

Federal Cocaine Sentencing in Transition

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No issue in the world of federal sentencing has sparked more controversy or engendered more criticism than the punishment scheme for crack and powder cocaine. Congress set forth the basic crack and powder policy more than twenty years ago in a set of mandatory minimum sentencing statutes, producing the now infamous 100-to-1 quantity ratio. The U.S. Supreme Court's recent *Booker* decision making the Guidelines "effectively advisory" has added a challenging new set of issues for federal judges: what should district judges and circuit judges do when considering suggested Guideline crack sentences that seem excessive, particularly in relation to suggested sentences for comparable powder cocaine offenses? *Booker* creates a new urgency for debates about the appropriateness of federal cocaine sentencing policy and the judicial discretion to resist that policy in individual sentencing decisions.

As highlighted in this Issue, debates over *Booker* and sentencing fairness are developing into what may become a "perfect storm" paving the way for meaningful reform a generation after Congress produced the 100-to-1 crack/powder ratio that many now consider deeply misguided. In these Observations, we quickly review the current complicated lay of the land and offer our suggestions for a productive path forward.

I. The Troubled History of Modern Crack Sentencing

Responding to what it perceived as a new drug crisis, Congress hastily passed the crack and powder mandatory minimum sentencing statutes as part of the Anti-Drug Abuse Act of 1986—while the U.S. Sentencing Commission was still working on its initial set of sentencing guidelines.¹ Unlike the Sentencing Reform Act of 1984, which created the Commission to produce comprehensive guidelines, the mandatory minimums and the underlying congressional policy at the root of the long-standing crack controversy were passed quickly and without much reflection.² The most renowned and reviled of the drug sentencing statutes passed by a panicked Congress is the five-year mandatory minimum punishment provision for offenders trafficking five grams of crack cocaine or 500 grams of powder cocaine.³ This 100-to-1 quantity ratio also finds expression in a ten-year mandatory minimum punishment level for offenders trafficking in either fifty grams of crack cocaine or five kilograms (5,000 grams) of powder cocaine.

In 1986, the first Sentencing Commission had to consider Congress's new drug sentencing mandates when trying to finalize its initial set of Federal Sentencing Guidelines. The fledgling and then—politically weak Commission decided that it should follow the statutory mandatory minimum scheme—the 100-to-1 quantity ratio—when setting punishment levels for crack and powder offenses generally.⁴ That is, the Commission extended the 100-to-1 ratio into the Federal Sentencing Guidelines' offense level computations for all amounts of crack and powder cocaine.⁵

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In the pre-*Booker* years of so-called mandatory Guidelines, sentencing courts generally followed—without too much resistance, but with many complaints—the Commission’s decision to extend the 100-to-1 quantity ratio to the Guidelines even as the Commission came to acknowledge that crack and powder cocaine “are two forms of the same drug, containing the same active ingredient.”⁶ Defendants challenged the application of the 100-to-1 quantity ratio in both the statutory mandatory minimums and the Guidelines on various constitutional grounds. This litigation effort was a failure, particularly at the appellate level, as lower courts resisted all arguments that more severe crack sentences were constitutionally problematic.⁷ One circuit court stated, for example, that “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.”⁸ Few outside the Department of Justice supported crack sentencing provisions, but that did not matter much: the Guidelines reflecting the 100-to-1 quantity ratio were found constitutional, repeatedly followed, and simply reviled.⁹

Starting in the mid-1990s, however, the Sentencing Commission began advocating a change of course. In a series of extensive, well-supported reports, the Commission has tried repeatedly to persuade Congress that the 100-to-1 quantity ratio was a mistake and should be modified. In its reports, the Commission stressed (1) that the 100-to-1 crack/powder ratio is disproportionate to the relative harms presented by the two drugs; (2) that some harms associated with crack could and should be addressed by Guideline enhancements that are not drug-specific; and (3) that severe crack penalties fall disproportionately on lower-level offenders, and most significantly on African-Americans.¹⁰ Indeed, in its first major cocaine sentencing report in 1995, the Commission stated clearly that “[t]he 100-to-1 crack cocaine to powder cocaine quantity ratio is a primary cause of the growing disparity between sentences for Black and White federal defendants.”¹¹

Shortly after issuing its 1995 report, the Commission proposed equalizing completely the Guideline punishments for crack and powder by changing quantity thresholds for crack sentences to the levels set for powder cocaine sentences. At the same time, the Commission urged Congress to make similar changes to the mandatory minimum sentencing provisions in statutory law. But Congress recoiled: it refused to modify the statutory mandatory minimums and passed legislation formally rejecting the Commission’s proposed Guideline changes.¹² The legislation that rebuffed the Commission’s equalization efforts made clear that Congress believed that crack sentences should generally be set at levels higher than powder cocaine sentences.

The Sentencing Commission’s subsequent cocaine sentencing reports, issued in 1997 and 2002, reached similar conclusions about the realities of powder and crack cocaine and the inappropriateness of the 100-to-1 quantity ratio. The Commission did not, however, formally propose new guidelines again; it merely made suggestions to Congress. In 1997, the Commission suggested a mandatory minimum and Guideline sentencing ratio of basically 5-to-1, which was to be accomplished by increasing the quantity thresholds for crack sentences and lowering the thresholds for powder sentences.¹³ In 2002, the Commission suggested a mandatory and Guideline ratio of basically 20-to-1, which was to be accomplished by increasing the thresholds for crack and maintaining the thresholds for powder.¹⁴ Congress did not respond to either report.

II. The Sentencing Commission Takes Another Crack at Crack Reform

After Congress repudiated the Sentencing Commission’s 1995 efforts to equalize powder and crack cocaine sentences, the Commission understandably was more circumspect in its crack sentencing reform efforts. In 1997 and 2002, the Commission did not deploy its rule-making authority to try to modify the 100-to-1 ratio still reflected in its Guidelines. Instead, the Commission simply urged Congress to narrow the weight-based punishment differential, and it did not follow up these recommendations with extensive advocacy or other reforms when Congress failed to act.

Earlier this year, however, the Sentencing Commission flexed some of the muscle it still has in this area. In May 2007, the Commission issued another comprehensive report in which it reaffirmed its earlier findings concerning the inappropriateness of the 100-to-1 crack/powder quantity ratio and urged Congress to shrink this ratio by raising the mandatory minimum threshold quantities for crack. And, this time, the Commission also issued proposed Guideline amendments that reduce applicable sentencing ranges for all crack offenses by lowering the base offense level by two levels.¹⁵

In its latest report, the Sentencing Commission has stressed that its proposed crack guideline modifications are just a small step toward comprehensive reforms, in part because the statutory

mandatory minimums still set floors at 500 (and 5,000) grams of powder cocaine and only 5 (and 50) grams of crack cocaine. Still, unless Congress moves to reject the proposed crack guideline amendments, they will take effect on November 1, 2007, and mark the most consequential change in federal cocaine sentencing policy in the last two decades. Significantly, in contrast to 1995, there seems to be no congressional opposition to the Commission's proposals. Indeed, with the Commission trying to goad Congress into acting,¹⁶ the most tangible congressional response to date has been the introduction of various bills seeking to advance different proposals for reforming the statutory mandatory minimums. And, if Congress allows the Commission's amendments to take effect, there are reasons to believe that the Commission could provide for its new crack guidelines to be given retroactive effect.¹⁷

III. What Will the Justices Do?

The Supreme Court's chosen remedy in *Booker* (which, interestingly enough, was a crack cocaine case) has offered an opportunity for district judges troubled by the crack guidelines to effectuate their own vision of sentencing justice. Yet, as one of us has explained in more detail elsewhere, *Booker* has proved to be neither a magic bullet nor a mirage for crack defendants and broader crack sentencing controversies; rather, *Booker* has contributed another messy set of debates in what has become a sentencing muddle.¹⁸

Since *Booker*, the lower courts have grappled—sometimes inconsistently and often unconvincingly—to determine exactly what authority the judiciary now has after *Booker* to disregard the Guidelines based on a disagreement with policy determinations reflected in the Guidelines. Unpacking this critical issue, which is important to post-*Booker* sentencing dynamics in all cases, becomes especially complicated and convoluted when judges consider the crack guidelines: a tangled web of congressional action, Commission research and recommendations, and pre-*Booker* judicial rulings upholding the 100-to-1 quantity ratio provide a foundation for an array of potent post-*Booker* arguments.¹⁹

The judiciary's post-*Booker* views on this subject have generally fractured along the trial-appellate divide. Several district courts schooled in the Commission's research view the 100-to-1 quantity ratio in the Guidelines as inappropriate and have charted their own new path—often adopting one of the Commission's various ratio recommendations (e.g., 1-to-1, 5-to-1, or 20-to-1)—when sentencing crack offenders. But, when taking a new path, district courts have rarely discussed pre-*Booker* precedents rebuffing challenges to the 100-to-1 quantity ratio. Also, few district courts have thoroughly considered the relationship between the Sentencing Reform Act's command to avoid “unwarranted” disparity and Congress's apparent embrace of the 100-to-1 quantity ratio as a warranted disparity. Nor have district courts explored the disparity stemming from the “cliffs” that using one ratio for the mandatories and another ratio for the Guidelines could cause.²⁰

Yet the circuit court opinions that have repeatedly reversed efforts by district judges to move away from the crack guidelines have no shortage of their own problems. Appellate courts often rely heavily on pre-*Booker* precedents rebuffing challenges to the 100-to-1 quantity ratio and thereby treat the now advisory Guidelines a lot like the mandatory dictates they no longer are. Moreover, circuit courts have generally failed to consider the Sentencing Reform Act's command that district courts impose sentences “not greater than necessary” along with the Commission's repeated determination that crack sentences are excessively severe. The circuit courts since *Booker*, and recently the Supreme Court in *Rita v. United States*, have stressed the special expertise and wisdom of the Commission to support affording the Guidelines a “presumption of reasonableness” on appeal, but these courts have not explained what this should mean for crack cases in which the Commission has repeatedly criticized and urged modification of its own Guidelines.

The Justices will have the opportunity to sort out these issues at the very start of the Supreme Court's October 2007 Term. In *Gall v. United States*, the Supreme Court has a case that should allow it to provide guidance for district and appellate courts concerning the justifications for a sentence outside of the advisory Guideline range. And, in *Kimbrough v. United States*, the Court has a crack case that should allow the Justices to address these matters specifically in the context of cocaine sentencing law and policy. In *Kimbrough*, the sentencing judge criticized the crack guidelines; determined that the sentencing range recommended by the Guidelines also ignored other important factors, thus making it inconsistent with the Sentencing Reform Act; and exercised his post-*Booker* discretion to impose a below-Guideline sentence. Derrick Kimbrough was able to get the Justices to

assess his initial sentence after the Fourth Circuit reversed that sentence as unreasonable because the sentencing court expressed general disagreement with the crack guidelines.

In its briefs to the Supreme Court in *Gall* and *Kimbrough*, the Government walks a fine line by asserting that only certain types of policy disagreements with the Guidelines can provide a valid basis for a non-Guidelines sentence. Specifically, the Government explains to the Supreme Court that “[a]lthough sentencing courts may impose non-Guidelines sentences based on policy disagreements with the Sentencing Commission, courts may not vary from the Guidelines under Section 3553(a) based on disagreements with policy choices mandated by Congress.” The Government thereafter describes any variances based on disagreement with the 100-to-1 crack/powder ratio to be one type of policy disagreements that is off-limits.²¹

In *Kimrough*, the Supreme Court will have to find a way to resolve the tension between binding mandatory minimums and discredited, “effectively advisory” Guidelines. But, with crack guideline changes and congressional reform debates in midstream, it is unlikely that a still-disjointed set of Justices will be able to author an easy, pretty, or perfectly clear new crack sentencing script.²²

IV. What Congress Should Do

The problems with federal cocaine sentencing transcend particular Guideline levels and mandatory minimum punishment thresholds for defendants. Consequently, the Commission’s proposed amendments alone are unlikely to resolve long-standing debates and can only partially salve long-fester wounds. In fact, cocaine sentencing issues are now much broader than just the question of what is the “right” punishment for violating certain federal drug laws.

The larger problem is one of fairness and justice—both its reality and its perception. Federal cocaine sentencing policy has been so out of balance for so long that it has come to represent—fairly or not—all the worst attributes of federal sentencing for many people.²³ For nearly two decades, the crack-powder disparity has been “Exhibit A” for those who believe that the criminal justice system is racially biased. It has been “Exhibit A” for those who believe that the federal justice system is excessively severe. It has been “Exhibit A” for those who believe that Congress does not genuinely care about fairness and justice and would rather cultivate tough-on-crime political rhetoric than confront tough-to-solve sentencing realities. For these and other reasons, current federal cocaine sentencing policy has a corrosive effect on both the American criminal justice system and our society at large. Congress should and must do better, for vital symbolic reasons as well as substantive ones.

We think that the Commission’s latest admonitions to Congress are basically on target, and they provide a useful to-do list for our nation’s legislature. First, Congress should reduce or eliminate the weight-based punishment disparity between powder and crack cocaine. There are several viable options advanced by the Commission over the years from which Congress can choose, each of which is better than the current policy. Reasonable minds can differ as to which option (e.g., 1-to-1 vs. 5-to-1 vs. 20-to-1) is “right,” but there seems to be no sound criminal justice reason to reach the desired ratio by lowering the powder threshold. Each of the Commission’s proffered quantity ratios would be an improvement over the current policy and would signal that Congress is engaged and willing to address the disruptive forces it unleashed twenty years ago.²⁴

Second, Congress should also, at a bare minimum, repeal the five-year mandatory minimum for simple possession of at least five grams of crack cocaine. This mandatory minimum exceeds the statutory *maximum* for simple possession of any amount of powder cocaine.

Finally, Congress could take a bolder, more proactive step and consider evidence-based options for lower-level user-dealers who may respond better to compulsory treatment than to lengthy incarceration.²⁵ Although the target defendant population is at times different, some states have used this approach for certain low-level drug offenders with encouraging results. Valuably, the U.S. Sentencing Commission has indicated, through its latest announcement of official priorities, that it will finally begin exploring alternatives to incarceration. Congress should urge the Commission to pursue this course vigorously.

Importantly, Congress need not and should not wait for further action by the Commission or for the Supreme Court’s ultimate resolution of *Kimrough* and *Gall*. Even if the Supreme Court allows the lower courts to override problematic policies in the Guidelines, Congress still needs to act. It cannot and should not rely on the courts and the Commission to make all the tough calls; it cannot and should not rely on the judiciary to solve a legislatively created problem. *Only* Congress can really clarify the proper relationship between its mandatory minimum laws and sentencing for quantities of cocaine above and below those levels. More importantly, *only* Congress can send the message that it

cares about the injustices—real and perceived—emanating from its cocaine policy. *Only* Congress can redress these grievances. This power and this duty rest squarely on the elected branches of government.

Notes

- ¹ See, e.g., Eric E. Sterling, *The Sentencing Boomerang: Drug Prohibition Politics and Reform*, 40 VILL. L. REV. 383 (1995).
- ² See, e.g., U.S. SENTENCING COMMISSION, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 126 (2006) (noting that “Congress responded to a national sense of urgency surrounding penalties for crack cocaine and other controlled substances by enacting the Anti-Drug Abuse Act of 1986”); William J. Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1255 (1996); *Simon v. United States*, 361 F. Supp. 2d 35, 44 (E.D.N.Y. 2005) (stating that the “Act was moved through Congress with little discussion”).
- ³ 21 U.S.C. § 841. See generally Steven L. Chanenson, *Booker on Crack: Sentencing’s Latest Gordian Knot*, 15 CORNELL J.L. & PUB. POL’Y 551 (2006).
- ⁴ Sentencing experts Paul Hofer and Mark Allenbaugh note that the young Commission’s “failure to accommodate the statutory penalties might [have] suggest[ed] to Congress that the Commission’s approach to punishment cannot be trusted. This could [have led] to more mandatory minimums and further diminish the Commission’s role.” Paul J. Hofer & Mark H. Allenbaugh, *The Reason behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19, 34 n.68 (2003).
- ⁵ See, e.g., U.S. SENTENCING COMMISSION, GUIDELINES MANUAL §2D1.1(c); *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.”).
- ⁶ U.S. SENTENCING COMMISSION, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY v-vi (1995).
- ⁷ See, e.g., *id.* at 118 (“[A]ll federal circuit courts addressing the constitutionality of crack cocaine penalties have upheld the current federal cocaine sentencing scheme, including the 100-to-1 ratio.”).
- ⁸ *United States v. Lawrence*, 951 F.2d 751, 755 (7th Cir. 1991).
- ⁹ Chanenson, *supra* note 3, at 561.
- ¹⁰ See *id.*
- ¹¹ U.S. SENTENCING COMMISSION, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 154 (1995).
- ¹² See Federal Sentencing Guidelines, Amendment, Disapproval, Pub.L. No. 104-38, 109 Stat. 334 (1995).
- ¹³ U.S. SENTENCING COMMISSION, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY v (2002).
- ¹⁴ *Id.* at viii.
- ¹⁵ U.S. SENTENCING COMMISSION, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 9 (2007).
- ¹⁶ *Cf. id.* at 2 (“It is the Commission’s firm desire that this report will facilitate prompt and appropriate legislative action by Congress.”); *id.* at 1-2 (“Congressional enactment of a uniform remedy to the problems created by the 100-to-1 drug quantity ratio, as opposed to the employment of varied remedies by the courts, would better promote the goals of the Sentencing Reform Act, including avoiding unwarranted sentence disparities among defendants with similar criminal records who have been found guilty of similar criminal conduct.”).
- ¹⁷ The Sentencing Commission has requested comments on whether to make its proposed crack amendments retroactive, and the American Bar Association has recently documented that other changes to drug guidelines have previously been made retroactive. See Douglas A. Berman, *ABA Makes Pitch for USSC Crack Amendments to Be Made Retroactive*, SENTENCING LAW AND POLICY (Aug. 23, 2007), available at http://sentencing.typepad.com/sentencing_law_and_policy/2007/08/aba-makes-pitch.html.
- ¹⁸ Chanenson, *supra* note 3, at 553.
- ¹⁹ *Id.* at 571.
- ²⁰ *Id.* at 577.
- ²¹ *Gall v. United States*, No. 06-7949, Brief of the United States at 37, n. 11.
- ²² The Third Circuit’s recent opinion in *United States v. Ricks*, Nos. 05-4832, 05-48332007 U.S. App. LEXIS 17258 (3d Cir. 2007), offers one potential approach that may try to bridge the divide. Consistent with the views of some of its sister courts, *Ricks* prohibited district courts from categorically rejecting the 100-to-1 quantity ratio and replacing it with a ratio of the district court’s choosing. However, it did allow the sentencing judge to consider the Commission’s objections to the current Guidelines “when applying the § 3553(a) factors to a specific case and defendant.” *Id.* at *26. Whether this tact proves workable in practice or attractive to the Supreme Court remains to be seen.
- ²³ For example, a consortium of advocacy groups—including the Open Society Institute, the ACLU, the Drug Policy Alliance, and the Sentencing Project—recently launched an ad campaign designed to draw attention to the federal crack cocaine sentencing issue titled “It’s Not Fair. It’s Not Working.” See <http://www.sentencingproject.org/crackreform>.
- ²⁴ Although more sweeping than anything that we think is likely to pass in the foreseeable future, we believe that Congress should ask the Commission to think outside the box. Specifically, Congress should direct the Commission to consider other mechanisms to assess the culpability of and the harm caused by a defendant who trafficked in narcotics that do not rely so heavily on drug weight. In his commentary in this Issue, Pro-

fessor Mark Osler develops one possible and viable means to pursue such a goal. See Mark Osler, *More Than Numbers: A Proposal for Rational Drug Sentences*, 19 FED. SENT'G, REP. ____ (2007).

²⁵ See, e.g., Douglas B. Marlowe, *Effective Strategies for Intervening with Drug Abusing Offenders*, 47 VILL. L. REV. 989 (2002); Douglas B. Marlowe et al., *Amenability to Treatment of Drug Offenders*, 67 FEDERAL PROBATION 40 (2003).