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## Crack, Congress, and the Normalization of Federal Sentencing: Why 12,040 Federal Inmates Believe That Their Sentences Should Be Reduced, and Why They and Others Like Them May Be Right

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# Comment

## **Crack, Congress, and the Normalization of Federal Sentencing: Why 12,040 Federal Inmates Believe That Their Sentences Should Be Reduced, and Why They and Others Like Them May Be Right**

### I. INTRODUCTION

The 1980s was a transitional period in American history, when the general acceptance of casual drug use, which is still associated with the 1960s and 1970s, began to turn to widespread disapproval.<sup>1</sup> The practice and dangers of “freebasing”—smoking cocaine that had been purified with ether and inhaled over an open flame—came into the public spotlight in 1980 when a prominent comedian immolated himself in an accident blamed on the dangerous practice.<sup>2</sup> Beginning in 1984, a cheaper, more accessible form of freebase cocaine, called “crack,” began

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1. Robert Reinhold, *Leveling Off of Drug Use Found Among Students*, N.Y. TIMES, Feb. 19, 1981, at A1.

2. *Richard Pryor's Tragic Accident Spotlights a Dangerous Drug Craze: Freebasing*, PEOPLE, June 30, 1980, at 69, available at <http://www.people.com/people/archive/article/0,,20076864,00.html> [hereinafter *Freebasing*].

growing in popularity in New York, Miami, and Los Angeles.<sup>3</sup> In November 1985, newspapers began running articles that raised public alarm over this new, cheap, and powerful form of cocaine.<sup>4</sup> By mid-1986, the term "crack epidemic" had come into widespread use as a way to describe this new drug's booming popularity.<sup>5</sup>

In response to the rising numbers of crack users across the nation, Congress took swift and decisive action by passing the Anti-Drug Abuse Act of 1986.<sup>6</sup> This law rewrote federal drug regulations that had been in place since 1970 and added, for the first time, sentences for possession of controlled substances that varied based on both the substance and the quantity possessed.<sup>7</sup> The passage of the Act had been preceded by almost a year of regular congressional hearings on the dangerousness of crack cocaine, with the conversations escalating in both alarm and urgency.<sup>8</sup> As a result of these hearings, the quantity of crack that a defendant was required to have in order to trigger a mandatory minimum sentence of 5 or 10 years' imprisonment was set at 1% of the quantity of cocaine required to trigger the same sentence.<sup>9</sup>

While fiercely fighting the "crack epidemic," Congress was also creating a new federal agency, the United States Sentencing Commission, to promote uniformity and predictability in federal criminal sentencing.<sup>10</sup> The Commission's first set of regulations took effect in 1987, and the sentencing guidelines therein were made compulsory on the judges applying them.<sup>11</sup> This included the heightened statutory minimum sentences required by Congress's 1986 Anti-Drug legislation.<sup>12</sup> It was not long, however, before patterns began emerging. By the mid-1990s, it became apparent that African-Americans were

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3. See, e.g., Ray Huard, *Cocaine a Cheap High, Hotline Finding*, MIAMI HERALD, Nov. 21, 1985, at 1.

4. See *id.*

5. See Kevin Cullen, *New "Crack" Drug a Major Challenge, Officials Say*, BOS. GLOBE, May 1, 1986, at 29.

6. Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended at 21 U.S.C. §§ 801-971).

7. See Controlled Substances Import and Export Penalties Enhancement Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-15 (this Act embodies "Subtitle G" of the Anti-Drug Abuse Act of 1986).

8. See, e.g., *Mandatory Minimum Sentencing Laws—The Issues: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 110th Cong. 170-72 (2007) (statement of Eric E. Sterling, Former Assistant Counsel, House Subcommittees on Crime and Criminal Justice, 1979-1989) (describing how the drafters of the Anti-Drug Abuse Act of 1986 arrived at a 100:1 sentencing ratio).

9. *Id.*

10. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987, 2017.

11. 18 U.S.C. § 3553(b)(1) (2006).

12. See U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 (1987) (amended 2011).

subjected to a disproportionate number of federal crack convictions, along with their drastically heightened penalties.<sup>13</sup> Meanwhile, those being convicted for possession of drugs without heightened penalties, such as powdered cocaine, were disproportionately white.<sup>14</sup>

These two new legal systems continued to operate side-by-side until 2005, with federal judges in the position of being compelled to sentence members of the overrepresented African-American community more harshly for drug crimes.<sup>15</sup> Then, in 2005, the United States Supreme Court held in *United States v. Booker*<sup>16</sup> that the statutes that made the United States Sentencing Guidelines compulsory on federal judges were unconstitutional, and reinterpreted the guidelines as being merely advisory.<sup>17</sup>

Since then, the call to end the disparity between crack and cocaine sentencing has drawn a great deal of support,<sup>18</sup> and eventually Congress passed the Fair Sentencing Act of 2010.<sup>19</sup> This Act has reduced the 100:1 ratio used in crack and cocaine sentencing to one that treats the possession of crack somewhat more leniently.<sup>20</sup> Furthermore, because the United States Sentencing Commission has modified the United States Sentencing Guidelines in accordance with the Fair Sentencing Act,<sup>21</sup> and has chosen to make those modifications retroactively applicable to people serving sentences for crack convictions that predate the Act,<sup>22</sup> this area of law is likely to be the subject of a large amount of litigation in the coming years—particularly as prisoners continue to struggle to receive the sentencing reductions to which they

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13. See Douglas C. McDonald & Kenneth E. Carlson, *Why Did Racial/Ethnic Sentencing Differences in Federal District Courts Grow Larger Under the Guidelines?*, 6 FED. SENT'G REP. 223, 224-26 (1994).

14. *Id.*

15. See *United States v. Booker*, 543 U.S. 220, 233-34 (2005).

16. 543 U.S. 220 (2005).

17. See *id.* at 244-45.

18. See U.S. SENTENCING GUIDELINES MANUAL, app. C, vol. III, amend. 706 (2011).

19. Pub. L. No. 111-220 § 2-3, 124 Stat. 2372, 2372 (codified in scattered sections of 21 U.S.C. ch. 13).

20. Compare *id.* § 2, 124 Stat. at 2372, with Anti-Drug Abuse Act of 1986 § 1002, 100 Stat. at 3207-2 to -4.

21. U.S. SENTENCING COMM'N, AMENDMENTS TO SENTENCING GUIDELINES (2011), available at [http://www.ussc.gov/Legal/Amendments/Official\\_Text/20110428\\_Amendments.pdf](http://www.ussc.gov/Legal/Amendments/Official_Text/20110428_Amendments.pdf).

22. News Release, U.S. Sentencing Commission, U.S. Sentencing Commission Votes Unanimously To Apply Fair Sentencing Act of 2010 Amendment to the Federal Sentencing Guidelines Retroactively (June 30, 2011), available at [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Newsroom/Press\\_Releases/20110630\\_Press\\_Release.pdf](http://www.ussc.gov/Legislative_and_Public_Affairs/Newsroom/Press_Releases/20110630_Press_Release.pdf).

are entitled.<sup>23</sup> This Comment explores the issues and outcomes of those cases, including current circuit splits in the area, as well as the possibility for future litigation in the United States Supreme Court and other possible directions for this rapidly-evolving area of federal criminal law.

## II. HISTORY OF THE ISSUE

### A. Cocaine and Cocaine Base

Cocaine is a powerful stimulant drug that is derived from the leaves of coca plants.<sup>24</sup> It came into popular use as an anesthetic near the end of the nineteenth century, but today it is widely understood to be a dangerous and highly addictive drug.<sup>25</sup> Cocaine is classified as a Schedule II drug under the Controlled Substances Act (CSA),<sup>26</sup> which means that it “has a high potential for abuse[,] . . . [it] has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions[,] . . . [and a]buse of the drug . . . may lead to severe psychological or physical dependence.”<sup>27</sup>

Cocaine is widely available as a fine, white powder.<sup>28</sup> This form is also known as cocaine hydrochloride (cocaine HCl).<sup>29</sup> Cocaine HCl is a salt form of cocaine that readily dissolves in water.<sup>30</sup> However, this salt form has a higher melting temperature than cocaine base, the chemically pure form of cocaine, which causes cocaine HCl to burn and lose its psychoactive properties at lower temperatures than those required to vaporize it for smoking or inhalation.<sup>31</sup> In the 1970s, cocaine users started applying chemical processes to cocaine HCl to remove the hydrochloride component of the molecule and crystallize the

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23. See generally *Dillon v. United States*, 130 S. Ct. 2683 (2010); *United States v. Ware*, No. 08-625-01, 2012 WL 38937 (E.D. Pa. Jan. 9, 2012).

24. *Powdered Cocaine Fast Facts: Questions and Answers*, NAT'L DRUG INTELLIGENCE CENTER (U.S. Dep't of Justice), Apr. 2003, available at <http://www.justice.gov/ndic/pubs3/3951/3951p.pdf>.

25. *Id.*

26. Pub. L. No. 91-513, tit. II, 84 Stat. 1242 (1970) (codified as amended at 21 U.S.C. §§ 801-904 (2006 & Supp. IV 2010)).

27. 21 U.S.C. § 812(b)(2) (2006).

28. *Powdered Cocaine Fast Facts*, *supra* note 24.

29. *Id.*

30. Special Report, *The CIA-Contra-Crack Cocaine Controversy: A Review of the Justice Department's Investigations and Prosecutions*, OFF. OF THE INSPECTOR GEN. (U.S. Dep't of Justice), Dec. 1997, at app. B, available at <http://www.justice.gov/oig/special/9712/index.htm>.

31. *Id.* at app. B, n.1.

purified cocaine base.<sup>32</sup> This purified form, called “freebase,” sublimates, or vaporizes, at a much lower temperature than cocaine HCl, and can be directly inhaled without losing its stimulant characteristics.<sup>33</sup> Using freebase, “freebasing,”<sup>34</sup> has a more immediate, more intense effect on the user than powdered cocaine, though the effects fade more quickly than those of powdered cocaine.<sup>35</sup>

Before the popularization of crack cocaine, creating freebase involved using highly flammable ether to separate the drug base from chemical solvents that trapped the hydrochloride component of cocaine HCl.<sup>36</sup> This dangerous practice came to national attention in 1980 when comedian Richard Pryor was badly burned over a large portion of his body in an accident that the Los Angeles Police Department attributed to freebasing.<sup>37</sup> Despite the danger and complexity of the freebasing process, a 1983 survey of callers to the national cocaine hotline revealed that 21% of those surveyed indicated that freebasing was their choice method for ingesting cocaine.<sup>38</sup> In addition, 40% of cocaine users were earning more than \$25,000 per year,<sup>39</sup> and the average user spent \$637 a week on 6.5 grams of cocaine (at \$98 per gram).<sup>40</sup>

In the mid-1980s, this began to change. A follow-up survey by the national cocaine hotline, conducted in early 1985, found that demographics were shifting rapidly.<sup>41</sup> By that time, only 27% of users were earning more than \$25,000 per year,<sup>42</sup> the average user was spending \$535 per week on 7.2 grams of cocaine (at about \$74 per gram), and the proportion of those who preferred to insufflate (snort) cocaine HCl fell, while the proportion of users who preferred freebasing climbed to

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32. *Id.* at app. B.

33. *Id.*

34. DRUG ENFORCEMENT AGENCY, *What's up with Cocaine?*, in GET IT STRAIGHT! (1996), available at <http://web.archive.org/web/20101129180552/http://www.justice.gov/dea/pubs/straight/cocaine.htm>.

35. *DePierre v. United States*, 131 S. Ct. 2225, 2228-29 (2011).

36. *Id.* at 2228; see also Jeff Leen, *Freebasing Causes Euphoric 'Explosion,'* MIAMI HERALD, Dec. 30, 1985, at 3B.

37. *Freebasing*, *supra* note 2.

38. Herb Roehrich & Mark S. Gold, *800-COCAINE: Origin, Significance, and Findings*, 61 YALE J. BIO. & MED. 149, 151 tbl. 2 (1988).

39. This would be roughly equivalent to earning more than \$56,893.83 per year in 2012 dollars. *CPI Inflation Calculator*, U.S. BUREAU OF LABOR STATISTICS, [http://www.bls.gov/data/inflation\\_calculator.htm](http://www.bls.gov/data/inflation_calculator.htm) (last visited Mar. 11, 2012).

40. Roehrich & Gold, *supra* note 38.

41. *Id.*

42. This would be roughly equivalent to earning more than \$52,663.80 per year in 2012 dollars. *CPI Inflation Calculator*, *supra* note 39.

30%.<sup>43</sup> Survey analysts interpreted this shift as signaling the end of cocaine as a drug for the wealthy.<sup>44</sup> The press blamed this change on crack cocaine.<sup>45</sup> By November 1985, stories about the spread of this cheaper form of freebase cocaine began circulating in American newspapers.<sup>46</sup>

Crack was a newly-popularized way of isolating cocaine base by combining cocaine HCl in water with another pH-basic chemical, usually baking soda, and boiling the mixture down into a solid state to cause the hydrochloride to bond chemically with the added base instead of the cocaine base.<sup>47</sup> From this solid state, the concoction could be chipped apart into "rocks" resembling small pieces of soap, which sold for about \$10 per pea-sized dose.<sup>48</sup> The end product was a cheaper form of smokable freebase cocaine that was easier and safer to make—the sound of which gave crack its onomatopoeic name<sup>49</sup>—with the same potent and immediate effects that required dangerous ether-based purification methods only years earlier.<sup>50</sup> The profound, immediate, and brief high that crack users experienced would be followed by a strong desire to smoke more and return to the same high state.<sup>51</sup> As a result, crack users could become deeply addicted in a matter of weeks, whereas powdered cocaine users normally required years of use before addiction.<sup>52</sup>

From inner-city New York, Miami, and Los Angeles, crack began to spread to the rest of the country over the next few years.<sup>53</sup> By the end of 1986, crack use, sales, and trafficking had reached rural areas in the

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43. Roehrich & Gold, *supra* note 38.

44. *Id.* at 150; *see also* Huard, *supra* note 3.

45. *See, e.g.*, Peter Kerr, *Extra-Potent Cocaine: Use Rising Sharply Among Teen-agers*, N.Y. TIMES, Mar. 20, 1986, at B1.

46. *See generally* Huard, *supra* note 3; Jane Gross, *A New, Purified Form of Cocaine Causes Alarm as Abuse Increases*, N.Y. TIMES, Nov. 29, 1985, at A1; Associated Press, *'Crack' Found Luring Young Drug Users*, PHILA. DAILY NEWS, Dec. 6, 1985, at 10.

47. *Crack Cocaine Fact Facts: Questions and Answers*, NAT'L DRUG INTELLIGENCE CENTER (U.S. Dep't of Justice), Apr. 2003, available at <http://www.justice.gov/ndic/pubs3/3978/3978p.pdf>.

48. Al Truesdell, *Crack Ruins Some, Scares Many—Cocaine Derivative Creates Addicts in All Economic Levels of County*, ORLANDO SENTINEL, July 27, 1986, at 1.

49. Ellis E. Conklin, *Crack: The Most Addictive Substance on This Planet—1 1/2 Million Are Hooked*, CHI. SUN-TIMES, Sept. 10, 1986, at 43.

50. Truesdell, *supra* at note 48.

51. Kerr, *supra* at note 45.

52. Peter Kerr, *Anatomy of the Drug Issue: How, After Years, It Erupted*, N.Y. TIMES, Nov. 17, 1986, at A1.

53. William E. Schmidt, *Police Say Use of Crack Is Moving to Small Towns and Rural Areas*, N.Y. TIMES, Sept. 10, 1986, at A1.

western and southeastern United States, as well as parts of New England.<sup>54</sup> As crack spread, an increase in “robberies and violent crime” followed.<sup>55</sup> By 1987, gangs had developed organized crack distribution networks, and in some parts of the country, wars broke out between rival groups vying for control of contested territory wherever crack could be sold.<sup>56</sup>

One popular tactic for female addicts was to resort to prostitution as a means of feeding their crack dependencies.<sup>57</sup> This practice led to dramatic increases in some areas in the numbers of reported cases of HIV, syphilis, and drug-resistant strains of gonorrhea.<sup>58</sup> News outlets also told of overwhelming numbers of “crack babies” born to mothers addicted to the drug.<sup>59</sup> These babies exhibited signs of drug withdrawal through their first few weeks of life, “including irritability, tremors, muscle rigidity and stiffness.”<sup>60</sup> In one particularly horrifying case in Detroit, a three-month-old infant died of a drug overdose after nursing from its mother a few days after she had taken crack.<sup>61</sup> In the child’s short life, she had already developed scars from where her mother had neglected her diaper rash, and she had been “racked by seizures and scorched by fever-symptoms common to cocaine-related deaths.”<sup>62</sup>

#### B. *The United States Sentencing Commission*

The United States Sentencing Commission (USSC), which is comprised of eight members, including three federal judges,<sup>63</sup> was created on

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54. *Id.*

55. *Id.*

56. Peter Kerr, *A Crack Plague in Queens Brings Violence and Fear*, N.Y. TIMES, Oct. 19, 1987, at A1; see also William Overendt, *Crips and Bloods L.A. Gangs: Are They Migrating?*, L.A. TIMES, Apr. 3, 1987, at 1.

57. Al Truesdell, *Sexual Disease Spreading Public Health Officials Blame Prostitutes Trading Sex for Crack Cocaine*, ORLANDO SENTINEL, Oct. 21, 1987, at 1.

58. *Id.*

59. *E.g.*, Peter Kerr, *Babies of Crack Users Fill Hospital Nurseries*, N.Y. TIMES, Aug. 25, 1986, at B1.

60. *Id.* In recent years, studies following babies suffering from prenatal cocaine exposure have strongly undermined the fears of the 1980s that crack “would produce a generation of severely damaged children.” Susan Okie, *The Epidemic that Wasn’t*, N.Y. TIMES, Jan. 27, 2009, at D1. While studies have found “reliable and persistent” differences between cocaine-exposed children and other children, “the long-term effects of such exposure on children’s brain development and behavior appear relatively small.” *Id.*

61. Stephen Franklin, *Detroit Wages All-Out War Against Crack*, CHI. TRIBUNE, Dec. 13, 1987, at 29.

62. *Id.*

63. 28 U.S.C. § 991(a) (Supp. IV 2010).



October 12, 1984, by the Sentencing Reform Act of 1984<sup>64</sup> for the purpose of “establish[ing] sentencing policies and practices for the Federal criminal justice system” and “develop[ing] means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing.”<sup>65</sup> This was seen as necessary in order to

provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and . . . [to] reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process.<sup>66</sup>

As originally created, the USSC’s twenty-three specifically enumerated duties centered around promulgating regulations for sentencing courts to use as a guide for calculating the form, degree, and conditions attached to sentences, based on factors such as the nature of the crimes of conviction, criminal history, and aggravating and mitigating factors.<sup>67</sup>

The product of the USSC’s rulemaking effort was called the *Guidelines Manual* (USSG).<sup>68</sup> After receiving congressional approval, the USSG were first published in 1987.<sup>69</sup> The USSG effectively boiled down the entire range of federal criminal behavior onto a single-page “sentencing table.”<sup>70</sup> All crimes could be sentenced under the table according to a systematic process.<sup>71</sup> First, the USSG assigned each defendant an “offense level” based on the crime(s) of conviction.<sup>72</sup> Then, the guidelines adjusted each offense level to account for considerations such as degree of involvement, use of a firearm, cooperation with authorities,

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64. Pub. L. No. 98-473, ch. II, 98 Stat. 1987.

65. Pub. L. No. 98-473, § 217(a), 98 Stat. at 2018 (codified as amended at 28 U.S.C. § 991(b)(1) & (2) (2006)).

66. *Id.* (codified as amended at 28 U.S.C. § 991(b)(1)(B)-(C)).

67. *Id.* § 217(a), 98 Stat. at 2019-2024 (codified as amended at 28 U.S.C. § 994 (2006)).

68. U.S. SENTENCING GUIDELINES MANUAL (2011). The acronym “USSG” is the USSC’s self-styled shorthand for the *Guidelines Manual*, simply meaning “United States Sentencing Guidelines.” *Id.* at ii.

69. *Id.* § 1A1.

70. *Id.* § 5A. A copy of the sentencing table has been appended to this comment for reference.

71. *See id.* § 1B1.1.

72. *Id.* § 1B1.1(a)(2).

and numerous others.<sup>73</sup> After that, defendants would be assigned a “criminal history category” by counting past criminal convictions.<sup>74</sup> Next, the court would find the sentencing range on the sentencing table that corresponded to the defendant’s final offense level and criminal history category.<sup>75</sup> Lastly, the court would consider any options for imposing a fine, a probated sentence, restitution, or any other sentencing conditions.<sup>76</sup>

To help with the USSG’s implementation, the Sentencing Reform Act of 1984 contained explicit instructions for federal judges imposing criminal sentences.<sup>77</sup> Subsection (a) of 18 U.S.C. § 3553<sup>78</sup> requires that the court consider not only the sentencing range given by the USSG, but a wide variety of other factual and policy concerns.<sup>79</sup> Of note are factors requiring the weighing of various social policies that justify criminal punishment, the desirability of uniformity in sentencing, and the general nature of the offense.<sup>80</sup> However, subsection (b) of the same statute then obligates that the sentencing court, after considering all of the factors listed in subsection (a), “shall impose a sentence of the kind, and within the range, referred to in [the USSG] unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission.”<sup>81</sup>

This created a system in which sentencing courts were under a statutory mandate to weigh and balance numerous complex social and governmental policies, and then, despite those findings, choose a sentence within a narrow, limited range.<sup>82</sup> On the other hand, this curbing of judicial discretion was the first solution in “almost a century” that effectively ended the “[f]undamental and widespread dissatisfaction with the uncertainties and the disparities” of federal sentencing.<sup>83</sup> Predictably, since these new rules altered the sentences federal convicts

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73. *Id.* § 1B1.1(a)(3).

74. *Id.* § 1B1.1(a)(6).

75. *Id.* § 1B1.1(a)(7).

76. *Id.* § 1B1.1(a)(8).

77. Pub. L. No. 98-473, § 212, 98 Stat. at 1989 (codified as amended at 18 U.S.C. § 3553 (2006 & Supp. IV 2010)).

78. 18 U.S.C. § 3553(a) (2006).

79. *Id.*

80. *Id.*

81. 18 U.S.C. § 3553(b)(1) (2006) (emphasis added).

82. *See id.* § 3553 (2006 & Supp. IV 2010).

83. *Mistretta v. United States*, 488 U.S. 361, 363-66 (1989), *affg* *United States v. Johnson*, 682 F. Supp. 1033 (W.D. Mo. 1988).

would receive and ended the federal parole system,<sup>84</sup> challenges to the new sentencing regulations quickly followed their taking effect on November 1, 1987.

The first published case challenging the constitutionality of the USSG appears to be *United States v. Arnold*,<sup>85</sup> followed four days later by *Federal Defenders of San Diego, Inc. v. U.S. Sentencing Commission*.<sup>86</sup> The general nature of both constitutional complaints was that the USSG exceeded Congress's authority to delegate its power to determine sentences, and that, even though the USSC was placed within the judicial branch, the required presence of Article III<sup>87</sup> judges on the Commission violated the separation of powers doctrine.<sup>88</sup> In *Arnold*, the United States District Court for the Southern District of California fully endorsed the separation of powers argument and ruled that the USSG, and the Commission itself, were both unconstitutional.<sup>89</sup> This result, however, was not unanimous among federal courts. In *Federal Defenders*, the United States District Court for the District of Columbia held that federal public defenders did not have standing to challenge the guidelines because they had not yet been injured in a constitutionally cognizable way.<sup>90</sup> Even though the USSG would impact every future federal defendant that the public defenders would represent, the allegations that those public defenders would suffer from an increased workload that would harm their ability to represent clients effectively were not enough to create a case or controversy under Article III of the United States Constitution.<sup>91</sup> Finally, on the opposite end of the spectrum, the United States District Court for the Eastern District of Louisiana fully approbated the USSC and USSG in another early case, *United States v. Chambless*.<sup>92</sup>

Given the "imperative public importance of the issue . . . and because of the disarray among the Federal District Courts," the question of the

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84. 18 U.S.C. § 3624 (2006 & Supp. IV 2010), enacted as part of the Sentencing Reform Act of 1984, eliminated parole for federal prisoners by requiring release only "on the date of the expiration of the prisoner's term of imprisonment," with no early release available, except for a maximum of fifty-four days per year of additional credit for time served earned for each year of good behavior after the first year served. 18 U.S.C. § 3624(a)-(b) (2006).

85. 678 F. Supp. 1463 (S.D. Cal. 1988).

86. 680 F. Supp. 26 (D.D.C. 1988).

87. U.S. CONST. art. III.

88. See, e.g., *Arnold*, 678 F. Supp. at 1466-72.

89. *Id.* at 1465; see also *United States v. Smith*, 686 F. Supp. 847, 865 (D. Colo. 1988) (holding presence of Article III judges on Sentencing Commission violates separation of powers).

90. 680 F. Supp. at 27-32.

91. *Id.* at 32.

92. 680 F. Supp. 793, 797-800 (E.D. La. 1988).

guidelines' constitutionality was put on the fast track to review by the United States Supreme Court.<sup>93</sup> In *United States v. Johnson*,<sup>94</sup> three defendants, who had been convicted and were awaiting sentencing in the United States District Court for the Western District of Missouri, filed motions with the court seeking a declaration that the USSG were unconstitutional.<sup>95</sup> Seven judges on the court convened as a panel and heard arguments on the issue.<sup>96</sup> The court then issued an opinion—written by Judge Howard Sachs, joined in the judgment only by three other judges, and dissented to by Chief Judge Scott Wright—upholding the USSC and USSG.<sup>97</sup> The defendants appealed to the United States Court of Appeals for the Eighth Circuit.<sup>98</sup> However, before the Eighth Circuit could rule on the case, both sides filed petitions for certiorari before judgment with the United States Supreme Court, and, in an unusual move by the Court, the petitions were granted.<sup>99</sup> In resolving the case, which was restyled *Mistretta v. United States*,<sup>100</sup> the Court considered both the nondelegation doctrine and separation of powers arguments that had been tested in the various district courts and, ultimately, found that both the USSC and the USSG complied with the Constitution.<sup>101</sup> Thus, in less than 15 months, the USSG went from being newly-passed judicial regulations, on November 1, 1987, to being fully upheld by the Supreme Court on January 18, 1989.<sup>102</sup>

### C. Crack and Cocaine Sentencing

The original version of the Controlled Substances Act, as passed in 1970, contained no mention of cocaine base.<sup>103</sup> Instead, the listing under Schedule II that addressed cocaine was grouped with other

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93. *Mistretta*, 488 U.S. at 371 (footnote and internal quotation marks omitted).

94. 682 F. Supp. 1033 (W.D. Mo. 1988), *aff'd sub nom.* *Mistretta v. United States*, 488 U.S. 361 (1989).

95. *Id.* at 1033.

96. *Id.*

97. *Id.* at 1035. The opinion itself makes no mention of the positions taken by the two judges who were on the panel, but whose positions were not accounted for. Indeed, the opinion does not even identify those two remaining judges by name.

98. *Mistretta*, 488 U.S. at 362.

99. *Id.* at 371. The Supreme Court only grants a petition for certiorari before judgment "upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in [the Supreme] Court." SUP. CT. R. 11.

100. 488 U.S. 361 (1989).

101. *Id.* at 412.

102. *See id.*

103. *See* Pub. L. No. 91-513, tit. II, 84 Stat. 1242 (1970).

"substances of vegetable origin," with the prohibition written in terms of coca leaves.<sup>104</sup> Specifically prohibited were

Coca leaves and any salt, compound, derivative, or preparation of coca leaves, and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include decocainized coca leaves or extraction of coca leaves, which extractions do not contain cocaine or ecgonine.<sup>105</sup>

While this description would still include cocaine HCl, as a derivative of coca leaves,<sup>106</sup> as well as freebase or crack cocaine, as chemically equivalent derivatives of a derivative,<sup>107</sup> the shift in perspective is noteworthy. Furthermore, penalties under the Controlled Substance Act (CSA) did not assign different punishments based on the quantity of drugs possessed.<sup>108</sup> Instead, the original form of the CSA punished "manufactur[ing], distribut[ing], or dispens[ing], or possess[ing] with intent to manufacture, distribute, or dispense" cocaine, or its derivatives with "a term of imprisonment of not more than 5 years, a fine of not more than \$15,000, or both."<sup>109</sup>

Even sentencing for simple possession received dramatically different treatment in the original CSA than it does today.<sup>110</sup> Absent further intent, crimes of simple possession had one prescribed punishment under the CSA, without regard to the controlled substance involved, the schedule the substance was classified under, or the quantity of the substance possessed.<sup>111</sup> That punishment was "a term of imprisonment of not more than one year, a fine of not more than \$5,000, or both. . . ."<sup>112</sup> The statute's only aggravating factor allowed for the sentence to be doubled for those with prior convictions for simple possession.<sup>113</sup> Highlighting the relative leniency with which the Ninety-First Congress treated simple drug possession, there was even a

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104. Pub. L. No. 91-513, § 202(c), 84 Stat. at 1250.

105. *Id.*

106. *Powdered Cocaine Fast Facts*, *supra* note 24.

107. *Crack Cocaine Fast Facts*, *supra* note 47.

108. *See generally* Controlled Substances Act, Pub. L. No. 91-513, §§ 401-404, 84 Stat. at 1260-65.

109. *Id.* § 401(a)-(b), 84 Stat. at 1260-62. The sentencing for Schedule I and II drugs varied based on whether the drug in question was a narcotic, such as a painkiller, or not. *See id.* Because cocaine is a stimulant it was punished less harshly under the CSA. *See id.*

110. *See id.* § 404, 84 Stat. at 1264.

111. *Id.* § 404(a), 84 Stat. at 1264.

112. *Id.*

113. *Id.*

provision that allowed judges to place first-time defendants charged with simple possession on probation before adjudication.<sup>114</sup> This system, which did not account for quantity at all, punished the sale of 5 grams of marijuana more severely than the simple possession of 500 tons of heroin and lasted until 1986.<sup>115</sup>

In 1986, Congress passed the Anti-Drug Abuse Act of 1986,<sup>116</sup> which completely overhauled the federal sentencing of drug-related offenses.<sup>117</sup> For the first time since 1970, sentencing judges had to consider more than just intent to traffic or distribute.<sup>118</sup> Now, they also had to consider both the substance involved and its quantity, and the sentence given was dependent on each.<sup>119</sup> In the year leading up to the enactment of this major legislation, both houses of Congress had a number of hearings addressing questions on the current state of American anti-drug efforts, as well as what more could or should be done to address drug trafficking, sales, and use throughout the country.<sup>120</sup> These hearings sought to view America's drug problem from every angle and included testimony from recovering addicts, their family members, law enforcement, interdiction officials, professional athletes, and others.<sup>121</sup>

In June 1986, fuel was added to the fire of media attention on skyrocketing cocaine use when first round NBA draft pick Len Bias died of a cocaine overdose, followed eight days later by Cleveland Browns safety Don Rogers.<sup>122</sup> This led members of Congress to question the roles of professional athletes as influences and role models for children as young as twelve who were pressured by their peers into trying this

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114. *See id.* § 404(b), 84 Stat. at 1264. This allowed the defendants an opportunity to complete a period of up to one year of probation and have the charges against them dismissed, with only a sealed record showing that the defendant had used up that chance in case of a later arrest on the same charge. *See id.* If the defendant under this program later violated the terms of the probation, then adjudication of guilt would be entered at that time and sentencing would occur anew. *See id.*

115. *See* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended at 21 U.S.C §§ 801-971).

116. Pub. L. No. 99-570, 100 Stat. 3207.

117. *See id.*

118. *See id.* § 1002, 100 Stat. at 3207-2 to -4.

119. *See id.*

120. *See, e.g., The Crack Cocaine Crisis: Joint Hearing Before the Select H. Comm. on Narcotics Abuse and Control and Select H. Comm. on Children, Youth, and Families, 99th Cong. (1986); see also "Crack" Cocaine: Hearing Before the Perm. Subcomm. on Investigations of the S. Comm. on Governmental Affairs, 99th Cong. (1986).*

121. *See, e.g., sources cited supra* note 120.

122. *See* Associated Press, *Cocaine Killed Rogers, Tests Indicate*, N.Y. TIMES, June 30, 1986, available at <http://www.nytimes.com/1986/06/30/sports/cocaine-killed-rogers-tests-indicate.html>.

new and dangerous drug.<sup>123</sup> Other testimony declared that a person could become completely addicted to crack after just one or two uses.<sup>124</sup> Crack houses opened up across New York<sup>125</sup> and other major cities, operating in residential areas and serving crack to anyone with money while providing the kind of social consumption atmosphere that bars and nightclubs currently provide with respect to alcohol.<sup>126</sup> Some crack houses in the Washington, D.C., area even let customers purchase crack on credit, but it was considered a matter of "everyday business" for the proprietors to murder those who had racked up as little as \$2000, or less, in debt.<sup>127</sup> This was apparently intended to serve as a warning to others who wished to go into debt with their suppliers just to support their habits.<sup>128</sup>

There was also an escalating amount of gang involvement with the crack trade.<sup>129</sup> The use of crack throughout the nation was widely referred to as an "epidemic."<sup>130</sup> Soon the term began to apply to the concomitant gang activity as well.<sup>131</sup> Murder and other crime rates in major cities rose sharply as gang members competed for blocks or neighborhoods in which to sell crack.<sup>132</sup>

Over the course of 1986, a number of bills were proposed in Congress, suggesting punishments based on differing limits and quantities of various controlled substances.<sup>133</sup> While most (if not all) punished

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123. See *The Crack Cocaine Crisis*, *supra* note 120, at 20-22 (statements of Kevin Grevey, former player, Washington Bullets basketball team, President, Off Season, Inc.; William Scheu, player-coach, USA Legends basketball team, Director, Youth Sports Drug Awareness Program).

124. "*Crack*" Cocaine, *supra* note 120, at 44 (testimony of Michael Taylor, former crack house employee).

125. Peter Kerr, *Opium Dens for the Crack Era*, N.Y. TIMES, May 18, 1986, available at <http://www.nytimes.com/1986/05/18/nyregion/opium-dens-for-the-crack-era.html>.

126. See "*Crack*" Cocaine, *supra* note 120, at 38-39 (testimony of Michael Taylor, former crack house employee).

127. *Id.* at 43.

128. *Id.*

129. Jim Morris, *Gangs at War in LA Streets-Drug Money Fueling Deadly Rivalries*, *Officials Say*, SACRAMENTO BEE, Oct. 19, 1986, at A1.

130. See, e.g., *The Crack Cocaine Crisis*, *supra* note 120, at 7 (statement of Rep. Mel Levine).

131. See David Enscoe, *Holdups Blamed on Gang-Drug Users Terrorize Convenience Stores*, SOUTH FLA. SUN-SENTINEL, Sept. 15, 1986, at 1B.

132. See Morris, *supra* note 129.

133. See, e.g., Drug Trade Elimination Act, H.R. 5329, 99th Cong. (1986); Drug Abuse Prevention and Treatment Act of 1986, H.R. 5334, 99th Cong. (1986); Drug Eradication Act of 1986, H.R. 5358, 99th Cong. (1986); Narcotics Penalties and Enforcement Act of 1986, H.R. 5394, 99th Cong. (1986); Comprehensive Narcotics Control Act of 1986, S. 2798, 99th Cong. (1986); Drug-Free America Act of 1986, S. 2849, 99th Cong. (1986); and Drug

crack-related crimes more severely than crimes related to cocaine HCl, the ratio of the quantity of cocaine HCl to crack that subjected an offender to a given level of punishment varied widely.<sup>134</sup> However, as the year progressed—and greater volumes of testimony came in concerning the unstoppable dangers of crack—that ratio grew ever larger.<sup>135</sup> By the time the Anti-Drug Abuse Act of 1986 passed into law, the ratio stood at 100:1, with the statutory sentencing range for possession of 500 grams (1.1 pounds) of cocaine HCl or 5 grams (0.18 ounces—about the weight of a nickel) of crack cocaine being identical at five to forty years in prison.<sup>136</sup>

It was not long, however, before the legal community noticed a powerful incidental effect of the new, harsh crack cocaine laws: almost all of the criminals convicted of crack-related offenses were African-American, while most of the criminals convicted of powder-cocaine-related offenses were Caucasian.<sup>137</sup> In one such case, *State v. Russell*,<sup>138</sup> it was “show[n] that of all persons charged with possession of cocaine base [in Minnesota] in 1988, 96.6% were black. Of all persons charged with possession of powder cocaine, 79.6% were white.”<sup>139</sup> Even the Supreme Court, in the 1996 case *United States v. Armstrong*,<sup>140</sup> heard a claim of selective prosecution in a federal crack case. In *Armstrong*, the Court cited statistics showing that more than 90% of sentences issued for crack offenses in 1994 were against black defendants.<sup>141</sup> However, the Court ultimately held that, without proof of the non-prosecution of non-blacks who were caught committing crack offenses, no selective prosecution claim could lie.<sup>142</sup> Lastly, “[b]ills that would have addressed this disparity by reducing the powder-to-crack

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Enforcement Act of 1986, S. 2850, 99th Cong. (1986).

134. See U.S. SENTENCING COMM’N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 117 (1995), available at [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Drug\\_Topics/199502\\_RtC\\_Cocaine\\_Sentencing\\_Policy/chap5-8.pdf](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/199502_RtC_Cocaine_Sentencing_Policy/chap5-8.pdf).

135. See *id.* at 117-18.

136. Pub. L. No. 99-570, § 1002, 100 Stat. at 3207-2 to -4. It is also interesting to note that the sentence for possession of 5 grams of crack cocaine was also equivalent to that for 1 gram of LSD or quantities in excess of 100 kilograms (220 pounds) of marijuana.

137. See, e.g., *State v. Russell*, 477 N.W.2d 886, 887-89 & n.1 (Minn. 1991) (holding that the state crack and cocaine sentencing laws, which punished possession of three grams of crack or ten grams of cocaine equally, violated state equal protection guarantees because the law had a discriminatory impact on African-Americans).

138. 477 N.W.2d 886 (Minn. 1991).

139. *Id.* at 887 n.1.

140. 517 U.S. 456 (1996).

141. See *id.* at 469.

142. *Id.* at 470-71.



ratio were introduced in Congress in 1993, 1995, 1996, 1997, 1998, 1999, 2001, 2002, 2003, 2005, 2006, 2007, 2008, and 2009, but these measures and similar proposals offered by the United States Sentencing Commission . . . failed."<sup>143</sup>

#### D. Modern Developments

**1. *Mistretta* Revisited, but not Overruled.** The United States Supreme Court first presaged the fall of the mandatory USSG in its *Blakely v. Washington*<sup>144</sup> decision. In *Blakely*, Ralph Blakely, Jr. received divorce papers from his then-wife. Blakely had a history of psychological and personality disorders and abducted his wife by binding her with duct tape and forcing her at knifepoint to climb into a wooden box in Blakely's pickup truck, all the while begging her to dismiss the divorce proceedings against him. Blakely then ordered the couple's teenage son to follow behind him in another car and threatened to shoot his wife with a shotgun if the boy did not comply. After his arrest, Blakely pleaded guilty to second-degree kidnapping involving domestic violence and use of a firearm in the commission of a crime,<sup>145</sup> which would normally warrant a sentence in the range of 49 to 53 months' imprisonment under Washington's Sentencing Reform Act.<sup>146</sup>

Washington's sentencing system operated much like the USSG.<sup>147</sup> First, a criminal statute listed any mandatory minimum or maximum sentences that an offense might carry.<sup>148</sup> Then, separate statutory provisions pared the specific sentence that a defendant might receive down to a narrow range, based on things like the severity of the offense.<sup>149</sup> Lastly, the sentencing court had the authority to impose a sentence above the maximum (mandatory) guidelines range if it made findings of certain aggravating factors, by a preponderance of the

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143. Kyle Graham, *Sorry Seems To Be the Hardest Word: The Fair Sentencing Act of 2010, Crack, and Methamphetamine*, 45 U. RICH. L. REV. 765, 766-67 (2011) (citations omitted). Professor Graham's essay provides an in-depth review of the social and political forces that led to the correction of the 100:1 crack and powdered cocaine ratio with the Fair Sentencing Act of 2010, Pub. L. 111-220, 124 Stat. 2372, as well as a comparison with and commentary on current attitudes and sentencing policies with regard to methamphetamines.

144. 542 U.S. 296 (2004).

145. *Id.* at 298-301.

146. WASH. REV. CODE § 9.94A (2011), available at <http://apps.leg.wa.gov/RCW/>.

147. See *Blakely*, 542 U.S. at 299-300.

148. See *id.* at 299.

149. See *id.*

evidence, that could “justify an exceptional sentence.”<sup>150</sup> In *Blakely*’s case, the sentencing court found that the crime was carried out “with deliberate cruelty” and sentenced *Blakely* to an enhanced term of 7.5 years in prison.<sup>151</sup> This increased *Blakely*’s sentence to 37 months beyond the general statutory maximum.<sup>152</sup>

In deciding *Blakely*, the Supreme Court first turned to its own recent case law, reiterating that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”<sup>153</sup> The state of Washington argued that “the relevant statutory maximum” was the 10-year maximum written in the kidnapping statute, and not the 53-month maximum in the applicable sentencing range.<sup>154</sup> The Court found this argument unpersuasive, though, and held that

the relevant statutory maximum is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment, and the judge exceeds his proper authority.<sup>155</sup>

Thus, imposing a higher sentence violated *Blakely*’s right to a trial by jury since the sentencing range, though lower than the “maximum” sentence for the crime of conviction, was nonetheless binding on the sentencing judge.<sup>156</sup>

In 2005, when the Supreme Court revisited its holding in *Mistretta*, any doubts cast over the USSG by the *Blakely* decision were firmly cemented in place.<sup>157</sup> This case, *United States v. Booker*,<sup>158</sup> considered the claims of two federal defendants who had been convicted of crack-related offenses.<sup>159</sup> The first defendant, Freddie Booker, had been indicted for possession of at least 50 grams of crack with intent to distribute. Based on evidence presented at trial that he had actually possessed 92.5 grams of crack, the jury convicted him. Under the USSG,

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150. *Id.*; see also WASH. REV. CODE § 9.94A.505(2)(b).

151. *Blakely*, 542 U.S. at 300; WASH. REV. CODE § 9.94A.535(3)(a).

152. *Blakely*, 542 U.S. at 300.

153. *Id.* at 301 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)).

154. *Id.* at 303 (internal quotation marks omitted).

155. *Id.* at 303-04 (citations and internal quotation marks omitted).

156. *Id.* at 304-05.

157. See *United States v. Booker*, 543 U.S. 220, 241-43 (2005).

158. 543 U.S. 220 (2005).

159. *Id.* at 227-29.

as they existed at the time of Booker's conviction, this would have corresponded to a sentence of 210-262 months in prison. Rather than follow the mandatory sentencing range imposed by the guidelines, however, the trial judge instead held a sentencing hearing at which he concluded that, by a preponderance of the evidence, Booker actually possessed a total of 685.5 grams of crack cocaine, and that he was guilty of obstructing justice. On the basis of these additional findings, the trial judge abandoned the mandatory maximum sentence of 21 years and 10 months, and instead sentenced Booker to 30 years in prison.<sup>160</sup> On appeal, the United States Court of Appeals for the Seventh Circuit vacated Booker's sentence on the premise that it violated the Supreme Court's holding in *Apprendi v. New Jersey*<sup>161</sup> that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."<sup>162</sup>

In the case of the second defendant, Ducan Fanfan was convicted of "conspiracy to distribute and to possess with intent to distribute at least 500 grams of cocaine [HCl]."<sup>163</sup> In delivering a special verdict, the jury made a specific finding that "the amount of cocaine [was] 500 or more grams."<sup>164</sup> This alone would have authorized a sentence of no more than 78 months in prison.<sup>165</sup> In a sentencing hearing that occurred about 8 months after the jury verdict was entered against Fanfan, the trial judge issued an unpublished opinion in which he openly agonized over how to apply the Supreme Court's holding in *Blakely*, then just 4 days old.<sup>166</sup>

Despite the fact that the trial judge had made additional findings at sentencing—that Fanfan was actually responsible for 2.5 kilograms of cocaine as well as 261.6 grams of crack, and that Fanfan was an organizer, leader, manager, or supervisor in the conspiracy—the court yielded to the new holding in *Blakely*.<sup>167</sup> Because "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings,"<sup>168</sup> the court could not continue the practice

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160. *Id.* at 227.

161. 530 U.S. 466 (2000).

162. *Booker*, 543 U.S. at 227-28 (quoting *Apprendi*, 530 U.S. at 490).

163. *Id.* at 228.

164. *Id.*

165. *Id.*

166. See *Fanfan v. United States*, No. 03-47, 2004 WL 1723114, at \*2 (D. Me. June 28, 2004).

167. *Booker*, 543 U.S. at 228-29.

168. *Blakely*, 542 U.S. at 303-04.

of ruling on aggravating factors under the preponderance of the evidence standard once the jury had returned a verdict, unless those factors did not increase the sentence beyond the maximum sentence available under the jury verdict alone.<sup>169</sup> Thus, even though the aggravating factors found in Fanfan's case would have resulted in a sentence of 15 to 16 years, he was only sentenced to 6.5 years.<sup>170</sup> The United States appealed the sentence to the United States Court of Appeals for the First Circuit, but the United States Supreme Court granted certiorari before judgment and joined Fanfan's case to Booker's.<sup>171</sup>

In another unusual turn, the *Booker* case was decided with all nine sitting justices joining or authoring opinions of the Court, and eight of the nine issuing dissents.<sup>172</sup> Each of the two opinions of the Court answered one of the questions on appeal. The first opinion, authored by Justice Stevens, and joined by Justices Scalia, Souter, Thomas, and Ginsburg, addressed the question of "whether [the] application of the Federal Sentencing Guidelines [to Booker's and Fanfan's cases] violated the Sixth Amendment."<sup>173</sup> The second opinion, authored by Justice Breyer, and joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Ginsburg, addressed the fact that Justice Stevens's opinion found a constitutional violation and answered the question of what can be done to save part or all of the statutory scheme behind the USSG so as to cure the constitutional defect.<sup>174</sup> With Justice Ginsburg being the only one to join the entire opinion, the eight remaining justices all issued or joined dissents, each explaining their opposition to the half of the opinion they did not join.<sup>175</sup>

Specifically, the first opinion in *Booker* held that "The [Sentencing] Guidelines as written . . . are mandatory and binding on all judges. . . . [S]ubsection (b) [of 18 U.S.C. § 3553] directs that the court 'shall impose a sentence of the kind, and within the range' established by the Guidelines, subject to departures in specific, limited cases."<sup>176</sup> The Court even points to similar language in the *Mistretta* case, which first upheld the constitutionality of the USSC and USSG in 1989.<sup>177</sup> However, the Court held that where the USSG requires the imposition

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169. *Booker*, 543 U.S. at 228-29.

170. *Fanfan*, 2004 WL 1723114, at \*2-3.

171. *Booker*, 543 U.S. at 229.

172. *See id.* at 225-334.

173. *Id.* at 226.

174. *Id.* at 245.

175. *See id.* at 271-334.

176. *Id.* at 233-34.

177. *Id.* at 233 n.2.

of a sentence based on facts not found by a jury, defendants are deprived of their Sixth Amendment<sup>178</sup> rights.<sup>179</sup> The Court noted that

[t]he Framers would not have thought it too much to demand that, before depriving a man of [ten] more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to the unanimous suffrage of twelve of his equals and neighbours, rather than a lone employee of the State.<sup>180</sup>

Because the demands of the Sixth Amendment and the *Guidelines Manual* were found to be at odds, the Court held that the Sixth Amendment must prevail and that the USSG were unconstitutional.<sup>181</sup>

The second opinion in *Booker* addressed whether any part of the USSG or the statutes that supported or created them could be severed from the unconstitutional provisions and left intact.<sup>182</sup> After examining the legislative history and congressional intent behind the creation of the USSC and adoption of the USSG, the Court held that the constitutional defect could and should be cured simply by excising those portions of the enabling statutes that made the USSG binding upon trial courts.<sup>183</sup> The Court concluded by noting that this new change in the rules of criminal procedure should be applied to all cases that were not then final, but that the holding was not so extensive as to find that all criminal sentences under the prior rule were handed down in violation of the Sixth Amendment.<sup>184</sup>

**2. Fixing the 100:1 Sentencing Ratio.** In 2007, the USSC passed USSG Amendment 706<sup>185</sup> as an interim measure for correcting the 100:1 crack-to-powder sentencing disparity and spurring congressional action to more adequately address the issue.<sup>186</sup> While the USSC

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178. U.S. CONST. amend. VI.

179. *Booker*, 543 U.S. at 244.

180. *Id.* at 238 (quoting *Blakely*, 542 U.S. at 313-14).

181. *Id.* at 244-45.

182. *Id.* at 245.

183. *Id.* at 246-65. In light of the Court's holding that the USSG could not be binding on sentencing judges, the Court's severability analysis compared the likelihood that the 98th Congress would have preferred that the entire Sentencing Reform Act of 1984 be invalidated to the likelihood that the 98th Congress would have still passed the Act without the unconstitutional provisions. *Id.* at 249.

184. *Id.* at 268.

185. U.S. SENTENCING COMM'N, AMENDMENTS TO SENTENCING GUIDELINES at 42 (2007), available at [http://www.ussc.gov/Legal/Amendments/Official\\_Text/20070501\\_Amendments.pdf](http://www.ussc.gov/Legal/Amendments/Official_Text/20070501_Amendments.pdf).

186. See U.S. SENTENCING GUIDELINES MANUAL app. C, vol. III, amend. 706 (2011) (restating the amendment and giving the USSC's intent behind passing the amendment).

lacked authority to eliminate the mandatory minimum sentences for possession of at least 5 or 50 grams of cocaine base, the USSC used Amendment 706 to lower by two the USSG offense levels of all other threshold amounts of cocaine base-related offenses.<sup>187</sup> This reduction in offense levels became effective November 1, 2007,<sup>188</sup> and was then made retroactive on March 3, 2008, when Amendment 713 to the USSG took effect.<sup>189</sup> As a result of this retroactivity amendment, prisoners who had been sentenced under the previous offense levels were now eligible to file a motion for sentencing reduction under 18 U.S.C. § 3582 (c)(2).<sup>190</sup>

While the 2007 USSG amendments did provide some relief, the crack cocaine sentencing disparity was not fully addressed until Congress passed the Fair Sentencing Act of 2010 (FSA),<sup>191</sup> which amended the Controlled Substance Act by eliminating mandatory minimum sentences for persons convicted of simple possession of more than 5 grams of crack.<sup>192</sup> The FSA also changed the threshold quantities of crack or cocaine base that one must possess with intent to distribute, manufacture, dispense, import, or export in order to be subject to possible 5-to-40-years or 10-years-to-life sentencing ranges.<sup>193</sup> Where defendants convicted between 1986 and 2010 for possession with intent to distribute would receive sentences in the range of 5 to 40 years for having at least 5 grams of crack or 500 grams of cocaine, the same sentence is now required only for those who have at least 28 grams of crack or cocaine base (with the cocaine thresholds staying the same).<sup>194</sup> Likewise, a prison sentence of between 10 years and life now awaits only those convicted of possession with intent to distribute more than 280 grams of cocaine base, rather than 50 grams, which was the threshold set in 1986.<sup>195</sup> This has reduced the old 100:1 sentencing disparity to a 17.86:1 ratio.<sup>196</sup>

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Note that the commentary to Amendment 706 was further revised by the technical Amendment 711, also passed in 2007. *See id.* amend. 711.

187. *See id.* amend. 706.

188. *Id.*

189. *Id.* amend. 713.

190. 18 U.S.C. § 3582(c)(2) (2006).

191. Pub. L. No. 111-220, 124 Stat. 2372 (2010) (codified in scattered sections of 21 U.S.C. ch. 13).

192. *Id.* § 3 (amending 21 U.S.C. § 844(a)).

193. *Id.* § 2 (amending 21 U.S.C. §§ 841(b)(1), 960(b)).

194. *Compare id.*, with Anti-Drug Abuse Act of 1986, § 1002, 100 Stat. at 3207-2 to -4.

195. *See sources cited supra* note 194.

196. *Id.*

In light of the changes made by the FSA, the USSC promulgated emergency amendments to the USSG that accounted for the reduced sentences for crack offenders.<sup>197</sup> These amendments adjusted the recommended sentences for crimes involving various quantities of cocaine base, adopting the same 17.86:1 ratio throughout.<sup>198</sup> On April 28, 2011, these emergency amendments were submitted to Congress without change for approval to be permanently included in the USSG.<sup>199</sup> By operation of 28 U.S.C. § 994(p),<sup>200</sup> the proposed permanent amendments became effective November 1, 2011, when Congress failed to modify or disapprove of the proposal.<sup>201</sup> Additionally, by the unanimous vote of the USSC, the amendment applying the 17.86:1 crack ratio throughout the USSG was also made retroactive, as of November 1, 2011.<sup>202</sup> The USSC estimates that this will make a possible sentence reduction available to 12,040 federal inmates, giving individual sentence reductions that range from less than a month to over 10 years, with the average projected sentence reduction being 37 months.<sup>203</sup>

### III. DISCUSSION OF THE ISSUE

#### A. *Post-Booker* Interpretations of Federal Sentencing Practices

**1. 2007: A Year Spent Clarifying *Booker*.** Though the United States Supreme Court in *United States v. Booker*<sup>204</sup> unilaterally took

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197. U.S. SENTENCING GUIDELINES MANUAL supp. 1-35 (2010).

198. *Id.* at 10-15.

199. U.S. SENTENCING COMM'N, AMENDMENTS TO SENTENCING GUIDELINES (2011), available at [http://www.ussc.gov/Legal/Amendments/Official\\_Text/20110428\\_Amendments.pdf](http://www.ussc.gov/Legal/Amendments/Official_Text/20110428_Amendments.pdf).

200. 28 U.S.C. § 994(p) (2006).

201. See Sentencing Guidelines for United States Courts, 76 Fed. Reg. 58,563 (Sept. 21, 2011). "On April 28, 2011, the Commission submitted to the Congress amendments to the sentencing guidelines and official commentary, which become effective on November 1, 2011, unless Congress acts to the contrary." *Id.*

202. News Release, United States Sentencing Commission, U.S. Sentencing Commission Votes Unanimously To Apply Fair Sentencing Act of 2010 Amendment to the Federal Sentencing Guidelines Retroactively (June 30, 2011), available at [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Newsroom/Press\\_Releases/20110630\\_Press\\_Release.pdf](http://www.ussc.gov/Legislative_and_Public_Affairs/Newsroom/Press_Releases/20110630_Press_Release.pdf).

203. Memorandum from United States Sentencing Commission, Office of Research and Data and Office of General Counsel to Chair Saris, Commissioners, and Judith Sheon, *Analysis of Impact of Guideline Implementation of the Fair Sentencing Act of 2010 if the Amendment Were Applied Retroactively* 10, 28 (May 20, 2011), available at [http://www.ussc.gov/Research/Retroactivity\\_Analyses/Fair\\_Sentencing\\_Act/20110520\\_Crack\\_Retroactivity\\_Analysis.pdf](http://www.ussc.gov/Research/Retroactivity_Analyses/Fair_Sentencing_Act/20110520_Crack_Retroactivity_Analysis.pdf).

204. 543 U.S. 220 (2005).

away the mandate that the United States Sentencing Guidelines (USSG)<sup>205</sup> had carried for the first eighteen years of their existence,<sup>206</sup> the transition in trial courts from mandatory to advisory sentencing guidelines was not so simple. In 2007 alone, the Supreme Court reapplied *Booker* in four new cases. The first, *Cunningham v. California*,<sup>207</sup> struck down California's sentencing scheme, which assigned each crime a "lower, middle, and upper term sentence."<sup>208</sup> These "terms" were not sentencing ranges, but three unique, discrete possible sentences that were the only available sentences for a given crime.<sup>209</sup> In *Cunningham's* case, a conviction for continuous sexual abuse of a child under the age of fourteen carried a lower term sentence of six years, a middle term sentence of twelve years, and an upper term sentence of sixteen years.<sup>210</sup> State sentencing laws then required the sentencing courts to impose the middle term sentence, unless there were mitigating or aggravating "facts which justify the imposition of the upper [or lower] prison term" and are "established by a preponderance of the evidence."<sup>211</sup>

The Supreme Court, citing both *Blakely v. Washington*<sup>212</sup> and *Booker*, held that the statutory requirement to impose the middle term sentence meant that the right to jury trial was implicated by any attempt to find facts for the purpose of imposing an upper term sentence.<sup>213</sup> Thus, "the ball" was placed back into "California's court" for the purpose of rewriting the state's sentencing laws to comply with the *Apprendi*<sup>214</sup>-*Booker* line of cases.<sup>215</sup>

The next two cases focused on the "reasonableness" standard that *Booker* applied to the imposition of federal sentences. Both *Rita v. United States*<sup>216</sup> and *Claiborne v. United States*<sup>217</sup> were argued on the same day in the October 2006 Term of Court.<sup>218</sup> In *Rita*, the United States District Court for the Western District of North Carolina

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205. U.S. SENTENCING GUIDELINES MANUAL (2011).

206. *Booker*, 543 U.S. at 245.

207. 549 U.S. 270 (2007).

208. *Id.* at 277, 293.

209. *Id.* at 292.

210. *Id.* at 275.

211. *Id.* at 278 (citations and internal quotation marks omitted).

212. 542 U.S. 296 (2004).

213. *Cunningham*, 549 U.S. at 293.

214. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

215. *Cunningham*, 549 U.S. at 293-94.

216. 551 U.S. 338 (2007).

217. 551 U.S. 87 (2007), *dismissed as moot*. *But see* *Gall v. United States*, 552 U.S. 38, 40-41 (2007) (discussing and then reaching the issues presented in *Claiborne*).

218. *See Gall*, 552 U.S. at 40.



convicted Victor Rita of perjury for false statements he made in front of a grand jury relating to the investigation of a company believed to be illegally selling kits that could be made into machine guns.<sup>219</sup> At his sentencing hearing, the court calculated that the (now advisory) USSG recommended a sentence of 33 to 41 months' imprisonment, as this was Rita's first offense. Rita argued to the court that he should get a below-guidelines sentence because of his numerous physical ailments, his full career of military service, and because he feared that he might be targeted by any inmates who might have recognized Rita from his past criminal justice work.<sup>220</sup> After hearing from the Government, the court weighed the factors found in 18 U.S.C. § 3553(a)<sup>221</sup> and decided that the USSG recommended range was appropriate, but sentenced Rita the minimum under that range, 33 months in prison.<sup>222</sup>

Rita appealed, arguing that his sentence was unreasonable.<sup>223</sup> On appeal, the United States Court of Appeals for the Fourth Circuit held that any sentence within the guidelines range was "presumptively reasonable" and that Rita was not entitled to have his sentence overturned.<sup>224</sup> The Supreme Court upheld the presumption of reasonableness, but also limited the presumption's strength by highlighting the Court's reasons for supporting such a presumption.<sup>225</sup> Specifically, the Court held:

For one thing, the presumption is not binding. It does not, like a trial-related evidentiary presumption, insist that one side, or the other, shoulder a particular burden of persuasion or proof lest they lose their case. Nor does the presumption reflect strong judicial deference of the kind that leads appeals courts to grant greater fact finding leeway to an expert agency than to a district judge. Rather, the presumption reflects the fact that, by the time an appeals court is considering a within-Guidelines sentence on review, *both* the sentencing judge and the Sentencing Commission will have reached the *same* conclusion as to the proper sentence in the particular case. That double determina-

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219. 551 U.S. at 341.

220. *Id.* at 342-45.

221. 18 U.S.C. § 3553(a) (2006). This weighing of factors was explicitly required in the *Booker* decision and proved to be a regular source of enlightenment for the Supreme Court's subsequent rulings that applied *Booker*. See *Booker*, 543 U.S. at 222.

222. *Rita*, 551 U.S. at 345.

223. *Id.*

224. *Id.* at 345-46 (quoting *United States v. Rivera-Magana*, 177 F. App'x 358, 358 (4th Cir. 2006)).

225. *Id.* at 347.

tion significantly increases the likelihood that the sentence is a reasonable one.<sup>226</sup>

Also, the Court held that, because Congress charged both the USSC and the sentencing judge with applying the same guiding factors under 18 U.S.C. § 3553(a), the fact that each independently arrive at similar sentences for the same crime committed by the same kind of criminal further impresses upon reviewing courts the idea that there is a heightened probability that both are reasonable.<sup>227</sup>

*Rita's* twin case, *Claiborne v. United States*,<sup>228</sup> focused on the question of whether sentences below the guidelines range could be reviewed under a "proportionality test" that used the ratio between the guidelines range and the sentence imposed as a measure of reasonableness.<sup>229</sup> It also sought to answer the question of whether appellate courts could require findings of extraordinary circumstances to justify sentences that fell far below the guidelines range.<sup>230</sup> Unfortunately, Mario Claiborne died on May 30, 2007, less than a month before the decision in *Rita* (and possibly his own case as well) issued.<sup>231</sup> Therefore, the *Claiborne* case was rendered moot.<sup>232</sup> Undeterred, the Supreme Court granted certiorari in a new case that presented identical issues, *Gall v. United States*,<sup>233</sup> less than two weeks after Claiborne's death.<sup>234</sup>

In *Gall*, Brian Gall joined an ongoing enterprise distributing the street drug ecstasy. At the time, Gall was a sophomore at the University of Iowa, and was himself a user of cocaine, ecstasy, and marijuana. He spent seven months delivering various quantities of ecstasy tablets from one supplier to several dealers, who then sold the tablets to those who used the drug. During the 7-month period, Gall made over \$30,000 and at least 2500 grams of ecstasy passed through his hands. However, after seven months, he stopped using ecstasy himself and advised his co-conspirators that he would no longer participate in their operations. Gall graduated from the university in 2002. Soon thereafter, he started a successful construction company that installed window and door

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226. *Id.* (citations omitted).

227. *Id.* at 347, 350-51.

228. 551 U.S. 87 (2007), *dismissed as moot*.

229. *Gall*, 552 U.S. at 40-41 (citing *Claiborne v. United States*, 549 U.S. 1016 (2006)).

230. *Id.*

231. *Claiborne*, 551 U.S. at 87.

232. *Id.* at 87-88.

233. 552 U.S. 38 (2007).

234. *See Gall v. United States*, 551 U.S. 1113 (2007) (granting cert.); *see also Gall*, 552 U.S. at 41 ("We granted certiorari in the case before us today in order to reach that question, left unanswered last Term.").

fixtures, and he became engaged to be married. Then, in 2004, Gall's past caught up with him when a grand jury indicted Gall and seven others for their participation in the ecstasy distribution ring. Gall entered into a plea agreement and his probation officer prepared a presentence report recommending a sentence of 30 to 37 months in prison. At the sentencing hearing, the court was presented with an abundance of evidence from a wide variety of relatives, friends, neighbors, and business contacts unanimously praising Gall's reformed life and character. As a result, the court sentenced Gall to 36 months of probation.<sup>235</sup>

The Government appealed Gall's sentence of probation, and the United States Court of Appeals for the Eighth Circuit held that the probationary sentence "amounted to a 100% downward variance," which must necessarily be supported by "extraordinary circumstances."<sup>236</sup> Applying *Booker*, the Supreme Court held that the only requirements placed on federal courts during sentencing were that the sentence imposed must be reasonable and that it must be given only after considering the sentencing factors listed in 18 U.S.C. § 3553(a).<sup>237</sup> Next, the Court plainly rejected the requirement that sentences falling significantly outside of the USSG range should include "extraordinary" findings as justification.<sup>238</sup> Instead, it held that such a demand might give rise to an impermissible presumption that a sentence outside of the USSG range is unreasonable.<sup>239</sup> Finally, the Court also rejected the idea that mathematical percentages could be used to create some kind of proportionality test that might serve as a basis for evaluating reasonableness, because such a test would amount to reviewing sentences with less deference than the *Booker*-prescribed "abuse-of-discretion" standard.<sup>240</sup>

The Supreme Court issued the last of 2007's *Apprendi-Booker*-descendent decisions, *Kimbrough v. United States*,<sup>241</sup> on the same day as the opinion in *Gall*. *Kimbrough* was the first United States Supreme Court case to address both the 100:1 crack cocaine sentencing disparity and the new "reasonableness" standard for sentences, as announced in *Booker*.<sup>242</sup> In that case, Derrick Kimbrough pleaded guilty to conspira-

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235. *Gall*, 552 U.S. at 41-43.

236. *Id.* at 45 (internal quotation marks omitted).

237. *Id.* at 46, 49-50 n.6.

238. *Id.* at 47.

239. *Id.* at 47 n.3.

240. *Id.* at 47-49.

241. 552 U.S. 85 (2007).

242. *See id.* at 90-91.

cy to distribute crack and powder cocaine, possession of more than 50 grams of crack cocaine with intent to distribute, possession of powder cocaine with intent to distribute, and possession of a firearm in furtherance of a drug-trafficking offense. For his crimes, Kimbrough was subject to a mandatory statutory minimum of 10 years' imprisonment for the drug crimes, plus a mandatory consecutive 5 years for the firearms offense. At his sentencing hearing, the sentencing court considered the USSG range for Kimbrough's criminal conduct and arrived at a recommended range of between 19 and 22.5 years in prison. The sentencing court contrasted this applicable USSG range with the USSG maximum that would have applied had Kimbrough dealt only in powdered cocaine, 8 years and 10 months, and decided that the statutory minimum was more than adequate. Thus, the court sentenced Kimbrough to only the mandatory minimum of 15 years' imprisonment (followed by 5 years on supervised release), representing a downward variance of 4 years below the minimum USSG recommendation.<sup>243</sup>

The United States Court of Appeals for the Fourth Circuit vacated the sentence and held that "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."<sup>244</sup> This holding framed the question on review in the Supreme Court, though it was reworded to specifically address whether the *Booker* decision also rendered the 100:1 sentencing ratio advisory.<sup>245</sup> In resolving the question on certiorari, the Court revisited its analysis of the deference given to sentences that fall within the USSG guidelines.<sup>246</sup> In particular, the Court discussed its holdings in *Rita* and *Gall*, noting that the presumption of reasonableness for within-guidelines sentences comes in large part from the fact that, as to most offenses, the USSC had used the empirical data from thousands of actual past cases to determine, within a fairly narrow range, what the sentencing norms actually were for the corresponding crimes.<sup>247</sup>

However, the Court pointed out that, with respect to crack cocaine offenses, the USSC took a different approach and based sentencing ranges solely on the cutoff points given in the Anti-Drug Abuse Act of 1986.<sup>248</sup> Furthermore, in light of reports from the USSC itself stating

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243. *Id.* at 91-93.

244. *Id.* at 93 (citation and internal quotation marks omitted).

245. *Id.*

246. *Id.* at 108-09.

247. *Id.*

248. *Id.* at 109; see also Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended at 21 U.S.C. §§ 801-971).

that the 100:1 sentencing disparity for crack offenses produces sentences that are “greater than necessary” under 18 U.S.C. § 3553(a), the Court held that it would not be a reversible abuse of discretion for a sentencing judge to reach the same conclusion.<sup>249</sup> Thus, the Court upheld Kimbrough’s 15-year sentence as reasonable.<sup>250</sup>

**2. 2008 through 2010: The USSG and Crack Sentencing Policies Interweave.** Over the three years following the *Kimbrough* decision, the Supreme Court would have occasion to reapply *Booker* four more times, with cases tending to include progressively more discussion of the crack-powder sentencing disparity.<sup>251</sup> In 2008, the Court decided *Irizarry v. United States*,<sup>252</sup> which concerned a criminal defendant’s asserted right to advance notice if the sentencing court is considering a sentence above the USSG range.<sup>253</sup> Richard Irizarry pleaded guilty to one count of making a threatening interstate communication, and at his plea hearing he admitted to actually sending dozens of similar e-mails to his ex-wife. Those e-mails, sent in violation of a restraining order, repeatedly threatened to kill both his ex-wife and her new husband. Irizarry also admitted that the e-mail messages were intended to convey true threats and that his actions were knowingly and willfully carried out. Irizarry had even sought out one of his fellow inmates to kill his ex-wife and her new husband for him. Irizarry’s presentence report detailed concerns that his criminal history category under the USSG might not accurately account for his prior criminal history or propensity to recidivate.<sup>254</sup>

At Irizarry’s sentencing hearing, his ex-wife took the stand and testified in detail about his history of domestic violence; her reasons for seeking a restraining order against him; his threats to harm her, her friends, and her family; and also her actual belief that Irizarry would act on his threats if given the opportunity. Evidence was also presented showing that, at the time of his arrest, Irizarry had documents in his vehicle that reinforced the claim that he was actually planning to hunt down his ex-wife and children. In his defense, Irizarry asserted that he did not mean what he said in any of the threatening messages, that he

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249. *Kimbrough*, 552 U.S. at 110.

250. *Id.* at 111-12.

251. *See generally* *Dillon v. United States*, 130 S. Ct. 2683 (2010); *Spears v. United States*, 555 U.S. 261 (2009); *Irizarry v. United States*, 553 U.S. 708 (2008).

252. 553 U.S. 708 (2008).

253. *See id.* at 709-10.

254. *Id.* at 710.

took full responsibility for his actions, and that he never spoke to his cellmates about killing his ex-wife's new husband.<sup>255</sup>

After weighing the aggravating and mitigating factors, the trial judge announced the findings of the court, ruling:

I find the guideline range is not appropriate in this case. I find Mr. Irizarry's conduct most disturbing. I am sincerely convinced that he will continue, as his ex-wife testified, in this conduct regardless of what this court does and regardless of what kind of supervision he's under. And based upon that, I find that the maximum time that he can be incapacitated is what is best for society, and therefore the guideline range, I think, is not high enough. The guideline range goes up to 51 months, which is only nine months shorter than the statutory maximum. But I think in Mr. Irizarry's case the statutory maximum is what's appropriate, and that's what I'm going to sentence him.<sup>256</sup>

In addition to the 5-year statutory maximum, the court also sentenced Irizarry to a 3-year period of supervised release.<sup>257</sup>

Irizarry appealed, arguing that the Supreme Court's precedent in *Burns v. United States*<sup>258</sup> required notice of a court's intent to sua sponte impose a sentence greater than the maximum stated in the USSG sentencing range.<sup>259</sup> The United States Court of Appeals for the Eleventh Circuit held that the Supreme Court's *Booker* decision amounted to constructive notice that all future sentencing hearings had the possibility of resulting in sentences outside of the advisory USSG range.<sup>260</sup> Therefore, parties no longer required specific notice when a sentencing court sought to exercise its new judicial discretion.<sup>261</sup>

The Supreme Court wholeheartedly agreed.<sup>262</sup> The Court held that "neither the Government nor the defendant may place the same degree of reliance on the type of 'expectancy' that gave rise to a special need for

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255. *Id.* at 711.

256. *Id.* at 711-12 (internal quotation marks omitted).

257. *Id.* at 712.

258. 501 U.S. 129 (1991).

259. *Irizarry*, 553 U.S. at 712. Rule 32 of the Federal Rules of Criminal Procedure required parties to have a chance to comment on the findings relating to the sentence under consideration by a sentencing court. The Court in *Burns* held that under the then-mandatory USSG, parties had a reason to rely on the guidelines in preparing their arguments for the purpose of seeking a particular sentence. 501 U.S. at 138-39. Therefore, in order to enable parties to fairly address the possibility of a sentence that exceeded the USSG guidelines, sentencing courts were required to give advance notice of any intent to exceed the guideline range. *Id.*

260. *Irizarry*, 553 U.S. at 712.

261. *Id.*

262. *See id.* at 713.

notice in *Burns*. Indeed, a sentence outside the Guidelines carries no presumption of unreasonableness.<sup>263</sup> Thus, while sentencing courts are still required to give parties an opportunity to prepare for and address unresolved sentencing concerns, no specific notice regarding the risk of a higher-than-recommended sentence is required, and relief may not be sought on that grounds that such notice is not given.<sup>264</sup>

The Supreme Court's 2009 decision in *Oregon v. Ice*<sup>265</sup> marked the first significant post-*Booker* limitation on the right to trial by jury.<sup>266</sup> In *Ice*, respondent Thomas Ice had been convicted in Oregon after, on two separate occasions, he illegally entered an apartment in a housing complex he managed and, while there, sexually assaulted an eleven-year-old girl. The state charged and convicted Ice on six different counts, including two counts each of burglary with intent to commit sexual abuse, sexual assault by touching the victim's genitals, and sexual assault by touching the victim's breasts. A separate tenet of Oregon law required sentencing courts to impose, by default, concurrent sentences on defendants who were convicted of multiple crimes simultaneously, unless the sentencing court made additional findings, including, for example, that the offenses arose out of separate courses of conduct, indicated a willingness to commit additional crimes, or created an exceptional risk of harm to the victim or others. Applying these laws at sentencing, the judge found that each burglary was a separate course of conduct, and that Ice met the other statutory qualifications for consecutive sentences with respect to each of the sexual assault counts. With these findings, Ice was sentenced to 28 years and 4 months in prison, up from a possible sentence of 7.5 years if the judge had ordered concurrent sentences.<sup>267</sup>

Ice appealed to the Oregon Supreme Court, arguing that, because a judge and not a jury decided that Ice had met the statutory qualifications for consecutive sentencing, the judge had effectively found "fact[s] that increase[d] the penalty for [his] crime[s] beyond the prescribed statutory maximum" and that, under *Apprendi*, those findings of fact "must be submitted to a jury, and proved beyond a reasonable doubt."<sup>268</sup> The Oregon Supreme Court agreed with Ice, reasoning that "the imposition of consecutive sentences increased the quantum of

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263. *Id.* at 713-14.

264. *Id.* at 714-16 & n.2.

265. 555 U.S. 160 (2009).

266. *See id.* at 172.

267. *Id.* at 165-66 & n.5.

268. *Id.* at 166-67 (quoting *Apprendi*, 530 U.S. at 490).

punishment imposed.<sup>269</sup> The United States Supreme Court disagreed.<sup>270</sup>

In reaching its decision, the Supreme Court traced its reasoning from *Apprendi*, *Blakely*, *Booker*, and *Cunningham* back to the common law origins of the right to trial by jury.<sup>271</sup> In doing so, it held that the difference in the sentencing procedures between those cases and Ice's case was that the right to determine the facts of a case "was understood as within 'the domain of the jury . . . by those who framed the Bill of Rights,'" while the choice of imposing concurrent or consecutive sentences traditionally "rested exclusively with the judge."<sup>272</sup> Because of this traditional division of labor, the Court held that Ice was not entitled to have the facts that permitted consecutive sentencing to be found by a jury, even though state law made concurrent sentencing the default absent the specific finding of such facts.<sup>273</sup> The Court went on to hold that finding otherwise would impede upon states' sovereign authority to legislatively address crime as each state felt appropriate.<sup>274</sup> Thus, it reasoned, extending the Sixth Amendment to encompass a legislative regulation of concurrent sentencing could also extend the right to trial by jury to the great range of other sentence-related decisions judges have traditionally made, such as the imposition or extent of supervised release, community service, fines, or restitution.<sup>275</sup> Therefore, the relief that the Oregon Supreme Court granted to Ice was reversed.<sup>276</sup>

Just one week after deciding *Ice*, the Supreme Court issued its second opinion in *Spears v. United States*,<sup>277</sup> returning to issues and facts nearly identical to those presented in *Kimbrough* and issuing a summary, per curiam opinion reversing the Eighth Circuit's holding without hearing oral argument.<sup>278</sup> In *Spears*, the United States District Court for the Northern District of Iowa convicted Steven Spears of conspiring to distribute at least 50 grams of crack cocaine and at least 500 grams of cocaine HCl. Based on his criminal history, the USSG recommended sentence for Spears was between 27 years and 33 years,

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269. *Id.* at 166 (internal quotation marks omitted).

270. *Id.* at 172.

271. *Id.* at 167-68.

272. *Id.* at 168 (quoting *Harris v. United States*, 536 U.S. 545, 557 (2002)).

273. *Id.* at 169-70.

274. *Id.* at 170-72.

275. *Id.* at 171.

276. *Id.* at 172.

277. 555 U.S. 261 (2009).

278. *See id.* at 262-68. The lack of oral argument is noted in a statement made by Justice Kennedy as part of the opinion. *See id.* at 268.



9 months in prison. However, the sentencing court issued findings that the 100:1 crack sentencing disparity resulted in a sentence that was excessive under the 18 U.S.C. § 3553(a) factors analysis. In an effort to alleviate some of the disparity, the court instead applied a 20:1 ratio to the facts of Spears's case, which led to a new guidelines range of 17.5 years to 21 years, 10 months. Finding the statutory mandatory minimum adequate, the court sentenced Spears to 20 years' imprisonment.<sup>279</sup>

The Government appealed the sentence to the United States Court of Appeals for the Eighth Circuit, which held that it was error for the sentencing court to "categorically reject[] the 100:1 quantity ratio and substitut[e] its own ratio in calculating Spears's sentence."<sup>280</sup> The Supreme Court granted Spears's first petition for writ of certiorari, summarily vacated the Eighth Circuit's ruling, and remanded with instruction to reconsider the case in light of *Kimbrough*.<sup>281</sup> On remand, the Eighth Circuit reached the exact same conclusion that it had reached previously, for the exact same reasons.<sup>282</sup> "Because the Eighth Circuit's decision on remand conflict[ed] with [the Supreme Court's] decision in *Kimbrough*, [the Court] grant[ed Spears's] petition for certiorari and reverse[d]."<sup>283</sup>

In reapplying *Kimbrough*, the Court held that "the point of *Kimbrough* [was to recognize] district courts' authority to vary from the crack cocaine Guidelines based on *policy* disagreement with them, and not simply based on an individualized determination that they yield an excessive sentence in a particular case."<sup>284</sup> In driving home the point, the Court went on to say that the latter part of that statement, that sentencing courts had authority to make individualized determinations that a sentence under the USSG would be excessive, had been decided all the way back in *Booker*.<sup>285</sup> Not only that, but the Court also highlighted the fact that the same point had been conceded by the Government in arguing *Kimbrough*, and the holding in *Kimbrough* plainly recognized that the discretion afforded to sentencing courts when presiding over crack cases reached beyond even the broad discretionary augmentation created in *Booker*.<sup>286</sup> Finally, with the holding in

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279. *Id.* at 261-62.

280. *Id.* at 262 (quoting *United States v. Spears*, 469 F.3d 1166, 1174 (8th Cir. 2006)).

281. *Id.* at 262-63 (citing *Spears v. United States*, 552 U.S. 1090 (2008)).

282. *Id.* at 263.

283. *Id.*

284. *Id.* at 264.

285. *Id.*

286. *Id.* at 264-65.

*Kimbrough* clarified for the Eighth Circuit, the Court again reversed the Eighth Circuit's holding and remanded for further proceedings.<sup>287</sup>

The October 2009 Term of Court presented the Supreme Court with its first opportunity to consider the procedural requirements of sentencing reduction hearings after a 2008 USSG amendment recommended retroactively decreasing sentences for crack cocaine offenses.<sup>288</sup> In *Dillon v. United States*,<sup>289</sup> Percy Dillon was serving a sentence of 26 years, 10 months in prison for his 1993 conviction on numerous counts of crack and powder cocaine trafficking, as well as one count of using a firearm in relation to a drug-trafficking offense. At his sentencing hearing, the United States District Court for the Western District of Pennsylvania found that Dillon had controlled 1.5 kilograms of crack as well as 1.6 kilograms of cocaine HCl. This resulted in a base offense level of 38 for Dillon's drug offenses, plus a mandatory consecutive 5-year sentence for the firearms offense.<sup>290</sup> Because the USSG were mandatory at the time, the sentencing court sentenced Dillon to the minimum within the guidelines range, commenting at the time that the sentence was "entirely too high for the crime [Dillon] committed."<sup>291</sup>

When the USSC retroactively applied an across-the-board, two-level reduction in the base offense levels of crack offenses in 2008, Dillon filed an 18 U.S.C. § 3582(c)(2)<sup>292</sup> motion seeking a modification of his sentence.<sup>293</sup> At his motion hearing, Dillon argued for a further reduction below the new guidelines range, "[b]ased largely on his post-sentencing conduct, including his determined pursuit of educational and community-outreach opportunities."<sup>294</sup> The district court granted Dillon's motion, but only reduced his sentence to 22.5 years, the minimum under the new guidelines recommendation. The court reasoned that, while *Booker* rendered advisory the Guidelines' recommendations in federal sentencing hearings, the directives governing post-sentencing adjustments based on § 3582(c)(2) motions were still mandatory.<sup>295</sup> Therefore, when the USSG themselves permit a retroactive reduction in the sentences of prisoners filing proper

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287. *Id.* at 266-68 ("[W]e should therefore promptly remove from the menu the Eighth Circuit's offering, a smuggled-in dish that is indigestible.")

288. *See Dillon v. United States*, 130 S. Ct. 2683 (2010).

289. 130 S. Ct. 2683 (2010).

290. *Id.* at 2689.

291. *Id.* (alteration in original) (internal quotation marks omitted).

292. 18 U.S.C. § 3582(c)(2) (2006).

293. *Dillon*, 130 S. Ct. at 2689.

294. *Id.*

295. *Id.* at 2689-90.

§ 3582(c)(2) motions, USSG § 1B1.10(b)(2)<sup>296</sup> also limits the extent of the sentence reduction available.<sup>297</sup> This limitation requires that

the court shall not reduce the defendant's term of imprisonment . . . to a term that is less than the minimum of the amended guideline range . . . [unless] the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to a government motion to reflect the defendant's substantial assistance to authorities, [in which case] a reduction comparably less than the amended guideline range . . . may be appropriate.<sup>298</sup>

The United States Court of Appeals for the Third Circuit affirmed the decision, reiterating the district court's position that the sentencing reduction provisions of the USSG were still mandatory.<sup>299</sup>

The Supreme Court agreed.<sup>300</sup> It held that § 3582(c)(2) entitled a prisoner to a modification of an already-imposed final sentence and not a resentencing *de novo*.<sup>301</sup> This narrow interpretation of § 3582(c)(2) required courts hearing sentence modification motions to follow a strict two-step analysis.<sup>302</sup> First, the court must figure out whether the USSC has explicitly allowed for the retroactive application of a sentencing guidelines amendment under USSG § 1B1.10(b)(2), and only then does the court conduct an analysis of the 18 U.S.C. § 3553(a) factors to determine what would constitute a new, fair sentence in light of the new guidelines recommendation.<sup>303</sup> With this preliminary issue out of the way, the Court went on to hold that, because § 3582(c)(2) only applies in limited circumstances and does not grant the prisoner a plenary resentencing, § 3582(c)(2) is not under the same constitutional constraints as the entire USSG sentencing process was *pre-Booker*.<sup>304</sup> Therefore, the Court held that the limitation imposed by § 3582(c)(2) was binding such that courts cannot modify a within-guidelines sentence to become a below-guidelines sentence under the newly applicable guidelines range.<sup>305</sup>

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296. U.S. SENTENCING GUIDELINES MANUAL § 1B1.10(b)(2) (2011).

297. *See id.*

298. *Id.*

299. *Dillon*, 130 S. Ct. at 2690.

300. *Id.* at 2694.

301. *Id.* at 2690-91.

302. *Id.* at 2691.

303. *Id.* at 2691-92.

304. *Id.* at 2692.

305. *Id.*

**3. 2011: Justice Sotomayor Defines Term “Wide Discretion.”** In its most recent term, the Supreme Court decided yet another case in the *Apprendi-Booker* line, *Pepper v. United States*,<sup>306</sup> in which the Court made a fine distinction between different kinds of sentencing procedures.<sup>307</sup> Given the narrow interpretation of § 3582(c)(2) motions for reduction of sentence under *Dillon*, some may have found it surprising that the Court held just 9 months later in *Pepper* that district courts could enjoy wide discretion with respect to resentencing when a defendant’s sentence had been vacated on appeal.<sup>308</sup> This is especially true given that the opinions in both *Dillon* and *Pepper* were penned by Justice Sotomayor.<sup>309</sup>

In *Pepper*, the petitioner, Jason Pepper, had pleaded guilty to conspiracy to distribute more than 500 grams of methamphetamine. As part of his plea deal, Pepper also turned two of his co-conspirators over to police and agreed to testify about their criminal activities before a federal grand jury. At his initial sentencing hearing, the Government acknowledged Pepper’s substantial assistance in their investigation and moved for a 15% downward departure from the sentencing guideline range of 97 to 121 months’ imprisonment. Instead, the district court sentenced Pepper to 24 months’ imprisonment, or about 75% below the minimum recommended USSG sentence.<sup>310</sup> The Government appealed the sentence to the Eighth Circuit, which vacated the sentence in light of the intervening *Booker* case. Pepper then completed his original sentence just days later, and he was freed on supervised release.<sup>311</sup>

A resentencing hearing took place in May 2006, at which Pepper testified regarding his successful completion of the prison’s 500-hour drug abuse program, his complete rehabilitation from drug dependence, his reconciliation with estranged family members, his enrollment and success at a local college, and his steady employment since being released from prison. Acknowledging the command of the Eighth Circuit, the court limited the downward sentencing departure for assisting authorities to only 40%. However, the court also made special findings that Pepper’s post-sentencing rehabilitation entitled him to an

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306. 131 S. Ct. 1229 (2011).

307. *See id.* at 1241.

308. *See id.*

309. *See id.* at 1235; *Dillon*, 130 S. Ct. at 2687.

310. *Pepper*, 131 S. Ct. at 1236 & nn.1-2. The sentencing judge chose a 24-month sentence because that was the minimum sentence that a prisoner could serve in the assigned federal prison while still qualifying for the prison’s intensive drug abuse treatment program. *See United States v. Pepper*, 412 F.3d 995, 997 (8th Cir. 2005).

311. *Pepper*, 131 S. Ct. at 1236.

additional downward departure of 59% and reinstated the already-served 24-month sentence. The Government again appealed, and the Eighth Circuit vacated the sentence once more, holding that a 59% downward departure was an abuse of discretion.<sup>312</sup> Pepper petitioned for certiorari, and the Supreme Court granted the petition, along with a summary reversal and remand in light of the holding in *Gall* concerning the use of percentages in determining the unreasonableness of guidelines departures.<sup>313</sup>

On remand, the Eighth Circuit distinguished Pepper's case from *Gall*, holding that, without reference to the percent of the downward departure, it was nonetheless inappropriate for the sentencing court to have considered Pepper's post-sentencing rehabilitation efforts in his new resentencing hearing. Thus, Pepper returned again to the district court in 2008 for his third sentencing hearing, this time before a new judge. At this third sentencing, the district court agreed with the Eighth Circuit's position that a 40% downward departure for cooperating with authorities was excessive and that Pepper deserved no consideration for his post-sentencing rehabilitation efforts, despite the fact that, by this time, Pepper was a supervisor at his job, and had married and was raising a child. The district court sentenced Pepper to 65 months' imprisonment, and he was remanded into federal custody. Pepper appealed the new sentence, claiming, among other things, that the sentencing court erred by failing to consider his post-sentencing rehabilitation efforts. The Eighth Circuit affirmed the new sentence and the Supreme Court granted certiorari yet again.<sup>314</sup>

The Court began by addressing the claim that it was error for the sentencing court to fail to consider Pepper's post-sentencing rehabilitation.<sup>315</sup> By recalling the old adage that "punishment should fit the offender and not merely the crime," the Court held that

both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.<sup>316</sup>

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312. *Id.* at 1236-38.

313. *Id.* at 1238 (citing *Pepper v. United States*, 552 U.S. 1089 (2008)).

314. *Id.* at 1238-39.

315. *Id.* at 1239-40.

316. *Id.* at 1240 (quoting *Williams v. New York*, 337 U.S. 241, 246-47 (1949)).

This reaffirmed the traditional breadth of discretion and judgment long enjoyed by sentencing courts.<sup>317</sup> The Court then referred back to the Sentencing Reform Act of 1984<sup>318</sup>—which had originally created the USSC and ordered the establishment of the USSG<sup>319</sup>—and noted that the guidelines themselves explicitly permitted sentencing judges to consider any kind of information from any legal source.<sup>320</sup>

This highlights the stark difference between *Pepper* and *Dillon*. In *Dillon*, the Court held that a sentence modification proceeding was constrained by mandatory limitations on available reductions in sentences, and that the 18 U.S.C. § 3553(a) “fair sentencing” factors were secondary to the determination that a sentence modification was even available.<sup>321</sup> In contrast, *Pepper* expressly held that, in a plenary resentencing, the fairness factors of § 3553(a) were the primary consideration of courts and any lawfully available information under the sun could be weighed in reaching any legal sentence, no matter how far below the advisory guidelines the sentence fell, so long as there was no abuse of discretion.<sup>322</sup>

#### *B. Crack Cocaine Sentencing Outside of Booker: Justice Sotomayor Defines the Term “Cocaine Base”*

As the fates of crack offenders and the United States Sentencing Commission continue to intertwine, a number of new cases have appeared on the Supreme Court docket just in the last and current terms of Court. In the October 2010 term, the Supreme Court decided two cases relating to crack specifically. The first decision came once again from Justice Sotomayor, in the June 2011 case *DePierre v. United States*.<sup>323</sup> At issue in *DePierre* was the legal definition of the term “cocaine base.”<sup>324</sup> Petitioner Frantz DePierre had been charged with distribution of more than 50 grams of cocaine base after he sold the drugs to a government informant. At trial, a chemist working for the government testified that the substance, which DePierre had sold, weighed 55.1 grams and contained cocaine base. However, the chemist was unable to conclude that the substance had any baking soda (sodium

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317. *See id.*

318. Pub. L. No. 98-473, ch. II, 98 Stat. 1987.

319. Pub. L. No. 98-473, § 991, 98 Stat. at 2017.

320. *See Pepper*, 131 S. Ct. at 1240.

321. *Dillon*, 130 S. Ct. at 2691-92.

322. *Pepper*, 131 S. Ct. at 1241-43.

323. 131 S. Ct. 2225 (2011).

324. *Id.* at 2227-28.

bicarbonate) in it, and was therefore unable to determine whether it was actually crack cocaine or some other form of cocaine base.<sup>325</sup>

At trial, DePierre argued that the jury could not convict him under the “cocaine base” statute unless it could be proven that the substance was, in fact, crack cocaine. Along with his argument, DePierre submitted two proposed jury instructions: one which gave the definition of “crack” as laid out in the USSG, and one which instructed the jury that the chemical identification of crack depended on the detection of (the unfound) sodium bicarbonate in the substance. Instead, the court instructed the jury that the relevant statute only specifies that it is illegal to distribute “cocaine base,” and therefore, evidence that the substance was cocaine base, though not necessarily crack, was legally sufficient to support a conviction. The jury convicted DePierre and the court sentenced him to the then-minimum statutory sentence of 10 years in prison.<sup>326</sup> The First Circuit affirmed the conviction, noting the deep circuit split between circuits where “cocaine base” was defined solely as meaning “crack cocaine” and those defining the term to include any form of cocaine base.<sup>327</sup>

The Supreme Court defined the term “cocaine base” by first turning to the relevant statutory language.<sup>328</sup> In 21 U.S.C. § 841(b)(1)(A),<sup>329</sup> a mandatory minimum 10-year sentence is required for offenses involving

5 kilograms or more of . . . coca leaves, . . . cocaine, its salts, optical and geometric isomers, and salts of isomers[,] . . . ecgonine, its derivatives, their salts, isomers, and salts of isomers[,] or . . . any compound, mixture, or preparation which contains any quantity of any of the [above] substances . . . [or] . . . 50 grams or more of a mixture or substance described [above] which contains cocaine base.<sup>330</sup>

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325. *Id.* at 2230; see *supra* note 47 and accompanying text (describing the manufacturing process of crack cocaine).

326. *DePierre*, 131 S. Ct. at 2230.

327. *Id.* at 2230-31; see also *United States v. DePierre*, 599 F.3d 25, 30-31 & nn.3-4 (1st Cir. 2010) (noting that “cocaine base” is defined as only meaning “crack” or “crack and other types of smokable cocaine base” in the 6th, 7th, 8th, 9th, 11th, and D.C. circuits, while the term is interpreted to include any form of cocaine base in the 1st, 2nd, 3rd, 4th, 5th, and 10th circuits).

328. See *DePierre*, 131 S. Ct. at 2231.

329. 21 U.S.C. § 841(b)(1)(A) (2006 & Supp. IV 2010).

330. *Id.* Note that § 841 was amended by the Fair Sentencing Act of 2010, raising from 50 grams to 280 grams the threshold quantity of cocaine base-containing substance required to trigger the 10-year mandatory minimum sentence. See Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 124 Stat. 2372, 2372.

The Court found that the “most natural reading of the term ‘cocaine base’ [was] ‘cocaine in its base form’ . . . the molecule found in crack cocaine, freebase, and coca paste.”<sup>331</sup> Nonetheless, the Court acknowledged that the term “cocaine base” was redundant in that chemically pure cocaine is, by definition, chemically basic.<sup>332</sup> The Court explained this redundancy by noting that the term “cocaine” is traditionally used to refer either to all substances containing cocaine in any form, or just to cocaine HCl (powdered cocaine).<sup>333</sup> Therefore, while technically redundant, the Court held that the additional word “base” served to disambiguate forms of cocaine including crack, freebase, and coca paste from those forms such as powdered cocaine, which Congress sought to punish less harshly.<sup>334</sup>

In its opinion, the Court also addressed, but dismissed, additional arguments, including DePierre’s invocation of the legislative intent in passing the 100:1 sentencing ratio in the Anti-Drug Abuse Act of 1986.<sup>335</sup> First, DePierre claimed that Congress passed the Act in response to a specific legislative concern about the dangerousness of crack cocaine, as opposed to cocaine base generally.<sup>336</sup> However, the Court held that this was not necessarily so because the discussions about the dangerousness of crack cocaine focused on the fact that crack allowed the drug to be inhaled—a method of use that is also available with other forms of cocaine base, but not cocaine HCl.<sup>337</sup> Second, DePierre asserted that the inclusive definition of “cocaine base” led to absurd results because 5 grams of raw coca leaves, which allegedly contained .05 grams of smokable cocaine base, would therefore be subject to the same minimum sentence as 5 grams of purified, smokable crack cocaine.<sup>338</sup> The Court held that the explicit inclusion of coca leaves in the higher-threshold sections of the statute indicated that Congress meant for crimes involving coca leaves to be punished under the higher thresholds, even if they might contain cocaine in its chemically basic form.<sup>339</sup> Third, DePierre asserted that, since 1993, the USSG themselves had explicitly defined “cocaine base” to mean “crack.”<sup>340</sup>

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331. *DePierre*, 131 S. Ct. at 2231.

332. *Id.* at 2232.

333. *Id.*

334. *Id.*

335. *Id.* at 2234.

336. *Id.*

337. *Id.*

338. *Id.* at 2235.

339. *Id.* at 2235-36.

340. *Id.* at 2236.



The Court also found this argument unpersuasive because the USSC, in making that statement in the guidelines, did not purport to be interpreting 21 U.S.C. § 841(b)(1), and because the guidelines did not serve to modify the statutory minimum sentences, but only created some intermediate quantity thresholds within the confines of the statutory scheme.<sup>341</sup> Thus, the Court fully adopted the broader definition of “cocaine base” as meaning more than just “crack cocaine,” and affirmed DePierre’s conviction.<sup>342</sup>

Just two weeks after deciding *DePierre*, the Court decided *Freeman v. United States*,<sup>343</sup> which, like *Dillon*, concerned a crack offender seeking to take advantage of the retroactive sentencing reductions offered by the 2008 amendment to the USSG.<sup>344</sup> In 2005 a grand jury charged William Freeman with “various crimes, including possessing with intent to distribute cocaine base.”<sup>345</sup> Freeman entered into an agreement in which he pleaded guilty to all charges in exchange for a government recommendation that he receive the minimum sentence under the USSG, as they existed at the time.<sup>346</sup> Then, in 2008, the USSC amended the USSG so that its recent amendments, which lowered the offense levels of all crack-related offenses by two, would be retroactive. Shortly thereafter, Freeman filed a motion under 18 U.S.C. § 3582(c)(2), seeking, as in *Dillon*, a reduction in his sentence.<sup>347</sup> However, the United States District Court for the Western District of Kentucky denied Freeman’s motion, and the United States Court of Appeals for the Sixth Circuit affirmed the district court’s denial on the grounds that defendants who enter into plea agreements which specify a particular sentence are not eligible for relief under § 3582(c)(2).<sup>348</sup>

The Supreme Court reversed the judgment of the Sixth Circuit without issuing a majority opinion.<sup>349</sup> Rather, Justice Kennedy wrote the plurality opinion, joined by Justices Ginsburg, Breyer, and Kagan, with

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341. *Id.* at 2236-37.

342. *Id.* at 2237.

343. 131 S. Ct. 2685 (2011).

344. *See id.* at 2691-92 (Kennedy, J., plurality opinion).

345. *Id.* at 2691.

346. *Id.* The district court sentenced Freeman to 106 months’ imprisonment, including 46 months for his drug and other offenses, as well as a mandatory consecutive 60 months for possession of a firearm in furtherance of a drug trafficking crime. *Id.*

347. *Id.* at 2691-92; *see also Dillon*, 130 S. Ct. at 2689. As a result of the USSG amendments, Freeman’s sentence was now the maximum sentence under the newly-applicable guidelines range, and a reduction back to the minimum of the new range would have given Freeman reprieve from 9 months of his sentence. *See Freeman*, 131 S. Ct. at 2691.

348. *Freeman*, 131 S. Ct. at 2692 (Kennedy, J., plurality opinion).

349. *See id.* at 2690.

Justice Sotomayor concurring in the judgment only,<sup>350</sup> and the remaining Justices dissenting.<sup>351</sup> The plurality reasoned that the sentencing guidelines give judges “a basis . . . for the judge’s exercise of discretion,” and that, while a judge will usually “impose a sentence within the range[, e]ven where the judge varies from the recommended range, if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, then the Guidelines are in a real sense a basis for the sentence.”<sup>352</sup> Next, the plurality reasoned that, while the portion of the Federal Rules of Criminal Procedure governing plea agreements<sup>353</sup> makes a recommended sentence in such an agreement binding upon the court once the agreement is accepted, the judicial act of accepting a plea itself requires the court to evaluate the reasonableness of the agreement in light of the USSG.<sup>354</sup> Thus, because a retroactive amendment to the USSG operates “to isolate whatever marginal effect the since-rejected Guideline had on the defendant’s sentence,” a prisoner should be able to invoke § 3582(c)(2) for the purpose of seeking relief as “to whatever extent the sentencing range in question was a relevant part of the analytic framework the judge used to determine the sentence or to approve the [plea] agreement.”<sup>355</sup>

In reaching its conclusions, the plurality rejected the Government’s position that, when a plea agreement includes a recommended sentence, which is accepted and imposed by a sentencing court, then the only basis for the sentence imposed would be the agreement itself, without reference to the USSG.<sup>356</sup> However, because the district court must refer to the USSG in order to evaluate the offered plea agreement, and because a later sentence reduction proceeding is subject to great constraint (including under *Dillon*), the plurality held that the Government’s position was not only untenable, but that the Government’s fear that § 3582(c)(2) would be subject to abuse was unfounded.<sup>357</sup>

In concurring in the judgment only, Justice Sotomayor took a different perspective with respect to the relationship between a plea agreement that recommends a sentence and the imposition of that sentence by a sentencing judge.<sup>358</sup> She wrote that the sentencing guidelines only serve as a basis for a defendant’s sentence if the guidelines were used by

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350. *See id.*

351. *See id.* at 2700 (Roberts, C.J., dissenting).

352. *Id.* at 2692 (Kennedy, J., plurality opinion) (citation omitted).

353. FED. R. CRIM. P. 11(c).

354. *Freeman*, 131 S. Ct. at 2692 (Kennedy, J., plurality opinion).

355. *Id.* at 2692-93.

356. *Id.* at 2693.

357. *Id.* at 2693-95.

358. *See id.* at 2695-96 (Sotomayor, J., concurring).

the *parties* in agreeing upon a sentence to recommend to the court as part of the plea deal.<sup>359</sup> Because the district court has only two options—in effect, take it or leave it—any reference to the sentencing guidelines made by the court only serves as a basis for accepting or rejecting the agreement, and not as a basis for the sentence itself.<sup>360</sup> To support her position, Justice Sotomayor reasoned that parties in future plea agreements can help ensure the retroactive reducibility of their sentences by including a specific clause in the agreement stating that the sentence was based on the USSG.<sup>361</sup> On the other hand, prosecutors can ensure that a particular defendant serves out his full sentence by including in the plea agreement a waiver of the right to bring a § 3582(c)(2) motion in the event that one of his or her crimes of conviction are later the subject of a retroactive reduction in sentence.<sup>362</sup> Finally, because the plea agreement at issue in this case did make specific reference to the range recommended in the USSG, Justice Sotomayor wrote that Freeman had qualified for a sentence reduction under her analysis.<sup>363</sup>

The period from 2005 through 2010 saw the parallel histories of the USSG and federal crack sentencing policies continue to intertwine. However, the story of the complex relationship between these areas of law is far from over. Though federal crack sentencing policies changed significantly between 2005 and 2010, the litigation relating to those changes seems likely to continue for a long time.

#### IV. FUTURE OF THE ISSUE

##### A. Cases Currently Pending in the Supreme Court

For the October 2011 term, the Supreme Court has already granted certiorari in one more “crack” case,<sup>364</sup> as well as in another case which will extend the *Apprendi*<sup>365</sup>-*Booker*<sup>366</sup> line of cases.<sup>367</sup> In fact, both

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359. *Id.*

360. *Id.*

361. *Id.* at 2697-98.

362. *Id.* at 2699.

363. *Id.* at 2699-2700.

364. See *Dorsey v. United States*, 132 S. Ct. 759 (2011), *granting cert. in United States v. Fisher*, 635 F.3d 336 (7th Cir., 2011) and *Hill v. United States*, 132 S. Ct. 759 (2011). *Fisher* and *Hill* were consolidated for this appeal. See *id.* The Supreme Court made a decision in *Dorsey* on June 21, 2012.

365. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

366. *United States v. Booker*, 543 U.S. 220 (2005).

367. See *Southern Union Co. v. United States*, 132 S. Ct. 756 (2011). The Supreme Court made a decision in *Southern Union* on June 21, 2012.

petitions for certiorari were granted on the same day, November 28, 2011.<sup>368</sup> The “crack” case comes as a consolidated appeal from two separate cases, both out of the Seventh Circuit, *United States v. Fisher*<sup>369</sup> and *United States v. Hill*.<sup>370</sup> In *Fisher*, which was itself a consolidated appeal, two defendants sought to convince the Seventh Circuit that their respective sentencing courts had erred in failing to sentence them under the reduced sentences of the Fair Sentencing Act of 2010 (FSA).<sup>371</sup> The first, Anthony Fisher, had pleaded guilty in February 2010, before the United States District Court for the Eastern District of Wisconsin, to conspiring to distribute crack cocaine.<sup>372</sup> While Fisher disputed the quantity of crack involved, all agreed that it had exceeded the 50 gram threshold for triggering a mandatory 10-year minimum sentence, which is what Fisher received. The court sentenced Fisher on June 2, 2010, and he appealed on June 3, 2010, with his appeal thus pending when the FSA took effect on August 3, 2010.<sup>373</sup>

The second defendant, Edward Dorsey, pleaded guilty on June 3, 2010, in the United States District Court for the Central District of Illinois, to possessing 5.5 grams of crack cocaine with intent to distribute. Under the pre-FSA sentencing scheme, in light of a prior drug conviction Dorsey had, the mandatory minimum sentence was 10 years’ imprisonment. However, at the time of Dorsey’s sentencing, the FSA had already gone into effect (where it had not in Fisher’s case), and new criminal defendants who were similarly situated would only have been subject to such a sentence if they had possessed at least 28 grams of crack cocaine. Nonetheless, when Dorsey sought the lower FSA sentence at his sentencing hearing, the district court ruled that, because his criminal act was committed in 2008, Dorsey was not entitled to the benefit of the new legislation. In addition to Fisher’s claim that the FSA should be generally retroactive, Dorsey argued on appeal that, because the FSA dealt specifically with sentencing, the question of retroactivity should only be applied to those *sentenced* after August 3, 2010, and not those whose criminal conduct occurred thereafter. Therefore, it was Dorsey’s position that Congress intended the FSA to take immediate effect as to all future sentencing, that the FSA was fully applicable to him at the

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368. *See id.*; *Dorsey*, 132 S. Ct. at 759.

369. 635 F.3d 336 (7th Cir. 2011), *cert. granted sub nom* *Dorsey v. United States*, 132 S. Ct. 759 (2011).

370. 417 F. App’x 560 (7th Cir. 2011), *cert. granted sub nom* *Dorsey v. United States*, 132 S. Ct. 759 (2011).

371. *Fisher*, 635 F.3d at 338-39; *see also* Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (codified in scattered sections of 21 U.S.C. ch. 13).

372. *Fisher*, 635 F.3d at 337.

373. *Id.*

time of his sentencing, and that he did not need the benefit of a finding of retroactivity.<sup>374</sup>

The Seventh Circuit first examined the retroactivity argument brought by both defendants, but found that the claims were barred under 1 U.S.C. § 109,<sup>375</sup> which generally says that the repeal of a law does not end any penalties or liabilities imposed under the repealed law unless the repealing act specifically says otherwise.<sup>376</sup> Because the text of the FSA did not specifically mention granting retroactive relief, none could be had.<sup>377</sup> Similar reasoning informed the court's disposition of Dorsey's claim that Congress intended the FSA's immediate effect.<sup>378</sup> In addressing that question, the court held that

[d]ebate surrounding the crack cocaine sentencing scheme and the infamous "100:1 ratio" has been raging for years, and there is strong rhetoric to be found on either side. The FSA is compromise legislation and must be viewed as such. Given the long-standing debate surrounding, and high-level congressional awareness of, this issue, we hesitate to read in by implication anything not obvious in the text of the FSA. We believe that if Congress wanted the FSA or the guideline amendments to apply to not-yet-sentenced defendants convicted on pre-FSA conduct, it would have at least dropped a hint to that effect somewhere in the text of the FSA, perhaps in its charge to the Sentencing Commission. In other words, if Congress wanted retroactive application of the FSA, it would have said so.<sup>379</sup>

In closing, the court expressed its remorse that Fisher and Dorsey were not entitled to lower sentences, but noted in dicta that a hypothetical defendant who had been convicted of continuous conduct spanning from before August 3, 2010 until afterwards "may very well be able to benefit, at least in part, from the FSA."<sup>380</sup>

The Seventh Circuit decided *Fisher's* consolidated companion case, *Hill*, less than a month after *Fisher* and only one day after the parties' briefs had been submitted.<sup>381</sup> Appellant Corey Hill was in a situation very similar to that of Edward Dorsey in *Fisher*—Hill had been convicted in 2009 of possessing more than 50 grams of crack cocaine with intent

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374. *Id.* at 338-39.

375. 1 U.S.C. § 109 (2006).

376. *Fisher*, 635 F.3d at 338.

377. *Id.* (noting that both the Eleventh and Sixth Circuits have reached similar results in similar cases).

378. *See id.* at 339-40.

379. *Id.*

380. *Id.* at 340.

381. *Compare id.* at 336, with *Hill*, 417 F. App'x at 560.

to distribute.<sup>382</sup> However, Hill's sentencing hearing was not until December 2010, after the FSA had taken effect. At sentencing, the United States District Court for the Northern District of Illinois denied Hill the benefit of the FSA on the ground that, as with Dorsey, Hill's criminal conduct had occurred before the FSA took effect. The sentencing judge did note, however, that, but for the mandatory minimum sentence, he would have imposed only a 51-month sentence instead of the 120 months that Hill received. Hill appealed, arguing, again like Dorsey, that the FSA should have applied to all sentences handed down after the Act took effect, regardless of the date the criminal conduct occurred. This would have subjected Hill to a mandatory minimum sentence of 5, not 10, years in prison.<sup>383</sup> Echoing the *Fisher* panel, the court simply recalled that "we recently rejected the same argument in [*Fisher*], where we reaffirmed our [prior] holding . . . that the Fair Sentencing Act does not apply retroactively and added that the relevant date for determining whether the Act applies is the date of the offense conduct, rather than the date of sentencing."<sup>384</sup>

While it is noteworthy that the Supreme Court granted certiorari in these two cases, it is particularly interesting that the Court only granted Dorsey's and Hill's petitions for certiorari.<sup>385</sup> In fact, Fisher also petitioned the Court for certiorari, but the Supreme Court denied his petition.<sup>386</sup> Hence, it is Dorsey's name, and not Fisher's, that will appear in the style of the Supreme Court case.<sup>387</sup> This is interesting because the only material factual difference between Fisher's case and the cases of Dorsey and Hill is that Fisher both committed his crime and received his sentence before the FSA took effect, whereas both Dorsey and Hill committed their crimes before the FSA, but were not sentenced until afterward.<sup>388</sup>

This suggests that the Supreme Court will use this case to establish whether the FSA changed sentencing for all prisoners sentenced after August 3, 2010, or just for those who committed crimes after that date. Another parallel between these two cases lies in the fact that the USSC had retroactively amended the guidelines recommendations for crack offenses once again, so that all persons previously convicted of crack

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382. *Hill*, 417 F. App'x at 560-61.

383. *Id.*

384. *Id.* at 561.

385. Compare *Dorsey*, 132 S. Ct. at 759, and *Hill*, 132 S. Ct. at 759, with *Fisher v. United States*, 132 S. Ct. 762 (2011) (denying cert.).

386. *Fisher*, 132 S. Ct. at 762.

387. See *Dorsey*, 132 S. Ct. at 759.

388. Compare *Fisher*, 635 F.3d at 338-39, with *Hill*, 417 F. App'x at 560-61.

offenses can now take advantage of an 18 U.S.C. § 3582(c)(2)<sup>389</sup> sentence modification. Thus, the difference between Fisher's future sentence-reduction efforts and those of Dorsey and Hill (if the Supreme Court agrees with them) will be identical to the differences between the *Dillon*<sup>390</sup> and *Pepper*<sup>391</sup> cases.<sup>392</sup> However, even if the Court does not agree with Dorsey and Hill, all is not lost. Where Dorsey's possession of 5.5 grams of cocaine base with intent to distribute was formerly a base level 24 offense, it would now be a base level 16 offense and, without regard to his other sentencing considerations, Dorsey might still see a reduction of 3 years or more off of his sentence.<sup>393</sup> Likewise, Hill's possession of 50 or more grams of crack with intent to distribute was formerly a base level 30 offense, since reduced to a base offense level of 26, which could mean a reduction of 4 years or more from his sentence.<sup>394</sup>

The newest case in the *Apprendi-Booker* line of cases, *Southern Union Co. v. United States*,<sup>395</sup> is also currently pending before the Supreme Court. In *Southern Union*, a jury in the United States District Court for the District of Rhode Island convicted a Texas-based natural gas company of illegally storing spent mercury-sealed gas regulators, as well as loose mercury and other mercury-contaminated objects in an unsafe manner within an abandoned gas manufacturing plant in Rhode Island. The site where Southern Union was storing this mercury was not regularly staffed, lacked security cameras, had gaps in the surrounding fence, was frequently vandalized, and was known to the company to be housing homeless people in one of the sheds on-site.<sup>396</sup> The company kept the mercury-sealed gas regulators double-bagged in regular plastic bags and held in "plastic kiddie pools on the floor of the brick build-

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389. 18 U.S.C. § 3582(c)(2) (2006).

390. *Dillon v. United States*, 130 S. Ct. 2683 (2010).

391. *Pepper v. United States*, 131 S. Ct. 1229 (2011).

392. That is, Fisher's future motions for a reduced sentence would be mandatorily limited to the new applicable guidelines range, as was the case in *Dillon*, 130 S. Ct. at 2694, whereas Dorsey and Hill may have the benefit of a plenary resentencing, like in *Pepper*, 131 S. Ct. at 1240-43, if the Supreme Court holds in their favor.

393. Compare U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 (2010) (amended 2011) (old cocaine base offense levels), with U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 (2011) (current cocaine base offense levels); see also U.S. SENTENCING GUIDELINES MANUAL § 5A (2011) (showing the difference in possible punishments between offense level 24 crimes and offense level 16 crimes).

394. See sources cited *supra* note 393.

395. 630 F.3d 17, *cert. granted*, 132 S. Ct. 756 (2011). Note that the Supreme Court granted certiorari in both this case and *Dorsey* on the same day.

396. *Southern Union*, 630 F.3d at 22.

ing.”<sup>397</sup> The company was also storing loose mercury in “a milk jug, a paint can, glass jars, and plastic containers,” as well as other “various containers in which it arrived.”<sup>398</sup>

This mercury had accumulated over the course of more than two years, and eventually amounted to about 1.25 gallons of loose mercury, and 165 mercury-sealed gas regulators. While some employees within the company made efforts to call attention to the mounting mercury storage problems at this facility, the company never undertook any actual cleanup efforts. About two years after the illegal mercury storage began, a group of local youths broke into the abandoned facility and started playing with some of the mercury, which they spilled in and around the building. They also took some mercury back to their apartment complex, where they played with it outside and threw it into the air. As a result, the untreated mercury also contaminated several apartments. Southern Union did not discover the break-in until after about three weeks had passed, at which point the company immediately brought in a contractor to clean up the spills, and contacted the Rhode Island Department of Environmental Management. Nonetheless, Southern Union spent more than \$6 million cleaning up the contamination, and the entire apartment complex had to be evacuated for more than two months.<sup>399</sup>

Despite Southern Union’s gross environmental mismanagement, a jury convicted it of only one count of violating 42 U.S.C. § 6928(d),<sup>400</sup> for storing hazardous liquid mercury waste without a permit.<sup>401</sup> By the terms of the statute, the maximum fine that can be imposed for violating § 6928(d) is \$50,000 per day of the violation.<sup>402</sup> However, the indictment under which Southern Union was charged only specified that the violation occurred “[f]rom on or about September 19, 2002 until on or about October 19, 2004,” with similar language appearing on the verdict form.<sup>403</sup> When the jury returned its verdict of guilty, the sentencing judge interpreted that the jury had found that a continuous violation throughout the entire named period of time was proved beyond a reasonable doubt.<sup>404</sup> As a result, the court calculated that the maximum fine to which Southern Union was subject would be \$38.1

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397. *Id.*

398. *Id.*

399. *Id.* at 22-24.

400. 42 U.S.C. § 6928(d) (2006).

401. *Southern Union*, 630 F.3d at 24.

402. 42 U.S.C. § 6928(d).

403. *Southern Union*, 630 F.3d at 32 (internal quotation marks omitted).

404. *Id.*



million.<sup>405</sup> Instead, the court imposed a \$6 million fine, as well as an additional \$12 million “community service obligation.”<sup>406</sup>

Southern Union appealed the sentence, alleging that, because the jury verdict did not include a specific finding as to the number of days of the violation, the largest fine that could be imposed by the jury verdict alone would be the one-day maximum of \$50,000. That is, the jury only found that a violation had occurred at some point, and not over any specific number of days. Therefore, when the district court interpreted the jury verdict as meaning that Southern Union had violated the law on each day within the span given on the verdict form, it was finding additional facts that operated to increase the maximum sentence beyond that which was supported by the jury verdict alone. This, they argued, violated Southern Union’s right to trial by jury, as held in the *Apprendi-Booker* line of cases.<sup>407</sup>

The First Circuit began analyzing the claim by reviewing the entire line of *Apprendi-Booker* cases.<sup>408</sup> Specifically, the court found it significant that these cases concerned the right to have a jury find all facts relevant to “punishment” or “penalties,” without addressing any specific kind of punishment, such as fines, prison sentences, probated sentences, or any other kind of penalty that a sentencing court might impose.<sup>409</sup> However, because of the generality of the language used in the *Apprendi-Booker* line of cases, and the fact that all of these cases have dealt with natural persons, and not corporations, as defendants, the First Circuit treated the issue as a matter of first impression.<sup>410</sup> The court then turned to the Government’s arguments, which relied on *Oregon v. Ice*<sup>411</sup> and the historical division between judicial discretion and the power of the jury.<sup>412</sup> The Government held the position that, because judges traditionally have discretion to set the specific amounts of fines imposed on criminal defendants, the right to a jury trial does not protect those facing punitive fines.<sup>413</sup>

Following the analytical path laid out in *Ice*, the First Circuit then noted the Supreme Court’s dicta in *Ice*, which stated that

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405. *Id.* The time span in question measured 762 days, which, at a maximum of \$50,000 in fines per day, would have subjected Southern Union to a maximum total fine of \$38.1 million. *Id.*

406. *Id.* (internal quotation marks omitted).

407. *Id.* at 33.

408. *Id.*

409. *Id.* (internal quotation marks omitted).

410. *See id.* at 21, 33.

411. 555 U.S. 160 (2009).

412. *Southern Union*, 630 F.3d at 33.

413. *Id.*

[t]rial judges often find facts about the nature of the offense or the character of the defendant in determining, for example, the length of supervised release following service of a prison sentence; required attendance at drug rehabilitation programs or terms of community service; and *the imposition of statutorily prescribed fines* and orders of restitution.<sup>414</sup>

Next, the First Circuit pointed out that judges, not the jury, traditionally enjoyed the discretion to set the amount of any fine imposed on a criminal.<sup>415</sup> Thus, it held that the *Apprendi-Booker* line of cases does not apply to criminal fines.<sup>416</sup> The court also recognized that, by applying *Ice* to deny those facing criminal fines the increased protection of the jury, it was creating a circuit split with the United States Courts of Appeals for both the Second and Seventh Circuits.<sup>417</sup> Lastly, as a precaution, the court went on to hold that, if *Apprendi* does apply to criminal fines, then the district court erred in presuming that the jury's verdict found a violation on every day in the range specified in the indictment, beyond a reasonable doubt.<sup>418</sup>

As with *Dorsey/Hill*, the Supreme Court granted certiorari on November 28, 2011.<sup>419</sup> It is worth noting that, despite the complex questions of environmental regulatory law also raised below in *Southern Union*, the only issue on certiorari is Southern Union's claim that it is entitled to jury fact-finding, under *Apprendi*, with respect to the duration of the violation.<sup>420</sup> Perhaps this is an indication of where Southern Union's attorneys feel its strongest argument lies. Perhaps this is an effort to focus the Supreme Court's attention on what Southern Union considers to be the most important issue for the future of the business.

In any case, there are some significant policy considerations at stake with the decision of this appeal. If the Supreme Court holds that *Apprendi* does not apply to fines, then that would be equivalent to holding that it does not apply to any case against a corporate defendant,

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414. *Id.* at 34 (quoting *Ice*, 555 U.S. at 171) (alteration in original).

415. *Id.* at 35.

416. *Id.* at 36.

417. *Id.* at 36 n.17.

418. *Id.* at 36-37.

419. *Southern Union*, 132 S. Ct. at 756.

420. See Petition for a Writ of Certiorari, *Southern Union v. United States*, 132 S. Ct. 756 (2011) (No. 11-94), 2011 WL 2877878, at \*II (stating the sole "Question Presented" as "Whether the Fifth and Sixth Amendment principles that this Court established in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny, apply to the imposition of criminal fines.").

because fines and similar penalties are traditionally the only sentences imposed on corporations.<sup>421</sup> In a way, such a holding would scale back the degree of “personhood” enjoyed by corporations, because natural persons would de facto enjoy greater rights as criminal defendants than corporations. On the other hand, if the Court decides that *Apprendi* does apply to fines, then a new question will arise as to where to draw the line. While *Ice* held that judges had full discretion with respect to the question of concurrent or consecutive sentencing, applying *Apprendi* to fines might mean that, in coming years, the Supreme Court would have to individually revisit each of the other traditional judicial provinces mentioned in *Ice*, including, for example, “the length of supervised release following service of a prison sentence; required attendance at drug rehabilitation programs or terms of community service; and the imposition of . . . orders of restitution.”<sup>422</sup>

*B. Possible Matters for the United States Supreme Court to Address in the Future*

While the Supreme Court is deciding *Dorsey* and *Southern Union* this term, there are some potential future issues for the Court currently brewing in the lower federal courts. For example, the Eighth Circuit recently issued an unpublished decision in *United States v. Duncan*.<sup>423</sup> In *Duncan*, a federal grand jury indicted defendant Larita Duncan in March 2010 for possession of crack cocaine, and she pleaded guilty on August 24, 2010, to possession of more than 5, but less than 20, grams of crack.<sup>424</sup> At sentencing, on November 22, 2010, Duncan received the mandatory minimum sentence of five years’ imprisonment under the pre-FSA version of the USSG.<sup>425</sup> At her sentencing hearing, Duncan argued that the FSA should apply to her retroactively and that she should not be subject to the mandatory minimum sentence.<sup>426</sup>

The Eighth Circuit, relying on its own precedent, rejected Duncan’s claim.<sup>427</sup> In doing so, however, the court noted that it was splitting with the First Circuit, which had recently affirmed a case upholding the proposition that Congress intended the FSA to affect all crack sentencing

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421. See *Southern Union*, 630 F.3d at 33.

422. *Ice*, 555 U.S. at 171.

423. 449 F. App’x 531 (8th Cir. 2011).

424. Brief of Appellee, *United States v. Duncan*, 449 F. App’x 531 (8th Cir. 2011) (No. 10-3737), 2011 WL 585552, at \*i.

425. *Duncan*, 449 F. App’x at 532.

426. *Id.*

427. *Id.*

that took place after its effective date.<sup>428</sup> Finding that Congress could have simply said so in the text of the statute if it had intended for the FSA to apply retroactively, the Eighth Circuit then held that it was not authorized to impute such a meaning to the statute on its own.<sup>429</sup> The Eighth Circuit's action in this case was particularly surprising in light of the fact that this decision came out after the Supreme Court granted certiorari in *Dorsey* and *Hill*.<sup>430</sup> In fact, the court even acknowledged the certiorari grants in a footnote.<sup>431</sup>

Given the narrow scope of the issue in *Dorsey* and *Hill*, this decision effectively amounts to the Eighth Circuit's re-voicing its vote among those opposing holdings already made by other circuit courts.<sup>432</sup> In an opinion concurring in the judgment only, Circuit Judge Kermit Bye even details the extent of the circuit split, stating that the First, Third, and Eleventh Circuits have applied the FSA with respect to all sentencing taking place after the law's enactment, while the Second, Sixth, and Seventh Circuits share the Eighth Circuit's position.<sup>433</sup> He then writes of his personal agreement with those circuits that have applied the FSA to all sentences following its enactment, but "reluctantly concur[s]" with the panel's "absurd result" because the decision was bound under circuit precedent.<sup>434</sup>

Another question that divides the circuit courts is the issue of whether offenders sentenced under the career offender provisions of the USSG for crack-related offenses are at all eligible for sentence reductions under the new, post-FSA, guideline amendments.<sup>435</sup> The United States Court of Appeals for the Second Circuit answered that question in the 2011 case *United States v. Rivera*.<sup>436</sup> In 1996, the United States District Court for the District of Connecticut convicted Gilberto Rivera of a crime involving roughly 3.3 kilograms (7.26 pounds) of crack cocaine.<sup>437</sup> At the time, the highest offense level that the USSG assigned for a crack violation was a base offense level of 38, given for crimes involving 1.5

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428. See *id.* (citing *United States v. Douglas*, 746 F. Supp. 2d 220 (D. Me. 2010), *aff'd* 644 F.3d 39 (1st Cir. 2011)).

429. *Id.*

430. See *id.* at 532 n.2.

431. *Id.*

432. See *generally id.* at 532-34 (majority opinion and Bye, C.J., concurring).

433. *Id.* at 533 (Bye, C.J., concurring).

434. *Id.* at 532-34.

435. See *United States v. Rivera*, 662 F.3d 166, 178-84 (2d. Cir. 2011) (gathering and comparing cases from various circuits).

436. 662 F.3d 166 (2d. Cir. 2011).

437. *Id.* at 168.

kilograms of crack or more.<sup>438</sup> Rivera's prior convictions initially qualified him for a criminal history category of IV, and the combination of a level 38 offense and a category IV offender would have yielded a sentence of between 324 and 405 months in prison. However, given the nature of Rivera's past offenses, the court reclassified him as a "career offender."<sup>439</sup>

Under USSG § 4B1.1,<sup>440</sup> one qualifies as a "career offender" if three conditions are met.<sup>441</sup> First, the defendant must have been over eighteen years old at the commission of the crime being sentenced; second, the crime in question must have been a felony involving either violence or a controlled substance; and third, the defendant must have had at least two prior felony convictions that were either crimes of violence or controlled substance violations.<sup>442</sup> Thus, the "career offender" categorization works on a sort of "three strikes" model, with a strong possibility of increased punishment for those found to fit its requirements. Once a court designates a person as being a career offender, the court then applies two modifications to the sentencing calculations.<sup>443</sup> First, the court automatically increases the defendant's criminal history category to VI, which is the highest possible category.<sup>444</sup> Then, the court increases the defendant's offense level based on the statutory maximum sentence for the crime to be punished, except where the non-career-offender offense level already equals or exceeds this heightened offense level.<sup>445</sup> Typically, this has the effect of assigning a defendant a new category and offense level, without reference to the original offense level.<sup>446</sup>

For Rivera, the offense level for his crime of conviction, at 38, already exceeded the maximum offense level of 37 given by the career offender guideline; therefore, at Rivera's sentencing, the career offender designation only affected his criminal history category.<sup>447</sup> Still, this raised his possible sentencing range to between 30 years and life imprisonment. As a last consideration, though, the sentencing judge gave Rivera a three-level downward departure because of Rivera's poor

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438. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c)(1) (1995) (amended 2011), available at [http://www.ussc.gov/Guidelines/1995\\_guidelines/Manual/CH2PTD.htm](http://www.ussc.gov/Guidelines/1995_guidelines/Manual/CH2PTD.htm).

439. *Rivera*, 662 F.3d at 168-69.

440. U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 (2011).

441. *Id.*

442. *Id.* at § 4B1.1(a).

443. *Id.* at § 4B1.1(b).

444. *Id.*

445. *Id.*

446. *See id.* at § 4B1.1, cmt. background, p. 397 (2011).

447. *Rivera*, 662 F.3d at 169-70.

mental health history, sentencing him to the guidelines' minimum sentence of 292 months in prison. Following the 2008 amendment to the USSG, retroactively reducing all crack-related offenses by two offense levels, Rivera filed a § 3582(c)(2) motion for reduction of sentence. However, the district court found that the "applicable guideline range" under which Rivera had been sentenced was the career offender range, which had not been retroactively reduced, as opposed to the cocaine base guideline range, which had. Therefore, the district court denied Rivera's motion, and he appealed to the Second Circuit.<sup>448</sup>

In approaching the question of whether Rivera was eligible for a sentence reduction, the Second Circuit focused on the fact that the statute that allows for a reduction only makes that allowance if the defendant was sentenced "based on a sentencing range that has subsequently been lowered by the Sentencing Commission."<sup>449</sup> Similarly, the USSG themselves limit the availability of sentence reductions to prisoners for whom "the *guideline range applicable to that defendant* has subsequently been lowered."<sup>450</sup> However, because the retroactive sentence reductions granted in 2008 only referred to the guidelines governing controlled substance violations, and not to the career offender guidelines, these phrases quoted by the court established a critical threshold question.<sup>451</sup> That is, if the "applicable guideline range" that the sentence was "based on" was the career offender guideline, and not the cocaine base guideline, then Rivera was not even eligible for consideration for a sentencing reduction because his applicable range had not been reduced.<sup>452</sup> In fact, the court even pointed out that when the only sentencing consideration was that someone was a career offender, with no downward departures, ten circuit courts of appeals have held that a reduction in crack sentencing guidelines does not make a § 3582(c)(2) sentence reduction available.<sup>453</sup>

The court then noted that, when a sentencing judge identifies the fact that someone qualifies as a career offender, but then explicitly sets aside the career offender guidelines and imposes a sentence using the guidelines range for the crime of conviction, the circuits are deeply divided as to whether such a sentencing is still "based on" the career

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448. *Id.*

449. *Id.* at 170.

450. *Id.* at 171; U.S. SENTENCING GUIDELINES MANUAL § 1B1.10(a)(1) (2011).

451. *See Rivera*, 662 F.3d at 171-72.

452. *Id.*

453. *Id.* at 172 & n.4.

offender guidelines or the guidelines for the crime of conviction.<sup>454</sup> Ultimately, the court held that, because of the downward departure to account for Rivera's mental health issues, this was unlike the situation where a defendant was sentenced directly based on the career offender guidelines, and also unlike the case where a career offender was explicitly sentenced under the guidelines for the crime of conviction.<sup>455</sup> Thus, the court had to decide what guideline range Rivera's sentence was based on, since he was a crack offender who qualified as a career offender, but was subsequently given a downward departure from the career offender guidelines.<sup>456</sup> To complicate the question, the judge who sentenced Rivera made no mention of either the career offender guidelines or the cocaine base guidelines with respect to the final sentence, and the sentence ultimately imposed was lower than what would have been suggested by either set of rules.<sup>457</sup>

To resolve this question, the court of appeals looked to a number of factors, including the USSC's purpose for revising the guidelines, the rule of lenity, and an inquiry into the definition of the terms "applicable" and "based on."<sup>458</sup> After a "cogent and scholarly"<sup>459</sup> analysis, the court concluded that the sentence was "based on" the guideline range that was ultimately imposed, and not on either the career offender range or that of the crime of conviction.<sup>460</sup> From there, the court held that, though the post-departure career offender range had not been retroactively reduced by the 2008 USSG amendment, it was sufficient that a lower sentence would result for Rivera if the guidelines that had been reduced were in effect and used at his initial sentencing.<sup>461</sup> Because the USSC adjusted the maximum cocaine base offense level to only include offenses involving 4.5 kilograms or more of cocaine, Rivera would have initially had a base offense level of 36, and not 38, under the new guidelines.<sup>462</sup> The career offender rules would have increased this to a level 37 and, with Rivera's three-level mental health reduction, he would have ended up at level 34, not level 35, meaning that the

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454. See *id.* at 172 n.5 (noting that the First, Third, and Fourth Circuits have held that such defendants are eligible for a sentence reduction, while the Sixth, Eighth, and Tenth Circuits have reached the opposite conclusion).

455. *Id.* at 172-73.

456. *Id.*

457. *Id.* at 173.

458. *Id.* at 172-77.

459. *Id.* at 187 (Katzmann, C.J., concurring).

460. *Id.* at 177 (majority opinion).

461. *Id.* at 182-83.

462. *Id.* at 174 n.7.

minimum possible sentence would have been 30 months shorter.<sup>463</sup> Because the court found that the cocaine base sentencing reductions were intended to correct unjust sentences, the court held that, where plugging in the new guidelines and following the same logic used by the sentencing judge leads to a new result, then a defendant is eligible for a sentence reduction.<sup>464</sup>

Lastly, the court mentioned that the USSC had promulgated a proposed amendment to the USSG that would make the post-FSA guidelines revisions retroactive and clarify the definition of “applicable guidelines range” for sentence modification hearings.<sup>465</sup> The court noted that, under the new USSG definition of “applicable guidelines range,” the relevant guideline has become the guideline used as a starting point, before any departures are granted.<sup>466</sup> The court also pointed out that, had that new amendment been in effect when Rivera first sought his sentence modification, then he would have been completely barred from receiving any modification because it would be the career offender guidelines, and not cocaine base guidelines, that courts would have to look to for retroactive resentencing.<sup>467</sup>

While the USSC intended this new amendment to resolve the circuit split discussed in *Rivera*, this change has already created new problems in the few short months since it took effect.<sup>468</sup> In fact, one district court, in *United States v. Ware*,<sup>469</sup> has already held that, despite the *Rivera* court’s apprehensions, the new definition of “applicable guidelines range” does *not* preclude a court from reducing the sentence of a defendant in a situation very similar to that in *Rivera*.<sup>470</sup> In *Ware*, the United States District Court for the Eastern District of Pennsylvania convicted defendant Andre Ware in 2009 of, inter alia, of possessing 1.17 grams of crack cocaine with intent to distribute within 1000 feet of a school. Ware had an extensive criminal history and qualified as a career offender. But, because of the tiny quantity of crack involved, the sentencing judge determined that the career offender guidelines range of 262 to 327 months’ imprisonment was far too large. Instead, the

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463. *Id.* at 174.

464. *Id.* at 175-77.

465. *See id.* at 183 (referring to U.S. SENTENCING GUIDELINES MANUAL app. C, vol. III, amend. 759 (2011), which was pending subject to congressional approval at the time *Rivera* was decided, but which took effect on Nov. 1, 2011).

466. *Id.* at 183-84.

467. *Id.* at 183.

468. *See* U.S. SENTENCING GUIDELINES MANUAL, app. C, vol. III, amend. 759, at 421 (discussing reasons for the amendment).

469. No. 08-625-01, 2012 WL 38937 (E.D. Pa. Jan. 9, 2012).

470. *Id.* at \*6.



judge departed from the career offender range and sentenced Ware to double the midpoint of the guidelines range for his crimes of conviction, which resulted in a sentence of 128 months in prison.<sup>471</sup>

After USSG Amendment 759<sup>472</sup> passed, Ware filed a § 3582(c)(2) motion for a reduced sentence.<sup>473</sup> In considering Ware's motion, the district court ruled that the Supreme Court's interpretation of § 3582(c)(2) in *Freeman v. United States*<sup>474</sup> took precedent over the new USSG definition of "applicable guidelines range."<sup>475</sup> The court also held that the policy considerations behind the retroactive reduction of crack sentences likewise reinforced the idea that, despite the revised definition of "applicable guidelines range," it was still appropriate to grant Ware's § 3582(c)(2) motion.<sup>476</sup> Therefore, while the USSC's recent amendments may have attempted to resolve the circuit split discussed in *Rivera*, that resolution may be short-lived as it appears that the issue may, at least for the time being, still be very much alive.

## V. CONCLUSION

Though the United States Sentencing Commission and its *Guidelines Manual* both have a long and complicated relationship with federal crack cocaine sentencing policies, there is little indication of that relationship losing its aptitude for producing complex and interesting litigation in the coming years. This is an area that the Supreme Court continues to be actively involved in, and the Author is interested to see not only how the Court decides the two cases on its current docket, but also whether the circuit splits discussed above might soon be picked up on certiorari in an upcoming term of court. One thing is for certain though: with an estimated 12,040 inmates that are expected to benefit from last November's retroactive guidelines amendment, and an unknown number of career offenders now potentially barred from receiving the same kind of reduction, there will be ample opportunity for this issue to continue to be litigated in the district courts over the next few years. One can only hope and expect that, at the end of that litigation (and any

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471. *Id.* at \*1-3.

472. U.S. SENTENCING GUIDELINES MANUAL, app. C, vol. III, amend. 759 (2011).

473. *Ware*, 2012 WL 38937, at \*1.

474. 131 S. Ct. 2685 (2011).

475. *Ware*, 2012 WL 38937, at \*5-7.

476. *Id.* at \*8-10.

subsequent appeals), the judicial system will work to ensure that each defendant will receive whatever sentence is truly fair.

MICHAEL MCNEILL

## APPENDIX

## SENTENCING TABLE

(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points)						
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)	
1	0-6	0-6	0-6	0-6	0-6	0-6	
2	0-6	0-6	0-6	0-6	0-6	1-7	
3	0-6	0-6	0-6	0-6	2-8	3-9	
Zone A	4	0-6	0-6	0-6	2-8	4-10	6-12
	5	0-6	0-6	1-7	4-10	6-12	9-15
	6	0-6	1-7	2-8	6-12	9-15	12-18
Zone B	7	0-6	2-8	4-10	8-14	12-18	15-21
	8	0-6	4-10	6-12	10-16	15-21	18-24
	9	4-10	6-12	8-14	12-18	18-24	21-27
Zone C	10	6-12	8-14	10-16	15-21	21-27	24-30
	11	8-14	10-16	12-18	18-24	24-30	27-33
Zone D	12	10-16	12-18	15-21	21-27	27-33	30-37
	13	12-18	15-21	18-24	24-30	30-37	33-41
	14	15-21	18-24	21-27	27-33	33-41	37-46
	15	18-24	21-27	24-30	30-37	37-46	41-51
	16	21-27	24-30	27-33	33-41	41-51	46-57
	17	24-30	27-33	30-37	37-46	46-57	51-63
	18	27-33	30-37	33-41	41-51	51-63	57-71
	19	30-37	33-41	37-46	46-57	57-71	63-78
	20	33-41	37-46	41-51	51-63	63-78	70-87
	21	37-46	41-51	46-57	57-71	70-87	77-96
	22	41-51	46-57	51-63	63-78	77-96	84-105
	23	46-57	51-63	57-71	70-87	84-105	92-115
	24	51-63	57-71	63-78	77-96	92-115	100-125
	25	57-71	63-78	70-87	84-105	100-125	110-137
	26	63-78	70-87	78-97	92-115	110-137	120-150

27	70-87	78-97	87-108	100-125	120-150	130-162
28	78-97	87-108	97-121	110-137	130-162	140-175
29	87-108	97-121	108-135	121-151	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	168-210
31	108-135	121-151	135-168	151-188	168-210	188-235
32	121-151	135-168	151-188	168-210	188-235	210-262
33	135-168	151-188	168-210	188-235	210-262	235-293
34	151-188	168-210	188-235	210-262	235-293	262-327
35	168-210	188-235	210-262	235-293	262-327	292-365
36	188-235	210-262	235-293	262-327	292-365	324-405
37	210-262	235-293	262-327	292-365	324-405	360-life
38	235-293	262-327	292-365	324-405	360-life	360-life
39	262-327	292-365	324-405	360-life	360-life	360-life
40	292-365	324-405	360-life	360-life	360-life	360-life
41	324-405	360-life	360-life	360-life	360-life	360-life
42	360-life	360-life	360-life	360-life	360-life	360-life
43	Life	life	life	life	life	life

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