Sentencing Law and Policy

Cases, Statutes, and Guidelines

Second Edition

2008-2009 Supplement

Nora V. Demleitner
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ASPEN
PUBLISHERS

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1185 Avenue of the Americas, New York, NY 10036
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Introduction

The practice and study of sentencing law since 2000 has been something like riding a roller coaster, and it shows no sign of stopping. The wild ride has been highlighted by a series of decisions by the United States Supreme Court,starting most visibly with*Blakely* and *Booker* in 2004 and 2005. But in a country with 52 major sentencing systems, the excitement extends far beyond the Supreme Court fireworks. There is no other area of the law going through this kind of transformation.

The Supreme Court's cases have attracted new attention from legislators and actors within the criminal justice systems. These cases have also generated significant new interest in sentencing throughout the legal academy. For those scholars who have been following the past 20-30 years of modern sentencing reforms, this flood of developments and attention is both exciting and baffling. It is exciting because current developments may provide the chance for significant new reforms in an area filled with scholarly and policy problems. It is baffling since the specific focus of the Supreme Court (the role of the jury in sentencing) comes in an area that few scholars had considered important.

The idea of "sentencing law" as a coherent field of legal study and practice is itself still in its adolescence. While the turbulence in sentencing law makes for very exciting classes and discussions, it also multiplies the challenges of getting a handle on the field. With the profusion of federal and state cases and the sprouting of many legislative and executive initiatives, teachers and students must continually work to see the still young forest along with the many fascinating trees.

We encourage students and teachers to follow sentencing developments on the Sentencing Law & Policy blog (which can be accessed at sentencing.typepad.com or through the casebook web pages at www.sentencingbook.com). Extensive scholarly discussion of sentencing law can be found in the *Federal Sentencing Reporter* or in special symposia being produced by law reviews. Other cutting-edge developments can be found in judicial decisions, proposed and newly-enacted federal and state legislation, executive branch policy statements and research, individual pieces of legal scholarship, and opinion commentary.

Chapter 1

The Purposes of Punishment and Sentencing

A. Social Purposes of Sentencing

1. Stated Purposes

Page 9. Add this material at the end of note 3.

Oregon trial judge Michael Marcus has argued forcefully against the principle of limited retributivism in writings on the goals of sentencing. Judge Marcus believes that the aim of the sentencing process should be crime reduction, and he has written provocative articles advocating that sentencing decisions be based on empirical data about what sanctions and programs reduce the likelihood of recidivism for different offenders. See, e.g., Michael Marcus, Sentencing in the Temple of Denunciation: Criminal Justice's Weakest Link, 1 Ohio State Journal of Criminal Law 671 (2004); Michael Marcus, Archaic Sentencing Liturgy Sacrifices Public Safety: What's Wrong and How We Can Fix It, 16 Federal Sentencing Reporter 76 (2003).

Operating with similar concerns, in recent years the Virginia Sentencing Commission has been processing risk offender data to provide Virginia's judges at sentencing with a statistical report that analyzes characteristics of offenders to quantify the likelihood that a particular offender will commit another crime. Virginia's system of risk assessment at sentencing is legally and politically controversial because it attempts to estimate the threat each offender poses to public safety and suggests sentencing outcomes should be influenced by statistical probabilities. See Emily Bazelon, Sentencing by the Numbers, New York Times Magazine, Jan 2. 2005; Richard P. Kern and Meredith Farrar-

Owens, Sentencing Guidelines with Integrated Offender Risk Assessment, 16 Federal Sentencing Reporter 165 (Feb. 2004).

Relatedly, some academics have started asserting that the debate over punishment theories needs to pay considerably more attention to how different individuals perceive and experience different types of punishment. Professor Adam Kobler, for example, has complained that even though people "vary substantially in their experiences of punishment, our sentencing laws pay little attention to such differences," which in turn creates "a disconnect between our punishment theories and practices." *See* Adam Kobler, *The Subjective Experience of Punishment*, available at http://papers.ssrn.com/abstract_id=1090337 (2008). He put forward these two claims:

> First, a successful theory of punishment must take account of offenders' subjective experiences when assessing punishment severity. Second, given the uses most punishment theories put to the concept of punishment severity, these theories imply that we are obligated to subjectively-calibrate punishment, at least when we can do so in a cost-effective, administrable manner.

See also Professors John Bronsteen et al., *Happiness and Punishment*, available at http://papers.ssrn.com/abstract_id=1241008 (2008) (arguing that punishment theorists, both retributivist and utilitarian, have failed to account for human beings' ability to adapt to changed circumstances, including fines and even imprisonment).

B. Purposes in Practical Context

3. Politics, Philosophy, and Economics

Page 83. Add this material after the note.

National Crime Politics in America. Despite an extraordinarily lengthy and dynamic presidential campaign which included sharply contested primaries in both major political parties, the 2008 election season has included barely any serious national discussion of crime and punishment issues either in the traditional media or in the "new media" of political websites and blogs. Even the websites of the major candidate have few explicit mentions of classic criminal justice concerns.

Why has crime and punishment dropped off the national political radar? Is the notable *lack* of attention given to these issues in national politics a welcome or troublesome development?

Chapter 2

Who Sentences?

A. Sentencing in the Courtroom

2. Sentencing Juries

Page 107. Add this material after note 4.

4. *Jury sentencing in the "war on terror."* After years of legal wrangling over the constitutionality and structure of the military tribunals, the criminal trial via military tribunal of Ramdan Hamdan, Osama bin Laden's driven, went forward in 2008 and resulted in a conviction. To the surprise of many, the same jury that convicted Hamdan imposed an unexpectedly light sentence, which had the effect of making him eligible for release in less than a year because of the time he had already served in detention at Guantanamo Bay.

What lessons and insights can and should we take away from the surprisingly short sentence imposed upon Hamdan by the military jury that heard his case? Is there reason to think that jury sentencing might be especially appropriate—or especially problematic—for certain types of crimes or for certain types of defendants?

B. Legislatures and Commissions

Page 113. Add this material at the end of note 4.

At the federal level, legislators have not expressed any serious interest or concern about modern sentencing severity and increases in the size of the United States prison population. The one exception has been Senator Jim Webb (D-VA) who in 2007 and 2008 conducted hearings through Congress's Joint Economic Commission to examine the costs of mass incarceration and American drug policy. Though Senator Webb invited leading academics to testify on these subjects, his efforts garnered surprisingly little attention in either the traditional media or the "new media." Should legislatures focus on the economic costs and benefits of sentencing law and policy, or are other values necessarily paramount in this arena?

C. Prosecutors

Page 129. Add this material at the end of problem 2-5.

In June 2008, the Supreme Court in *District of Columbia v. Heller*, 128 S. Ct. ____ (2008), held that the Second Amendment protects an individual right to possess a firearm in the home for self-protection, though the Court left unclear the exact scope of this right or the level of constitutional scrutiny that must now be given to firearm prohibitions. In dicta, the majority opinion in *Heller* asserted that the holding should not cast doubt on laws that prohibit felons from possessing firearms. Nevertheless, within weeks of the *Heller* ruling, a number of federal defendants began to bring Second Amendment challenges to federal laws that prohibit felons (and certain misdemeanants) from possessing any type of firearm.

In the wake of *Heller*, do prosecutors now have an independent constitutional responsibility to consider the meaning and scope of the Second Amendment right recognized by the Supreme Court when deciding whether and how to pursue federal firearm charges?

Chapter 3

Regulating Discretion

A. Sentencing Guideline Structures

3. Development and Structure of the Federal Sentencing Guidelines

Pages 212-13. Replace last textual paragraph and charts with following materials:

In December 2007, the Supreme Court addressed the standards for reviewing sentencing imposed below the applicable guidelines range in Gall v. United States, 128 S. Ct. ___ (2007), and Kimbrough v. United States, 128 S. Ct. ___ (2007). In both these cases, circuit courts had reversed district court decisions to impose a below-guideline sentence and the defendants appealed to the Supreme Court with the hope that the Justices would declare their below guideline sentences to be reasonable. In these cases (both of which are partially reprinted in this Supplement, *infra*), the Supreme Court stressed that circuit review of sentences outside the guideline should be subject to the same deferential abuse-of-discretion standard that is applied when reviewing within-guideline sentences. And the Supreme Court, applying this standard, upheld as reasonable the below-guideline sentences initially given by district courts in *Gall* and *Kimbrough*.

Many district judges, as well as commentators concerned about the rigidity of the guidelines and some post-*Booker* circuit precedents, praised the Supreme Court's emphasis on district court discretion reflected in the *Gall* and *Kimbrough*. And the most recent sentencing statistics from the U.S. Sentencing Commission suggest that district court have felt even more comfortable sentencing outside applicable guideline ranges following the rulings in *Gall* and *Kimbrough.*

B. Capital Punishment: Regulating Discretion Through Constitutional Rules

Page 269. Add this material at the end of note 3.

Emboldened by the *Hill* ruling, as well as new medical research and reports of botched executions, death row inmates in numerous jurisdictions began challenging state lethal injection protocols under the Eighth Amendment. Though taking a variety of forms, defendants generally claimed that the type and sequence of drugs used in standard execution protocols could, if not properly administered, cause extreme and unnecessary pain while masking the pain being experienced by the defendant during the execution. After lower courts in a few states held state procedures to be unconstitutional because they lacked sufficient safeguards and oversight to ensure that the risk of errors were minimized, the Supreme Court in fall 2007 granted certiorari in one of these cases coming from Kentucky.

On April 16, 2008, the U.S. Supreme Court ruled in Baze v. Rees, 128 S. Ct. ___ (2008), that Kentucky's three-drug protocol for carrying out lethal injections did not violate the Eighth Amendment's prohibition on cruel and unusual punishment. Thee ruling was split and splintered; seven of nine Justices wrote separate opinions. Kentucky had conducted only one execution by lethal injection, and the opinion for the Court, authored by Chief Justice Roberts, concluded that there was insufficient evidence to find that the state had not made sufficient efforts to reduce the risk of severe pain from its standard three-drug lethal injection process. In his opinion, the Chief Justice suggested that litigants would have to show a genuine risk of severe pain that could be avoided by readily available and feasible alternatives to make out a viable constitutional claim.

Chapter 4

Sentencing Inputs: The Crime and Its Effects

A. Which Crime?

1. Real Offense Versus Conviction Offense

Page 214. Add this material before the Notes.

Derrick Kimbrough v. United States
128 S. Ct. 558 (2007)

GINSBURG, J.

This Court's remedial opinion in *United States v. Booker* instructed district courts to read the United States Sentencing Guidelines as "effectively advisory." In accord with 18 U.S.C. § 3553(a), the Guidelines, formerly mandatory, now serve as one factor among several courts must consider in determining an appropriate sentence. *Booker* further instructed that "reasonableness" is the standard controlling appellate review of the sentences district courts impose.

Under the statute criminalizing the manufacture and distribution of crack cocaine, 21 U.S.C. § 841, and the relevant Guidelines prescription, § 2D1.1, a drug trafficker dealing in crack cocaine is subject to the same sentence as one dealing in 100 times more powder cocaine. The question here presented is whether, as the Court of Appeals held in this case, "a sentence ... outside the guidelines range is per se unreasonable when it is based on a disagreement with the sentencing disparity for crack and powder cocaine offenses." We hold that, under *Booker,* the cocaine

Guidelines, like all other Guidelines, are advisory only, and that the Court of Appeals erred in holding the crack/powder disparity effectively mandatory. A district judge must include the Guidelines range in the array of factors warranting consideration. The judge may determine, however, that, in the particular case, a within-Guidelines sentence is "greater than necessary" to serve the objectives of sentencing. 18 U.S.C. § 3553(a). In making that determination, the judge may consider the disparity between the Guidelines' treatment of crack and powder cocaine offenses.

I

In September 2004, petitioner Derrick Kimbrough was indicted in the United States District Court for the Eastern District of Virginia and charged with four offenses: conspiracy to distribute crack and powder cocaine; possession with intent to distribute more than 50 grams of crack cocaine; possession with intent to distribute powder cocaine; and possession of a firearm in furtherance of a drug-trafficking offense. Kimbrough pleaded guilty to all four charges.

Under the relevant statutes, Kimbrough's plea subjected him to an aggregate sentence of 15 years to life in prison: 10 years to life for the three drug offenses, plus a consecutive term of 5 years to life for the firearm offense.[1] In order to determine the appropriate sentence within this statutory range, the District Court first calculated Kimbrough's sentence under the advisory Sentencing Guidelines. Kimbrough's guilty plea acknowledged that he was accountable for 56 grams of crack cocaine and 92.1 grams of powder cocaine. This quantity of drugs yielded a base offense level of 32 for the three drug charges. See United States Sentencing Commission, Guidelines Manual § 2D1.1(c) (Nov. 2004) (USSG). Finding that Kimbrough, by asserting sole culpability for the crime, had testified falsely at his codefendant's trial, the District Court increased his offense level to 34. See § 3C1.1. In accord with the presentence report, the court determined that Kimbrough's criminal history category was II. An offense level of 34 and a criminal history category of II yielded a Guidelines range of 168 to 210 months for the

[1] The statutory range for possession with intent to distribute more than 50 grams of crack is ten years to life. See 21 U.S.C. § 841(b)(1)(A)(iii). The same range applies to the conspiracy offense. See § 846. The statutory range for possession with intent to distribute powder cocaine is 0 to 20 years. See § 841(b)(1)(C). Finally, the statutory range for possession of a firearm in furtherance of a drug-trafficking offense is five years to life. See 18 U.S.C. § 924(c)(1)(A)(i). The sentences for the three drug crimes may run concurrently, see § 3584(a), but the sentence for the firearm offense must be consecutive, see § 924(c)(1)(A).

three drug charges. The Guidelines sentence for the firearm offense was the statutory minimum, 60 months. See USSG § 2K2.4(b). Kimbrough's final advisory Guidelines range was thus 228 to 270 months, or 19 to 22.5 years.

A sentence in this range, in the District Court's judgment, would have been "greater than necessary" to accomplish the purposes of sentencing set forth in 18 U.S.C. § 3553(a). As required by § 3553(a), the court took into account the "nature and circumstances" of the offense and Kimbrough's "history and characteristics." The court also commented that the case exemplified the "disproportionate and unjust effect that crack cocaine guidelines have in sentencing." In this regard, the court contrasted Kimbrough's Guidelines range of 228 to 270 months with the range that would have applied had he been accountable for an equivalent amount of powder cocaine: 97 to 106 months, inclusive of the 5-year mandatory minimum for the firearm charge, see USSG § 2D1.1(c). Concluding that the statutory minimum sentence was "clearly long enough" to accomplish the objectives listed in § 3553(a), the court sentenced Kimbrough to 15 years, or 180 months, in prison plus 5 years of supervised release.[3]

In an unpublished *per curiam* opinion, the Fourth Circuit vacated the sentence. Under Circuit precedent, the Court of Appeals observed, a sentence "outside the guidelines range is per se unreasonable when it is based on a disagreement with the sentencing disparity for crack and powder cocaine offenses."

We granted certiorari to determine whether the crack/powder disparity adopted in the United States Sentencing Guidelines has been rendered "advisory" by our decision in *Booker*.

II

We begin with some background on the different treatment of crack and powder cocaine under the federal sentencing laws. Crack and powder cocaine are two forms of the same drug. Powder cocaine, or cocaine hydrochloride, is generally inhaled through the nose; it may also be mixed with water and injected. See United States Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy 5, 12 (Feb.1995), available at http://www.ussc.gov/crack/exec.htm (hereinafter 1995 Report). Crack cocaine, a type of cocaine base, is formed by dissolving powder cocaine and baking soda in boiling water. The resulting solid is divided into single-dose "rocks" that

[3] The prison sentence consisted of 120 months on each of the three drug counts, to be served concurrently, plus 60 months on the firearm count, to be served consecutively.

users smoke. The active ingredient in powder and crack cocaine is the same. The two forms of the drug also have the same physiological and psychotropic effects, but smoking crack cocaine allows the body to absorb the drug much faster than inhaling powder cocaine, and thus produces a shorter, more intense high.

Although chemically similar, crack and powder cocaine are handled very differently for sentencing purposes. The 100-to-1 ratio yields sentences for crack offenses three to six times longer than those for powder offenses involving equal amounts of drugs. See United States Sentencing Commission, Report to Congress: Cocaine and Federal Sentencing Policy iv (May 2002), available at http://www. ussc.gov/r_ congress/02crack/2002crackrpt.pdf (hereinafter 2002 Report). This disparity means that a major supplier of powder cocaine may receive a shorter sentence than a low-level dealer who buys powder from the supplier but then converts it to crack.

The crack/powder disparity originated in the Anti-Drug Abuse Act of 1986 (1986 Act), 100 Stat. 3207. The 1986 Act created a two-tiered scheme of five- and ten-year mandatory minimum sentences for drug manufacturing and distribution offenses. Congress sought "to link the ten-year mandatory minimum trafficking prison term to major drug dealers and to link the five-year minimum term to serious traffickers." The 1986 Act uses the weight of the drugs involved in the offense as the sole proxy to identify "major" and "serious" dealers. For example, any defendant responsible for 100 grams of heroin is subject to the five-year mandatory minimum, and any defendant responsible for 1,000 grams of heroin is subject to the ten-year mandatory minimum.

Crack cocaine was a relatively new drug when the 1986 Act was signed into law, but it was already a matter of great public concern: "Drug abuse in general, and crack cocaine in particular, had become in public opinion and in members' minds a problem of overwhelming dimensions." Congress apparently believed that crack was significantly more dangerous than powder cocaine in that: (1) crack was highly addictive; (2) crack users and dealers were more likely to be violent than users and dealers of other drugs; (3) crack was more harmful to users than powder, particularly for children who had been exposed by their mothers' drug use during pregnancy; (4) crack use was especially prevalent among teenagers; and (5) crack's potency and low cost were making it increasingly popular.

Based on these assumptions, the 1986 Act adopted a "100-to-1 ratio" that treated every gram of crack cocaine as the equivalent of 100 grams of powder cocaine. The Act's five-year mandatory minimum applies to any defendant accountable for 5 grams of crack or 500 grams of powder; its ten-year mandatory minimum applies to any defendant

accountable for 50 grams of crack or 5,000 grams of powder.

While Congress was considering adoption of the 1986 Act, the Sentencing Commission was engaged in formulating the Sentencing Guidelines. In the main, the Commission developed Guidelines sentences using an empirical approach based on data about past sentencing practices, including 10,000 presentence investigation reports. The Commission modified and adjusted past practice "in the interests of greater rationality, avoiding inconsistency, complying with congressional instructions, and the like."

The Commission did not use this empirical approach in developing the Guidelines sentences for drug-trafficking offenses. Instead, it employed the 1986 Act's weight-driven scheme. The Guidelines use a drug quantity table based on drug type and weight to set base offense levels for drug trafficking offenses. See USSG § 2D1.1(c). In setting offense levels for crack and powder cocaine, the Commission, in line with the 1986 Act, adopted the 100-to-1 ratio. The statute itself specifies only two quantities of each drug, but the Guidelines "go further and set sentences for the full range of possible drug quantities using the same 100-to-1 quantity ratio." The Guidelines' drug quantity table sets base offense levels ranging from 12, for offenses involving less than 250 milligrams of crack (or 25 grams of powder), to 38, for offenses involving more than 1.5 kilograms of crack (or 150 kilograms of powder).

Although the Commission immediately used the 100-to-1 ratio to define base offense levels for all crack and powder offenses, it later determined that the crack/powder sentencing disparity is generally unwarranted. Based on additional research and experience with the 100-to-1 ratio, the Commission concluded that the disparity "fails to meet the sentencing objectives set forth by Congress in both the Sentencing Reform Act and the 1986 Act." 2002 Report 91. In a series of reports, the Commission identified three problems with the crack/powder disparity.

First, the Commission reported, the 100-to-1 ratio rested on assumptions about "the relative harmfulness of the two drugs and the relative prevalence of certain harmful conduct associated with their use and distribution that more recent research and data no longer support." See United States Sentencing Commission, Report to Congress: Cocaine and Federal Sentencing Policy 8 (May 2007), available at http://www.ussc.gov/r_ congress/cocaine2007.pdf (hereinafter 2007 Report) (ratio Congress embedded in the statute far overstates both "the relative harmfulness" of crack cocaine, and the "seriousness of most crack cocaine offenses"). For example, the Commission found that crack is associated with "significantly less

trafficking-related violence ... than previously assumed." It also observed that "the negative effects of prenatal crack cocaine exposure are identical to the negative effects of prenatal powder cocaine exposure." The Commission furthermore noted that "the epidemic of crack cocaine use by youth never materialized to the extent feared."

Second, the Commission concluded that the crack/powder disparity is inconsistent with the 1986 Act's goal of punishing major drug traffickers more severely than low-level dealers. Drug importers and major traffickers generally deal in powder cocaine, which is then converted into crack by street-level sellers. But the 100-to-1 ratio can lead to the "anomalous" result that "retail crack dealers get longer sentences than the wholesale drug distributors who supply them the powder cocaine from which their crack is produced."

Finally, the Commission stated that the crack/powder sentencing differential "fosters disrespect for and lack of confidence in the criminal justice system" because of a "widely-held perception" that it "promotes unwarranted disparity based on race." Approximately 85 percent of defendants convicted of crack offenses in federal court are black; thus the severe sentences required by the 100-to-1 ratio are imposed "primarily upon black offenders."

Despite these observations, the Commission's most recent reports do not urge identical treatment of crack and powder cocaine. In the Commission's view, "some differential in the quantity-based penalties" for the two drugs is warranted, because crack is more addictive than powder, crack offenses are more likely to involve weapons or bodily injury, and crack distribution is associated with higher levels of crime. But the 100-to-1 crack/powder ratio, the Commission concluded, significantly overstates the differences between the two forms of the drug. Accordingly, the Commission recommended that the ratio be "substantially" reduced.

The Commission has several times sought to achieve a reduction in the crack/powder ratio. In 1995, it proposed amendments to the Guidelines that would have replaced the 100-to-1 ratio with a 1-to-1 ratio. Complementing that change, the Commission would have installed special enhancements for trafficking offenses involving weapons or bodily injury. See Amendments to the Sentencing Guidelines for United States Courts, 60 Fed. Reg. 25075-25077 (1995). Congress, acting pursuant to 28 U.S.C. § 994(p), rejected the amendments. Simultaneously, however, Congress directed the Commission to "propose revision of the drug quantity ratio of crack cocaine to powder cocaine under the relevant statutes and guidelines."

In response to this directive, the Commission issued reports in 1997 and 2002 recommending that Congress change the 100-to-1 ratio

prescribed in the 1986 Act. The 1997 Report proposed a 5-to-1 ratio. See United States Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy 2 (Apr. 1997), http://www.ussc.gov/r_congress/newcrack.pdf. The 2002 Report recommended lowering the ratio "at least" to 20 to 1. Neither proposal prompted congressional action.

The Commission's most recent report, issued in 2007, again urged Congress to amend the 1986 Act to reduce the 100-to-1 ratio. This time, however, the Commission did not simply await congressional action. Instead, the Commission adopted an ameliorating change in the Guidelines. The alteration, which became effective on November 1, 2007, reduces the base offense level associated with each quantity of crack by two levels. See Amendments to the Sentencing Guidelines for United States Courts, 72 Fed. Reg. 28571-28572 (2007).[10] This modest amendment yields sentences for crack offenses between two and five times longer than sentences for equal amounts of powder. Describing the amendment as "only ... a partial remedy" for the problems generated by the crack/powder disparity, the Commission noted that any "comprehensive solution requires appropriate legislative action by Congress."

III

... The statute, as modified by *Booker,* contains an overarching provision instructing district courts to "impose a sentence sufficient, but not greater than necessary" to accomplish the goals of sentencing, including "to reflect the seriousness of the offense," "to promote respect for the law," "to provide just punishment for the offense," "to afford adequate deterrence to criminal conduct," and "to protect the public from further crimes of the defendant." 18 U.S.C. § 3553(a). The statute further provides that, in determining the appropriate sentence, the court should consider a number of factors, including "the nature and circumstances of the offense," "the history and characteristics of the defendant," "the sentencing range established" by the Guidelines, "any pertinent policy statement" issued by the Sentencing Commission pursuant to its statutory authority, and "the need to avoid unwarranted sentence disparities among defendants with similar records who have

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[10] The amended Guidelines still produce sentencing ranges keyed to the mandatory minimums in the 1986 Act. Under the pre-2007 Guidelines, the 5- and 50-gram quantities that trigger the statutory minimums produced sentencing ranges that slightly *exceeded* those statutory minimums. Under the amended Guidelines, in contrast, the 5- and 50-gram quantities produce "base offense levels corresponding to guideline ranges that *include* the statutory mandatory minimum penalties."

been found guilty of similar conduct." In sum, while the statute still requires a court to give respectful consideration to the Guidelines, *Booker* "permits the court to tailor the sentence in light of other statutory concerns as well."

The Government acknowledges that the Guidelines "are now advisory" and that, as a general matter, "courts may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines." But the Government contends that the Guidelines adopting the 100-to-1 ratio are an exception to the "general freedom that sentencing courts have to apply the [§ 3553(a)] factors." That is so, according to the Government, because the ratio is a "specific policy determination that Congress has directed sentencing courts to observe." The Government offers three arguments in support of this position. We consider each in turn.

As its first and most heavily pressed argument, the Government urges that the 1986 Act itself prohibits the Sentencing Commission and sentencing courts from disagreeing with the 100-to-1 ratio.[13] The Government acknowledges that the "Congress did not *expressly* direct the Sentencing Commission to incorporate the 100:1 ratio in the Guidelines." Nevertheless, it asserts that the Act "implicitly" requires the Commission and sentencing courts to apply the 100-to-1 ratio. Any deviation, the Government urges, would be "logically incoherent" when combined with mandatory minimum sentences based on the 100-to-1 ratio.

This argument encounters a formidable obstacle: It lacks grounding in the text of the 1986 Act. The statute, by its terms, mandates only maximum and minimum sentences: A person convicted of possession with intent to distribute 5 grams or more of crack cocaine must be sentenced to a minimum of 5 years and the maximum term is 40 years. A person with 50 grams or more of crack cocaine must be sentenced to a minimum of 10 years and the maximum term is life. The statute says nothing about the appropriate sentences within these brackets, and we decline to read any implicit directive into that congressional silence. Drawing meaning from silence is particularly inappropriate here, for Congress has shown that it knows how to direct sentencing practices in express terms. For example, Congress has specifically required the Sentencing Commission to set Guidelines sentences for serious recidivist

[13] The Government concedes that a district court may vary from the 100-to-1 ratio if it does so "based on the individualized circumstance [s]" of a particular case. Brief for United States at 45. But the Government maintains that the 100-to-1 ratio is binding in the sense that a court may not give any weight to its own view that the ratio itself is inconsistent with the § 3553(a) factors.

offenders "at or near" the statutory maximum. 28 U.S.C. § 994(h).

In addition to the 1986 Act, the Government relies on Congress' disapproval of the Guidelines amendment that the Sentencing Commission proposed in 1995. Congress "not only disapproved of the 1:1 ratio," the Government urges; it also made clear "that the 1986 Act required the Commission (and sentencing courts) to take drug quantities into account, and to do so in a manner that respects the 100:1 ratio."

It is true that Congress rejected the Commission's 1995 proposal to place a 1-to-1 ratio in the Guidelines, and also expressed the view 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." But nothing in Congress' 1995 reaction to the Commission-proposed 1-to-1 ratio suggested that crack sentences must exceed powder sentences by a ratio of 100 to 1. To the contrary, Congress' 1995 action required the Commission to recommend a "revision of the drug quantity ratio of crack cocaine to powder cocaine."

The Government emphasizes that Congress required the Commission to propose changes to the 100-to-1 ratio in *both* the 1986 Act and the Guidelines. This requirement, the Government contends, implicitly foreclosed any deviation from the 100-to-1 ratio in the Guidelines (or by sentencing courts) in the absence of a corresponding change in the statute. But it does not follow as the night follows the day that, by calling for recommendations to change the statute, Congress meant to bar any Guidelines alteration in advance of congressional action. The more likely reading is that Congress sought proposals to amend both the statute and the Guidelines because the Commission's criticisms of the 100-to-1 ratio concerned the exorbitance of the crack/powder disparity in both contexts.

Moreover, as a result of the 2007 amendment, the Guidelines now advance a crack/powder ratio that varies (at different offense levels) between 25 to 1 and 80 to 1. Adopting the Government's analysis, the amended Guidelines would conflict with Congress' 1995 action, and with the 1986 Act, because the current Guidelines ratios deviate from the 100-to-1 statutory ratio. Congress, however, did not disapprove or modify the Commission-initiated 2007 amendment. Ordinarily, we resist reading congressional intent into congressional inaction. But in this case, Congress failed to act on a proposed amendment to the Guidelines in a high-profile area in which it had previously exercised its disapproval authority under 28 U.S.C. § 994(p). If nothing else, this tacit acceptance of the 2007 amendment undermines the Government's position, which is itself based on implications drawn from congressional silence.

Finally, the Government argues that if district courts are free to deviate from the Guidelines based on disagreements with the

crack/powder ratio, unwarranted disparities of two kinds will ensue. First, because sentencing courts remain bound by the mandatory minimum sentences prescribed in the 1986 Act, deviations from the 100-to-1 ratio could result in sentencing "cliffs" around quantities that trigger the mandatory minimums. For example, a district court could grant a sizable downward variance to a defendant convicted of distributing 49 grams of crack but would be required by the statutory minimum to impose a much higher sentence on a defendant responsible for only 1 additional gram. Second, the Government maintains that, if district courts are permitted to vary from the Guidelines based on their disagreement with the crack/powder disparity, "defendants with identical real conduct will receive markedly different sentences, depending on nothing more than the particular judge drawn for sentencing."

Neither of these arguments persuades us to hold the crack/powder ratio untouchable by sentencing courts…. Concerning the second disparity, it is unquestioned that uniformity remains an important goal of sentencing. As we explained in *Booker,* however, advisory Guidelines combined with appellate review for reasonableness and ongoing revision of the Guidelines in response to sentencing practices will help to "avoid excessive sentencing disparities." These measures will not eliminate variations between district courts, but our opinion in *Booker* recognized that some departures from uniformity were a necessary cost of the remedy we adopted. And as to crack cocaine sentences in particular, we note a congressional control on disparities: possible variations among district courts are constrained by the mandatory minimums Congress prescribed in the 1986 Act.

Moreover, to the extent that the Government correctly identifies risks of "unwarranted sentence disparities" within the meaning of 18 U.S.C. § 3353(a)(6), the proper solution is not to treat the crack/powder ratio as mandatory. Section 3553(a)(6) directs *district courts* to consider the need to avoid unwarranted disparities-along with other § 3553(a) factors-when imposing sentences. Under this instruction, district courts must take account of sentencing practices in other courts and the "cliffs" resulting from the statutory mandatory minimum sentences. To reach an appropriate sentence, these disparities must be weighed against the other § 3553(a) factors and any unwarranted disparity created by the crack/powder ratio itself.

IV

While rendering the Sentencing Guidelines advisory, we have nevertheless preserved a key role for the Sentencing Commission. As explained in *Rita* and *Gall*, district courts must treat the Guidelines as the "starting point and the initial benchmark." Congress established the

Commission to formulate and constantly refine national sentencing standards. Carrying out its charge, the Commission fills an important institutional role: It has the capacity courts lack to "base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise."

We have accordingly recognized that, in the ordinary case, the Commission's recommendation of a sentencing range will "reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives." The sentencing judge, on the other hand, has "greater familiarity with ... the individual case and the individual defendant before him than the Commission or the appeals court." He is therefore "in a superior position to find facts and judge their import under § 3353(a)" in each particular case. In light of these discrete institutional strengths, a district court's decision to vary from the advisory Guidelines may attract greatest respect when the sentencing judge finds a particular case "outside the 'heartland' to which the Commission intends individual Guidelines to apply." On the other hand, while the Guidelines are no longer binding, closer review may be in order when the sentencing judge varies from the Guidelines based solely on the judge's view that the Guidelines range "fails properly to reflect § 3553(a) considerations" even in a mine-run case.

The crack cocaine Guidelines, however, present no occasion for elaborative discussion of this matter because those Guidelines do not exemplify the Commission's exercise of its characteristic institutional role. In formulating Guidelines ranges for crack cocaine offenses, as we earlier noted, the Commission looked to the mandatory minimum sentences set in the 1986 Act, and did not take account of "empirical data and national experience." Indeed, the Commission itself has reported that the crack/powder disparity produces disproportionately harsh sanctions, *i.e.,* sentences for crack cocaine offenses "greater than necessary" in light of the purposes of sentencing set forth in § 3553(a). Given all this, it would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence "greater than necessary" to achieve § 3553(a)'s purposes, even in a mine-run case.

V

Taking account of the foregoing discussion in appraising the District Court's disposition in this case, we conclude that the 180-month sentence imposed on Kimbrough should survive appellate inspection. The District Court began by properly calculating and considering the advisory Guidelines range. It then addressed the relevant § 3553(a) factors. First, the court considered "the nature and circumstances" of the crime, see 18

U.S.C. § 3553(a)(1), which was an unremarkable drug-trafficking offense. App. 72-73 ("This defendant and another defendant were caught sitting in a car with some crack cocaine and powder by two police officers—that's the sum and substance of it—[and they also had] a firearm."). Second, the court considered Kimbrough's "history and characteristics." § 3553(a)(1). The court noted that Kimbrough had no prior felony convictions, that he had served in combat during Operation Desert Storm and received an honorable discharge from the Marine Corps, and that he had a steady history of employment.

Furthermore, the court alluded to the Sentencing Commission's reports criticizing the 100-to-1 ratio, noting that the Commission "recognizes that crack cocaine has not caused the damage that the Justice Department alleges it has." Comparing the Guidelines range to the range that would have applied if Kimbrough had possessed an equal amount of powder, the court suggested that the 100-to-1 ratio itself created an unwarranted disparity within the meaning of § 3553(a). Finally, the court did not purport to establish a ratio of its own. Rather, it appropriately framed its final determination in line with § 3553(a)'s overarching instruction to "impose a sentence sufficient, but not greater than necessary" to accomplish the sentencing goals advanced in § 3553(a)(2). Concluding that "the crack cocaine guidelines [drove] the offense level to a point higher than is necessary to do justice in this case," the District Court thus rested its sentence on the appropriate considerations and "committed no procedural error."

The ultimate question in Kimbrough's case is "whether the sentence was reasonable—*i.e.,* whether the District Judge abused his discretion in determining that the § 3553(a) factors supported a sentence of [15 years] and justified a substantial deviation from the Guidelines range." The sentence the District Court imposed on Kimbrough was 4.5 years below the bottom of the Guidelines range. But in determining that 15 years was the appropriate prison term, the District Court properly homed in on the particular circumstances of Kimbrough's case and accorded weight to the Sentencing Commission's consistent and emphatic position that the crack/powder disparity is at odds with § 3553(a). Indeed, aside from its claim that the 100-to-1 ratio is mandatory, the Government did not attack the District Court's downward variance as unsupported by § 3553(a). Giving due respect to the District Court's reasoned appraisal, a reviewing court could not rationally conclude that the 4.5-year sentence reduction Kimbrough received qualified as an abuse of discretion….

THOMAS, J., dissenting.

I continue to disagree with the remedy fashioned in *United States v.*

Booker. The Court's post-*Booker* sentencing cases illustrate why the remedial majority in *Booker* was mistaken to craft a remedy far broader than necessary to correct constitutional error. The Court is now confronted with a host of questions about how to administer a sentencing scheme that has no basis in the statute. Because the Court's decisions in this area are necessarily grounded in policy considerations rather than law, I respectfully dissent….

Applying the statute as written, it is clear that the District Court erred by departing below the mandatory Guidelines range. I would therefore affirm the judgment of the Court of Appeals vacating petitioner's sentence and remanding for resentencing.

[Justice Alito also dissented, stating that "[f]or the reasons explained in my dissent in *Gall v. United States* I would hold that, under the remedial decision in *Booker* a district judge is still required to give significant weight to the policy decisions embodied in the Guidelines…."]

Notes

1. *The long debate over crack sentencing*. As the *Kimbrough* decision details, the differential treatment of crack and powder cocaine offenses has long been a sources of significant controversy and dynamic inter-branch debate in the federal sentencing system. Given this long-standing debate, it was not surprising that some district courts utilized the new discretion afforded by the *Booker* decision to impose sentences below applicable guideline ranges in crack cases. Before the ruling in *Kimbrough*, however, most circuit court declared unreasonable any decision to impose a sentence below the crack guidelines based simply on a policy disagreement with the severity levels established by the crack guidelines incorporating the 100-to-1 ratio. The ruling in *Kimbrough* has been important to the operation of the advisory guidelines in part because the Government conceded that courts are generally authorized after *Booker* to vary from guidelines ranges "based solely on policy considerations, including disagreements with the guidelines," and because the Supreme Court rejected the Government's claims that this post-*Booker* sentencing authority did not extend to cases involving the crack guidelines.

2. *The uncertain reach of* Kimbrough. Because of the long debate over the crack guidelines, and because the Sentencing Commission had written numerous reports criticizing its own guidelines, the broader applicability of principles set forth in *Kimbrough* are subject to debate.

The Supreme Court's opinion in *Kimbrough* emphasized, based on the Commission's own criticisms, that the crack guidelines did "not exemplify the Commission's exercise of its characteristic institutional role" because these guidelines "did not take account of 'empirical data and national experience.'" In arguing that other guidelines should still be given significant weight after *Booker*, the Government asserts many other settings that other guidelines do reflect and exemplify the Commission's exercise of its characteristic institutional role. In contrast, federal defendants have repeatedly argued that many guidelines, not just those for crack offenses, fail to reflect the Commission's expertise in assessing "empirical data and national experience."

How should a district court assess and resolve after *Booker* whether certain guidelines "exemplify the Commission's exercise of its characteristic institutional role"? Because the Commission, other than in the crack setting, has produced very few in-depth reports or public analyses focused on the foundation and soundness of particular guidelines, advocates have often point to snippets of legislative history and public Commission records and meeting materials when developing post-*Kimbrough* arguments about how to regard different offense guidelines. After *Kimbrough*, may district courts conduct their own investigation – perhaps even having a sentencing hearing to hear arguments or even testimony about the background and development of a particular guideline – when deciding how much weight that particular guideline is to be afforded? Should they? Must they?

2. Multiple Convictions

Page 293. Add this material at the end of note 2.

In early 2008, the Supreme Court took up a case from Oregon presenting the issue of whether *Blakely* requires facts that permit a judge to impose consecutive sentences under state law must be proven to a jury. See Oregon v. Ice, ___ P.3d ___ (2007), cert. granted, ___ S. Ct. ___ (2008). This case will be argued before the Supreme Court in fall 2008.

B. Assessing Offense Seriousness

2. Quantitative Assessments of Harm

Page 313. Add this material at the end of note 2.

In June 2008, the Supreme Court in *Heller v. District of Columbia*, 128 S. Ct. ____ (2008), held that the Second Amendment protects an individual right to possess a firearm in the home for self-protection, though the Court left unclear the exact scope of this right or the level of constitutional scrutiny that must now be given to firearm prohibitions. Before *Heller*, federal sentencing enhancements for possessing a firearm in furtherance of a drug crime have been broadly applied – e.g., defendants would regularly be subject to such an enhancement based on the presence of a gun in an upstairs bedroom closet even if all the evidence of drug dealing was confined to a basement location. In the wake of *Heller*, should a defendant be able to challenge the application of any sentencing enhancement based on possession of a gun in the home if the defendant can make a credible claim that the gun was only kept for personal self-protection and was never used or brandished in connect with any criminal activity taking place in the home?

C. The Role of Victims and the Community

Page 337. Add this material after note 5.

6. *Should there be any limit on the manner or means of victim and community input at sentencing?* In our electronic age, there are a variety of manners and means through which victim and community input might be presented to a sentencing judge. Especially in murder cases, the family of the victim may have an personal archive of pictures, songs, videos, websites, and other materials that might be presented to a court to showcase the best features and best moments of the person killed. Should there be any limit on what kinds of visual materials can be presented to a court at sentencing? If a community is struggling with the effects of a certain crime in a particular neighborhood, should prosecutors

consider creating a neighborhood video to show to judges at the sentencing of any and all persons convicted on this crime?

Chapter 5

Sentencing Inputs: The Offender's Record and Background

C. The Offender's Character and Circumstances

Brian Michael Gall v. United States
128 S. Ct. 586 (2007)

STEVENS, J.

In two cases argued on the same day last Term we considered the standard that courts of appeals should apply when reviewing the reasonableness of sentences imposed by district judges. The first, *Rita v. United States*, 127 S. Ct. 2456 (2007), involved a sentence within the range recommended by the Federal Sentencing Guidelines; we held that when a district judge's discretionary decision in a particular case accords with the sentence the United States Sentencing Commission deems appropriate "in the mine run of cases," the court of appeals may presume that the sentence is reasonable.

The second case, *Claiborne v. United States*, involved a sentence below the range recommended by the Guidelines, and raised the converse question whether a court of appeals may apply a "proportionality test," and require that a sentence that constitutes a substantial variance from the Guidelines be justified by extraordinary circumstances. We did not have the opportunity to

answer this question because the case was mooted by Claiborne's untimely death. We granted certiorari in the case before us today in order to reach that question, left unanswered last Term. We now hold that, while the extent of the difference between a particular sentence and the recommended Guidelines range is surely relevant, courts of appeals must review all sentences — whether inside, just outside, or significantly outside the Guidelines range — under a deferential abuse-of-discretion standard. We also hold that the sentence imposed by the experienced District Judge in this case was reasonable.

I

In February or March 2000, petitioner Brian Gall, a second-year college student at the University of Iowa, was invited by Luke Rinderknecht to join an ongoing enterprise distributing a controlled substance popularly known as "ecstasy." Gall — who was then a user of ecstasy, cocaine, and marijuana — accepted the invitation. During the ensuing seven months, Gall delivered ecstasy pills, which he received from Rinderknecht, to other conspirators, who then sold them to consumers. He netted over $30,000.

A month or two after joining the conspiracy, Gall stopped using ecstasy. A few months after that, in September 2000, he advised Rinderknecht and other co-conspirators that he was withdrawing from the conspiracy. He has not sold illegal drugs of any kind since. He has, in the words of the District Court, "self-rehabilitated." He graduated from the University of Iowa in 2002, and moved first to Arizona, where he obtained a job in the construction industry, and later to Colorado, where he earned $18 per hour as a master carpenter. He has not used any illegal drugs since graduating from college.

After Gall moved to Arizona, he was approached by federal law enforcement agents who questioned him about his involvement in the ecstasy distribution conspiracy. Gall admitted his limited participation in the distribution of ecstasy, and the agents took no further action at that time. On April 28, 2004 — approximately a year and a half after this initial interview, and three and a half years after Gall withdrew from the conspiracy — an indictment was returned in the Southern District of Iowa charging him and seven other defendants with participating in a conspiracy to distribute ecstasy, cocaine, and marijuana, that began in or about

May 1996 and continued through October 30, 2002. The Government has never questioned the truthfulness of any of Gall's earlier statements or contended that he played any role in, or had any knowledge of, other aspects of the conspiracy described in the indictment. When he received notice of the indictment, Gall moved back to Iowa and surrendered to the authorities. While free on his own recognizance, Gall started his own business in the construction industry, primarily engaged in subcontracting for the installation of windows and doors. In his first year, his profits were over $2,000 per month.

Gall entered into a plea agreement with the Government, stipulating that he was "responsible for, but did not necessarily distribute himself, at least 2,500 grams of [ecstasy], or the equivalent of at least 87.5 kilograms of marijuana." In the agreement, the Government acknowledged that by "on or about September of 2000," Gall had communicated his intent to stop distributing ecstasy to Rinderknecht and other members of the conspiracy. The agreement further provided that recent changes in the Guidelines that enhanced the recommended punishment for distributing ecstasy were not applicable to Gall because he had withdrawn from the conspiracy prior to the effective date of those changes.

In her presentence report, the probation officer concluded that Gall had no significant criminal history; that he was not an organizer, leader, or manager; and that his offense did not involve the use of any weapons. The report stated that Gall had truthfully provided the Government with all of the evidence he had concerning the alleged offenses, but that his evidence was not useful because he provided no new information to the agents. The report also described Gall's substantial use of drugs prior to his offense and the absence of any such use in recent years. The report recommended a sentencing range of 30 to 37 months of imprisonment.

The record of the sentencing hearing held on May 27, 2005, includes a "small flood" of letters from Gall's parents and other relatives, his fiance, neighbors, and representatives of firms doing business with him, uniformly praising his character and work ethic. The transcript includes the testimony of several witnesses and the District Judge's colloquy with the Assistant United States Attorney (AUSA) and with Gall. The AUSA did not contest any of the

evidence concerning Gall's law-abiding life during the preceding five years, but urged that "the Guidelines are appropriate and should be followed," and requested that the court impose a prison sentence within the Guidelines range. He mentioned that two of Gall's co-conspirators had been sentenced to 30 and 35 months, respectively, but upon further questioning by the District Court, he acknowledged that neither of them had voluntarily withdrawn from the conspiracy.

The District Judge sentenced Gall to probation for a term of 36 months. In addition to making a lengthy statement on the record, the judge filed a detailed sentencing memorandum explaining his decision, and provided the following statement of reasons in his written judgment:

> The Court determined that, considering all the factors under 18 U.S.C. 3553(a), the Defendant's explicit withdrawal from the conspiracy almost four years before the filing of the Indictment, the Defendant's post-offense conduct, especially obtaining a college degree and the start of his own successful business, the support of family and friends, lack of criminal history, and his age at the time of the offense conduct, all warrant the sentence imposed, which was sufficient, but not greater than necessary to serve the purposes of sentencing.

At the end of both the sentencing hearing and the sentencing memorandum, the District Judge reminded Gall that probation, rather than "an act of leniency," is a "substantial restriction of freedom." In the memorandum, he emphasized:

> [Gall] will have to comply with strict reporting conditions along with a three-year regime of alcohol and drug testing. He will not be able to change or make decisions about significant circumstances in his life, such as where to live or work, which are prized liberty interests, without first seeking authorization from his Probation Officer or, perhaps, even the Court. Of course, the Defendant always faces the harsh consequences that await if he violates the conditions of his probationary term.

Finally, the District Judge explained why he had concluded that the sentence of probation reflected the seriousness of Gall's offense and that no term of imprisonment was necessary:

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

II

The Court of Appeals reversed and remanded for resentencing. [It] held that a sentence outside of the Guidelines range must be supported by a justification that "is proportional to the extent of the difference between the advisory range and the sentence imposed." Characterizing the difference between a sentence of probation and the bottom of Gall's advisory Guidelines range of 30 months as "extraordinary" because it amounted to "a 100% downward variance," the Court of Appeals held that such a variance must be-and here was not-supported by extraordinary circumstances.

Rather than making an attempt to quantify the value of the justifications provided by the District Judge, the Court of Appeals identified what it regarded as five separate errors in the District Judge's reasoning: (1) He gave "too much weight to Gall's withdrawal from the conspiracy"; (2) given that Gall was 21 at the time of his offense, the District Judge erroneously gave "significant weight" to studies showing impetuous behavior by persons under the age of 18; (3) he did not "properly weigh" the seriousness of Gall's offense; (4) he failed to consider whether a sentence of probation would result in "unwarranted" disparities; and (5) he placed "too much emphasis on Gall's post-offense rehabilitation." As we shall explain, we are not persuaded that these factors, whether viewed separately or in the aggregate, are sufficient to support the conclusion that the District Judge abused his discretion. As a preface to our discussion of these particulars, however, we shall explain why the Court of Appeals' rule requiring "proportional" justifications for departures from the Guidelines

range is not consistent with our remedial opinion in *United States v. Booker*.

III

In Booker we invalidated both the statutory provision, 18 U.S.C. § 3553(b)(1), which made the Sentencing Guidelines mandatory, and § 3742(e), which directed appellate courts to apply a de novo standard of review to departures from the Guidelines. As a result of our decision, the Guidelines are now advisory, and appellate review of sentencing decisions is limited to determining whether they are "reasonable." Our explanation of "reasonableness" review in the *Booker* opinion made it pellucidly clear that the familiar abuse-of-discretion standard of review now applies to appellate review of sentencing decisions.

It is also clear that a district judge must give serious consideration to the extent of any departure from the Guidelines and must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications. For even though the Guidelines are advisory rather than mandatory, they are, as we pointed out in *Rita*, the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions.

In reviewing the reasonableness of a sentence outside the Guidelines range, appellate courts may therefore take the degree of variance into account and consider the extent of a deviation from the Guidelines. We reject, however, an appellate rule that requires "extraordinary" circumstances to justify a sentence outside the Guidelines range. We also reject the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence.

As an initial matter, the approaches we reject come too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range. Even the Government has acknowledged that such a presumption would not be consistent with *Booker*.

The mathematical approach also suffers from infirmities of application. On one side of the equation, deviations from the Guidelines range will always appear more extreme-in percentage

terms-when the range itself is low, and a sentence of probation will always be a 100% departure regardless of whether the Guidelines range is 1 month or 100 years. Moreover, quantifying the variance as a certain percentage of the maximum, minimum, or median prison sentence recommended by the Guidelines gives no weight to the "substantial restriction of freedom" involved in a term of supervised release or probation.

We recognize that custodial sentences are qualitatively more severe than probationary sentences of equivalent terms. Offenders on probation are nonetheless subject to several standard conditions that substantially restrict their liberty. Probationers may not leave the judicial district, move, or change jobs without notifying, and in some cases receiving permission from, their probation officer or the court. They must report regularly to their probation officer, permit unannounced visits to their homes, refrain from associating with any person convicted of a felony, and refrain from excessive drinking. Most probationers are also subject to individual "special conditions" imposed by the court. Gall, for instance, may not patronize any establishment that derives more than 50% of its revenue from the sale of alcohol, and must submit to random drug tests as directed by his probation officer.

On the other side of the equation, the mathematical approach assumes the existence of some ascertainable method of assigning percentages to various justifications. Does withdrawal from a conspiracy justify more or less than, say, a 30% reduction? Does it matter that the withdrawal occurred several years ago? Is it relevant that the withdrawal was motivated by a decision to discontinue the use of drugs and to lead a better life? What percentage, if any, should be assigned to evidence that a defendant poses no future threat to society, or to evidence that innocent third parties are dependent on him? The formula is a classic example of attempting to measure an inventory of apples by counting oranges.

Most importantly, both the exceptional circumstances requirement and the rigid mathematical formulation reflect a practice—common among courts that have adopted "proportional review"—of applying a heightened standard of review to sentences outside the Guidelines range. This is inconsistent with the rule that the abuse-of-discretion standard of review applies to appellate review of all sentencing decisions-whether inside or outside the Guidelines range.

As we explained in *Rita*, a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range. As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark. The Guidelines are not the only consideration, however. Accordingly, after giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party. In so doing, he may not presume that the Guidelines range is reasonable. He must make an individualized assessment based on the facts presented. If he decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance. We find it uncontroversial that a major departure should be supported by a more significant justification than a minor one. After settling on the appropriate sentence, he must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing.

Regardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse-of-discretion standard. It must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence-including an explanation for any deviation from the Guidelines range. Assuming that the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard. When conducting this review, the court will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range. If the sentence is within the Guidelines range, the appellate court may, but is not required to, apply a presumption of reasonableness. But if the sentence is outside the Guidelines range, the court may not apply a presumption of unreasonableness. It may consider the extent of the deviation, but must give due

deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance. The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court.

Practical considerations also underlie this legal principle. "The sentencing judge is in a superior position to find facts and judge their import under § 3553(a) in the individual case. The judge sees and hears the evidence, makes credibility determinations, has full knowledge of the facts and gains insights not conveyed by the record." Brief for Federal Public and Community Defenders et al. as Amici Curiae 16. "The sentencing judge has access to, and greater familiarity with, the individual case and the individual defendant before him than the Commission or the appeals court." Moreover, district courts "have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines sentences than appellate courts do." *Koon v. United States*, 518 U.S. 81, 98 (1996).

"It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." The uniqueness of the individual case, however, does not change the deferential abuse-of-discretion standard of review that applies to all sentencing decisions. As we shall now explain, the opinion of the Court of Appeals in this case does not reflect the requisite deference and does not support the conclusion that the District Court abused its discretion.

IV

As an initial matter, we note that the District Judge committed no significant procedural error. He correctly calculated the applicable Guidelines range, allowed both parties to present arguments as to what they believed the appropriate sentence should be, considered all of the § 3553(a) factors, and thoroughly documented his reasoning. The Court of Appeals found that the District Judge erred in failing to give proper weight to the seriousness of the offense, as required by § 3553(a)(2)(A), and

failing to consider whether a sentence of probation would create unwarranted disparities, as required by § 3553(a)(6). We disagree.

Section 3553(a)(2)(A) requires judges to consider "the need for the sentence imposed ... to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." The Court of Appeals concluded that "the district court did not properly weigh the seriousness of Gall's offense" because it "ignored the serious health risks ecstasy poses." Contrary to the Court of Appeals' conclusion, the District Judge plainly did consider the seriousness of the offense. It is true that the District Judge did not make specific reference to the (unquestionably significant) health risks posed by ecstasy, but the prosecutor did not raise ecstasy's effects at the sentencing hearing. Had the prosecutor raised the issue, specific discussion of the point might have been in order, but it was not incumbent on the District Judge to raise every conceivably relevant issue on his own initiative.

The Government's legitimate concern that a lenient sentence for a serious offense threatens to promote disrespect for the law is at least to some extent offset by the fact that seven of the eight defendants in this case have been sentenced to significant prison terms. Moreover, the unique facts of Gall's situation provide support for the District Judge's conclusion that, in Gall's case, "a sentence of imprisonment may work to promote not respect, but derision, of the law if the law is viewed as merely a means to dispense harsh punishment without taking into account the real conduct and circumstances involved in sentencing."

Section 3553(a)(6) requires judges to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." The Court of Appeals stated that "the record does not show that the district court considered whether a sentence of probation would result in unwarranted disparities." As with the seriousness of the offense conduct, avoidance of unwarranted disparities was clearly considered by the Sentencing Commission when setting the Guidelines ranges. Since the District Judge correctly calculated and carefully reviewed the Guidelines range, he necessarily gave significant weight and consideration to the need to avoid unwarranted disparities.

[It] is perfectly clear that the District Judge considered the need to avoid unwarranted disparities, but also considered the need to avoid unwarranted similarities among other co-conspirators who were not similarly situated. The District Judge regarded Gall's voluntary withdrawal as a reasonable basis for giving him a less severe sentence than the three codefendants discussed with the AUSA, who neither withdrew from the conspiracy nor rehabilitated themselves as Gall had done. We also note that neither the Court of Appeals nor the Government has called our attention to a comparable defendant who received a more severe sentence.

Since the District Court committed no procedural error, the only question for the Court of Appeals was whether the sentence was reasonable—i.e., whether the District Judge abused his discretion in determining that the § 3553(a) factors supported a sentence of probation and justified a substantial deviation from the Guidelines range. As we shall now explain, the sentence was reasonable. The Court of Appeals' decision to the contrary was incorrect and failed to demonstrate the requisite deference to the District Judge's decision.

V

The Court of Appeals gave virtually no deference to the District Court's decision that the § 3553(a) factors justified a significant variance in this case. Although the Court of Appeals correctly stated that the appropriate standard of review was abuse of discretion, it engaged in an analysis that more closely resembled de novo review of the facts presented and determined that, in its view, the degree of variance was not warranted.

The Court of Appeals thought that the District Court "gave too much weight to Gall's withdrawal from the conspiracy because the court failed to acknowledge the significant benefit Gall received from being subject to the 1999 Guidelines." This criticism is flawed in that it ignores the critical relevance of Gall's voluntary withdrawal, a circumstance that distinguished his conduct not only from that of all his codefendants, but from the vast majority of defendants convicted of conspiracy in federal court. The District Court quite reasonably attached great weight to the fact that Gall voluntarily withdrew from the conspiracy after deciding, on his own initiative, to change his life. This lends strong support to the

District Court's conclusion that Gall is not going to return to criminal behavior and is not a danger to society. See 18 U.S.C. §§ 3553(a)(2)(B), (C). Compared to a case where the offender's rehabilitation occurred after he was charged with a crime, the District Court here had greater justification for believing Gall's turnaround was genuine, as distinct from a transparent attempt to build a mitigation case.

The Court of Appeals thought the District Judge "gave significant weight to an improper factor" when he compared Gall's sale of ecstasy when he was a 21-year-old adult to the "impetuous and ill-considered" actions of persons under the age of 18. The appellate court correctly observed that the studies cited by the District Judge do not explain how Gall's "specific behavior in the instant case was impetuous or ill-considered."

In that portion of his sentencing memorandum, however, the judge was discussing the "character of the defendant," not the nature of his offense. He noted that Gall's criminal history included a ticket for underage drinking when he was 18 years old and possession of marijuana that was contemporaneous with his offense in this case. In summary, the District Judge observed that all of Gall's criminal history "including the present offense, occurred when he was twenty-one-years old or younger" and appeared "to stem from his addictions to drugs and alcohol." The District Judge appended a long footnote to his discussion of Gall's immaturity. The footnote includes an excerpt from our opinion in *Roper v. Simmons*, 543 U.S. 551, 569 (2005), which quotes a study stating that a lack of maturity and an undeveloped sense of responsibility are qualities that "often result in impetuous and ill-considered actions." The District Judge clearly stated the relevance of these studies in the opening and closing sentences of the footnote:

> Immaturity at the time of the offense conduct is not an inconsequential consideration. Recent studies on the development of the human brain conclude that human brain development may not become complete until the age of twenty-five. [The recent National Institute of Health] report confirms that there is no bold line demarcating at what age a person reaches full maturity. While age does not excuse behavior, a

> sentencing court should account for age when inquiring into the conduct of a defendant.

Given the dramatic contrast between Gall's behavior before he joined the conspiracy and his conduct after withdrawing, it was not unreasonable for the District Judge to view Gall's immaturity at the time of the offense as a mitigating factor, and his later behavior as a sign that he had matured and would not engage in such impetuous and ill-considered conduct in the future.

Finally, the Court of Appeals thought that, even if Gall's rehabilitation was dramatic and permanent, a sentence of probation for participation as a middleman in a conspiracy distributing 10,000 pills of ecstasy "lies outside the range of choice dictated by the facts of the case." If the Guidelines were still mandatory, and assuming the facts did not justify a Guidelines-based downward departure, this would provide a sufficient basis for setting aside Gall's sentence because the Guidelines state that probation alone is not an appropriate sentence for comparable offenses. But the Guidelines are not mandatory, and thus the "range of choice dictated by the facts of the case" is significantly broadened. Moreover, the Guidelines are only one of the factors to consider when imposing sentence, and § 3553(a)(3) directs the judge to consider sentences other than imprisonment.

We also note that the Government did not argue below, and has not argued here, that a sentence of probation could never be imposed for a crime identical to Gall's. Indeed, it acknowledged that probation could be permissible if the record contained different—but in our view, no more compelling—mitigating evidence. Arg. 37-38 (stating that probation could be an appropriate sentence, given the exact same offense, if "there are compelling family circumstances where individuals will be very badly hurt in the defendant's family if no one is available to take care of them").

The District Court quite reasonably attached great weight to Gall's self-motivated rehabilitation, which was undertaken not at the direction of, or under supervision by, any court, but on his own initiative. This also lends strong support to the conclusion that imprisonment was not necessary to deter Gall from engaging in future criminal conduct or to protect the public from his future criminal acts. See 18 U.S.C. §§ 3553(a)(2)(B), (C).

The Court of Appeals clearly disagreed with the District Judge's conclusion that consideration of the § 3553(a) factors justified a sentence of probation; it believed that the circumstances presented here were insufficient to sustain such a marked deviation from the Guidelines range. But it is not for the Court of Appeals to decide de novo whether the justification for a variance is sufficient or the sentence reasonable. On abuse-of-discretion review, the Court of Appeals should have given due deference to the District Court's reasoned and reasonable decision that the § 3553(a) factors, on the whole, justified the sentence. Accordingly, the judgment of the Court of Appeals is reversed.

SOUTER, J., concurring.

I join the Court's opinion here, as I do in today's companion case of *Kimbrough v. United States*, which follow *United States v. Booker*, and *Rita v. United States*. My disagreements with holdings in those earlier cases are not the stuff of formally perpetual dissent, but I see their objectionable points hexing our judgments today. After *Booker*'s remedial holding, I continue to think that the best resolution of the tension between substantial consistency throughout the system and the right of jury trial would be a new Act of Congress: reestablishing a statutory system of mandatory sentencing guidelines (though not identical to the original in all points of detail), but providing for jury findings of all facts necessary to set the upper range of sentencing discretion.

ALITO, J., dissenting.

The fundamental question in this case is whether, under the remedial decision in *United States v. Booker*, a district court must give the policy decisions that are embodied in the Sentencing Guidelines at least some significant weight in making a sentencing decision. I would answer that question in the affirmative and would therefore affirm the decision of the Court of Appeals.

I

In *Booker*, a bare majority held that the Sentencing Reform Act of 1984 violated the Sixth Amendment insofar as it required district judges to follow the United States Sentencing Guidelines, but another bare majority held that this defect could be remedied by excising the two statutory provisions, 18 U.S.C. §§ 3553(b)(1)

and 3742(e), that made compliance with the Guidelines mandatory. As a result of these two holdings, the lower federal courts were instructed that the Guidelines must be regarded as "effectively advisory," and that individual sentencing decisions are subject to appellate review for "reasonableness." The *Booker* remedial opinion did not explain exactly what it meant by a system of "advisory" guidelines or by "reasonableness" review, and the opinion is open to different interpretations…. [The best] reading is that sentencing judges must still give the Guidelines' policy decisions some significant weight and that the courts of appeals must still police compliance.

[At various] points in the [*Booker*] remedial opinion, the Court expressed confidence that appellate review for reasonableness would help to avoid "excessive sentencing disparities" and "would tend to iron out sentencing differences." Indeed, a major theme of the remedial opinion, as well as our decision last Term in *Rita v. United States* was that the post-*Booker* sentencing regime would still promote the Sentencing Reform Act's goal of reducing sentencing disparities.

It is unrealistic to think this goal can be achieved over the long term if sentencing judges need only give lip service to the Guidelines. The other sentencing factors set out in § 3553(a) are so broad that they impose few real restraints on sentencing judges. Thus, if judges are obligated to do no more than consult the Guidelines before deciding upon the sentence that is, in their independent judgment, sufficient to serve the other § 3553(a) factors, federal sentencing will not "move ... in Congress' preferred direction." On the contrary, sentencing disparities will gradually increase. Appellate decisions affirming sentences that diverge from the Guidelines (such as the Court's decision today) will be influential, and the sentencing habits developed during the pre-*Booker* era will fade.

Finally, in reading the *Booker* remedial opinion, we should not forget the decision's constitutional underpinnings. *Booker* and its antecedents are based on the Sixth Amendment right to trial by jury. The Court has held that (at least under a mandatory guidelines system) a defendant has the right to have a jury, not a judge, find facts that increase the defendant's authorized sentence. It is telling that the rules set out in the Court's opinion in the present case have nothing to do with juries or factfinding and,

indeed, that not one of the facts that bears on petitioner's sentence is disputed. What is at issue, instead, is the allocation of the authority to decide issues of substantive sentencing policy, an issue on which the Sixth Amendment says absolutely nothing. The yawning gap between the Sixth Amendment and the Court's opinion should be enough to show that the *Blakely-Booker* line of cases has gone astray….

I recognize that the Court is committed to the *Blakely-Booker* line of cases, but we are not required to continue along a path that will take us further and further off course. Because the Booker remedial opinion may be read to require sentencing judges to give weight to the Guidelines, I would adopt that interpretation and thus minimize the gap between what the Sixth Amendment requires and what our cases have held.

II

Read fairly, the opinion of the Court of Appeals holds that the District Court did not properly exercise its sentencing discretion because it did not give sufficient weight to the policy decisions reflected in the Guidelines. Petitioner was convicted of a serious crime, conspiracy to distribute "ecstasy." He distributed thousands of pills and made between $30,000 and $40,000 in profit. Although he eventually left the conspiracy, he did so because he was worried about apprehension. The Sentencing Guidelines called for a term of imprisonment of 30 to 37 months, but the District Court imposed a term of probation….

If the question before us was whether a reasonable jurist could conclude that a sentence of probation was sufficient in this case to serve the purposes of punishment set out in 18 U.S.C. § 3553(a)(2), the District Court's decision could not be disturbed. But because I believe that sentencing judges must still give some significant weight to the Guidelines sentencing range, the Commission's policy statements, and the need to avoid unwarranted sentencing disparities, I agree with the Eighth Circuit that the District Court did not properly exercise its discretion.

Appellate review for abuse of discretion is not an empty formality. A decision calling for the exercise of judicial discretion "hardly means that it is unfettered by meaningful standards or shielded from thorough appellate review." And when a trial court is required by statute to take specified factors into account in

making a discretionary decision, the trial court must be reversed if it "ignored or slighted a factor that Congress has deemed pertinent."

Here, the District Court "slighted" the factors set out in 18 U.S.C. §§ 3553(a)(3), (4), and (5)—namely, the Guidelines sentencing range, the Commission's policy statements, and the need to avoid unwarranted sentencing disparities. Although the Guidelines called for a prison term of at least 30 months, the District Court did not require any imprisonment—not one day. The opinion of the Court makes much of the restrictions and burdens of probation, but in the real world there is a huge difference between imprisonment and probation. If the District Court had given any appreciable weight to the Guidelines, the District Court could not have sentenced petitioner to probation without very strong countervailing considerations.

The court listed five considerations as justification for a sentence of probation: (1) petitioner's "voluntary and explicit withdrawal from the conspiracy," (2) his "exemplary behavior while on bond," (3) "the support manifested by family and friends," (4) "the lack of criminal history, especially a complete lack of any violent criminal history," (5) and his age at the time of the offense, 21.

Two of the considerations that the District Court cited —"the support manifested by family and friends" and his age — amounted to a direct rejection of the Sentencing Commission's authority to decide the most basic issues of sentencing policy. In the Sentencing Reform Act, Congress required the Sentencing Commission to consider and decide whether certain specified factors—including "age," "education," "previous employment record," "physical condition," "family ties and responsibilities," and "community ties"—"have any relevance to the nature [and] extent ... of an appropriate sentence." 28 U.S.C. § 994(d). These factors come up with great frequency, and judges in the pre-Sentencing Reform Act era disagreed regarding their relevance. Indeed, some of these factors were viewed by some judges as reasons for increasing a sentence and by others as reasons for decreasing a sentence. For example, if a defendant had a job, a supportive family, and friends, those factors were sometimes viewed as justifying a harsher sentence on the ground that the defendant had squandered the opportunity to lead a law-abiding

life. Alternatively, those same factors were sometimes viewed as justifications for a more lenient sentence on the ground that a defendant with a job and a network of support would be less likely to return to crime. If each judge is free to implement his or her personal views on such matters, sentencing disparities are inevitable.

In response to Congress' direction to establish uniform national sentencing policies regarding these common sentencing factors, the Sentencing Commission issued policy statements concluding that "age," "family ties," and "community ties" are relevant to sentencing only in unusual cases. See United States Sentencing Commission, Guidelines Manual §§ 5H1.1 (age), 5H1.6 (family and community ties). The District Court in this case did not claim that there was anything particularly unusual about petitioner's family or community ties or his age, but the court cited these factors as justifications for a sentence of probation. Although the District Court was obligated to take into account the Commission's policy statements and the need to avoid sentencing disparities, the District Court rejected Commission policy statements that are critical to the effort to reduce such disparities.

The District Court relied on petitioner's lack of criminal history, but criminal history (or the lack thereof) is a central factor in the calculation of the Guidelines range. Petitioner was given credit for his lack of criminal history in the calculation of his Guidelines sentence. Consequently, giving petitioner additional credit for this factor was nothing more than an expression of disagreement with the policy determination reflected in the Guidelines range.

The District Court mentioned petitioner's "exemplary behavior while on bond," but this surely cannot be regarded as a weighty factor.

Finally, the District Court was plainly impressed by petitioner's "voluntary and explicit withdrawal from the conspiracy." As the Government argues, the legitimate strength of this factor is diminished by petitioner's motivation in withdrawing. He did not leave the conspiracy for reasons of conscience, and he made no effort to stop the others in the ring. He withdrew because he had become afraid of apprehension. While the District Court was within its rights in regarding this factor and petitioner's "self-rehabilitat[ion]," as positive considerations, they are not enough, in

light of the Guidelines' call for a 30-to 37-month prison term, to warrant a sentence of probation.

Notes

1. *The debate over offender circumstances in federal sentencing*. Are the majority and the dissent in *Gall* really debating how much weight should be given to the guideline sentencing range in this case or rather whether to respect the Sentencing Commission's basic policy decision to afford offender-related circumstances no role in the calculation of guideline ranges? In light of the provisions of 3553(a), must a district court now give more weight to offender circumstances than do the guidelines?

Are there particular offender circumstances that arose in Gall that should be a more regularize and quantified aspect of guideline sentencing? If you were a member of the U.S. Sentencing Commission, would you consider as a response to *Gall* a proposal to have a formal reduction to the guideline range based on, for example, voluntary withdrawal from a conspiracy?

2. *Prosecutorial discretion and offender circumstances*. Why did the United States Attorney in Iowa charged Brian Gall? Why did this office pursue an appeal after the district court in a reasoned opinion decided that a term of probation was a sufficient sentence? Might one test of whether a substantial below guideline sentence is reasonable by asking whether a prosecutor could or would plausibly decline to charge the crime at all and/or whether a prosecutor might have readily accepted a plea deal to the sentencing term ultimately imposed by the district judge?

Chapter 9

Race, Class, and Gender

A. African-Americans in the Criminal Justice System

Page 699. Add this material at the end of note 4.

In May 2007, the United States Sentencing Commission unanimously adopted an amendment that sought to respond to long-standing complaints about the crack-powder disparity by modestly reducing crack cocaine guidelines levels across the board. In the original guidelines, the Commission established guideline ranges that were set above applicable mandatory minimum penalties for crack set by Congress: for example, the guideline range for first time crack offenses involving 5 or more grams of crack cocaine was 63 to 78 months, while the statutory mandatory minimum was 5 years (or 60 months). Similarly, the guideline range for the 50 or more gram level, which has a mandatory minimum of 120 months imprisonment, was 121-151 months. The 2007 amendment reduces the base offense level for crack cocaine offenses so that the sentencing range includes, rather than exceeds, any applicable statutory mandatory minimum. Thus, for first time offenders at the 5 and 50 gram levels, the guideline ranges after the amendment are 51-63 months and 97-121 months. Similar reductions are made for crack cocaine amounts below and above mandatory minimum thresholds.

In a press release accompanying its amendment, the Commission "emphasized and expressed its strong view that the amendment is only a partial solution to some of the problems associated with the 100-to-1 drug quantity ratio. Any

comprehensive solution to the 100-to-1 drug quantity ratio would require appropriate legislative action by Congress." *See* U.S. Sentencing Commission Votes to Amend Guidelines for Terrorism, Sex Offenses, Intellectual Property Offenses, and Crack Cocaine Offenses (April 27, 2008), *at* http://www.ussc.gov/PRESS/rel0407.htm.

This amendment attracted relatively little congressional attention, and took effect on November 1, 2007. Thereafter in December 2007, the Sentencing Commission voted unanimously to give retroactive effect to this amendment, effective on March 3, 2008. Although this decision was more controversial and led to Attorney General Michael Mukasey to encourage Congress to pass legislation to overrule the Commission's decision, serious Congressional opposition never developed to this retroactivity decision. As a result of these actions, approximately 1500 inmates became eligible for immediate release and as many as 20,000 inmates could potentially have their sentences reduced in the coming years.