the Supreme Court sought to clarify its holding in *Kimbrough* that had been misinterpreted by not only the Eighth Circuit Court of Appeals, but the First and Third Circuits as well.[88] The Court speculated that if the Eighth Circuit's restrictive interpretation of *Kimbrough* was correct, one of two things would likely occur:

> Either district courts would treat the Guidelines' policy embodied in the crack-to-powder ratio as mandatory, believing that they are not entitled to vary based on "categorical" policy disagreements with the Guidelines, or they would continue to vary, masking their categorical policy disagreements as "individualized determinations." The latter is institutionalized subterfuge. The former contradicts our holding in *Kimbrough.* Neither is an acceptable sentencing practice.[89]

2007 Amendment of the Sentencing Guidelines

In May 2007, the United States Sentencing Commission submitted proposed amendments to the Guidelines (including those applicable in *Kimbrough*) that essentially did away with the 100:1 ratio for purposes of the Guidelines (except at the point at which the statutory mandatory minimums are triggered).[90] It also recommended that the thresholds for the statutory mandatory minimums for trafficking in crack be raised, thereby eliminating the statutory 100:1.[91] In July 2007, the Commission proposed that the changes relating to what had been the 100:1 ratio in the Guidelines be made retroactively applicable, should they become effective on November 1, 2007, in the absence of a Congressional objection.[92] On November 1, 2007, the amendments to the Guidelines including those relating to crack and the 100:1 ratio went into effect.[93] On December 11, 2007, the Sentencing Commission unanimously voted to apply the crack amendment retroactively.[94]

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[87] *Id.* at *7.

[88] *Id.* at *11 (citing United States v. Russell, 537 F.3d 6, 11 (1st Cir. 2008); United States v. Gunter, 527 F.3d 282, 286 (3rd Cir. 2008)).

[89] *Id.* at *8.

[90] 72 Fed. Reg. 28558 (May 21, 2007). A change in the statutory 100:1 ratio found in 21 U.S.C. § 841(b)(1) would require Congressional action.

[91] United States Sentencing Commission, Report to Congress: Cocaine and Federal Sentencing Policy, p.8 (May 2007), available on November 13, 2007 at http://www.ussc.gov/r_congress/cocaine2007.pdf.

[92] 72 Fed. Reg. 41794 (July 31, 2007). Proposed Guideline amendments submitted to Congress on or before May 1 become effective on the following November 1, unless modified or disapproved by Act of Congress. 28 U.S.C. § 994(p). A federal court may modify a sentence it has imposed to reflect a subsequently reduced sentencing range, to the extent the modification is consistent with Sentencing Commission policy statements. 18 U.S.C. § 3582(c)(2).

[93] United States Sentencing Commission, *Guidelines Manual* (November 1, 2007), available on November 13, 2003 at http://www.ussc.gov/2007guid/GL2007.pdf.

[94] U.S. Sentencing Commission, *News Release: U.S. Sentencing Commission Votes Unanimously to Apply Amendment Retroactively for Crack Cocaine Offenses*, Dec. 11, 2007, *available at* http://www.ussc.gov/PRESS/rel121107.htm.

As noted earlier, the Controlled Substances Act makes trafficking in 5 to 50 grams of crack cocaine or 500 to 5,000 grams of cocaine powder punishable by imprisonment for not less than 5 years and not more than 40 years.[95] It makes trafficking more than 50 grams of crack or more than 5,000 grams of cocaine powder punishable by imprisonment for not less than 10 years and not more than life.[96] These sanctions, like most federal criminal penalties, are reflected in the Sentencing Guidelines. The Guidelines assign most federal crimes to an individual guideline which in turn assigns the offense an initial base sentencing level. Drug trafficking offenses, for example, have been assigned to section 2D1.1, which sets the base offense level according to the amount of crack or powder cocaine involved in a particular case.[97] Levels are then added or subtracted on the basis of any aggravating or mitigating factors presented in a particular defendant's case. For example, a defendant's offense level may be decreased by 2 or 4 levels, if the offense involved a number of participants and the defendant's role in the offense was minor or minimal.[98] A defendant's final offense level and his criminal history (criminal record) govern the sentence recommended by the Guidelines.[99] The Guidelines assign sentencing ranges for each of the 43 possible final offense levels.[100] Each of the 43 has a series of six escalating sentencing ranges to mirror the extent of the defendant's criminal history.[101] For example, if a defendant has no prior criminal record and his final sentencing level is 26, the Guidelines recommend that the sentencing court impose a term of imprisonment somewhere between 63 and 78 months; at the other extreme, if a defendant has an extensive prior criminal record and his final sentencing level is the same 26, the Guidelines recommend a sentencing range of between 120 to 150 months.[102]

The drug quantity table that is part of the drug sentencing guideline, U.S.S.G. §2D1.1(c), assigns offenses to one of several steps with corresponding sentencing levels based on the kind and volume of the controlled substances involved in the offense.[103] For example, an offense involving 150 KG or more of powder cocaine is assigned a step (1) offense level of 38, while an offense involving less than 25 grams is assigned a step (14) offense level of 12.[104] Prior to the amendments effective on November 1, 2007, each of the steps reflected a 100:1 ratio between crack and powder cocaine; for instance, offenses involving either more than 150 KG of powder cocaine or more than 1.5 KG of crack cocaine were each assigned a step (1) offense level of 38.[105] In order to reduce the prospect of a Guideline result beneath the statutory minimums, the pre-amendment Guidelines assigned the 5-year-minimum-triggering 5G(crack)/500G(powder) offenses to U.S.S.G. §2D1.1(c), step (7), with an offense level of 26 which translated to a sentencing range of from 5 years and 3 months (63 months) to 6 years and 6 months (78

[95] 21 U.S.C. 841(b)(1)(B)(ii), (iii).

[96] 21 U.S.C. 841(b)(1)(A)(ii), (iii).

[97] U.S.S.G. §2D1.1(c)(Drug Quantity Table)(November 1, 2007).

[98] U.S.S.G. §3B1.2 (November 1, 2007).

[99] U.S.S.G. §1B1.1 (November 1, 2007).

[100] U.S.S.G. ch.5A (Sentencing Table) (November 1, 2007).

[101] *Id.*

[102] *Id.* A defendant's criminal history score is separately calculated, U.S.S.G. ch.4, and scores correspond to 1 of the 6 sentencing ranges assigned to each final offense level. In the case of offense level 26, for instance, the sentencing range for a defendant with an extensive criminal record (13 or more criminal history points) is 120 to 150 months rather than the 63 to 78 months for a first time offender. *Id*

[103] U.S.S.G. §2D1.1(c)(November 1, 2007).

[104] *Id.*

[105] U.S.S.G. §2D1.1(c)(1)(November 1, 2006).

months).[106] It made a similar assignment for the 10-year mandatory minimum offenses involving 50 grams of crack or 5,000 grams of powder cocaine: level 32 with a sentencing range for first offenders of from 10 year and 1 month (121 months) to 12 years and 7 months (151 months).[107]

The Commission's amendments focused first on the assignment for crack offenses subject to a mandatory minimum. The Commission noted that its earlier assignment set the bottom of the two ranges higher than necessary to satisfy minimum sentencing requirements (5 years and 3 months in the case of 5 grams; 10 years and 1 month in the case of 50 grams).[108] Its amendments reassign those offenses to offense levels where the mandatory minimum fell within the middle of the ranges, that is, to offense level 24 (51 to 63 months for first offenders) and offense level 30 (97 to 121 months for first offenders) for 5 and 50-gram crack offenses, respectively.[109] They then provide a similar two level reduction for crack offenses involving amounts above and beyond those that trigger the mandatory minimums.[110] The amendments, however, make no such changes in the offense levels to which powder cocaine offenses are assigned. As a consequence, the 100:1 ratio has disappeared from the Guidelines (although the statutory 100:1 ratio in the quantities of powder cocaine and crack cocaine that trigger the mandatory minimum penalties still remains).[111]

Retroactivity Decision

In July 2007, the Commission proposed that the amendment be made retroactively applicable to previously sentenced crack cocaine offenders.[112] After receiving public comment on the issue of retroactivity[113] and holding public hearings to consider the issue,[114] the Commission voted 7-to-0 in favor of retroactivity on December 11, 2007. While the Commission found "that the statutory purposes of sentencing are best served by retroactive application of the amendment," it emphasized that not all previously sentenced crack cocaine offenders will automatically receive a reduction in sentence—rather, federal sentencing judges will have the final authority to make that

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[106] U.S.S.G. §2D1.1(c), ch.5A (Sentencing Table) (November 1, 2006).

[107] *Id.*

[108] "*The drug quantity thresholds in the Drug Quantity Table are set so as to provide base offense levels corresponding to guideline ranges that are above the statutory mandatory minimum penalties. Accordingly, offenses involving 5 grams or more of crack cocaine were assigned a base offense level (level 26) corresponding to a sentencing guideline range of 63 to 78 months from a defendant in criminal History Category I (a guideline range that exceeds the five-year statutory minimum for such offenses by at least three months. . . .*" United States Sentencing Commission, *Amendments to the Sentencing Guidelines*, p.66 (May 11, 2007)(emphasis in the original); 72 Fed. Reg. 28573 (May 21, 2007).

[109] "*This amendment modifies the drug quantity thresholds in the Drug Quantity Table so as to assign, for crack cocaine offenses, base offense levels corresponding to guideline ranges that include the statutory mandatory minimum penalties. Accordingly, pursuant to the amendment, 5 grams of cocaine base are assigned a base offense level of 24 (51 to 63 months at Criminal History Category I, which includes the five-year (60 month) statutory minimum for such offenses). . . .*" United States Sentencing Commission, *Amendments to the Sentencing Guidelines*, p.66 (May 11, 2007)(emphasis in the original); 72 Fed. Reg. 28573 (May 21, 2007).

[110] *Id.*

[111] The existing ratio in the Guidelines varies from step to step, ranging from 25:1 to 80:1. The changes that the amendment made to the Drug Quantity Table are appended below.

[112] 72 Fed. Reg. 41,794 (July 31, 2007).

[113] Opinions were received from a variety of parties, including the judiciary, the executive branch, interested organizations, members of the defense bar, and individual citizens. These public comment letters are available at http://www.ussc.gov/pubcom_Retro/PC200711.htm.

[114] A transcript of the public hearing, held by the Commission on November 13, 2007, is available at http://www.ussc.gov/hearings/11_13_07/Transcript111307.pdf.

determination based on the merits of each case, after considering a variety of factors, including whether public safety would be endangered by early release of the prisoner.[115] To allow courts time to prepare for the motions that will be filed for such sentence reductions, the Commission elected to delay the effective date of its decision on retroactivity until March 3, 2008.[116]

Caselaw Applying the Retroactive Crack Cocaine Amendments

Federal law (18 U.S.C. § 3582(c)(2)) permits a federal prisoner to petition a court to reduce his original term of imprisonment, if the Sentencing Commission issues policy statements supporting such reduction for previously sentenced offenders. The court is not required to approve such sentence reduction motion; rather, the statute provides that a court "may" reduce such imprisonment term. However, a court may *not* reduce a sentence below a statutory mandatory minimum.[117]

A federal court considering a so-called "§3582(c)(2)" motion has discretion to reduce the imprisonment sentence after considering the following statutory factors, set forth in 18 U.S.C. §3553(a):

- the nature and circumstances of the offense and the history and characteristics of the defendant;
- 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 educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- the sentencing range established by the Commission;
- any pertinent policy statement issued by the Commission regarding application of the guidelines;
- the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- the need to provide restitution to any victims of the offense.[118]

In the wake of the Sentencing Commission's crack cocaine amendment retroactivity decision, the federal courts began considering §3582(c)(2) motions filed by crack offenders to obtain reductions in their sentences.[119] In the month of March 2008, when the retroactivity decision became effective, more than 3,000 prisoners nationwide had their sentences reduced; 1,000 of these inmates were released

[115] U.S. Sentencing Commission, *News Release: U.S. Sentencing Commission Votes Unanimously to Apply Amendment Retroactively for Crack Cocaine Offenses*, Dec. 11, 2007, *available at* http://www.ussc.gov/PRESS/rel121107.htm.

[116] *Id.*

[117] *Kimbrough*, 128 S. Ct. at 574 ("[A]s to crack cocaine sentences in particular, we note [that] district courts are constrained by the mandatory minimums Congress prescribed in the 1986 Act.").

[118] 18 U.S.C. §3553(a).

[119] Darryl Fears, *Government Starts Cutting Sentences Of Crack Inmates*, WASH. POST, Mar. 5, 2008, at A02.

> immediately.[120] By the end of 2008, a nationwide total of 12,119 motions were granted, with an average decrease of 24 months from the prisoners' original sentence (a 17% decrease), while 5,049 petitions were denied.[121]

Several issues arose during these cases, including whether prisoners who request sentence reductions are entitled to have court-appointed lawyers to represent them in court, whether crack offenders who were sentenced as career-offenders are eligible for sentence reductions, and whether courts may reduce a sentence below the bottom end of the new Guideline range (a power that would be available to a court assuming that *Booker* applies to §3582(c)(2) proceedings). Many of the §3582(c)(2) motions have been filed by defendants pro se, although often with some assistance by the local federal public defender office. A panel from the Fifth Circuit Court of Appeals declined to decide whether a §3582(c)(2) motion triggers a statutory or constitutional right to an attorney, but rather used its discretionary authority to appoint the prisoner an attorney "in the interest of justice."[122] Other federal courts have rejected the argument that a prisoner has a constitutional right to assistance of counsel in pursuing a §3582(c)(2) motion for a sentence reduction.[123]

Another question facing the courts was whether defendants who were convicted of crack cocaine offenses but sentenced as career offenders[124] could benefit from the amended crack cocaine sentencing guidelines. Courts of appeals that have considered the issue have ruled that they cannot.[125] An opinion from the Eleventh Circuit Court of Appeals is typical of these decisions:

> Where a retroactively applicable guideline amendment reduces a defendant's base offense level, but does not alter the sentencing range upon which his or her sentence was based, § 3582(c)(2) does not authorize a reduction in sentence. Here, although Amendment 706 [the crack cocaine amendment] would reduce the base offense levels applicable to the defendants, it would not affect their guideline ranges because they were sentenced as career offenders under [U.S. Sentencing Guidelines] § 4B1.1.[126]

Federal courts have also addressed whether *Booker* applied to §3582(c)(2) proceedings (which would determine whether district courts have the authority to impose a sentence that is less than the minimum of the amended Sentencing Guideline range). The Fourth and Tenth Circuit Court of Appeals have held that while *Booker* applies to original sentencing proceedings, "in which a district court must make a host of guideline application decisions in arriving at a defendant's applicable guideline range and then ultimately impose a sentence after reviewing the §3553(a)

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[120] *Crack Cocaine: Resentencing Goes Smoothly*, THE THIRD BRANCH, Vol. 40, No. 5 (May 2008), *available at* http://www.uscourts.gov/ttb/2008-05/article02.cfm.

[121] U.S. Sentencing Commission, *Preliminary Crack Cocaine Retroactivity Data Report*, (Dec. 2008 Data), *available at* http://www.ussc.gov/USSC_Crack_Cocaine_Retroactivity_Data_Report_8_December_08.pdf.

[122] United States v. Robinson, 542 F.3d 1045 (5th Cir. 2008).

[123] *See, e.g.*, United States v. Olden, 2008 U.S. App. LEXIS 22191 (10th Cir. 2008); United States v. Legree, 205 F.3d 724, 730 (4th Cir. 2000); United States v. Townsend, 98 F.3d 510, 512-13 (9th Cir. 1996).

[124] A defendant is a career offender if (1) the defendant was at least 18 years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. U.S. Sentencing Guidelines § 4B1.1.

[125] United States v. Thomas, 524 F.3d 889 (8th Cir. 2008); United States v. Sharkey, 543 F.3d 1236 (10th Cir. 2008); United States v. Moore, 541 F.3d 1323 (11th Cir. 2008); United States v. Caraballo, 2008 U.S. App. LEXIS 25805 (1st Cir. 2008).

[126] *Moore*, 541 F.3d at 1330.

factors," *Booker* does *not* apply to sentence modification proceedings under §3582(c)(2) because such proceedings are "much more narrow in scope."[127] However, in disagreement, the Ninth Circuit Court of Appeals has found that *Booker* renders the Guidelines advisory in a §3582(c)(2) proceeding, and thus a district court may reduce a sentence below the amended guideline range.[128] This split in circuit court opinions may require resolution by the Supreme Court in the future.

Legislation in the 111th Congress

As of the date of this report, two bills have been introduced concerning cocaine sentencing. Representative Roscoe Bartlett introduced H.R. 18 (Powder-Crack Cocaine Penalty Equalization Act of 2009) that would equalize the triggering quantity for the mandatory minimum sentences for cocaine offenses at the crack cocaine levels (5 grams of powder cocaine would result in a five-year sentence and 50 grams a 10-year sentence). Currently, it takes 100 times those quantities to trigger the 5- and 10-year mandatory minimum sentences for powder cocaine.

Representative Sheila Jackson-Lee introduced H.R. 265 (Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2009) that would eliminate the statutory 100:1 ratio in cocaine cases by raising the crack cocaine threshold to 500 grams and 5 kilograms for the 5- and 10-year mandatory minimums, respectively. It would call upon the Sentencing Commission to reexamine the weight given aggravating and mitigating factors in drug trafficking cases. It also would eliminate the five-year mandatory minimum for simple possession of crack cocaine. In addition, the bill would increase fines for significant drug trafficking offenses, authorize funding for prison- and jail-based drug treatment programs, and authorize increased resources for the Departments of Justice, Treasury, and Homeland Security.

Past Congresses have considered legislation relating to cocaine sentencing; some of these bills had called for a 1:1 drug quantity ratio between crack and powder cocaine,[129] while other bills would have changed the statutory ratio to 20:1.[130]

[127] United States v. Rhodes, 549 F.3d 833, 840 (10th Cir. 2008); *see also* United States v. Dunphy, 2009 U.S. App. LEXIS 6 (4th Cir. 2009).

[128] United States v. Hicks, 472 F.3d 1167, 1169 (9th Cir. 2007) ("Because *Booker* abolished the mandatory application of the Sentencing Guidelines in all contexts, and because reliance on its holding is not inconsistent with any applicable policy statement, we reverse the district court and hold that *Booker* applies to § 3582(c)(2) proceedings.").

[129] *See, e.g.*, H.R. 2456, 109th Cong., 1st Sess. (Crack-Cocaine Equitable Sentencing Act of 2005); H.R. 79, 110th Cong., 1st Sess. (Powder-Crack Cocaine Penalty Equalization Act of 2007); H.R. 460, 110th Cong., 1st Sess. (Crack-Cocaine Equitable Sentencing Act of 2007); S. 1711, 110th Cong., 1st Sess. (Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2007); H.R. 5035, 110th Cong., 2d Sess. (Fairness in Cocaine Sentencing Act of 2008).

[130] S. 1383, 110th Cong., 1st Sess. (Drug Sentencing Reform Act of 2007); S. 1685, 110th Cong., 1st Sess. (Fairness in Drug Sentencing Act of 2007).

Appendix. Drug Quantity Table (Before and After Amendment)

Controlled Substance and Quantity	Base Offense Level
150 KG or more of Cocaine ~~1.5~~ *4.5* KG or more of Cocaine Base	Level 38
At least 50 KG but not less than 150 KG of Cocaine At least ~~500~~ *1.5 G* but not less than ~~1.5~~ *4.5 KG* of Cocaine Base	Level 36
At least 15 KG but not less than 50 KG of Cocaine At least ~~150~~ *500* G not less than ~~500 G~~ *1.5 K*G of Cocaine Base	Level 34
At least 5 KG but not less than 15 KG of Cocaine At least ~~50~~ *150 G* not less than ~~150~~ *500 G* of Cocaine Base	Level 32
At least 3.5 KG but not less than 5 KG of Cocaine At least ~~35~~ *50 G* not less than ~~50~~ *150 G* of Cocaine Base	Level 30
At least 2 KG but not less than 3.5 KG of Cocaine At least ~~20~~ *35 G* not less than ~~35~~ *50 G* of Cocaine Base	Level 28
At least 500 G but not less than 2 KG of Cocaine At least ~~5~~ *20 G* not less than ~~20~~ *35 G* of Cocaine Base	Level 26
At least 400 G but not less than 500 G of Cocaine At least 4 *5 G* not less than ~~5~~ *20 G* of Cocaine Base	Level 24
At least 300 G but not less than 400 G of Cocaine At least ~~3~~ *4 G* not less than 4 *5 G* of Cocaine Base	Level 22
At least 200 G but not less than 300 G of Cocaine At least ~~2~~ *3 G* not less than ~~3~~ *4 G* of Cocaine Base	Level 20
At least 100 G but not less than 200 G of Cocaine At least + *2 G* not less than ~~2~~ *3 G* of Cocaine Base	Level 18
At least 50 G but not less than 100 G of Cocaine At least ~~500 MG~~ *1 G* not less than + *2 G* of Cocaine Base	Level 16
At least 25 G but not less than 50 G of Cocaine At least ~~250~~ *500 MG* not less than ~~500 MG~~ *1 G* of Cocaine Base	Level 14
At least 25 G of Cocaine At least ~~250~~ *500 MG* of Cocaine Base	Level 12

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