Nos. 05-2455 & 05-2461

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UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

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UNITED STATES OF AMERICA,
Appellant,

v.

SAMBATH PHO
and
SHAWN LEWIS
Defendants-Appellees.

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ON APPEAL FROM JUDGMENTS OF
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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# CONSOLIDATED OPENING BRIEF FOR THE APPELLANT UNITED STATES OF AMERICA

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## I. STATEMENT OF JURISDICTION

The district court (Torres, C.J.) had jurisdiction over these criminal cases pursuant to 18 U.S.C. § 3231.

The court sentenced defendant-appellee Shawn Lewis on August 25, 2005. The judgment was entered on the docket on September 12, 2005. The government filed a timely notice of appeal on September 22, 2005. (Appendix 5-6; Addendum 1-6.)

The court sentenced defendant-appellee Sambath Pho on September 16, 2005. The judgment was entered on the docket on October 6, 2005. The government filed a timely notice of appeal on September 23, 2005. (Appendix 10-11; Addendum 7-12.)

This Court has jurisdiction pursuant to 18 U.S.C. § 3742(b). United States v. Booker, 125 S. Ct. 738, 765 (2005).

## II. STATEMENT OF THE ISSUE

Whether, notwithstanding the advisory nature of the Sentencing Guidelines, it is unreasonable for district courts to categorically reject the 100:1 crack/powder cocaine quantity ratio (a ratio that is imbedded in the statutory penalties and faithfully mirrored in the Guidelines ranges), and to adopt their own preferred ratios, when this amounts to an open policy disagreement with Congress on the question of how severely crack offenses should be punished, and when the proliferation of varying ratios threatens to yield wildly disparate sentences.

## III. STATEMENT OF THE CASE

### A. Shawn Lewis

On September 30, 2004, local police officers searched Shawn Lewis's house pursuant to a warrant and discovered: (1) 153.75 grams of crack cocaine; (2) 174 grams of powder cocaine; (3) 147 grams of marijuana; (4) nine grams of heroin; (5) two digital scales and other drug processing supplies; (6) $4,597 in cash; (7) drug ledgers; and (8) two loaded .9 mm handguns stored near the drugs. (PSR ¶ 9; Plea Tr. 15-18.) Between 1993 and 2002, Lewis had amassed convictions for, among other things: carrying a pistol without a license; assault with intent to commit a felony; prison escape; possession of heroin; and receipt of stolen goods. (PSR ¶¶ 35-43.)

On June 3, 2005, Lewis pled guilty to a two-count information charging that he: (1) possessed more than 50 grams of cocaine base with the intent to distribute it; and (2) possessed the two handguns as a convicted felon. Lewis specifically admitted that he possessed in excess of 150 grams of cocaine base. (Plea Tr. 5, 10.)

The Probation Office determined that the base offense level for the drug count was 34. (PSR ¶ 16.) With a two-level gun enhancement and a three-level reduction for acceptance of responsibility, the total offense level was 33. (PSR ¶¶ 17, 31 & 32.) Lewis was in Criminal History Category ("CHC") VI. (PSR ¶

44.) The Guidelines range was 235-293 months. (PSR ¶ 67.) Lewis faced a mandatory minimum ten-year sentence. (PSR ¶ 66.)

At the August 25, 2005 sentencing, the district court noted that there was no dispute about the proposed Guidelines range, and on that basis it adopted that range. (Appendix 13.)

The principal defense argument was that a lower sentence was warranted based on the harshness of the 100:1 crack/powder sentencing ratio. (Appendix 14-17.)

The government's position was that, notwithstanding the advisory nature of the Guidelines, it was inappropriate for the court to substitute its own 20:1 ratio for the 100:1 ratio, and that in applying the statutory factors in 18 U.S.C. § 3553 the court should focus instead on case-specific circumstances, such as Lewis's substantial criminal history, his possession of the loaded firearms, and the fact that he was a major dealer in multiple kinds of drugs. (Appendix 18-22 & 24-27.)

The court began by cataloguing the reasons why consideration of the § 3553 criteria suggested that, if anything, Lewis deserved a sentence above the low end of the applicable (but advisory) Guidelines range: (1) there was nothing in his background or upbringing that even remotely supported a lower sentence; (2) the evidence indicated he was a "fairly big time drug dealer" and that he had been "dealing in a significant quantity of a variety of different drugs"; (3) the loaded firearms could have killed

someone, and only one firearm was necessary to trigger the two-level enhancement; and (4) he had a "long history of some serious criminal offenses" and had not been adequately deterred by the previous sentences. (Appendix 29-32.)

After ruling out various mitigating factors, the court went on to isolate the issue that is the subject of this appeal: "So the only thing I see in your favor here, the only reason I would conclude that the guidelines may call for an excessive sentence is this question that [defense counsel] raises about the disparity between the crack cocaine and the powder cocaine." (Appendix 32) (emphasis added). Citing the views of the Sentencing Commission, while recognizing that those views have not won the support of Congress, the court then explained why it thought that a 20:1 ratio was a "more appropriate multiple" than the 100:1 ratio. (Appendix 32-33.)

Using the 20:1 ratio as its baseline, and after converting the powder cocaine to crack for purposes of analysis, the court determined that Lewis should receive a sentence within the 188-235 month range, two levels below the advisory range. (Appendix 33-34.) Without further elaboration, the court stated that a sentence of 188 months was "sufficient to accomplish the statutory purposes." (Appendix 34.) The court imposed a concurrent 120-month sentence on the gun count. (Appendix 35.) The government then reiterated its objection. (Appendix 37.)

**B. Sambath Pho**

On January 11, 2005, local police officers searched Sambath Pho's house pursuant to a warrant and discovered: (1) 16.73 grams of crack cocaine; (2) three scales with cocaine residue; (3) a variety of drug processing supplies; (4) $2,370 in cash; and (5) a well stocked arsenal, including six handguns, two rifles, one shotgun, and hundreds of rounds of ammunition. (PSR ¶ 9; Plea Tr. 11-13.)

On June 10, 2005, Pho pled guilty to a one-count information charging that he possessed in excess of five grams of cocaine base with the intent to distribute it. (Plea Tr. 13-14.)

After converting the cash to drugs, the Probation Office concluded that Pho was responsible for 40.43 grams of cocaine base, yielding a base offense level of 30. (PSR ¶ 16.) With a two-level gun enhancement and a three-level reduction for acceptance of responsibility, the total offense level was 29. (PSR ¶¶ 17, 23 & 24.) Pho was in CHC I. (PSR ¶ 27.) The Guidelines range was 87-108 months. (PSR ¶ 44.) Pho faced a mandatory minimum five-year sentence. (PSR ¶ 43.)

At the September 16, 2005 sentencing, the court noted that there were no factual objections to the PSR but that Pho disputed the determination that the cash should be converted to drugs. (Appendix 40.) After hearing from the parties, the court rejected Pho's theory that the cash might have come from an untainted

source. (Appendix 41-45.) The court then adopted the total offense level proposed by the PSR. (Appendix 45.)

The lead defense argument for a non-Guidelines sentence was that the 100:1 crack/powder ratio was "tragic" and "incongruous." (Appendix 46.) Counsel also mentioned several traditional mitigating factors specific to Pho. (Appendix 46-47.)

The government strongly objected to the argument that the court should employ its own 20:1 ratio rather than the 100:1 ratio. (Appendix 47-48.) The government pointed out that although the court had broad discretion to impose a non-Guidelines sentence based on the facts of the case and a consideration of the criteria in 18 U.S.C. § 3553, a decision to switch ratios would merely be "supplanting Congress's wisdom" with its own. (Appendix 47-48.)

The court reinvoked its 20:1 ratio rule, explaining that it was no longer bound to follow the Guidelines, that the 100:1 ratio was "excessive" and "not reasonable" in its view, and that it had "consistently taken the position that the [Sentencing] Commission's recommendation [of a 20:1 ratio] makes sense." (Appendix 50.) Based on the 20:1 formula, the court concluded that for purposes of exercising its discretion after Booker it would treat Pho as though his Guidelines range was 57-71 months, four levels below the advisory range. (Appendix 47-51.) The court remarked that several mitigating factors (including Pho's military record) suggested a sentence at the low end of this revised range, but that Pho's

"arsenal" cancelled out those factors, making a middle-range sentence appropriate. (Appendix 51-52.) The court then sentenced Pho to 64 months. (Appendix 52.)

During the sentencing hearing, the district court expressed the hope that this Court would clarify whether its methodology was appropriate "sometime soon" to avoid a "backlog of these cases." (Appendix 50.)

## IV. SUMMARY OF ARGUMENT

The issue on appeal is not whether it was reasonable for the district court to deviate from the advisory Guidelines range under the particular circumstances of defendants' cases, but whether, in all crack cocaine cases, it is reasonable for courts to adopt their own across-the-board rules regarding the appropriate crack/powder sentencing ratio, when such rules override Congress's judgment on how severely crack offenses should be punished, and when the proliferation of varying ratios threatens to yield wildly disparate sentences as judges institute their own preferred schemes. The identical issue is now pending before the Second, Fourth, Sixth, Eighth, and Eleventh Circuits.[1]

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[1] Meanwhile, the Seventh Circuit recently addressed the converse issue and held that there was no error when a district court declined to impose a non-Guidelines sentence based on the 100:1 crack/powder differential. See United States v. Gipson, 425 F.3d 335, 337 (7th Cir. 2005) (per curiam).

The 100:1 crack/powder sentencing ratio is embedded in the statutory mandatory minimums and maximums. It is the direct result of Congress's decision to punish crack offenses more severely than powder offenses. The Guidelines merely reflect that legislative choice, as they must, to avoid potentially huge and unwarranted asymmetries between statute- and Guidelines-based penalties for offenses involving comparable crack amounts.

Prior to Booker, this Court upheld the 100:1 ratio against several constitutional challenges, and it also rejected the notion that judicial dissatisfaction with the ratio may serve as a basis for a downward departure. Booker now gives courts more freedom to tailor sentences based on a case-specific assessment of the facts and the criteria in 18 U.S.C. § 3553(a). It does not permit courts to institute their own personal sentencing schemes, however, especially when those schemes are based on an open disagreement with legislative policy.

Although no circuit court has addressed this issue to date, at least one district court has explained why, even after Booker, courts should not be free to substitute their own preferred ratios for the ratio enshrined in the statutory penalties and mirrored in the Guidelines ranges. See United States v. Tabor, 365 F. Supp.2d 1052, 1058-61 (D. Neb. 2005). Echoing that view in a case involving a similar issue but a different drug, Judge Gertner has reasoned that, while Booker gives judges much greater leeway to

deviate from the Guidelines in individual cases, it does not leave judges "free to disagree about the fundamental premises of sentencing, [or] to implement their own perceptions of what policies should drive punishment." United States v. Jaber, 362 F. Supp.2d 365, 370 (D. Mass. 2005). That is precisely what happened here.

The district court's categorical rule is unreasonable as a matter of law because it: (1) rejects Congress's express judgment concerning the appropriate level and relative severity of penalties for crack offenses (see infra at 33-37); (2) would lead to significant and unwarranted sentencing disparities (see infra at 37-41); and (3) conflicts with (a) the Supreme Court's admonition to take the Guidelines into account in all cases, (b) the case-specific focus of the sentencing statutes, and (c) traditional principles of discretionary decision-making (see infra at 42-45).

Conceivably, the district court might have justified non-Guidelines sentences by referring to the facts of the particular cases and by applying the criteria in 18 U.S.C. § 3553(a). The sole justification that the court gave, however, was that the 100:1 ratio was too harsh and that it preferred a 20:1 ratio instead. (Appendix 32-34 & 49-52.) That rationale (however well meant) is unacceptable. Thus, the cases should be remanded for resentencing.

## V. ARGUMENT

### A. GENERAL SENTENCING CONSIDERATIONS AFTER BOOKER, AND THE STANDARD OF REVIEW

#### 1. The Centrality of the Guidelines

In United States v. Booker, 125 S. Ct. 738 (2005), the Supreme Court held that mandatory sentencing enhancements triggered by judge-found facts are incompatible with the Sixth Amendment. As a remedy, the Court excised a provision of the Sentencing Reform Act ("SRA") that made the Sentencing Guidelines binding, 18 U.S.C. § 3553(b)(1), thus rendering them "effectively advisory." Booker, 125 S. Ct. at 756-57 & 764. The Court also severed 18 U.S.C. § 3742(e), which set appellate review standards. Id. The Court made clear, however, that the remainder of the Act is still intact. Id. at 764.

Although the Guidelines are no longer mandatory, a district court still must "consult [the] Guidelines and take them into account when sentencing." Booker, 125 S. Ct. at 767 (citing 18 U.S.C. §§ 3553(a)(4) & (5)); United States v. Antonakopoulos, 399 F.3d 68, 76 (1st Cir. 2005). It may "tailor the sentence in light of other statutory concerns as well." Booker, 125 S. Ct. at 757. Those statutory concerns are expressed primarily at 18 U.S.C. § 3553(a). Id. The ultimate sentence will then be subject to review for reasonableness. Booker, 125 S. Ct. at 765-66; United States v. Vazquez-Rivera, 407 F.3d 476, 490 (1st Cir.), cert. denied, 126 S.

Ct. 279 (2005); Antonakopoulos, 399 F.3d at 76.

Notwithstanding the remedial holding of Booker, "it would be a mistake to think that, after Booker[], district judges may return to the sentencing regime that existed before 1987 and exercise unfettered discretion to select any sentence within the applicable statutory maximum and minimum." United States v. Crosby, 397 F.3d 103, 113-114 (2d Cir. 2005). Indeed, because a system devoid of all benchmarks except the broad statutory parameters would tend to produce markedly disparate sentences, there is good reason to believe that "[w]hen the Supreme Court directed the federal courts to continue using the Guidelines as a source of advice for proper sentences, it expected that many (perhaps most) sentences would continue to reflect the results obtained through an application of the Guidelines." United States v. Mykytiuk, 415 F.3d 606, 607 (7th Cir. 2005).

Congress passed the SRA (which is still largely intact) in an effort to reduce such sentencing disparities. See Mistretta v. United States, 488 U.S. 361, 363-364 (1989). That goal remains paramount in the wake of Booker, and it is embodied in Congress's directive that the district courts should "avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6); see also 28 U.S.C. § 991(b)(1)(B) (issuing the same directive to the Sentencing Commission).

Significantly, every Supreme Court justice who authored an opinion in Booker recognized that the Guidelines implement the will of Congress that sentences be uniform across the country to the extent possible and be based on the offender's actual conduct and history. See, e.g., Booker, 125 S. Ct. at 761 (majority opinion of Breyer, J.) ("Congress' basic goal in passing the Sentencing Act was to move the sentencing system in the direction of increased uniformity."); id. at 783 (dissenting opinion of Stevens, J.) ("The elimination of sentencing disparity, which Congress determined was chiefly the result of a discretionary sentencing regime, was unquestionably Congress' principal aim."); id. at 789 (dissenting opinion of Scalia, J.) ("the primary objective of the Act was to reduce sentencing disparity.").

Even after Booker, therefore, "[t]he Guidelines remain an essential tool in creating a fair and uniform sentencing regime across the country." Mykytiuk, 415 F.3d at 608. Although Booker holds that uniformity cannot be achieved through mandatory Guidelines, it is indisputable that the goal of uniformity still weighs heavily in the determination of a reasonable sentence.

Fidelity to the Guidelines not only promotes uniformity, but advances the general sentencing goals set forth by Congress in 18 U.S.C. § 3553(a), and therefore the Guidelines are entitled to substantial weight. See United States v. Wilson, 350 F. Supp.2d 910, 914 (D. Utah 2005) ("Wilson I"); accord United States v.

Peach, 356 F. Supp.2d 1018, 1021 (D. N.D. 2005); United States v. Wanning, 354 F. Supp.2d 1056, 1062 (D. Neb. 2005) ("[T]he Guidelines must be given substantial weight even though they are now advisory [because] [t]o do otherwise is to thumb our judicial noses at Congress").[2]

Indeed, a core aspect of the Sentencing Commission's mandate was to "establish sentencing policies and practices . . . that . . . assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2)," 28 U.S.C. § 991(b)(1)(A), and to "develop means of measuring the degree to which [the resulting policies and practices] are effective in meeting [those purposes]," 28 U.S.C. § 991(b)(2). The Commission has explained how it has carried out that statutory mission. See USSG § 1A1.1, at 2-15 (Editorial Note) (2004); United States v. Bailey, 369 F. Supp.2d 1090, 1104 & n.30 (D. Neb. 2005).

Some courts have suggested that the Guidelines should not carry special weight, on the theory that they do not sufficiently reflect the factors set out in § 3553(a). See, e.g., United States v. Ranum, 353 F. Supp.2d 984 (E.D. Wisc. 2005). That view is misguided.

As Judge Cassell noted, "[i]t would be startling to discover that while Congress had created an expert agency, approved the

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[2] The Sentencing Commission also believes that the Guidelines should be given substantial weight. See Peach, 356 F. Supp.2d at 1021 (recounting February 2005 congressional testimony of the Honorable Ricardo H. Hinojosa, Chair of the United States Sentencing Commission).

agency's members, directed the agency to promulgate Guidelines, allowed those Guidelines to go into effect, and adjusted those Guidelines over a period of fifteen years, that the resulting Guidelines did not well serve the underlying congressional purposes. The more likely conclusion is that the Guidelines reflect precisely what Congress believes is the punishment that will achieve its purposes in passing criminal statutes." Wilson I, 350 F. Supp.2d at 915; accord Wanning, 354 F. Supp.2d at 1061.[3] Thus, the Court should presume that the Guidelines mirror, rather than conflict with, the goals of § 3553(a). See generally Wilson I, 350 F. Supp.2d at 914-922; United States v. Wilson, 355 F. Supp.2d 1269, 1273-87 (D. Utah 2005) ("Wilson II") (critiquing reasoning of Ranum opinion).

In sum, a Guidelines sentence is presumptively reasonable. See Mykytiuk, 415 F.3d at 608 ("any sentence that is properly calculated under the Guidelines is entitled to a rebuttable presumption of reasonableness"); United States v. Lincoln, 413 F.3d 716, 717 (8th Cir. 2005) (sentence within Guidelines range is "presumptively reasonable").[4] By contrast, a non-Guidelines

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[3] Congress reserved the right to disapprove or amend any guideline proposed by the Commission. The Commission must submit proposed amendments to Congress for a minimum 180-day review period. Amendments take effect no later than November 1 of the calendar year in which submitted, "except to the extent that . . . the amendment is otherwise modified or disapproved by Act of Congress." 28 U.S.C. § 994(p).

[4] There is even a strong argument that such sentences should be deemed reasonable per se. See United States v. Winingear, 422 F.3d 1241, 1246 (1st Cir. 2005) (noting argument

sentence requires more justification. As explained below, such justification should be based on case-specific circumstances and a consideration of the criteria in § 3553(a), rather than on the broad policy views of the individual judge -- especially when those views clash with a Congressional mandate.

**2. Standard of Review**

There can be little doubt that a sentence is "unreasonable" within the meaning of Booker if it is based on an error of law. See United States v. Price, 409 F.3d 436, 442-43 (D.C. Cir. 2005); Crosby, 397 F.3d at 114-15. The government's contention in this case is that the district court committed such an error when it imposed non-Guidelines sentences based solely on its disagreement with the 100:1 crack/powder sentencing ratio -- a ratio imbedded in the statutory penalties and mirrored in the Guidelines ranges -- and when it chose instead its own 20:1 ratio. That is, the error was in the court's sentencing methodology (i.e., the impermissible factor that drove its decision), not the pure length of the sentences imposed. Because this presents a legal question, review is de novo. Cf. Antonakopoulos, 399 F.3d at 82 (method of calculating loss reviewed de novo).

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but declining to reach it); United States v. Archuleta, 412 F.3d 1003, 1007 (8th Cir. 2005) (same); but see United States v. Webb, 403 F.3d 373, 385 n.9 (6th Cir. 2005) (rejecting the argument in a footnote, over a dissenting opinion).

## B. BACKGROUND ON COCAINE SENTENCING POLICIES

### 1. Introduction

The issue on appeal arises against the backdrop of Congress's adoption of the 100:1 ratio in a 1986 law, the incorporation of that ratio in the Sentencing Guidelines, and the ensuing debate between the Sentencing Commission and Congress over whether the strict sentences for crack cocaine offenses are justified. The history of that debate reveals several key points. First, the Commission has always acknowledged that there is empirical support for punishing crack offenses more severely than powder offenses; the Commission disagrees with Congress primarily over whether that evidence is sufficient to justify a ratio as wide as 100:1. Second, when the Commission proposed amendments to lower crack penalties so that they were equal to powder penalties, Congress promptly rejected that proposal, and it made clear that crack offenses should be punished more severely. Third, although the Commission has since made other proposals to reduce the crack penalties, Congress still has not concluded that such a change is necessary. Thus, even if this Court does not agree that Congress has effectively put its imprimatur on the Guidelines as a whole, Congress has certainly signaled that the current crack Guidelines establish the appropriate level of punishment for crack dealers.

### 2. The Anti-Drug Abuse Act of 1986

While the Sentencing Commission was developing its first set of Guidelines, Congress enacted tougher measures to combat illegal

drug use. The Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified at 21 U.S.C. § 841(a)), established substantial mandatory minimum sentences for those convicted of trafficking in significant quantities of illegal drugs, including cocaine. The Act imposed two basic levels of mandatory punishment -- five- and ten-year minimums -- which in general were intended to apply to "serious" and "major" drug traffickers, respectively. See United States Sentencing Commission, Report to the Congress: Cocaine and Federal Sentencing Policy (May 2002) ("2002 USSC Report") at 7.[5]

Congress deliberately established severe mandatory minimum sentences for trafficking in relatively small amounts of crack cocaine based on the conclusion that crack was a particularly dangerous and increasingly accessible drug. See United States Sentencing Commission, Special Report to the Congress: Cocaine and Federal Sentencing Policy (February 1995) ("1995 USSC Report") at 118. Congress believed that, compared to powder cocaine, crack cocaine was: (1) more likely to induce addiction; (2) more often associated with other serious crimes; (3) more likely to lead to widespread use among particularly vulnerable members of society because it is relatively easy to manufacture, less expensive, easier to use, and tended to be more potent; (4) had harsher physiological effects; and (5) was more likely to be used by young

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[5] The government cites to the pdf-file versions of the Commission's reports, available at its website, while noting that the hardcopy version of the 1995 report is paginated differently.

people. Id.[6]

Although Congress considered various crack/powder quantity ratios to reflect these greater dangers, it ultimately enacted thresholds that treated traffickers in a given quantity of crack cocaine as severely as traffickers in 100 times that amount of powder cocaine; that is, for sentencing purposes, 100 grams of powder cocaine equals one gram of crack cocaine. 1995 USSC Report at 116-117, 120. In terms of punishment, this translates into mandatory minimum sentences of (1) five years for trafficking in five to 49 grams of cocaine base or 500 to 4,999 grams of powder cocaine, and (2) ten years for trafficking in 50 grams or more of cocaine base or 5,000 grams or more of powder cocaine. 21 U.S.C. §§ 841(b)(1)(A)(ii) & (iii), and 841(b)(1)(B)(ii) & (iii). It also translates into maximum sentences of 40 years and life for each respective quantity tier. Id. Thus, Congress "in effect defined a 'major' drug trafficker as one who distributes 50 grams or more of crack." United States v. Webb, 134 F.3d 403, 407 (D.C. Cir. 1998).[7]

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[6] The statute itself refers to "cocaine base," not crack cocaine. 21 U.S.C. §§ 841(b)(1)(A)(iii), 841(b)(1)(B)(iii). After structuring the Guidelines around the mandatory minimums, the Commission defined "cocaine base" to mean only the form of cocaine base known as crack cocaine. See USSG § 2D1.1, comment. (backg'd); United States v. Medina, No. 04-2527, 2005 WL 2740828, at *3 & n.3 (1st Cir. Oct. 25, 2005). Because virtually all cocaine base dealing involves crack cocaine, see United States v. Brisbane, 367 F.3d 910, 912 (D.C. Cir.), cert. denied, 125 S. Ct. 342 (2004), the government uses the terms interchangeably.

[7] Additionally, in 1988, Congress enacted a mandatory minimum five-year sentence for simple possession of five grams or

### 3. The Sentencing Guidelines' Incorporation of the Statutory Crack/Powder Thresholds

The SRA required the Commission to "assure that the guidelines specify a sentence to a substantial term of imprisonment" for certain categories of defendants, including drug traffickers convicted under 21 U.S.C. § 841 whose offenses involve "a substantial quantity of a controlled substance." 28 U.S.C. § 994(i)(5). Congress defined what it considered to be "substantial quantit[ies]" of crack when it enacted quantity thresholds for the mandatory minimum (and maximum) sentences, as discussed above. Accordingly, the Commission built the crack offense levels around these five- and 50-gram thresholds.

As part of this effort, the Commission first assigned an offense level of 26 to offenses involving five grams of cocaine base, which resulted in a sentencing range of 63-78 months for a defendant in CHC I, and an offense level of 32 to offenses involving 50 grams of cocaine base, which resulted in a sentencing range of 121-151 months for a defendant in CHC I. 1995 USSC Report at 125-126. Then, to avoid sentencing disparities for offenses involving other amounts of crack, the Guidelines were adjusted

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more of cocaine base. Anti-Drug Abuse Act of 1988, Pub. L. 100-690, 102 Stat. 4181 (1988) (codified at 21 U.S.C. § 844(a)). Among other rationales, that provision was intended to promote law enforcement efforts to curtail crack cocaine trafficking by creating a presumption that possession of five grams or more of crack indicated that the possessor was a drug dealer. See 1995 USSC Report at 124-125.

proportionally up and down in two-level increments. Id.; see also USSG § 2D1.1, comment. (backg'd) (concluding that "a logical sentencing structure for drug offenses" requires coordination with mandatory minimums). Similar base offense levels reflecting the 100:1 ratio were designed for powder cocaine offenses. 1995 USSC Report at 125-126.

Although the 100:1 drug weight ratio is often used to describe the resulting difference between crack and powder sentences, that reference is misleading because the actual sentencing differential is much lower. A Department of Justice report indicates that, in 2000, the 100:1 ratio caused the average sentence for trafficking in crack cocaine to be 1.6 times the average sentence for trafficking in powder cocaine; depending on the drug amounts involved and specific offender characteristics, crack sentences ranged from 1.3 to 8.3 times longer than powder sentences. See U.S. Department of Justice, Federal Cocaine Offenses: An Analysis of Crack and Powder Penalties (March 19, 2002) ("2002 DOJ Report"), at 19. The average powder sentence in that year was 74 months, while the average crack sentence was 117 months. Id. at 21.

#### 4. The Mandatory Minimum Reform Act of 1994

By 1994, Congress had concluded that the mandatory minimums sometimes prevented sufficient recognition of appropriate mitigating factors for defendants convicted of trafficking in drug amounts at or just above the mandatory minimum quantity thresholds.

See H.R. Rep. No. 103-460, at 4-5 (1994). To correct this unintended anomaly, Congress enacted a "safety-valve" provision to "permit a narrow class of defendants, those who are the least culpable participants in [drug trafficking] offenses, to receive strictly regulated reductions in prison sentences for mitigating factors currently recognized under the federal sentencing guidelines." Id. at 2 (emphasis added).

Reflecting Congressional intent to "strictly regulate[]" sentences for this narrow class of defendants, the safety-valve provision only suspended the operation of the mandatory minimums, and it required courts to "impose a sentence pursuant to [the] guidelines." See 18 U.S.C. § 3553(f).[8] In addition, the Mandatory Minimum Sentencing Reform Act directed the Commission to ensure "that the lowest sentence in the guideline range that would apply to defendants meeting [the safety-valve] criteria will be at least two years in the case of defendants now subject to a five year [mandatory] minimum [sentence]." H.R. Rep. 103-460, at 6. As for safety-valve-eligible defendants who were responsible for larger drug quantities, Congress said it expected that "[g]uidelines ranges for other offenders would . . . increase progressively, in proportion to indicia of increased culpability or seriousness, from the floor of the two year guideline range." Id.

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[8] In light of Booker, that specific requirement has been held to be advisory. See United States v. De Los Santos, 420 F.3d 10, 15 n.5 (1st Cir. 2005) (discussing issue in passing).

### 5. The 1995 Sentencing Commission Report

Also in 1994, Congress directed the Commission to address the penalty levels for the different forms of cocaine, and to submit recommendations for the retention or modification of such differences. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 280006, 108 Stat. 1796, 2097 (1994).

In February 1995, the Commission issued a report entitled Special Report to the Congress: Cocaine and Federal Sentencing Policy (February 1995) ("1995 USSC Report"). See generally United States v. Camilo, 71 F.3d 984, 989-90 (1st Cir. 1995) (discussing report); Tabor, 365 F. Supp.2d at 1057 (same). The Commission reviewed available data that addressed the relationship between crack and powder cocaine use and trafficking and the concerns that had led Congress to impose higher penalties for crack offenses. The Commission concluded, for a number of reasons, that the 100:1 quantity ratio "should be re-examined and revised." 1995 USSC Report at 197.

At the same time, the Commission agreed that the available evidence supported a legislative finding that "crack cocaine poses greater harms to society than does powder cocaine," and, therefore, "important distinctions between the two may warrant higher penalties for crack than powder." 1995 USSC Report at xiii, 195. The Commission determined that:

> (1) "there is a greater likelihood of addiction resulting from the casual use of crack cocaine than from the casual

use of powder cocaine" and "the higher addictive qualities associated with crack combined with its inherent ease of use can support a higher ratio for crack over powder" (1995 USSC Report at 181, 183);[9]

(2) "most cocaine-related emergency room admissions result from smoking crack, [although] most cocaine-related deaths result from injection of powder" (1995 USSC Report at 184);[10]

(3) "the available research suggests that crack cocaine is significantly associated with systemic crime - that is, crime related to its marketing and distribution," and that "there appears to be more criminal activity associated with crack cocaine use and distribution than with powder cocaine use and distribution" (1995 USSC Report at 185-186);

(4) "crack offenders have worse criminal records than any other category of federal drug defendant" and crack offenders "are more likely to have a recent criminal record than any other category of drug offender" (1995 USSC Report at 186);

(5) although powder cocaine was used more often than crack by people in all age groups, a higher percentage of 12 to 17 year olds used crack compared to older users, and, "while both powder cocaine and crack cocaine distributors often are young, those involved in

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[9] Both crack and powder cocaine are psychologically, rather than physiologically addictive. Powder cocaine can be snorted or injected; crack cocaine can only be smoked. The Commission found that, compared to snorting powder cocaine, smoking crack or injecting powder produces more intense, though shorter-lived effects, which, in turn, lead to more frequent use and a greater likelihood of drug dependence. Although the effects of smoking crack and injecting powder are similar, crack is the more popular drug, probably because of its relative ease of use. Thus, in general, crack use is more likely to lead to addiction than powder use. See 1995 USSC Report at 182-183.

[10] Although injecting powder cocaine is potentially more dangerous, the Commission found that the vast majority of cocaine users snort powder (75%) or smoke crack (28%). Only 10% inject powder. 1995 USSC Report at 183 n.229. As the figures suggest, some users ingest cocaine by more than one method.

distributing crack are younger" (1995 USSC Report at 187);

(6) crack cocaine is relatively easy to manufacture and "can be marketed in smaller, more cheaply priced units, thereby rendering it more appealing to people with less money" (1995 USSC Report at 188-189).

Although the Commission "strongly recommend[ed] against a 100-to-1 ratio," it was not prepared to propose a new ratio or to make other changes in the crack/powder sentencing structure. 1995 USSC Report at 198. Rather, it told Congress it would present more comprehensive recommendations in the next Guidelines amendment cycle. 1995 USSC Report at xiv-xv, 198-200.

Despite its recognition that empirical data supported higher penalties for crack offenses, three months after issuing its report the Commission proposed amended guidelines that would have created identical penalties for crack and powder offenses involving the same drug amounts, by lowering the crack base offense levels to the powder base offense levels (instead of by raising the powder levels to the crack levels). See 60 Fed. Reg. 25,074, et seq. (May 10, 1995); Camilo, 71 F.3d at 990.[11]

After holding hearings on the Commission's proposal, however, Congress concluded that there were still valid reasons for treating crack offenders more severely. Specifically, it found that:

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[11] Although all seven members of the Commission believed that the ratio between crack and powder cocaine sentences was too wide, three Commissioners dissented from the proposal to equalize penalties. See H.R. Rep. 104-272, at *22 n.1 (1995), reprinted in 1995 U.S.C.C.A.N. 335, 355 n.1.

> [C]rack is more addictive than powder cocaine; it accounts for more emergency room visits; it is most popular among juveniles; it has a greater likelihood of being associated with violence; and crack dealers have more extensive criminal records than other drug dealers and tend to use young people to distribute the drug at a greater rate. In short, the evidence overwhelmingly demonstrates significant distinctions between crack and powder cocaine.

H.R. Rep. 104-272, at *3, 1995 U.S.C.C.A.N. 335, 337. Those reasons were consistent with the Commission's own findings. See supra at 22-24.

Most significantly for purposes of this appeal, Congress also found that, if the proposed amendments were allowed to go into effect without a corresponding change in the mandatory minimum sentences, "gross sentencing disparities" would be created because sentences just below the statutory minimum would be greatly reduced while the mandatory sentences would remain high. H.R. Rep. 104-272, at *4, 1995 U.S.C.C.A.N. 335, 337. As a result, Congress invoked its powers under 28 U.S.C. § 994(p) and rejected the proposal. See Pub. L. No. 104-38, § 1, 109 Stat. 334, 334 (1995); Camilo, 71 F.3d at 990.

Congress did acknowledge that the existing "100:1 quantity ratio may not be the appropriate ratio." H.R. Rep. 104-272, at *4, 1995 U.S.C.C.A.N. 335, 337. Accordingly, it directed the Commission to re-examine the crack/powder differential and develop new recommendations that reflected certain specific considerations. Primary among those considerations was that "the sentence imposed

for trafficking in a quantity of crack cocaine should generally exceed the sentence imposed for trafficking in a like quantity of powder cocaine." Pub. L. No. 104-38, § 2(a)(1)(A); 28 U.S.C. § 994 Note.

### 6. The 1997 Sentencing Commission Report

In April 1997, the Sentencing Commission issued another report entitled Special Report to the Congress: Cocaine and Federal Sentencing Policy (April 1997) ("1997 USSC Report"). See generally Tabor, 365 F. Supp.2d at 1057-58 (discussing report). In this report, the Commission recommended a significant narrowing, but not an equalization, of the ratio for crack and powder penalties. Referring primarily to the findings of the 1995 report, the Commission again concluded that the 100:1 quantity ratio was excessive, but it also "reiterate[d] the conclusion from its 1995 report that federal sentencing policy must reflect the greater dangers associated with crack." 1997 USSC Report at 2-4. Consequently, the Commission recommended that the differential be reduced by raising the quantity threshold for crack offenses and lowering the quantity threshold for powder offenses.[12] The Commission recommended lowering the powder threshold to recognize

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[12] Specifically, the Commission recommended that Congress raise the crack threshold for the five-year mandatory minimum sentence from five grams to between 25 and 75 grams, and lower the comparable threshold for powder cocaine from 500 to between 125 and 375 grams, thereby creating a 5:1 quantity ratio. 1997 USSC Report at 2, 5, 9.

the fact that "nearly all cocaine is initially distributed in powder form until some later time in the distribution chain when some is then converted to crack." 1997 USSC Report at 5. The Commission did not, however, propose amendments to the Guidelines to implement its recommended changes.

In response to the Commission's 1997 report, members of Congress introduced a number of bills addressing the crack/powder sentencing differential. The bills took varying approaches to the concerns raised by the Commission; some would have equalized penalties by raising the crack quantity thresholds, others would have bridged the gap by lowering the powder quantity thresholds, while still others would have amended both the powder and crack quantity thresholds to narrow, but not equalize, the penalties. See U.S. Department of Justice, Federal Cocaine Offenses: An Analysis of Crack and Powder Penalties (March 19, 2002) ("2002 DOJ Report"), at 18. Ultimately, however, Congress could not reach any consensus on whether, how, or to what degree, to revise the statutory thresholds that trigger the mandatory minimum sentences.

**7. The 2002 Sentencing Commission Report**

On December 12, 2001, members of the Senate Judiciary Committee asked the Sentencing Commission to update the 1997 USSC Report to provide guidance as Congress continued to evaluate the appropriateness of the crack/powder penalty differential. In 2002, the Commission issued a third report entitled Report to the

Congress: Cocaine and Federal Sentencing Policy (May 2002) ("2002 USSC Report"), which again determined that the 100:1 ratio was no longer advisable. See generally Tabor, 365 F. Supp.2d at 1058 (discussing report).

The 2002 USSC Report concluded that the 100:1 quantity ratio should be narrowed for several reasons. First, more recent data suggested that the penalties were disproportionate to the relative harms presented by the two drugs. Second, some of the harms associated with crack could be addressed more precisely by adding specific enhancements that would apply neutrally to all drug offenses. Third, the severe crack penalties seemed to fall disproportionately on lower-level participants in drug offenses and, most significantly, on African-Americans. See 2002 USSC Report at v-viii.

The 2002 report did acknowledge, however, that "differences in the intrinsic harms" posed by crack and powder cocaine, and "differences in other harms [associated with crack] that cannot be adequately accounted for by specific sentencing enhancements" justified punishing crack offenses more severely than powder cocaine offenses involving the same drug amounts. 2002 USSC Report at 92. Data compiled by the Commission and by the Department of Justice in 2002 supported several of the key findings that originally caused Congress to impose more severe penalties for crack cocaine than for powder cocaine. For example, the new data

bore out the conclusion that crack is generally more addictive than powder cocaine. 2002 DOJ Report at 3; 2002 USSC Report at 16, 18-19, 93-94, 106 ("crack cocaine always represents the most addictive form of cocaine"). Moreover, although the majority of both crack and powder offenses did not involve direct violence, crack offenses were still more often associated with other serious criminal behavior (including systemic violence) than powder offenses. 2002 DOJ Report at 8-9;[13] 2002 USSC Report at 57, 92, 100-102.[14] On the other hand, the Commission found that the new data no longer supported earlier beliefs that crack cocaine has a greater physiological effect, and is more likely to be used by young people.[15]

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[13] A 2000 study concluded that, in the absence of crack, urban crime rates in 1991 would have been 10% lower. 2002 DOJ Report at 8-9. The study also found that the most prevalent form of violence related to crack use was aggravated assault. Id. at 9. Additionally, a 1998 study identified crack as the drug most closely related to trends in homicide rates. Id. at 9.

[14] Even though data reported by the Commission indicated that the majority of crack and powder offenses did not involve weapons, crack offenses were more likely to involve weapons (25.5% of crack offenses versus 17.6% of powder offenses involved weapons). 2002 USSC Report at 54, 100, 107. Similarly, although rare in both kinds of offenses, crack offenses were more likely than powder offenses to involve bodily injury. 2002 USSC Report at 57, 100, 107.

[15] Contrary to the earlier findings of the Commission, 1995 USSC Report at 33-34, 83-84, the 2002 USSC Report found that relatively few young people use crack or powder cocaine, and powder is more likely to be used. 2002 USSC Report at 96. In a related area, data indicated that the involvement of minors in crack or powder cocaine offenses had declined significantly between 1995 and 2000. 2002 USSC Report at 57. However,

The 2002 Report recommended that Congress:

> (1) establish a new 20:1 crack/powder ratio by "increas[ing] the five-year mandatory minimum threshold quantity for crack cocaine offenses to at least 25 grams and the ten-year threshold quantity to at least 250 grams";
>
> (2) direct the Commission to devise specific Guideline enhancements for all drugs, to account for certain aggravating factors, such as involvement of a dangerous weapon, bodily injury caused by violence, and distribution to youth or employment of minors in distribution; and
>
> (3) maintain the current thresholds for powder cocaine offenses.

2002 USSC Report at viii. As in the case of the 1997 Report, the Commission did not propose specific amendments to the Guidelines.[16]

Congress has held hearings on the latest Commission recommendations, but no consensus has been reached.[17] Members of Congress continue to hold different views on whether, how, and to what extent, changes in the existing crack/powder sentencing structure should be made. See, e.g., 149 Cong. Rec. S10599-01,

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although rates of participation in both kinds of offenses were relatively low, crack offenses were more than twice as likely as powder offenses to involve minors (4.2% compared to 1.8% in 2000). Id.

[16] The Commission did, however, develop a prototypical set of revised Guidelines to illustrate its recommendations. 2002 USSC Report, Appendix.

[17] The Senate Judiciary Committee, for example, held hearings on the Commission's proposal in May 2002. See Statement of Senator Orrin Hatch, Senate Judiciary Subcommittee on Crime and Drugs, available at 2002 WL 1067869 (F.D.C.H.) (May 22, 2002).

*S10602 (2003). Two months ago, the Commission announced that a key priority in the upcoming Guidelines cycles will be working with the three branches of government on proposed changes related to its 2002 report. See 70 Fed. Reg. 51,398, 51,399 (Aug. 30, 2005).

**8. This Court's Rejection of Earlier Attacks on the 100:1 Ratio**

Prior to Booker, this Court upheld the 100:1 crack/powder ratio against several constitutional attacks. See United States v. Eirby, 262 F.3d 31, 41 (1st Cir. 2001); United States v. Berrios, 132 F.3d 834, 842 (1st Cir. 1998); United States v. Graciani, 61 F.3d 70, 74-75 (1st Cir. 1995); United States v. Lewis, 40 F.3d 1325, 1344-45 (1st Cir. 1994); United States v. Singleterry, 29 F.3d 733, 739-41 (1st Cir. 1994). In so doing, it summarized the policy factors which support Congress's choice here. See Singleterry, 29 F.3d at 740. While suggesting that it had its own reservations about the ratio, the Court stated: "We leave the resolution of these matters to the considered judgment of those with the proper authority and institutional capacity." Singleterry, 29 F.3d at 741 (emphasis added); see also United States v. Manzueta, 167 F.3d 92, 94 (1st Cir. 1999) ("Whether the ratio is fair or not, Congress has spoken with ample clarity").

This Court has also held that judicial disagreement with the ratio may not serve as a basis for a downward departure, noting that Congress has rejected proposed changes to the ratio. 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); Camilo, 71 F.3d at 989-90. The Court remarked: "we cannot blind our eyes to the fact that the Congress shot down the Commission's recommendation." Sanchez, 81 F.3d at 11.

### C. THE DISTRICT COURT'S CATEGORICAL REJECTION OF THE 100:1 CRACK/POWDER SENTENCING RATIO IN FAVOR OF ITS OWN 20:1 RATIO WAS UNREASONABLE

#### 1. Introduction

As noted (supra at 10-15), after Booker, a sentence within the Guidelines range is presumptively reasonable. Although variances are now permissible even in the absence of a downward departure, the district court's decision to ignore the crack guidelines in all cases, based on its policy view that the 100:1 ratio is too harsh and that a 20:1 ratio makes more sense (Appendix 32-34 & 49-52), is unreasonable as a matter of law. This is so because the court's approach: (1) rejects Congress's express judgment concerning the appropriate level and relative severity of penalties for crack offenses (see infra at 33-37); (2) would lead to significant and unwarranted sentencing disparities (see infra at 37-41); and (3) conflicts with (a) the Supreme Court's admonition to take the Guidelines into account in all cases, (b) the case-specific focus of the sentencing statutes, and (c) traditional principles of discretionary decision-making (see infra at 42-45).

### 2. Frustrating the Will of Congress

The federal drug statutes and corresponding Guidelines reflect a Congressional policy that trafficking in crack cocaine should be punished more severely than trafficking in powder cocaine. See Singleterry, 29 F.3d at 740. Even if the Sentencing Commission believes that the current policy is unjustified, Congress has not yet seen fit to agree. As explained (supra at 24-31), not only has Congress failed to adopt the Commission's proposals to narrow the crack/powder sentencing differential, but it has outright rejected the idea that sentences for crack offenses should be the same as sentences for powder offenses. See Camilo, 71 F.3d at 990.

Reasonable people may disagree over the relative merits of the Commission's recommendations and Congress's choices. It is beyond debate, however, that the authority to classify the gravity of particular offense categories and the severity of punishment rests exclusively with Congress. See, e.g., United States v. Evans, 333 U.S. 483, 486 (1948) (power to set punishment for federal crimes belongs solely to Congress). Because the crack Guidelines are built around legislative policy and merely reflect that policy, it was unreasonable for the district court to impose non-Guidelines sentences based solely on its own preference for the Commission's proposed 20:1 ratio over Congress's continued adherence to the original 100:1 ratio. Although Booker gives courts much greater leeway to deviate from the Guidelines in individual cases, it does

not leave judges "free to disagree about the fundamental premises of sentencing, [or] to implement their own perceptions of what policies should drive punishment." Jaber, 362 F. Supp.2d at 370 (Gertner, J.); see also id. at 381 (rejecting defendant's request for sentence of "time served" on ground that "Congress and the Commission have expressed their deep concern that pseudoephedrine offenses be treated seriously" and that court was "not free to reject that approach based on [its] personal predilection"). In short, "reasonableness" cannot be evaluated in the abstract, but must take into account the overall sentencing framework and goals established by Congress.

Adherence to these principles reflects proper deference to the distinct roles played by the judicial and legislative branches in our Constitutional system.[18] Given that Congress's policy choice here does not offend the Constitution, "[i]t is not for [the courts] to decide whether the 100:1 ratio is wise or equitable; that is a question for the popularly chosen branches of government." United States v. Lewis, 90 F.3d 302, 306 (8th Cir. 1996); see also United States v. Gaines, 122 F.3d 324, 330 (6th Cir. 1997) ("Reasonable minds can differ as to whether Congress or

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[18] The Supreme Court underscored the importance of this distinction when it upheld the constitutionality of Congress's limited delegation to the Sentencing Commission. See Mistretta, 488 U.S. at 364 ("Congress, of course, has the power to fix the sentence for a federal crime . . . and the scope of judicial discretion with respect to a sentence is subject to congressional control").

the Sentencing Commission chose the best policy, but as long as the 100:1 ratio does not violate the Constitution, it is for Congress to make the policy choices, not the Sentencing Commission or the courts"); United States v. Berger, 103 F.3d 67, 71 (9th Cir. 1996) (rejecting "the notion that a district court may override the express intention of Congress regarding penalties for crack cocaine and powder cocaine" and stating that "[i]t is not the province of this Court to second guess Congress's chosen penalty"); United States v. Fonts, 95 F.3d 372, 374 (5th Cir. 1996) ("[I]t is not the province of this Court to second guess Congress'[s] chosen penalty. That is a discretionary legislative judgment for Congress and the Sentencing Commission to make"); United States v. Alton, 60 F.3d 1065, 1071 (3d Cir. 1995) ("We defer to Congress and the Sentencing Commission to address the related policy issues [involving the impact of crack cocaine penalties on African-Americans] and to consider the wisdom of retaining the present sentencing scheme").

Booker does not undercut that conclusion. Although the courts cited above were addressing downward departure authority under the Guidelines, they were not simply construing the extent of that authority based on the language of the Guidelines or § 3553. Rather, the courts were applying broader principles concerning the proper relationship between Congress and the courts when it comes to sentencing policy. Those principles are as applicable to a post-Booker discretionary decision to impose a non-Guidelines

sentence as they are to a decision to depart from the Guidelines.

Even though the judge in Tabor personally disagreed with the 100:1 ratio, he reasoned as follows:

> In summary, Congress has made a choice regarding crack cocaine. To my way of thinking, it is not the best choice, but it is not a crazy one either. As a judge, I should defer to the choice of penalties that Congress has made for crack cocaine even though I would quickly do something different if it were within my proper role to choose. This is because judge-made changes to the crack Guidelines, while sometimes principled, are (1) undemocratic, and (2) not plainly superior to the judgments of Congress. We should maintain the status quo when exercising our Booker discretion within the context of the crack cocaine Guidelines because we are judges and not legislators and because the status quo is what Congress has chosen. [Footnote omitted] When it comes to the severity of punishment, Congress has the right to be wrong.

Tabor, 365 F. Supp.2d at 1060.

Finally, one of the reasons why Congress has not revised the crack cocaine penalty system is that, even among members who believe that some reduction in the crack/powder differential is needed, there is disagreement about the best way to make that reduction. See supra at 27, 30-31. Congress is not alone. Each of the Commission's studies has resulted in a different approach to reducing the differential. See supra at 22-30. The fact that each of the bodies whose role is to formulate national sentencing policy finds it difficult to agree internally on how best to resolve this issue strongly suggests that federal courts, which are not policymaking bodies, should refrain from interceding with their own alternative sentencing schemes. This Court has already intimated

as much. See Singleterry, 29 F.3d at 741 ("We leave the resolution of these matters to the considered judgment of those with the proper authority and institutional capacity.") (emphasis added); see also Tabor, 365 F. Supp.2d at 1061 ("Simply stated, unlike Congress or the Commission, we judges lack the institutional capacity (and, frankly, the personal competence) to set and then enforce one new, well-chosen, theoretically coherent, national standard.").

**3. Creating Unwarranted Disparities**

Ignoring the punishment scheme for crack cocaine would also contradict 18 U.S.C. § 3553 and Booker, both of which require judges to avoid unwarranted sentencing disparities. See 18 U.S.C. § 3553(a)(6); Booker, 125 S. Ct. at 759-61 & 764. Several different types of disparities would result.

If this Court upholds the "I can select any ratio I want" approach, the consequences are not hard to foresee: Otherwise similar defendants in neighboring districts or adjacent courtrooms will receive markedly disparate sentences based solely on their judges' personal opinions regarding the relative dangers of crack and powder cocaine. Some judges will gravitate to the 20:1 ratio, which now prevails in this district.[19] Others might endorse the

[19] See United States v. Perry, 2005 WL 2260196, at *23 & n.30 (D. R.I. Sep. 16, 2005).

Commission's earlier 5:1 proposal.[20] Many would likely adhere to the 100:1 ratio, which continues to hold sway in the other First Circuit districts. Still others might opt for complete parity. Some might even attempt to formulate their own unique ratios or alternative remedies, perhaps raising powder cocaine sentences instead of lowering crack sentences. After all, ratios are a two way street, and as the Tabor court noted: "[T]here is no plainly superior reason why a judge, using his or her newfound Booker discretion, ought to lessen the presumptive prison sentence for crack as opposed to increasing the presumptive prison sentence for powder cocaine." Tabor, 365 F. Supp.2d at 1060 (emphasis in original); see also 2002 USSC Report at 110 (noting proposals to raise powder penalties). In short, defendants who committed the same essential act involving the same drug weight would start off at sentencing with a big advantage or disadvantage depending on the fortuity of the judge they drew.

As one circuit court recognized pre-Booker, permitting reduced sentences based on such judicial ratio shopping "would allow every sentencing district judge to select his or her personal crack-cocaine ratio. . . . It is hard to imagine a more flagrant violation of the Guidelines' purpose to avoid unwarranted sentencing disparities among defendants with similar records who

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[20] There was yet another ratio (10:1) proposed by the Clinton Administration. Tabor, 365 F. Supp.2d at 1060.

have been found guilty of similar criminal conduct." In re: Sealed Case, 292 F.3d 913, 915-16 (D.C. Cir. 2002) (internal quotation marks and citations omitted). The same logic applies post-Booker, given that the SRA is largely intact, because the "I can select any ratio I want" approach would also "undermine the [SRA's] basic aim of ensuring similar sentences for those who have committed similar crimes in similar ways." Booker, 125 S. Ct. at 760. This is not just a Guidelines concern. It is a statutory concern as well, and the concern does not somehow vanish in the wake of Booker.

Ignoring the crack cocaine guidelines would also create unwarranted disparities of a different type due to the fixed nature of the mandatory minimums. See United States v. Anderson, 82 F.3d 436, 440-41 (D.C. Cir. 1996). For example, a first-time offender convicted of distributing 50 or more grams of crack would be subject to the ten-year mandatory minimum (or 120 months). Because the Guidelines were built around the mandatory minimums, the same offender who sold 49.9 grams of crack cocaine would (quite properly) face a presumptive sentence in the range of 97 to 121 months under the current version of the advisory Guidelines. USSG § 2D1.1(c)(5) (2004). By contrast, if a district court applied the Commission's 2002 proposal (advocating the 20:1 ratio), the second offender, though virtually identical to the first offender, would face a dramatically lower sentence, in the range of 63-78 months. See 2002 USSC Report, Appendix at A-4; USSG ch. 5, pt. A

(sentencing table) (2004). A mere 1/10 of a gram's difference would cut the sentence nearly in half. The effect of the Commission's 1995 equalization proposal would be even more dramatic, and even less supportable. There is nothing reasonable about such disparities, especially when they are institutionalized on a courtroom-by-courtroom basis.

Although the district court stated that it was following the lead of the Sentencing Commission (Appendix 32-33 & 50), "it is significant that the Commission's reform proposal[s] included an explicit invitation to Congress to change the mandatory minimums themselves," thus signifying that the Commission would not endorse sentencing practices that were out of sync with Congressional directives. Anderson, 82 F.3d at 441. "So far as appears, [the Commission] has not altered its original view that 'a logical sentencing [structure] for drug offenses' requires refinements coordinated with the mandatory minimums." Id. (internal citation omitted). The failure to ensure coordination with the statutory penalties was one of the reasons why Congress quashed the Commission's unilateral attempt to equalize crack and powder cocaine penalties in 1995. See supra at 25.

There is a further distorting effect. Applying either of the Commission's more lenient sentencing proposals to defendants who dealt in crack amounts above the mandatory minimum thresholds would cause an unjustifiable "flattening" of sentences for defendants

whose offenses are of varying degrees of severity, as measured by drug quantity. For example, if a district court adopted the 20:1 ratio (as the court did here), three first-time offenders who sold, respectively, 51 grams, 162 grams, and 249 grams of crack would be subject to sentencing ranges of 63-78 months, 78-97 months, and 97-121 months. See 2002 USSC Report, Appendix at A-4; USSG ch. 5, pt. A (sentencing table) (2004). However, because of the ten-year mandatory minimum, all three would have to be sentenced to at least 120 months, and only one could be sentenced to more than that (121 months), despite the significant difference in their levels of culpability. By contrast, the current Guidelines call for increasing sentencing ranges for quantities above the mandatory minimum thresholds so that sentences can reflect an increased level of criminal activity beyond the threshold required for the mandatory minimum sentence. That is consistent with the goal of imposing sentences that fairly reflect the actual conduct of the defendant.

To be sure, because the Guidelines are now advisory, judges might find ways of tinkering with the various ratios in an attempt to compensate for these skewed effects. But even then, the result would be hundreds of de facto Guidelines systems, each with its own set of benchmarks. That is a recipe for chaos, not "reasonable" sentences. Judges ought to start from the same basic plateau before exercising the discretion contemplated by Booker.

### 4. Ignoring the Centrality of the Guidelines and the Principle that Post-Booker Discretionary Sentences Should be Based on Case-Specific Factors

That is not to say that, following Booker, a non-Guidelines sentence in a crack cocaine case will always be unreasonable. On the contrary, it is quite clear that courts are free to impose such sentences after Booker. To avoid unwarranted disparities and remain true to traditional sentencing philosophy, however, courts should exercise this new-found discretion based on compelling individual circumstances instead of on their own abstract policy views.

As the Supreme Court observed in Booker, the requirement that sentencing courts "must consult [the] Guidelines and take them into account when sentencing" will "continue to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary." Booker, 125 S. Ct. at 767 (emphasis added). That is, "Congress' basic statutory goal -- a system that diminishes sentencing disparity -- depends for its success upon judicial efforts to determine, and to base punishment upon, the real conduct that underlies the crime of conviction." Id. at 759 (emphasis in original). It is such "real conduct" or case-specific circumstances which may justify disparate treatment or tailoring. Booker, 125 S. Ct. at 757.

The idea that sentencing disparities should only be tolerated in order to account for factually unique cases is exemplified in three federal statutes. In the first statute -- a key beacon for sentencing judges post-Booker -- Congress instructed judges to focus on enumerated case-specific factors, while making an effort to avoid unwarranted sentencing disparities. 18 U.S.C. § 3553(a). In the second statute, Congress stated that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a [defendant] . . . which a court . . . may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. § 3661. And in the third statute, Congress ordered the Sentencing Commission to devise policies that "avoid[] unwarranted sentencing disparities" but that allow "sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices." 28 U.S.C. § 991(b)(1)(B) (emphasis added). The clear message of these provisions is that judges are not to enact their own "general sentencing practices" but are to make individualized assessments regarding what punishment is warranted in a particular case. The fact that the Guidelines are now advisory does not alter this principle.

As discussed, this Court has repeatedly held that the crack/powder sentencing differential is not an individual circumstance that would justify departing from the Guidelines

range. See Andrade, 94 F.3d at 14-15; Sanchez, 81 F.3d at 11; Camilo, 71 F.3d at 989-90. Although courts are no longer limited to applying departure rules to justify sentences outside the applicable Guidelines range, a court should not impose a non-Guidelines sentence based solely on its own assessment of the relative seriousness of a whole category of offenses, especially where that assessment conflicts with Congress's assessment.

A categorical refusal to apply the crack Guidelines in all crack cases would also be inconsistent with Booker's directive to "consult th[e] Guidelines and take them into account" in every case, Booker, 125 S. Ct. at 767, and with the corresponding statutory command to "consider . . . the sentencing range established for . . . the applicable category of offense . . .," 18 U.S.C. § 3553(a)(4)(A). There may be case-specific reasons to discount the applicable range, but a policy of rejecting that range in every single instance, regardless of circumstances, is not meaningful consideration or consultation.

Moreover, application of such a categorical sentencing rule is inconsistent with a court's general duty to exercise discretion on a case-by-case basis. Ordinarily it is an abuse of discretion "when the trial court, while recognizing its right to exercise discretion, 'declines to do so, preferring instead to adhere to a uniform policy.'" Houston v. United States, 592 A.2d 1066, 1067 (D.C. 1991) (citation omitted) (reversing and remanding for re-

sentencing where sentencing judge had established policy of not applying available sentencing provision when certain circumstances were present). "[T]he discretion called for . . . is the exercise of discretion in individual cases, not the discretion of the trial judge to adopt a uniform policy . . . in all cases". United States v. Queen, 435 F.2d 66, 67 (D.C. Cir. 1970). So too, the exercise of post-Booker discretion calls for judging, not policy making.

**5. Why Perry Was Wrongly Decided**

The most forceful decision to the contrary originates from this district. See United States v. Perry, 2005 WL 2260196, at *16-24 (D. R.I. Sep. 16, 2005).[21] The government addresses the key points raised in Perry.

First, the bulk of the Perry decision is devoted to a policy discussion concerning why, in light of an "overwhelming amount of authority -- empirical, scholarly, and otherwise," id. at *20: (1) the 100:1 ratio "lack[s] any principled justification that can withstand scrutiny under § 3553," id. at *19; (2) the 2002 Commission report is "compelling," id.; and (3) the 20:1 ratio "makes the most sense," id. at *24. There are three responses: (1) the fact that the decision to embrace the 20:1 ratio over the 100:1 ratio is so policy-driven is precisely why the matter is appropriately addressed by Congress, not the courts; (2) it is

[21] The government recently cross-appealed in Perry. The case will present a number of other issues, including possible trial issues.

simply untrue that there is no "principled justification" for the 100:1 ratio; and (3) conversely, there is no empirical basis for the conclusion that the 20:1 ratio is plainly the best option as between this and other options (supra at 16-31). Indeed, even the Commission admitted that the quest for an ideal ratio "is a difficult and imprecise undertaking." 2002 USSC Report at 104.

Second, and ironically, the Perry court reasoned that it was attempting to reduce sentencing disparities. But it is clear that the "disparity" that the court had in mind is the statute-based disparity in the punishments for crack versus powder offenses. See, e.g., Perry, 2005 WL 2260196 at *18-19 (referring to the "crack/powder disparity" and "the unjustified disparity between powder and crack cocaine sentences"). Congress itself has already created these separate punishment categories, however, so the complaint about "disparity" is merely a restatement of the court's disagreement with Congress's choice. Cf. United States v. Martinez-Flores, No. 04-2681, 2005 WL 2837518, at *6 n.3 (1st Cir. Oct. 28, 2005) ("It is arguable that even post-Booker, it would never be reasonable to depart downward based on disparities between fast-track and non-fast-track jurisdictions given Congress' clear (if implied) statement in the PROTECT Act provision that such disparities are acceptable.").

In light of the legislatively-drawn division between crack and powder offenses, the Perry court was comparing apples and oranges.

In measuring atypicality for Guidelines purposes, the relevant comparison is between individual crack offenders. See Anderson, 82 F.3d at 447 n.3 (dissenting opinion) (reading majority opinion as implying this and agreeing with majority on this point). That is also the relevant class of offenders for purposes of measuring disparities under § 3553(a)(6). More importantly, the Perry court failed to address the relevant and very real disparities that will result in the case of this group of defendants if its position is accepted. See supra at 37-41.

Third, to the extent that the Perry court relied on the "seriousness of the offense" factor in 18 U.S.C. § 3553(a)(2)(A), Perry, 2005 WL 2260196 at *21, Congress has already made the categorical judgment that crack offenses are far more "serious" as a general matter. Instead of second-guessing that judgment, the appropriate role of a sentencing court is to decide how serious the given crack offense was based on the particular facts of the case. Neither is it the proper role of a court to decide, for purposes of § 3553(a)(2)(A), that Congress's chosen ratio does not promote respect for the law or is unjust, as the court apparently believes, id. at *21 & 22. The analysis should be case-specific, and it should take the broad, policy-based parameters of sentencing as a given. See Jaber, 362 F. Supp.2d at 370 (Gertner, J.).

Fourth, as noted (supra at 31-37), this Court's prior opinions concerning the 100:1 ratio are relevant to the analysis even if

they are technically "distinguishable," Perry, 2005 WL 2260196 at *24 n.32, because they dealt with constitutional and departure issues and not the question of post-Booker sentencing discretion.

Fifth, the government's position would not require courts to "blindly apply the Guideline range," id. at *24, or to "effectively impose the mandatory Guideline regime rejected by Booker/Fanfan," id. at *24 n.33. As explained (supra at 42-45), judges are unquestionably free to impose non-Guidelines sentences based on an individualized assessment of a defendant's case and the § 3553(a) factors. Conceivably, the Perry court could have justified the sentence it selected based on that sort of tailored analysis. What judges are not free to do is create across-the-board rules that clash with a bedrock sentencing policy of Congress.

Sixth, although the court relied on the so-called "parsimony" principle of 18 U.S.C. § 3553(a), id. at *20 & *24, a court cannot bless an otherwise improper sentence by invoking this provision. See Tabor, 365 F. Supp.2d at 1061 n.14. Congress has already made the categorical decision that much higher sentences are "necessary" for crack offenses and that lower sentences are not "sufficient." To the extent that the parsimony principle has a useful role in sentencing, it must be applied with respect for that decision, not as a basis for overriding it. Cf. Anderson, 82 F.3d at 441-42.[22]

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[22] Kindred decisions are similarly flawed. See United States v. Fisher, 2005 WL 2542916 (S.D.N.Y. Oct. 11, 2005); United States v. Smith, 359 F. Supp.2d 771 (E.D. Wisc. 2005).

## VI. CONCLUSION

The district court imposed the contested sentences based primarily (and in Lewis's case, exclusively) on its policy view that the 20:1 crack/powder sentencing ratio is preferable to the 100:1 ratio imbedded in the statutory penalties and mirrored in the Guidelines ranges. (Appendix 32-34 & 49-52.) For the reasons stated above, the court's approach was flawed as a matter of law. Accordingly, this Court should reverse both sentences and remand for resentencing.

Respectfully submitted,

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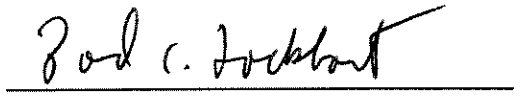
## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I, Donald C. Lockhart, certify that the word processing system of the Office of the United States Attorney states that this document (excluding the table of contents, the table of authorities, the certificate of compliance, and the certificate of service) contains 11,629 words.



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## CERTIFICATE OF SERVICE

I hereby certify that on this the 2nd day of November, 2005, I served two copies of the within Appellant-United States' Brief, and copy of the accompanying Joint Appendix, by hand-delivery, on each of the following:

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