PEPPERDINE UNIVERSITY

Pepperdine Law Review

Volume 36 | Issue 3 Article 3

4-20-2009

Kimbrough and Gall: Taking Another "Crack" at Expanding Judicial Discretion Under the Federal Sentencing Guidelines

Chris Gaspard

Follow this and additional works at: https://digitalcommons.pepperdine.edu/plr

Part of the Criminal Procedure Commons, and the Judges Commons

Recommended Citation

Chris Gaspard *Kimbrough and Gall: Taking Another "Crack" at Expanding Judicial Discretion Under the Federal Sentencing Guidelines*, 36 Pepp. L. Rev. Iss. 3 (2009)
Available at: https://digitalcommons.pepperdine.edu/plr/vol36/iss3/3

This Note is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized editor of Pepperdine Digital Commons. For more information, please contact bailey.berry@pepperdine.edu.

Kimbrough and *Gall*: Taking Another "Crack" at Expanding Judicial Discretion Under the Federal Sentencing Guidelines

I. INTRODUCTION
II. HISTORICAL BACKGROUND
  A. *U.S. Sentencing Commission and the Federal Sentencing Guidelines*
  B. *Jurisprudential Progeny of the Sentencing Guidelines*
III. A CLOSE LOOK AT *GALL V. UNITED STATES* AND *KIMBROUGH V. UNITED STATES*
  A. Gall v. United States
  B. Kimbrough v. United States
IV. IMPACT OF *KIMBROUGH* AND *GALL*
  A. *Legal Impact*
  B. *Unanswered Questions and Practical Implications*
V. CONCLUSION

I. INTRODUCTION

> A judge ought to prepare his way to a just sentence, as God useth to prepare his way, by raising valleys and taking down hills: so when there appeareth on either side an high hand, violent prosecution, cunning advantages taken, combination, power, great counsel, then is the virtue of a judge seen, to make inequality equal; that he may plant his judgment as upon an even ground.[1]

It is axiomatic that the confidence of a civilized people in its government depends on the fairness and consistency in the formation and application of its laws. The difficulty in forming ideal criminal sentencing

1. FRANCIS BACON, ESSAYS 549–50 (Richard Whately ed., Lee and Shepard 1875) (1625).

laws lies in the fact that "fairness" and "consistency" are often competing factors. In the United States federal court system, sentencing guidelines and congressionally mandated minimum sentencing statutes have been enacted in an attempt to strike a balance between these two goals.[2]

These sentencing statutes and guidelines are the tools used by district court judges who must carry out the unimaginable task of staring a fellow human being in the eye while gauging how much of his life to strip away. Should these judges be forced to adhere to such statutes and guidelines to ensure that those who commit similar crimes receive similar sentences? Or should judges be given the flexibility to tailor each sentence to the unique circumstances of the individual being sentenced?

The debate over the extent of judicial discretion in sentencing has raged on in the United States for as long as crimes have been committed. From "three strike" laws[3] to "mandatory" sentencing guidelines, one need not travel far to find an opinion on the subject. History is replete with stories of judges granting unthinkably extreme sentences to criminal defendants.[4] Such stories include criticisms of "activist judges" and complaints over severe disparities from one sentence to the next.[5] It is without question that

---

2. *See infra* notes 18–22 (discussing the Federal Sentencing Guidelines and mandatory sentencing statutes).

3. *See* People v. Romero, 122 Cal. Rptr. 2d 399 (Ct. App. 2002) (affirming a sentence of twenty-five years to life pursuant to California's Three Strikes law for a defendant convicted of stealing a $3 magazine).

4. Of recent notoriety is the case of Genarlow Wilson, a seventeen-year-old high school senior who was arrested after receiving consensual oral sex from a fifteen-year-old at a New Year's Eve party. *See* Brenda Goodman, *Georgia Court Frees Man Convicted in Sex Case*, N.Y. TIMES, Oct. 27, 2007, at A9, *available at* http://www.nytimes.com/2007/10/27/us/27georgia.html. He was a star athlete (who lost his scholarship) and honors student with no criminal record. *Id.* Wilson rejected a five year plea offer and was sentenced to ten years in prison. *Id.* The sentence was considered by many to be draconian and sparked a public outcry. *Id.* After serving more than two years of his sentence behind bars, he was released by a divided 4–3 Georgia Supreme Court. *Id.* The majority characterized his sentence as "grossly disproportionate to his crime" and further wrote that "the severe felony punishment and sex offender registration imposed on Wilson make no measurable contribution to acceptable goals of punishment." Humphrey v. Wilson, 652 S.E.2d 501, 507, 509 (2007).

5. Judicial activism is often discussed when someone does not agree with the outcome of legislation. Shortly after her retirement from the bench, Supreme Court Justice Sandra Day O'Connor commented on it in an interview:

> For the immediate future, I've been very concerned about the number of verbal attacks on judges—and a few physical attacks as well from time to time. I have felt that the public concern has followed the concerns expressed by various legislators both in Congress and state legislatures, concerns about so-called activist judges. I suspect when people hear legislators so often publicly denounce activist, godless judges that people start thinking that's the situation. It's very much a concern to me.

Q & A with Sandra Day O'Connor, TIME, Sep. 28, 2006, http://www.time.com/time/nation/article/0,8599,1540702,00.html; *see also* Wikipedia, Judicial Activism, http://en.wikipedia.org/wiki/Judicial_activism (quoting several U.S. Supreme Court Justices on their definitions of the term "judicial activism") (last visited Apr. 2, 2009).

refining the sentencing process has proven to be a difficult and complex task.[6]

Furthering this endeavor, the United States Supreme Court recently released two eagerly anticipated decisions markedly impacting federal sentencing, *Gall v. United States*[7] and *Kimbrough v. United States*.[8] Prior to the simultaneous release of these decisions on December 10, 2007, activist groups and the media alike were buzzing with speculation, particularly over *Kimbrough*—the notorious crack/powder cocaine disparity case.[9] It had become a common perception that crack related offenses were being punished "100 times harsher" than corresponding powder cocaine related offenses and that minorities were feeling the brunt of the disparate treatment.[10]

---

6. *See* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 412 (1993) ("[The federal sentencing] guidelines . . . were not the last word. There have been amendments, and amendments of amendments; the whole process has become hideously complex. As of April of 1992, there were 434 of these amendments, and the guidelines were well on their way to a level of convolution and intricacy hardly matched by any other laws—*maybe* the Internal Revenue Code.").

7. 128 S. Ct. 586 (2007).

8. 128 S. Ct. 558 (2007).

9. *See, e.g.*, Linda Greenhouse, *Court to Weigh Disparities in Cocaine Laws*, N.Y. TIMES, June 12, 2007, at A15, *available at* http://www.nytimes.com/2007/06/12/washington/12scotus.html?pagewanted=all; J.C. Watts & Pat Nolan, Editorial, *Powder and Crack Cocaine*, WASH. TIMES, Oct. 31, 2007, http://www.washingtontimes.com/news/2007/oct/31/powder-and-crack-cocaine; Charles Lane, *Supreme Court to Review Judges' Discretion in Cocaine Sentences*, WASH. POST, June 12, 2007, at A8, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/06/11/AR2007061101620.html. "Crack" is the street name and most commonly used term for cocaine base. Although the term "cocaine base" is a more appropriate and neutral term for an academic study, the author has elected to adopt the Court's language for the sake of uniformity. *See Kimbrough*, 128 S. Ct. 558 (using the designation "crack/powder disparity" throughout its opinion when referencing the sentencing disparity between offenses involving cocaine base and identical offenses involving cocaine hydrochloride); *see also infra* note 214 (explaining the difference between powder cocaine and crack cocaine); *infra* notes 24–26 (discussing the 100-to-1 sentencing ratio between crack and powder cocaine).

10. Darryl Fears, *Bush Seeks More Violent Crime Funds*, WASH. POST, Jan. 25, 2008, at A3, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/01/24/AR2008012403381.html ("Under mandatory minimum sentencing guidelines approved by Congress 20 years ago, crack cocaine offenders, most of whom are black, received prison terms that were 100 times harsher than powder cocaine offenders, who typically are white and Latino."). To say that the sentence is 100 times harsher is a misnomer. Technically, it would be more correct to say that it takes 100 times the quantity of powder cocaine as that of crack to qualify for the same sentence. Hundreds of news and academic articles have been written documenting the disproportionately harsh sentences among black defendants resulting from the 100-to-1 ratio. *See, e.g.*, Op-Ed., *Rationality in Crack Sentencing*, N.Y. TIMES, July 23, 1997, at A20, *available at* http://query.nytimes.com/gst/fullpage.html?res=9A0CE6DD103BF930A15754C0A961958260 ("President Clinton took a step toward fairer drug sentencing yesterday when he proposed narrowing the disparity that treats crimes involving *crack cocaine, popular in poor black neighborhoods*, 100 times as harshly as crimes involving *powdered cocaine, popular among whites*. The change had been recommended by

Serious questions have arisen questioning the integrity of federal sentencing: Can district courts depart from the Federal Sentencing Guidelines (the Guidelines) based on their own views of "reasonableness," or are they bound to strict adherence to the Guidelines? If courts are free to depart from sentencing ranges set forth in the Guidelines, can they do so based on a general belief that the crack/powder cocaine disparity is inherently unfair, or must they do so only on an "as applied" basis? Should changes in this area of the law be applied retroactively, or only prospectively? *Gall* and *Kimbrough* ultimately provide the answers to all of these questions, but in the process create several new ones.[11]

This Comment examines the Court's decisions in *Gall* and *Kimbrough* and discusses their ramifications. Part II examines the history of the Guidelines and discusses the jurisprudential evolution leading up to *Gall* and *Kimbrough*.[12] Part III sets forth a detailed analysis and critique of both opinions.[13] Part IV explores both the practical and legal impact of these cases.[14] Finally, Part V concludes with a summary and parting comments.[15]

II. HISTORICAL BACKGROUND

In order to understand the current state of sentencing in the federal court system, it is crucial to have a clear understanding of its historical development. As an academic exercise, it would be thought-provoking to travel back to constitutional times and trace the evolution of sentencing in American courts; however, for the limited scope of this article, it suffices to start from 1984.[16]

Attorney General Janet Reno and the White House drug policy director.... Ms. Reno and Mr. McCaffrey... recognized the danger of turning a blind eye to a disparity that 'has become an important symbol of *racial injustice* in our criminal justice system.'" (emphasis added)); *see also infra* note 31 (listing other academic articles discussing the crack/powder disparity).

11. *See infra* Part IV.B (discussing unanswered questions and practical implications of *Gall* and *Kimbrough*).

12. *See infra* notes 16–77 and accompanying text.

13. *See infra* notes 79–277 and accompanying text.

14. *See infra* notes 281–366 and accompanying text.

15. *See infra* notes 367–373 and accompanying text.

16. In his dissenting opinion in *Gall*, Justice Alito cites several cases from the 18th century in his discussion of the Sixth Amendment, drawing historical analogs to our modern day sentencing guidelines. *See* Gall v. United States, 128 S. Ct. 586, 605–06 & n.1 (2007) (Alito, J., dissenting). While this article includes some discussion of the Sixth Amendment, a more appropriate and relevant historical starting point for the article is the Sentencing Reform Act of 1984. *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, §§ 212–17, 98 Stat. 1987 (codified as amended in 18 U.S.C. §§ 3551–742 (2006), 28 U.S.C. §§ 991–98) [hereinafter 1984 Act].

A. U.S. Sentencing Commission and the Federal Sentencing Guidelines

As a prefatory comment, it bears mention that people routinely conflate "sentencing guidelines" with "mandatory minimums."[17] In order to avoid confusion, it is imperative to understand that, while often overlapping, they are indeed distinct. In 1984, Congress decided to abandon indeterminate sentencing in favor of a more uniformed statutory scheme.[18] This decision culminated in the Sentencing Reform Act of 1984 (the 1984 Act), which provided for the creation of the United States Sentencing Commission (the Commission),[19] an independent agency of the Judicial Branch responsible for the formulation of sentencing guidelines for federal criminal offenses.[20] The Commission submitted its first Federal Sentencing Guidelines Manual to Congress in 1987.[21]

---

17. The Guidelines are published every year in the Federal Sentencing Guidelines Manual. The Guidelines assign a base offense level between 1 and 43 calculated by considering such factors as the category of the offense, offense conduct, and the criminal history of the defendant. The offense level can then be adjusted by considering other aggravating or mitigating circumstances. Each offense level corresponds to a sentencing range. *See* U.S. SENTENCING GUIDELINES MANUAL (2007). Mandatory minimum sentences, on the other hand, are prescribed by Congress under the 1984 Act. *See* 1984 Act, *supra* note 16. The mandatory minimum sentences are keyed to certain amounts of particular drugs involved in trafficking crimes. Courts are only free to sentence below these minimums if the defendant being sentenced provides substantial assistance to another criminal prosecution. *See infra* note 22 (discussing "substantial assistance" departures).

18. Prior to the enactment of the 1984 Act, federal courts used a system of indeterminate sentencing, which was highly discretionary and stressed rehabilitation. *See* Mistretta v. United States, 488 U.S. 361, 363 (1989) ("For almost a century, the Federal Government employed in criminal cases a system of indeterminate sentencing. Statutes specified the penalties for crimes but nearly always gave the sentencing judge wide discretion to decide whether the offender should be incarcerated and for how long, whether he should be fined and how much, and whether some lesser restraint, such as probation, should be imposed instead of imprisonment or fine. This indeterminate-sentencing system was supplemented by the utilization of parole, by which an offender was returned to society under the 'guidance and control' of a parole officer." (citing Zerbst v. Kidwell, 304 U.S. 359, 363 (1938))). Congress grew wary of the severe sentencing disparities arising under such a flexible system. Its disapproval culminated in the 1984 Act. *See* Michael Guasco, Note, *Defining "Ordinary Prudential Doctrines" After Booker: Why The Limited Remand Is The Least Of Many Evils*, 37 GOLDEN GATE U. L. REV. 609, 611–12 (2007).

19. *See* 1984 Act, *supra* note 16; *see also* Kimbrough v. United States, 128 S. Ct. 558, 567 n.7 (2007) ("Congress created the Sentencing Commission and charged it with promulgating the Guidelines in the Sentencing Reform Act of 1984, but the first version of the Guidelines did not become operative until November 1987" (citing U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY, at ii–iv (1995), *available at* http://www.ussc.gov/crack/exec.htm [hereinafter 1995 REPORT])).

20. *See* 1995 REPORT, *supra* note 19, at 2 (listing additional responsibilities of the Commission as required under the 1984 Act, including monitoring and periodically reporting on the Guidelines); 28 U.S.C. § 995(a)(8), (9), (12)(A), (13)–(16), (20), (21) (2000) (outlining powers and responsibilities of the Commission).

21. U.S. SENTENCING GUIDELINES MANUAL (1987).

In the interim, Congress passed the Anti-Drug Abuse Act of 1986 (the 1986 Act), which promulgated an extensive list of mandatory minimum sentences prescribed for designated federal drug trafficking offenses.[22] The Act created a two-tiered sentencing schedule for drug trafficking offenses, with minimum sentences of five and ten years depending on the type of drug and quantity, based on weight.[23] Notably, the distribution of 5 grams of crack cocaine *or* 500 grams of powder cocaine carried a mandatory minimum sentence of five years in prison,[24] and the distribution of 50 grams of crack *or* 5000 grams of powder cocaine carried a mandatory minimum sentence of ten years to life in prison.[25] This sentencing disparity between powder cocaine versus crack cocaine became known as the "100-to-1 quantity ratio."[26] Much speculation exists over why crack was punished so much more harshly than other drugs, but the tipping point in the debate

---

22. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207. Perhaps the term "mandatory minimum sentence" is a bit misleading. There are multiple authorities under which a district court judge may depart from the Guidelines ranges, two of which authorize departure below the "mandatory" minimum sentence. The "substantial assistance" provision of the Guidelines allows a judge to sentence below the Guidelines. The "safety valve" provision of the Guidelines and the Federal Rules of Criminal Procedure go further by granting the judge authority to sentence below the mandatory minimum sentences. The safety valve provision allows for departures in cases involving certain mitigating sentencing factors. *See* U.S. SENTENCING GUIDELINES MANUAL § 5C1.2(a) (2007) ("[T]he court shall impose a sentence in accordance with the applicable guidelines *without regard to any statutory minimum sentence*, if the court finds that the defendant meets the criteria in 18 U.S.C. § 3553(f)(1)–(5) . . . : '[T]he defendant does not have more than 1 criminal history point . . . ; the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon . . . ; the offense did not result in death or serious bodily injury to any person; the defendant was not an organizer, leader, manager, or supervisor of others in the offense . . . and was not engaged in a continuing criminal enterprise . . . ; and not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan . . . .'" (emphasis added)). The other instance in which a sentencing court may depart below the mandatory minimum sentence is when granting a "Rule 35" departure. *See* FED. R. CRIM. P. 35(b) ("Upon the government's motion . . . the court may reduce a sentence if the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person. . . . When acting under [this section], the court may reduce the sentence to a level *below the minimum sentence established by statute*." (emphasis added)). Lastly, a sentencing court has the option of granting a "substantial assistance" departure, also called a "5K1.1" departure, in cases involving a defendant who provides substantial assistance to the government in the prosecution of another. However, unlike the safety valve and Rule 35 departures, a sentencing judge granting a substantial assistance departure pursuant to § 5K1.1 of the Guidelines is still bound by the statutory minimum sentence. *See* U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2007) ("Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may *depart from the guidelines*." (emphasis added)).

23. 21 U.S.C. § 841(b) (2000).

24. § 841(b)(1)(B) (mandating a prison sentence of five to forty years for trafficking offenses involving at least 5 grams of crack or 500 grams of powder cocaine).

25. § 841(b)(1)(A) (mandating a prison sentence of ten years to life for trafficking offenses involving at least 50 grams of crack or 5 kilograms of powder cocaine).

26. *See* 1995 REPORT, *supra* note 19, at 5.

occurred when young basketball star Len Bias died suddenly from crack use in 1986 at the age of twenty-two.[27]

The 100-to-1 ratio established under Congress's mandatory minimum sentencing regime was adopted by the Commission for use in the sentencing calculation tables contained in its Federal Sentencing Guidelines Manual.[28] However, use of the 100-to-1 ratio was not limited to the amounts of cocaine corresponding to the five- and ten-year mandatory minimum quantities; instead, it was adopted across the board.[29] Congress further evidenced its intent to deter crack offenses in passing the Anti-Drug Abuse Act of 1988, establishing a mandatory minimum sentence for simple *possession* of crack cocaine.[30]

With this sentencing scheme in place, the disparity in cocaine sentencing became more and more evident over the years.[31] On at least

---

27. *See, e.g.*, Marc Mauer, *Racial Impact Statements as a Means of Reducing Unwarranted Sentencing Disparities*, 5 OHIO ST. J. CRIM. L. 19, 20 (2007) ("The problem, at least as it was perceived, was not a generalized one, but rather a racial one, pertaining to young black men. From the cover of *Newsweek*, to stories on the nightly news, to pronouncements of members of Congress, the image of a dark-skinned inner-city youth was the face of this new and seemingly intractable drug problem. Already emotionally laden, the issue achieved high-profile status in the nation's capital following the tragic death of (black) University of Maryland basketball star Len Bias in June of 1986. Following the NBA draft, at which he had been selected as the number two pick by the Boston Celtics, Bias died of a drug overdose that evening while celebrating with friends. News reports indicated that he had overdosed on crack cocaine, an error that was not repudiated until months later when it was reported that he had in fact died from freebasing powder cocaine. Bias's death ignited momentum in Congress to 'do something' about this new drug scourge. The hastily crafted response called for harsh prison terms, and only harsh prison terms."); Richard B. Schmitt & David G. Savage, *Chipping at Tough Crack Sentencing*, L.A. TIMES, Dec. 30, 2007, at A16 (discussing Bias's death as the catalyst for the enactment of strict crack sentences), *available at* http://articles.latimes.com/2007/dec/30/nation/na-crack30.

28. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1, at 62 (1987) (prescribing 100-to-1 ratio between powder cocaine and crack).

29. *See infra* notes 229–230 and accompanying text (discussing the history of the Commission's adoption of the 100-to-1 ratio).

30. *See* 1995 REPORT, *supra* note 19, at 1–2 ("Congress also distinguished crack cocaine from both powder cocaine and other controlled substances in the Anti-Drug Abuse Act of 1988 by creating a mandatory minimum penalty for simple possession of crack cocaine. This is the only federal mandatory minimum for a first offense of simple possession of a controlled substance. Under this law, possession of more than five grams of crack cocaine is punishable by a minimum of five years in prison. Simple possession of any quantity of any other substance—including powder cocaine—by first-time offenders is a misdemeanor offense punishable by no more than one year in prison.").

31. It is important to point out at this juncture in the article that this project is intended to analyze the state of the Guidelines post-*Kimbrough*/*Gall*. This article takes no particular stance on the sociological issues raised. For a detailed discussion about cocaine and the 100-to-1 quantity ratio, see William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233 (1996); Elizabeth Tison, *Amending the Sentencing Guidelines for Cocaine*

three separate occasions between the 1987 inception of the Guidelines and 2005, the Commission recommended to Congress that the crack/powder ratio be reduced, but it never happened.[32] Tired of waiting for Congress to act, the Commission promulgated an "ameliorating" amendment to section 2D1.1 of the Guidelines in April of 2007, aiming to reduce crack sentencing base offense levels by two for each specified quantity.[33] Absent

---

Offenses: The 100-to-1 Ratio Is Not As "Cracked" Up As Some Suggest, 27 S. ILL. U. L.J. 413 (2003). However, I would be remiss in failing to note a couple of my observations relating to the Commission's most recent report to Congress. *See* U.S SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (2007), *available at* http://www.ussc.gov/r_congress/cocaine2007.pdf [hereinafter 2007 REPORT]. The report's Appendix C contains written public comments on the cocaine sentencing policy (advocating more lenient sentences for crack offenses) from the U.S. Department of Justice, Federal Public and Community Defenders, Practitioners' Advisory Group, National Council of La Raza and Mexican Legal Defense and Educational Fund, the Sentencing Project, Human Rights Watch, American Civil Liberties Union, Main Civil Liberties Union, Drug Policy Alliance, National African American Drug Policy Coalition, Families Against Mandatory Minimums, 108 Law Professors, 308 University Professors and Scholars, Students for Sensible Drug Policy, and individual citizens. *See id.* at app. C1–C7. Collectively, this does not appear to be the most conservative group ever assembled. Additionally, the government seems more concerned with clearing out prison space than equality in sentencing. Appendix D of the 2007 Report is entitled "Sentencing Impact and Prison Impact Analysis." It offers charts illustrating how many prison beds would be freed up if the ratio were reduced. For example, a ratio of 5-to-1 instead of 100-to-1 (increasing the amount of crack cocaine necessary for a five year mandatory minimum sentence to 100 grams) would result in a 13,343 "prison bed reduction" over the next ten years. *See id.* at app. D7. Conspicuously absent is an appendix section estimating the probability of crime surges resulting from the early release of drug traffickers from federal prisons. There were, however, two comments from members of law enforcement who, not surprisingly, are opposed to reducing sentences for crack-related offenses. On behalf of the U.S. Department of Justice, United States Attorney R. Alexander Acosta testified:

> There is substantial proof that crack cocaine is associated with violence to a greater degree than other controlled substances, including powder cocaine. . . . The strong federal sentencing guidelines are one of the best tools for law enforcement's efforts to stop violent crime . . . and reducing those sentences would created a risk of increased drug violence.

Id. at app. B2–B4. Chuck Canterbury, the National President of the Fraternal Order of Police, opposed any decrease in crack sentencing:

> [T]he low level dealer who traffics in small amounts is no less of a danger to the community than an individual at the manufacturing or wholesale level. The fact that they are at the bottom of the drug distribution chain does not decrease the risk of violence or the effect on quality of life associated with their activities.

Id. at app. B4–B5.

32. *See infra* note 222 (discussing the Commission's unsuccessful recommendations made in attempts to eliminate any disparity in 1995, reduce the ratio to 5-to-1 in 1997, and reduce the ratio to 20-to-1 in 2002).

33. *See* 2007 Report, *supra* note 31, at 9. The report explained the Commission's actions as follows:

> The Commission's strong desire for prompt legislative action notwithstanding, the problems associated with the 100-to-1 drug quantity ratio as detailed in this report are *so urgent and compelling* that on April 27, 2007, the Commission promulgated an amendment to USSG § 2D1.1 to somewhat alleviate those problems. The Commission concluded that the manner in which the Drug Quantity Table in USSG § 2D1.1 was constructed to incorporate the statutory mandatory minimum penalties for crack cocaine

congressional action, the amendment would become effective on November 1, 2007, per its terms. Congress remained silent and the amendment was adopted.[34] The Commission noted that "[a]ny comprehensive solution [to the crack/powder disparity would still] require[] appropriate legislative action by Congress."[35] Even after the 2007 amendment, sentences for crack-related offenses would still garner a sentence two to five times greater than that of the same powder cocaine-related offenses.[36] As the Commission struggled with the crack/powder disparity, a string of cases made its way up to the Supreme Court, repeatedly altering the interpretation, and thus application, of the Guidelines.

B. *Jurisprudential Progeny of the Sentencing Guidelines*

The first Supreme Court case to weigh in on the Guidelines was the landmark constitutional law case of *Mistretta v. United States*.[37] In *Mistretta*, two challenges were made to the creation of the Commission: that it was an improper delegation of legislative power and that it violated the separation of powers doctrine.[38] The issue arose after John Mistretta was indicted in district court on federal cocaine trafficking charges in December 1987.[39] He moved to have the newly enacted Guidelines ruled

---

> offenses is an area in which the federal sentencing guidelines *contribute to the problems associated with the 100-to-1 drug quantity ratio*.
>
> The amendment, which absent congressional action to the contrary will become effective November 1, 2007, modifies the drug quantity thresholds in the Drug Quantity Table so as to assign, for crack cocaine offenses, base offense levels corresponding to guideline ranges that include the statutory mandatory minimum penalties (as opposed to guideline ranges that exceed the statutory mandatory minimum penalties). Accordingly, pursuant to the amendment, five grams of crack cocaine will be assigned a base offense level of 24 (51 to 63 months at Criminal History Category I, which includes the five-year (60 month) statutory minimum for such offenses), and 50 grams of cocaine base will be assigned a base offense level of 30 (97 to 121 months at Criminal History Category I, which includes the ten-year (120 month) statutory minimum for such offenses). In order to *partially address some of the problems that are unique to crack cocaine offenses because of the 100-to-1 drug quantity ratio*, crack cocaine quantities above and below the mandatory minimum threshold quantities will be adjusted downward by two levels.

Id. (italicized emphasis added) (footnotes omitted).

34. *See infra* note 223 (discussing Congress's tacit approval of the cocaine sentencing amendment).

35. 2007 Report, *supra* note 31, at 10.

36. Kimbrough v. United States, 128 S. Ct. 558, 569 & nn.10–11 (2007).

37. 488 U.S. 361 (1989).

38. *Id.* at 370.

39. *Id.* Mistretta was indicted in the U.S. District Court for the Western District of Missouri on three counts relating to the sale of cocaine. He ultimately pled guilty to one violation of 21 U.S.C.

unconstitutional, arguing the Guidelines were the product of the Commission, which was established in violation of the separation of powers doctrine, and because Congress lacked the authority to delegate its legislative responsibilities to the Commission.[40] The case ended up before the Supreme Court, which held the 1984 Act constitutional,[41] and thus the Commission and its Guidelines were also deemed constitutional.[42]

The next challenge facing the Commission would be whether the Guidelines could pass muster under the Sixth Amendment.[43] This issue was taken up in the *Apprendi–Blakely–Booker* line of cases.[44] In 2000, the *Apprendi* Court was faced with a situation where a defendant pled guilty to firearm possession offenses after shooting into the home of an African-American family with apparent racial animus.[45] The applicable New Jersey

---

§§ 846 and 841(b)(1)(B), conspiracy and agreement to distribute cocaine. *Id.* at 370. The Government dismissed the remaining counts, and Mistretta was sentenced to eighteen months in prison with three years of supervised release under the Guidelines. *Id.* at 370–71.

40. *Id.* at 370. Although the district court rejected Mistretta's arguments, the district court judge stated that its opinion "[did] not imply that [the judge had] no serious doubts about some parts of the Sentencing Guidelines and the legality of their anticipated operation." *Id.*

41. *See* 1984 Act, *supra* note 16.

42. *Mistretta*, 488 U.S. at 412 ("We conclude that in creating the Sentencing Commission—an unusual hybrid in structure and authority—Congress neither delegated excessive legislative power nor upset the constitutionally mandated balance of powers among the coordinate Branches. The Constitution's structural protections do not prohibit Congress from delegating to an expert body located within the Judicial Branch the intricate task of formulating sentencing guidelines consistent with such significant statutory direction as is present here. Nor does our system of checked and balanced authority prohibit Congress from calling upon the accumulated wisdom and experience of the Judicial Branch in creating policy on a matter uniquely within the ken of judges. Accordingly, we hold that the [Sentencing Reform Act of 1984] is constitutional."). *But see id.* at 427 (Scalia, J., dissenting) ("I think . . . this case is not about commingling, but about the creation of a new Branch altogether, a sort of junior-varsity Congress. It may well be that in some circumstances such a Branch would be desirable; perhaps the agency before us here will prove to be so. But there are many desirable dispositions that do not accord with the constitutional structure we live under. And in the long run the improvisation of a constitutional structure on the basis of currently perceived utility will be disastrous.").

43. U.S. CONST. amend. VI. The Sixth Amendment issue occurs in cases where judge-found facts are considered in sentencing. For example, imagine a scenario in which the Guidelines mandated a sentencing range of four years to six years for robbery. The (hypothetical) defendant pled guilty to the robbery in district court. The U.S. attorney presented evidence that the robbery was racially motivated and asked the judge to consider a "hate crime" sentencing enhancement of three years. If the judge chose to apply the maximum enhancement, the defendant would be sentenced to at least a year over the Guidelines range based on a fact (racial animus) that was not proven to a jury or admitted to by the defendant. Many would say this runs afoul of the Sixth Amendment.

44. *See* Apprendi v. New Jersey, 530 U.S. 466 (2000); Blakely v. Washington, 542 U.S. 296 (2004); United States v. Booker, 543 U.S. 220 (2005).

45. *Apprendi*, 530 U.S. at 468–71. Charles Apprendi, Jr. was arrested and admitted to the shooting about an hour after it occurred. *Id.* at 469. The house was occupied by the first African-American family to move into an all-white neighborhood. *Id.* Apprendi admitted that he did it "because they [were] black in color [and] he [did] not want them in the neighborhood." *Id.* Pursuant to a plea agreement, Apprendi was convicted on to two counts of firearm possession for an unlawful

state sentencing statutes included a sentencing enhancement if the judge concluded, by a preponderance of the evidence, that the crime was committed to intimidate victims based on race.[46] The shooting crime alone carried a sentencing range of five to ten years, but the enhancement carried up to an additional ten years.[47] The sentencing judge found that Apprendi qualified for the enhancement and sentenced him to twelve years in prison—two years over the original sentencing range under the firearm offense.[48] Notwithstanding Apprendi's constitutional argument that application of sentencing enhancement violated the Sixth Amendment, the state appellate court and the New Jersey Supreme Court affirmed his sentence.[49] The United States Supreme Court granted certiorari to address the Sixth Amendment issue.[50] In a 5–4 decision,[51] the Court reversed, holding that any fact other than a prior conviction that increases a defendant's sentence beyond its statutory maximum must either be pled to by the defendant or proven to a jury beyond a reasonable doubt.[52]

---

purpose and one count of possessing an antipersonnel bomb. *Id.* at 469–70 (citing N.J. STAT. ANN. §§ 2C:39-4a, 2C:39-3a (West 1995)).

46. *Id.* at 468–69 ("A separate statute, described by [the New Jersey] Supreme Court as a 'hate crime' law, provides for an 'extended term' of imprisonment if the trial judge finds, by a preponderance of the evidence, that '[t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.' The extended term authorized by the hate crime law for second-degree offenses is imprisonment for 'between 10 and 20 years.'" (quoting N.J. STAT. ANN. §§ 2C:44-3(e), 2C:43-7(a)(3) (West Supp. 1999–2000))).

47. *See supra* note 46.

48. *Id.* at 471 ("Having found 'by a preponderance of the evidence' that Apprendi's actions were taken 'with a purpose to intimidate' as provided by the statute, the trial judge held that the hate crime enhancement applied. Rejecting Apprendi's constitutional challenge to the statute, the judge sentenced him to a 12-year term of imprisonment on [one count of second-degree possession of a firearm for an unlawful purpose], and to shorter concurrent sentences on the other two counts." (citations omitted)).

49. *Id.* at 471–72.

50. *Id.* at 474.

51. As usual in cases dealing with federal sentencing, the court was fragmented. Justice Stevens delivered the opinion of the Court, joined by Justices Scalia, Souter, Thomas, and Ginsburg. *Id.* at 468. Justice Scalia filed a concurring opinion and joined parts I and II of Justice Thomas's concurrence. *Id.* Justice O'Connor dissented, joined by Chief Justice Rehnquist and Justices Kennedy and Breyer. *Id.* Justice Breyer also dissented, joined by the Chief Justice. *Id.*

52. *Id.* at 475–76 ("The question whether Apprendi had a constitutional right to have a jury find [racial] bias on the basis of proof beyond a reasonable doubt is starkly presented. Our answer to that question was foreshadowed by our opinion in *Jones v. United States*, construing a federal statute. We there noted that 'under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.' The Fourteenth Amendment commands the same answer in this case

In 2004, the Court evidenced its commitment to *Apprendi* in *Blakely v. Washington*.[53] This case involved a defendant who had been sentenced to more than three years above the state law statutory maximum prescribed for the offense he pled guilty to, pursuant to a sentencing enhancement that relied on a judge-found fact.[54] Consistent with its holding in *Apprendi*, the Court ruled the sentence in *Blakely* violated the Sixth Amendment, this time in the context of state law.[55]

In 2005, the Supreme Court decided the watershed case of *United States v. Booker*.[56] Not surprisingly, *Booker* is an appeal from a cocaine conviction.[57] By a confusing bare majority,[58] the divided Court chose to render the previously mandatory Guidelines effectively "advisory" and establish an appellate review for "unreasonableness."[59] These changes were

---

involving a state statute." (citations omitted) (quoting Jones v. United States, 526 U.S. 227, 243 n.6 (1999))).

53. 542 U.S. 296 (2004). The "commitment" retained its 5–4 split. *Id.*

54. *Id.* at 298 ("Petitioner Ralph Howard Blakely, Jr., pleaded guilty to the kidnapping of his estranged wife. The facts admitted in his plea, standing alone, supported a maximum sentence of 53 months. Pursuant to state law, the court imposed an 'exceptional' sentence of 90 months after making a judicial determination that he had acted with 'deliberate cruelty.'" (citation omitted)).

55. *Id.* at 313–14 ("Petitioner was sentenced to prison for more than three years beyond what the law allowed for the crime to which he confessed, on the basis of a disputed finding that he had acted with 'deliberate cruelty.' The Framers would not have thought it too much to demand that, before depriving a man of three 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." (quoting WILLIAM BLACKSTONE, 4 COMMENTARIES *343)).

56. 543 U.S. 220 (2005).

57. *Booker* incorporates *United States v. Fanfan*, No. 04-105 (U.S. Jan. 12, 2004). Freddie Booker was convicted by a jury of "possession with intent to distribute at least 50 grams of [crack]", in violation of 21 U.S.C. § 841(a)(1). *Id.* at 227. His sentencing under the Guidelines range would have been from 210 to 260 months in prison but for a finding on the part of the sentencing judge that he possessed 566 additional grams of crack and obstructed justice, thus raising his sentencing range to 360 months to life. *Id.* In light of *Apprendi* and *Blakely*, the Seventh Circuit reversed, holding the sentence increase based on judge-found facts violated the Sixth Amendment. *Id.* at 227–28. The Government appealed. *Id.* at 229. Respondent Fanfan was convicted of "conspiracy to distribute and to possess with intent to distribute at least 500 grams of cocaine in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(B)(ii)." *Id.* at 228. The Guidelines sentencing range in Fanfan's case, based on his conviction, was from 188 to 235 months. *Id.* The judge made additional findings that would have increased Fanfan's sentence by ten years. *Id.* However, relying on *Blakely*, the judge chose only to consider the jury verdict in sentencing. *Id.* at 228–29. The Government filed for appeal in the First Circuit and petitioned the Supreme Court for a writ of certiorari. *Id.* at 229. The Supreme Court elected to resolve the issue presented in both cases together. *Id.*

58. The *Booker* Court was completely fractured. Justice Stevens delivered the majority opinion in part, joined by Justices Scalia, Souter, Thomas, and Ginsburg. *Id.* at 225. Justice Breyer also delivered the majority opinion in part, joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Ginsburg. *Id.* Justice Stevens dissented in part, joined by Justices Souter and Scalia, who joined except for Part III and footnote seventeen. *Id.* Both Justices Scalia and Thomas dissented in part. *Id.* Justice Breyer also dissented in part, joined by Chief Justice Rehnquist, and Justices O'Connor and Kennedy. *Id.*

59. The Court accomplished this conversion of the Guidelines from mandatory to advisory by

intended to keep application of the Guidelines in compliance with the Sixth Amendment.[60]

In 2006, the Court granted certiorari to two cases that would test the Guidelines standards set forth in *Booker*.[61] First, in *Rita v. United States*, a decorated veteran was convicted of perjury and obstruction of justice based on his conduct and statements connected with an investigation conducted by the Bureau of Alcohol, Tobacco, Firearms and Explosives.[62] His sentencing range calculated under the Guidelines was thirty-three to forty-one months.[63] He petitioned for a sentence below the Guidelines, citing his ailing physical condition, military service, education, employment record, lack of substance abuse, and mental and emotional health.[64] The court sentenced Rita to the low end of the Guidelines range, thirty-three months.[65] He appealed his sentence, but the Fourth Circuit affirmed, holding that a sentence within the Guidelines range is "presumptively reasonable."[66] The Supreme Court

---

excising two of its statutory provisions. *See id.* at 259 ("[W]e must sever and excise two specific statutory provisions: the provision that requires sentencing courts to impose a sentence within the applicable Guidelines range (in the absence of circumstances that justify a departure), and the provision that sets forth standards of review on appeal, including *de novo* review of departures from the applicable Guidelines range. With these two sections excised . . . the remainder of the Act satisfies the Court's constitutional requirements." (citing 18 U.S.C. § 3553(b)(1) (2006); 18 U.S.C. § 3742(e))). Further, the Court addressed standard of appellate review under the newly advisory Guidelines, electing to excise the statutory de novo standard of review put in place by Congress in 2003. *Id.* at 260–61 (discussing its excision of § 3742(e) in favor of a "reasonableness" standard that had been in place prior to 2003). Later, the Court would assert this was a clear pronouncement of an abuse-of-discretion standard of review, but there would be some debate over that assertion. *See infra* note 109 (discussing the issue of how clear the Court was in its prescribed abuse-of-discretion standard in *Booker*). How "advisory" were the Guidelines as the result of *Booker*? This would be the central issue in *Gall v. United States*.

60. *Booker*, 543 U.S. at 226–227 ("We hold that both courts correctly concluded that the Sixth Amendment as construed in *Blakely* does apply to the Sentencing Guidelines. . . . [I]n light of this holding, two provisions of the Sentencing Reform Act of 1984 (SRA) that have the effect of making the Guidelines mandatory must be invalidated in order to allow the statute to operate in a manner consistent with congressional intent."). After *Booker*, Justices Scalia, Souter, and Thomas would repeatedly assert that the Court went too far in its remedial holding. *See, e.g.*, *infra* notes 296–301 and accompanying text (quoting the three Justices in their disapproval of *Booker*).

61. *See* Rita v. United States, 127 S. Ct. 2456 (2007); Claiborne v. United States, 127 S. Ct. 2245 (2007) (mem.), *vacating as moot*, 439 F.3d 479 (8th Cir. 2006).

62. *Rita*, 127 S. Ct. at 2459–60.

63. *Id.* at 2461.

64. *Id.*

65. *Id.* at 2462.

66. *Id.* ("On appeal, Rita argued that his 33-month sentence was 'unreasonable' because (1) it did not adequately take account of 'the defendant's history and characteristics,' and (2) it 'is greater than necessary to comply with the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2).' The Fourth Circuit observed that it must set aside a sentence that is not 'reasonable.' The Circuit stated that 'a sentence imposed within the properly calculated Guidelines range . . . is presumptively

granted certiorari and affirmed, agreeing with the Fourth Circuit's presumption of reasonableness for sentences falling within the Guidelines.[67]

In 2006, the Supreme Court also granted certiorari in another Guidelines case—*Claiborne v. United States*.[68] Prior to his untimely death,[69] Mario Claiborne was arrested in 2003 for attempting to sell crack to an undercover police officer.[70] He pled guilty to two counts of violating 21 U.S.C. §§ 841(a)(1) and 844(a), possessing and distributing crack cocaine.[71] The applicable Guidelines range for his crimes was thirty-seven to forty-six months in prison.[72] Based on the now-advisory nature of the Guidelines, the district court sentenced him to only fifteen months.[73] The Government appealed to the Eighth Circuit, who remanded for re-sentencing, citing its established rule that "[a]n extraordinary reduction must be supported by extraordinary circumstances."[74] Claiborne was granted certiorari by the Supreme Court.[75] The Court heard oral arguments in *Claiborne* in February of 2007, but in a strange turn of events, Claiborne was shot and killed during the commission of a vehicle theft before the Court could rule on his case.[76] Nevertheless, the Eighth Circuit's holding in *Claiborne* would be addressed as one of the issues before the Court in its next set of Guidelines cases, *Gall v. United States* and *Kimbrough v. United States*.[77]

---

reasonable.' It added that 'while we believe that the appropriate circumstances for imposing a sentence outside the guideline range will depend on the facts of individual cases, we have no reason to doubt that most sentences will continue to fall within the applicable guideline range.' The Fourth Circuit then rejected Rita's arguments and upheld the sentence." (internal citations omitted)).

67. *Id.* at 2462.

68. 127 S. Ct. 2245 (2007) (mem.), *vacating as moot*, 439 F.3d 479 (8th Cir. 2006).

69. *See* Allison Retka, *U.S. Supreme Court Drops Case After Local Murder*, ST. LOUIS DAILY RECORD, June 5, 2007.

70. *Claiborne*, 439 F.3d 479, 480 (2006).

71. *Id.*

72. *Id.*

73. *Id.* ("Recognizing that the guidelines are advisory under *United States v. Booker*, the district court sentenced Claiborne to 15 months in prison, concluding that 'the 37 month low end of the range is, in my view, excessive' because of Claiborne's lack of criminal history, young age, the small quantity of drugs involved, and the court's opinion that Claiborne was not likely to commit similar crimes in the future.").

74. *Id.* at 481 (quoting United States v. Dalton, 404 F.3d 1029, 1033 (8th Cir. 2005)).

75. *See* Gall v. United States, 128 S. Ct. 586, 591 (2007) ("We did not have the opportunity to answer [the question in *Claiborne*] because the case was mooted by Claiborne's untimely death." (citing Claiborne v. United States, 127 S. Ct. 2245 (2007) (per curiam))).

76. Claiborne, having been released on his reduced prison sentence, was shot and killed during an attempted vehicle theft at a gas station in St. Louis. *See* Retka, *supra* note 69.

77. Kimbrough v. United States, 128 S. Ct. 558 (2007); Gall v. United States, 128 S. Ct. 586 (2007).

III. A CLOSE LOOK AT *GALL V. UNITED STATES* AND *KIMBROUGH V. UNITED STATES*

Both cases were argued on October 2, 2007, and both were decided on December 10, 2007. Full comprehension of the Court's opinion in *Kimbrough* would be difficult were it not read in light of *Gall*. *Gall* addresses the larger general issue of departures from the Guidelines and standard of appellate review for such departures.[78] It also resolves the *Claiborne* issue of whether a district court may depart from the applicable Guidelines range without adherence to a scheme or test that balances the extent of departure with the gravity of the circumstances involved.[79] The more focused question raised in *Kimbrough* is whether "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."[80] Following is a thorough examination and analysis of both cases.

A. Gall v. United States[81]

1. Facts[82]

In the early part of 2000, Brian Gall was struggling with alcohol and drug use while attending the University of Iowa as a sophomore.[83] He joined in an ongoing enterprise with Luke Rinderknecht and others in the distribution of a controlled substance known as "ecstasy."[84] For the next seven months, Gall received ecstasy pills from Rinderknecht and delivered them to co-conspirators, who sold them to users.[85] These transactions were lucrative, netting Gall over $30,000.[86]

---

78. *See Gall*, 128 S. Ct. 586.

79. *Id.*; *see also supra* notes 68–76 and accompanying text (explaining the issue raised in *Claiborne*).

80. United States v. Kimbrough, 174 F. App'x 798 (4th Cir. 2006), *rev'd*, 128 S. Ct. 558 (2007).

81. 128 S. Ct. 586 (2007).

82. *Id.* at 591–94.

83. *Id.* at 591–92 (explaining that Gall was using ecstacy, cocaine, and marijuana at the time); Brief for the Petitioner at 2, Gall v. United States, 128 S. Ct. 586 (2007) (No. 06-7949), 2007 WL 2197584.

84. *Gall*, 128 S. Ct. at 591–92. The Court noted the drug "ecstasy" is also referred to as "MDMA," which is short for its scientific name of "methylenedioxymethamphetamine." *Id.* at 592 n.1.

85. *Id.* at 592.

86. *Id.*

Gall quit using ecstasy within a couple of months of joining in the conspiracy.[87] In September of 2000, about seven months after first entering into the criminal enterprise, Gall withdrew his participation.[88] After graduating in 2002, he moved to Arizona and began working in construction, successfully achieving the status of master carpenter.[89]

About a year later, Gall was questioned by federal law enforcement agents.[90] He admitted his participation in the conspiracy, but no immediate action was taken against him.[91] In April 2004, Gall was indicted in district court for "participating in a conspiracy to distribute ecstasy, cocaine, and marijuana, that began in or about May 1996 and continued through October 30, 2002."[92] Gall then moved back to Iowa, was released by the court on his own recognizance, and started a successful construction business.[93]

Gall pled guilty to the conspiracy, "stipulating that he was 'responsible for, but did not necessarily distribute himself, at least 2,500 grams of [ecstasy], or the equivalent of at least 87.5 kilograms of marijuana.'"[94] Considering all of the mitigating factors in Gall's case, the probation officer issued a presentence report recommending "a sentencing range of 30 to 37 months of imprisonment."[95] During the sentencing hearing on May 27,

---

87. *Id.*

88. *Id.* The descriptions offered by Petitioner and Respondent of the "withdrawal" by Gall from the conspiracy are in stark contrast. *Compare* Brief for the Petitioner, *supra* note 83, at 2 ("Mr. Gall then decided to change his life. Intending to focus on his classes, he stopped using drugs and alcohol in September 2000. He scheduled a meeting with Mr. Rinderknecht and declared that 'he was getting out of the drug business and wanted nothing more to do with the conspiracy.'" (citation omitted)), *with* Brief for the United States at 3, *Gall*, 128 S. Ct. 586 (No. 06-7949), 2007 WL 2406805 ("By September 2000, petitioner became worried about the risks involved in continuing to participate in the conspiracy. He informed Rinderknecht that month that he no longer wanted to be involved because he was very nervous that [one of the other co-conspirators] was telling too many people about the business." (citation omitted)).

89. *Gall*, 128 S. Ct. at 592. It is interesting that the Court parroted the district court's characterization of Gall as "self-rehabilitated." *Id.*

90. *Id.*

91. *Id.*

92. *Id.* The Court pointed out that the indictment was issued about a year and a half after Gall's initial interview with federal law enforcement and three and a half years after Gall's withdrawal from the conspiracy. *Id.* Gall and seven other defendants were indicted by the U.S. District Court for the Southern District of Iowa. *Id.*; *see also* United States v. Gall, 374 F. Supp. 2d 758 (S.D. Iowa 2005).

93. *Gall*, 128 S. Ct. at 592. Gall moved back to Iowa upon receipt of notice of the indictment. *Id.* While freed on his own recognizance, he started up his own construction business, mainly subcontract installation of doors and windows. *Id.* He was making over $2000 profit a month. *Id.*

94. *Id.* In the plea agreement, the Government noted Gall's withdrawal from the conspiracy. *Id.*

95. *Id.* at 592–93 ("In her presentence report, the probation officer concluded that Gall had no significant criminal history; that he was not an organizer, leader, or manager; and that his offense did not involve the use of any weapons. The report stated that Gall had truthfully provided the Government with all of the evidence he had concerning the alleged offenses, but that his evidence was not useful because he provided no new information to the agents. The report also described Gall's substantial use of drugs prior to his offense and the absence of any such use in recent years.").

2005, the assistant U.S. attorney urged the judge to sentence Gall within the Guidelines range, notwithstanding the voluminous character rehabilitation evidence offered by Gall.[96] The judge, after discussing the thirty and thirty-five month prison sentences of two of Gall's co-conspirators who had not withdrawn voluntarily from the conspiracy, sentenced Gall to thirty-six months *probation*.[97]

The United States Court of Appeals for the Eighth Circuit reversed the district court, citing its previous holding in *United States v. Claiborne*,[98] that "a sentence outside of the Guidelines range must be supported by a justification that 'is proportional to the extent of the difference between the advisory range and the sentence imposed.'"[99] The Eighth Circuit characterized the district court's departure from the Guidelines in *Gall* from thirty months imprisonment to probation as "a 100% downward variance," and therefore "extraordinary."[100] Under the Eighth Circuit's rule in

96. *Id.* at 593 (recognizing the "'small flood' of letters [introduced on the record at the sentencing hearing] from Gall's parents and other relatives, his fiancé[e], neighbors, and representatives of firms doing business with him, uniformly praising his character and work ethic").

97. *Id.* The district court judge not only made a long and detailed statement on the record, but also filed a "detailed sentencing memorandum explaining his decision." *Id.* He reminded Gall, more than once, of the seriousness of probation and the consequences of violating the terms of his probation. *Id.* Finally, the judge explained why he was not sentencing Gall to a prison term:

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

Id. Apparently the district court judge found the petitioner's argument more persuasive than the Government's. *See supra* note 88 (discussing different characterizations of Gall's "voluntary" withdrawal from the conspiracy).

98. 439 F.3d 479 (8th Cir. 2006) (holding defendant's fifteen-month sentence for possession and distribution of rock cocaine was unreasonable downward departure from the Guidelines range of thirty-seven to forty-six months). In *Claiborne*, the Eighth Circuit relied on its earlier rule from *Dalton* that "[a]n extraordinary reduction must be supported by extraordinary circumstances." *Id.* at 481 (quoting United States v. Dalton, 404 F.3d 1029, 1033 (8th Cir. 2005)).

99. *Gall*, 128 S. Ct. at 594 (quoting United States v. Gall, 446 F.3d 884, 889 (8th Cir. 2006), in turn quoting *Claiborne*, 439 F.3d 479, 481 (8th Cir. 2006)).

100. *Id.* (quoting *Gall*, 446 F.3d at 889). The Supreme Court criticized the Eighth Circuit's analysis, noting that:

> Rather than making an attempt to quantify the value of the justifications provided by the District Judge, the Court of Appeals identified what it regarded as five separate errors in the District Judge's reasoning: (1) He gave "too much weight to Gall's withdrawal from the conspiracy"; (2) given that Gall was 21 at the time of his offense, the District Judge erroneously gave "significant weight" to studies showing impetuous behavior by persons

Claiborne,[101] such an "extraordinary" departure requires extraordinary circumstances, which were not present in this case.[102] The United States Supreme Court granted certiorari to "explain why the Court of Appeals' rule requiring 'proportional' justifications for departures from the Guidelines range is not consistent with [the Supreme Court's] remedial opinion in [*Booker*]."[103]

2. Analysis and Critique

a. Justice Stevens's Majority Opinion[104]

The Supreme Court, in a 7–2 decision, [105] reversed the Eighth Circuit's holding in *Gall*, finding that the district court had not abused its discretion in sentencing Gall below the sentencing range under the Guidelines.[106] In doing so, the Court cleared up any ambiguity as to its intent in *Booker*,[107] answering important questions left in the wake of its remedial decision.[108] First, the Court held that federal appellate courts *must* use the abuse-of-discretion standard in conducting an appellate review of sentences, whether or not those sentences fall within the Guidelines.[109] Second, district courts

---

under the age of 18; (3) he did not "properly weigh" the seriousness of Gall's offense; (4) he failed to consider whether a sentence of probation would result in "unwarranted" disparities; and (5) he placed "too much emphasis on Gall's post-offense rehabilitation." *Id.* (quoting *Gall*, 446 F.3d at 889–90).

101. *Claiborne*, 439 F.3d 479.

102. *Id.*; *see also supra* note 98 (discussing the Eighth Circuit's proportionality rule for Guidelines departures).

103. *Gall*, 128 S. Ct. at 594 (citing United States v. Booker, 543 U.S. 220 (2005)).

104. *Id.* at 594–602.

105. *Id.* Justice Stevens delivered the opinion of the Court, joined by Chief Justice Roberts and Justices Scalia, Kennedy, Souter, Ginsburg, and Breyer. *Id.* Justices Scalia and Souter filed separate concurring opinions. *Id.* Justices Thomas and Alito wrote separate dissenting opinions. *Id.* It is interesting to note that Justice Breyer, having authored *Booker*, simply joins the majority in *Gall*, not putting pen to paper.

106. *Id.* at 602. The Court found that the district court had committed "no procedural error" and the "Court of Appeals' decision to the contrary was incorrect and failed to demonstrate the requisite deference to the District Judge's decision." *Id.* at 600.

107. 543 U.S. 220; *see also supra* notes 56–60 and accompanying text (discussing *Booker*).

108. It is important to understand that the Court uses its opinion in *Gall*, in part, to clarify its holding in *Booker* and instruct district and appellate courts on application of the "advisory" Guidelines post-*Booker*. District courts were beginning to devise "mathematical" rules for determining reasonable variance from the Guidelines. *See Gall*, 128 S. Ct. at 595; *see also* United States v. Claiborne, 439 F.3d 479, 484 (8th Cir. 2006) (requiring the district court to show extraordinary circumstances to support an extraordinary degree of variance from the Guidelines). The Seventh Circuit also applied a proportionality test, albeit with more colorful language. *See* United States v. Wallace, 458 F.3d 606, 614 (7th Cir. 2006) (vacating a sentence handed down by a district court that had departed from the Guidelines in giving the defendant a "'World Series' break" because "[s]uch a break requires . . . a 'World Series' explanation").

109. *Gall*, 128 S. Ct. at 594 ("Our explanation of 'reasonableness' review in the *Booker* opinion

must seriously consider the extent of departure from the Guidelines and sufficiently articulate justifications for such departures.[110] The decision addressed both the responsibilities of the trial courts in sentencing and the role of the appellate courts in reviewing those sentences.

After a cursory discussion of the standard of review and general importance of the Guidelines, the Court turns to assessing the reasonableness of sentences falling outside the Guidelines range.[111] While district courts must consider the extent of their departure from the Guidelines, they are not bound by any mathematical sentencing scheme or matrix in justifying the departure in any particular case.[112] Specifically, the Court rejects the rigid rule requiring "'extraordinary' circumstances to justify a sentence outside the Guidelines range."[113] Further, just because the Court established a

---

made it pellucidly clear that the familiar abuse-of-discretion standard of review now applies to appellate review of sentencing decisions." (citing *Booker*, 543 U.S. at 260–62)). Here, the Court seems to mischaracterize the clarity of its earlier opinion in *Booker*. Nowhere in the *Booker* opinion will the reader find the term "abuse-of-discretion," certainly not on pages 260–262. Moreover, even at the time *Booker* was penned, Justice Scalia criticized the majority's "reasonableness" standard of review as vague. *See Booker*, 543 U.S. at 312 (Scalia, J., dissenting in part) ("What I anticipate will happen is that 'unreasonableness' review will produce a discordant symphony of different standards, varying from court to court and judge to judge, giving the lie to the remedial majority's sanguine claim that 'no feature' of its avant-garde Guidelines system will 'ten[d] to hinder' the avoidance of 'excessive sentencing disparities.'" (citations omitted)). It suffices to say that Justice Alito did not find the standards set forth in *Booker* for appellate review of sentencing decisions to be "pellucidly clear." *See Gall* 128 S. Ct. at 603 (Alito, J., dissenting) ("The *Booker* remedial opinion did not explain exactly what it meant by a system of 'advisory' guidelines or by 'reasonableness' review, and the opinion is open to different interpretations." (quoting *Booker*, 543 U.S. at 245–62)).

110. *Gall*, 128 S. Ct. at 594 ("[E]ven though the Guidelines are advisory rather than mandatory, they are . . . the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions." (citing Rita v. United States, 127 S. Ct. 2456 (2007))).

111. *Id.* at 594–95.

112. The Supreme Court disapproves of the developing trend among federal appellate courts of formulating mathematical rubrics designed to evaluate the reasonableness of Guidelines departures. *Compare* United States v. Gall, 446 F.3d 884, 889 (2006) ("Here, the district court imposed a sentence of probation when the bottom of Gall's advisory Guidelines range was 30 months incarceration. In essence, this amounts to a 100% downward variance, as Gall will not serve any prison time. Such a variance is extraordinary."), *and Claiborne*, 439 F.3d at 481 ("Here, the district court imposed a 15-month sentence when the bottom of Claiborne's advisory guidelines range was 37 months. This is a sixty percent downward variance."), *with Gall*, 128 S. Ct. at 595 ("The mathematical approach also suffers from infirmities of application. On one side of the equation, deviations from the Guidelines range will always appear more extreme—in percentage terms—when the range itself is low, and a sentence of probation will always be a 100% departure regardless of whether the Guidelines range is 1 month or 100 years."). Ultimately, the alternative offered by the Court varies only in diction. *See infra* note 286 (comparing the *Gall* Court's standard for evaluating Guidelines departures with that of the Eighth Circuit's standard in *Claiborne*).

113. *Gall*, 128 S. Ct. at 595.

"presumption of reasonableness" in sentences within the Guidelines,[114] there is *no* "presumption of unreasonableness" for sentences outside the Guidelines.[115]

During the majority's rebuke of the mathematical approach, it takes a detour to discuss the "severity" of being sentenced to probation.[116] While the language of the cases cited for support in this endeavor is compelling, the effectiveness of Justice Stevens's implicit assertion that the oppressive hardship of probation is somehow comparable to several years in federal prison is a tenuous argument at best.[117]

Turning back to the mathematical approach, the Court explains the difficulty of assigning numbers and percentages to a defendant's actions for

---

114. *See* Rita v. United States, 127 S. Ct. 2456 (2007).

115. *Gall*, 128 S. Ct. at 595. While the Court did not cite any appellate cases that adopted a presumption of unreasonableness for sentences falling outside the Guidelines, it opined that some approaches appeared to be coming close to such a presumption. The Court noted several cases previously rejecting a presumption of unreasonableness. *Id.* at 595 n.3 (citing United States v. Howard, 454 F.3d 700, 703 (7th Cir. 2006) ("Although a sentence outside the range does not enjoy the presumption of reasonableness that one within the range does, it does not warrant a presumption of unreasonableness."); United States v. Matheny, 450 F.3d 633, 642 (6th Cir. 2006) ("[T]his court's holding that sentences within the advisory guideline range are presumptively reasonable does not mean that sentences outside of that range are presumptively unreasonable."); United States v. Myers, 439 F.3d 415, 417 (8th Cir. 2006) ("We have determined that a sentence imposed within the guidelines range is presumptively reasonable. While it does not follow that a sentence outside the guidelines range is unreasonable, we review a district court's decision to depart from the appropriate guidelines range for abuse of discretion." (citation omitted))).

116. *Gall*, 128 S. Ct. at 595–96. The Court begins its digression by "recogniz[ing] that custodial sentences are qualitatively more severe than probationary sentences of equivalent terms." *Id.* at 595. This seems like an enormous understatement. Many would argue that custodial sentences are qualitatively more severe than probationary sentences of *almost any* term.

117. *Id.* at 595–96 & n.4 (quoting United States v. Knights, 534 U.S. 112, 119 (2001) ("Inherent in the very nature of probation is that probationers 'do not enjoy the absolute liberty to which every citizen is entitled.'"); ADVISORY COUNCIL OF JUDGES OF NATIONAL COUNCIL ON CRIME AND DELINQUENCY, GUIDES FOR SENTENCING 13–14 (1957) ("Probation is not granted out of a spirit of leniency. . . . As the Wickersham Commission said, probation is not merely 'letting an offender off easily.'"); 1 NEIL P. COHEN, THE LAW OF PROBATION AND PAROLE § 7:9 (2d ed. 1999) ("[T]he probation or parole conditions imposed on an individual can have a significant impact on both that person and society. . . . Often these conditions comprehensively regulate significant facets of their day-to-day lives . . . . They may become subject to frequent searches by government officials, as well as to mandatory counseling sessions with a caseworker or psychotherapist.")). The majority discusses the burdens placed on probationers:

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

Id. (citations omitted).

sentencing purposes.[118] While this argument is sound, it somewhat mischaracterizes the Eighth Circuit's analysis of *Gall.*[119] Justice Alito colorfully describes this in his dissent as "attack[ing] straw men."[120]

The Court outlines the procedures to be followed under *Rita* in calculating Guidelines ranges, stressing that the "Guidelines should be the starting point and the initial benchmark" but "are not the only consideration."[121] After both parties are given the opportunity to argue their positions, the judge must consider all of the factors under 18 U.S.C. § 3553(a).[122] The judge then "must make an individualized assessment based on the facts presented," and if the judge determines a sentence outside of the Guidelines, he "must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance."[123] Finally, the judge must "adequately explain the chosen sentence to allow for meaningful appellate review and to promote the

---

118. *Id.* at 596. The Court calls using such a mathematical formula for determining a proper sentence "attempting to measure an inventory of apples by counting oranges." *Id.* Idioms are in no short supply in the hallowed halls of the Supreme Court. *See infra* note 120 and accompanying text (defining the term "straw man" as used by Justice Alito in his dissent).

119. *See* United States v. Gall, 446 F.3d 884 (8th Cir. 2006); *see also infra* note 190 (discussing Justice Alito's criticism of the characterization offered by the majority of the Eighth Circuit's holding in *Gall*).

120. *Gall*, 128 S. Ct. at 609 (Alito J., dissenting). Straw man is defined as "[a] tenuous and exaggerated counterargument that an advocate puts forth for the sole purpose of disproving it." BLACK'S LAW DICTIONARY 1461 (8th ed. 2004). Here, the majority creates a position that is easy to refute (the precision of percentages in sentencing) and then attributes that position to the Eighth Circuit. A straw man argument can be a successful rhetorical technique in that it is persuasive, but it is misleading because the opponent's *actual* argument has not been addressed.

121. *Gall*, 128 S. Ct. at 596 (citing Rita v. United States, 127 S. Ct. 2456 (2007)).

122. *Id.* at 596–97 & n.6. ("Section 3553(a) lists seven factors that a sentencing court must consider. The first factor is a broad command to consider 'the nature and circumstances of the offense and the history and characteristics of the defendant.' 18 U.S.C. § 3553(a)(1). The second factor requires the consideration of the general purposes of sentencing, including: 'the need for the sentence imposed—(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.' § 3553(a)(2). The third factor pertains to 'the kinds of sentences available,' § 3553(a)(3); the fourth to the Sentencing Guidelines; the fifth to any relevant policy statement issued by the Sentencing Commission; the sixth to 'the need to avoid unwarranted sentence disparities,' § 3553(a)(6); and the seventh to 'the need to provide restitution to any victim,' § 3553(a)(7). Preceding this list is a general directive to 'impose a sentence sufficient, but not greater than necessary, to comply with the purposes' of sentencing described in the second factor. § 3553(a)." (quoting 18 U.S.C. § 3553(a) (2006))).

123. *Id.* at 597 (citing *Rita*, 127 S. Ct. 2456).

perception of fair sentencing."[124] In other words, it appears that in departing from the Guidelines, the judge must not only explain the reasonableness of the sentence but must do so in the context of the *extent* of the departure.[125]

After outlining the proper procedures for calculating a reasonable sentence under the Guidelines, the Court begins a detailed discussion of the abuse-of-discretion standard in reviewing sentences.[126] The Court declares that "[r]egardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse-of-discretion standard."[127] So as to leave no stone unturned, the Court provides an extensive explanation of what constitutes procedural error.[128]

Under the abuse-of-discretion standard, if no procedural error exists, the appellate court then looks to reasonableness.[129] Under *Rita,* the court can choose to "apply a presumption of reasonableness."[130] However, if the sentence falls outside of the Guidelines, there is no presumption of unreasonableness.[131] The court must then consider the extent from the Guidelines, giving due deference to the § 3553(a) factors.[132]

Turning to Gall's appellate record, the Supreme Court begins its deconstruction of the Eighth Circuit's review by first noting that the district court did not commit procedural error.[133] The Court then expresses its disagreement with the appellate court's holding that the district court failed "to give proper weight to the seriousness of the offense . . . and fail[ed] to consider whether a sentence of probation would create unwanted

---

124. *Id.*

125. Certainly, it would not "promote the perception of fair sentencing" for the judge to "consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance" without explaining that justification on the record. *See id.*

126. *Id.* The Court considers both procedural error and substantive unreasonableness of the sentence, either of which could constitute an abuse-of-discretion on the part of the sentencing court. *Id.*

127. *Id.*

128. *Id.* The court lists the following six instances as constituting procedural error in federal sentencing under the Guidelines: (1) failing to calculate the Guidelines range; (2) improperly calculating the Guidelines range; (3) treating the Guidelines as mandatory; (4) failing to consider the § 3553(a) factors; (5) selecting a sentence based on clearly erroneous facts; or (6) failing to sufficiently explain the chosen sentence, including an explanation for deviating from the Guidelines range. *Id.*

129. *Id.*

130. *Id.* (citing Rita v. United States, 127 S. Ct. 2456 (2007)).

131. *See Rita,* 127 S. Ct. at 2467 ("The fact that we permit courts of appeals to adopt a presumption of reasonableness does not mean that courts may adopt a presumption of unreasonableness.").

132. *Gall,* 128 S. Ct. at 597 ("The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court."). As the majority later alludes, this seems to have been the approach taken by the Eighth Circuit. *See id.* at 600; *see also supra* note 122 (listing all of the factors under § 3553(a)).

133. *Gall,* 128 S. Ct. at 598.

disparities."[134] The record in fact showed that the district court judge did discuss the severity of the offense involved and the likelihood of a resulting unwarranted sentencing disparity.[135]

Finally, the Court moves on to the issue of the reasonableness of Gall's sentence, beginning with a criticism of the Eighth Circuit's lack of deference to the district court.[136] Interestingly, the Court goes further by endorsing the district court's reliance on factors that would normally be irrelevant in calculating its sentence under the Guidelines,[137] such as Gall's age and the fact that Gall's illegal behavior stemmed from drug and alcohol addiction.[138]

---

134. *Id.* (citing 18 U.S.C. § 3553(a)(2)(A) (2006) (requiring judges to consider "the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense"); 18 U.S.C. § 3553(a)(6) (requiring judges to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct")).

135. *Id.* at 598–600 ("[I]t is perfectly clear that the District Judge considered the need to avoid unwarranted disparities, but also considered the need to avoid unwarranted *similarities* among other co-conspirators who were not similarly situated. . . . We also note that neither the Court of Appeals nor the Government has called our attention to a comparable defendant who received a more severe sentence.").

136. *Id.* at 600 ("The Court of Appeals gave virtually no deference to the District Court's decision that the [factors under § 3553(a)] justified a significant variance in this case. Although the Court of Appeals correctly stated that the appropriate standard of review was abuse of discretion, it engaged in an analysis that more closely resembled *de novo* review of the facts presented and determined that, in its view, the degree of variance was not warranted.").

137. 28 U.S.C. § 994(d) states the following:

> The Commission in establishing categories of defendants for use in the guidelines and policy statements governing the imposition of sentences . . . shall consider whether [age, along with other factors] . . . with respect to a defendant, *have any relevance* to the nature, extent, place of service, or other incidents of an appropriate sentence, and *shall take them into account only to the extent that they do have relevance* . . . .

28 U.S.C. § 994(d) (2000) (emphasis added); *see also* U.S. SENTENCING GUIDELINES MANUAL § 5H1.1 (2007) ("Age (including youth) is *not ordinarily relevant* in determining whether a departure is warranted. Age may be a reason to depart downward in a case in which the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration." (emphasis added)); *id.* § 5H1.4 ("Drug or alcohol dependence or abuse *is not a reason for a downward departure.* Substance abuse is highly correlated to an increased propensity to commit crime." (emphasis added)).

138. *Gall*, 128 S. Ct. at 601. This is an important point, albeit a confusing one. The majority accomplishes its subterfuge by essentially conflating issues raised by the district court. First, the majority points out that "[t]he Court of Appeals thought the District Judge 'gave significant weight to an improper factor' when he compared Gall's sale of ecstasy when he was a 21-year-old adult to the 'impetuous and ill-considered' actions of persons under the age of 18." *Id.* (quoting Gall v. United States, 446 F.3d 884, 884 (8th Cir. 2007)). Next, the Court concedes that the "appellate court correctly observed that the studies cited by the District Judge do not explain how Gall's 'specific behavior in the instant case was impetuous or ill-considered.' In that portion of his sentencing memorandum, however, the judge was discussing the 'character of the defendant,' not the nature of his offense." *Id.* (citation omitted). So here, if immaturity had been shown, it would be relevant as a

Under § 3553(a), the sentencing court must consider the "history and characteristics of the defendant."[139] In an attempt to bolster its support for the district court's opinion, the majority goes into a lengthy discussion that basically equates age with maturity.[140] Apparently, according to the district court and now the Supreme Court, being under twenty-five years old may now be a good excuse for selling drugs. The Court quotes the district court's assertion that:

> Immaturity at the time of the offense conduct is not an inconsequential consideration. Recent studies on the development of the human brain conclude that human brain development may not become complete until the age of twenty-five. . . . [T]he recent [National Institute of Health] report confirms that there is no bold line demarcating at what age a person reaches full maturity. While age does not excuse behavior, a sentencing court should account for *age* when inquiring into the *conduct* of a defendant.[141]

So is age, as opposed to maturity, now a "characteristic of the defendant," and therefore a sentencing factor under the Guidelines? If so, perhaps the National Institute of Health should be granted a seat on the United States Sentencing Commission. Moreover, the Supreme Court recognizes the district court's citation of a Skinnerian study from *Roper v. Simmons*, a case more than distinguishable from *Gall*.[142] *Roper* is a juvenile

characteristic of the defendant. However, the Court quotes the district judge's "biology lecture" on age and maturity, which ends with the declaration that "[w]hile age does not excuse behavior, a sentencing court should account for age when inquiring into the *conduct* of a defendant." *Id.* (emphasis added). Few would argue that age should be inquired into in assessing conduct. However, in this case, the conduct is stipulated to. Somehow, the majority manages to turn "age" into "maturity" and "conduct" into "characteristic." In the end of this tangential and perplexing analysis, the Court seems to arrive at the conclusion that the simple fact that Gall was only twenty-one at the time he sold drugs means that he must have been immature, *ipso facto* age becomes a mitigating factor in his sentencing.

139. 18 U.S.C. § 3553(a)(1).

140. *See supra* note 138.

141. *Gall*, 128 S. Ct. at 601 (emphasis added); *see also supra* note 138. Again, of course age should be considered when evaluating the "conduct of the defendant." However, should it really be considered a "characteristic" of the defendant for the purposes of sentencing? The court does not state it expressly, but effectively arrives at the same conclusion in its analysis.

142. *Gall*, 128 S. Ct. at 601 ("The District Judge appended a long footnote to his discussion of Gall's immaturity. The footnote includes an excerpt from our opinion in *Roper v. Simmons*, which quotes a study stating that a lack of maturity and an undeveloped sense of responsibility are qualities that 'often result in impetuous and ill-considered actions.' The District Judge clearly stated the relevance of these studies . . . ." (quoting Roper v. Simmons, 543 U.S. 551, 569 (2005))). This quote from *Roper* is intended to illustrate the immaturity level of juveniles in relation to adults, not to support the premise that twenty-one-year-old drug traffickers should be given a break because perhaps they were impetuous. It becomes much more evident when read in its entirety. *See Roper*, 543 U.S. at 569 ("First, as any parent knows and as the scientific and sociological studies respondent

death penalty case in which all of the immaturity discussion involves contrasting the maturity level of juveniles from that of adults.[143] Petitioner in *Roper* was seventeen years old when he committed his crime, while Gall was twenty-one.[144] So the Court chooses not to demarcate using the legal standard of eighteen years old, but instead draws an arbitrary line based on appellate review of the facts. At any rate, the Court had already made its point and would have been better served sticking with its sound legal analysis regarding the importance of judicial discretion in sentencing and leaving the evolutionary psychology to the scientists.[145]

The majority opinion closes by criticizing the error on the part of the appellate court in conducting what it called an abuse-of-discretion review, but was effectively tantamount to a de novo review.[146] The Court chastised the appellate court for failing to give due deference to the district court and accordingly reversed.[147]

---

and his *amici* cite tend to confirm, '[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.'" (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993))). If one continues down the rabbit hole, he will notice that *Johnson* is also a death penalty case, where perhaps consideration of mitigating factors is exceedingly important. *See Johnson*, 509 U.S. at 367 ("A lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions. A sentencer in a capital case must be allowed to consider the mitigating qualities of youth in the course of its deliberations over the appropriate sentence.").

143. *See Roper*, 543 U.S. 551 (holding that the Eighth Amendment requires banning imposition of the death penalty for offenders under eighteen years old).

144. *Id.* at 555 (explaining Christopher Simmons was seventeen years old when he committed murder); *see also supra* notes 137–141 and accompanying text (discussing Gall's age as a factor in his sentencing).

145. *See* Lee v. Weisman, 505 U.S. 577, 636 (1992) (Scalia, J., dissenting) ("[I]nterior decorating is a rock-hard science compared to psychology practiced by amateurs. A few citations of '[r]esearch in psychology' that have no particular bearing upon the precise issue here, cannot disguise the fact that the Court has gone beyond the realm where judges know what they are doing.").

146. *Gall*, 128 S. Ct. at 602 ("The Court of Appeals clearly disagreed with the District Judge's conclusion that consideration of the [factors under § 3553(a)] justified a sentence of probation; it believed that the circumstances presented here were insufficient to sustain such a marked deviation from the Guidelines range. But it is not for the Court of Appeals to decide *de novo* whether the justification for a variance is sufficient or the sentence reasonable. On abuse-of-discretion review, the Court of Appeals should have given due deference to the District Court's reasoned and reasonable decision that the [factors under § 3553(a)], on the whole, justified the sentence.").

147. *Id.*

b. *Justices Scalia and Souter Concur*[148]

Justice Scalia's concurrence is brief and offered simply to recognize that, although he is still concerned with the Sixth Amendment implications from *Booker*,[149] the majority's opinion will likely result in fewer constitutional challenges.[150] Justice Scalia has always had difficulty accepting the premise that judge-found facts should be relied upon in sentencing a defendant under the Guidelines.[151] However, he seems to have relaxed his stance a bit since *Booker*.

It is curious how Justice Scalia points out his belief of the inherent flaw in a substantive reasonableness review of sentences, then opts to give stare decisis to *Rita* anyway.[152] Why not just argue for rejecting a substantive review all together and replacing it with some other mechanism of review? He partially addresses that question in ending his short concurrence, reassured that at least defendants can still challenge sentences upheld based on facts not admitted to or proven to a jury on an as-applied basis.[153]

Justice Souter's concurring opinion is even briefer than that of Justice Scalia.[154] Justice Souter continues to advocate a return to a system of mandatory guidelines with the caveat requirement of jury trials necessary to prove facts used in sentencing increases for defendants under the Guidelines.[155] This would likely suit Justice Scalia just fine.[156]

---

148. *See id.* at 602–03 (Scalia, J., concurring); *id.* at 603 (Souter, J., concurring).

149. 543 U.S. 220 (2005).

150. *Gall*, 128 S. Ct. at 602 (Scalia, J., concurring) ("The highly deferential standard adopted by the Court today will result in far fewer unconstitutional sentences than the proportionality standard employed by the Eighth Circuit.").

151. *See* Rita v. United States, 127 S. Ct. 2456, 2478 (2007) (Scalia, J., concurring) ("[M]y position is that there will inevitably be *some* constitutional violations under a system of substantive reasonableness review, because there will be some sentences that will be upheld as reasonable only because of the existence of judge-found facts.").

152. *Gall*, 128 S. Ct. at 602 (Scalia, J., concurring).

153. *Id.* at 602–03 (citing *Rita*, 127 S. Ct. 2456).

154. *Id.* at 603 (Souter, J., concurring).

155. *Id.* ("My disagreements with [the] holdings in [*Booker* and *Rita*] are not the stuff of formally perpetual dissent, but I see their objectionable points hexing our judgments today." (citing *Rita*, 127 S. Ct. 2456 (Souter, J., dissenting); United States v. Booker, 543 U.S. 220, 272 (2005) (Stevens, J., dissenting in part)).

156. *See Rita*, 127 S. Ct. at 2475 (Scalia, J., concurring) ("I disagreed with the Court's remedial choice [in *Booker*], believing instead that the proper remedy was to maintain the mandatory character of the Guidelines and simply to require, for that small category of cases in which a fact was legally essential to the sentence imposed, that the fact be proved to a jury beyond a reasonable doubt or admitted by the defendant." (citing *Booker*, 543 U.S. at 272–91 (Stevens, J., joined by Scalia & Souter, JJ., dissenting in part))).

c. Justices Thomas and Alito Dissent[157]

Justice Thomas, refusing to accept the Guidelines as "advisory" under *Booker*, offers the following one-sentence dissent in *Gall*: "Consistent with my dissenting opinion in *Kimbrough v. United States*, I would affirm the judgment of the Court of Appeals because the District Court committed statutory error when it departed below the applicable Guidelines range."[158] Justice Thomas's dissent in *Kimbrough* stands for the proposition that application of the Guidelines as "advisory" instead of "mandatory" is simply unworkable.[159] Further, § 3553(b) should still be applied as written,[160] making the Guidelines mandatory and any departure from the Guidelines judicial error.[161] Essentially, the district court's departure from the Guidelines is only "statutory error" as viewed by Justice Thomas, who now completely ignores the fact that *Booker* is the law of the land (at least for now).[162]

In contrast to Justice Thomas,[163] Justice Alito recognizes *Booker* as rendering the Guidelines "advisory."[164] In his *Kimbrough* dissent, Justice Alito elects to discard strict constructionism for a historical analysis of the Sixth Amendment and sentencing jurisprudence, ultimately concluding that the district court failed to give adequate weight to the policy considerations

157. *Gall*, 128 S. Ct. at 603 (Thomas, J., dissenting); *id.* at 603–10 (Alito, J., dissenting).

158. *Id.* at 603 (citation omitted).

159. *Id.*; *see also* Kimbrough v. United States, 128 S. Ct. 558, 578 (2007) (Thomas, J., dissenting); *infra* Part III.B.2.c (analyzing Justice Thomas's dissent in *Kimbrough*).

160. *See supra* note 59 (discussing *Booker*'s conversion of Guidelines from "mandatory" to "advisory" by excising § 3553(b)(1)); *see also* 18 U.S.C. § 3553(b)(1) (2006) ("In determining whether a circumstance was adequately taken into consideration, the court shall consider *only* the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission." (emphasis added)), *held unconstitutional by Booker*, 543 U.S. 220.

161. *Gall*, 128 S. Ct. at 603 (Thomas, J., dissenting); *see also Kimbrough*, 128 S. Ct. at 578 (Thomas, J., dissenting); *infra* Part III.B.2.c (analyzing Justice Thomas's dissent in *Kimbrough*).

162. *Kimbrough*, 128 S. Ct. at 578 (Thomas, J., dissenting) ("Although I joined Justice Scalia's dissent in *Rita* accepting the *Booker* remedial opinion as a matter of 'statutory *stare decisis*,' I am now convinced that there is no principled way to apply the *Booker* remedy—certainly not one based on the statute. Accordingly, I think it best to apply the statute as written, including 18 U.S.C. § 3553(b), which makes the Guidelines mandatory." (citation omitted) (quoting Rita v. United States, 127 S. Ct. 2456, 2457 (2007))).

163. *See supra* text accompanying note 158 (quoting Justice Thomas's one-sentence dissent in *Gall*).

164. *Gall*, 128 S. Ct. at 603 (Alito, J., dissenting). For Justice Alito, "[t]he fundamental question in [*Gall*] is whether, under the remedial decision in [*Booker*], a district court must give the policy decisions that are embodied in the Sentencing Guidelines at least some significant weight in making a sentencing decision. [He] answer[s] that question in the affirmative . . . ." *Id.* (citation omitted).

under the Guidelines.[165] His dissent is broken down into two parts: the first discussing his interpretation of the law[166] and the second applying that interpretation to the facts of *Gall.*[167]

Justice Alito's dissent begins by defining what it means for the Guidelines to be advisory: "District courts must not only 'consult' the Guidelines, they must 'take them into account.'"[168] But isn't that exactly what the district court did here?[169] Or does the end define the means? After emphasizing the need to avoid sentencing disparities,[170] Justice Alito moves on to a speculative portrayal of the chaos awaiting federal courts because, in his estimation, "sentencing judges [now] need only give lip service to the Guidelines."[171]

---

165. Strict constructionism is defined as "[t]he doctrinal view of judicial construction holding that judges should interpret a document or statute (esp. one involving penal sanctions) according to its literal terms, without looking to other sources to ascertain the meaning." BLACK'S LAW DICTIONARY 1462 (8th ed. 2004).

166. *Gall*, 128 S. Ct. at 603–06 (Alito, J., dissenting).

167. *Id.* at 606–10.

168. *Id.* at 604 (quoting United States v. Booker, 543 U.S. 220, 264 (2005)). Justice Alito spends the first few paragraphs of his dissent outlining two possible interpretations of what the court meant in *Booker* by "advisory guidelines" and a "reasonableness review." *Id.* at 603–05; *see supra* note 109 (discussing the issue of how clear the Court was in prescribing an abuse-of-discretion standard in *Booker*). In Justice Alito's estimation, there are two possible interpretations. The first interpretation is that the sentencing judge is now only required to give "the Guidelines a polite nod, [and] then proceed essentially as if the Sentencing Reform Act had never been enacted." *Id.* at 603. He considers this the Stevens–Scalia interpretation. *Id.* at 603–04 ("This is how two of the dissents interpreted [*Booker*]. Justice Stevens wrote that sentencing judges had 'regain[ed] the unconstrained discretion Congress eliminated in 1984' when it enacted the Sentencing Reform Act. Justice Scalia stated that 'logic compels the conclusion that the sentencing judge . . . has full discretion, as full as what he possessed before the Act was passed, to sentence anywhere within the statutory range.'" (citations omitted) (quoting *Booker*, 543 U.S. at 297 (Stevens, J., dissenting); *id.* at 305 (Scalia, J., dissenting in part))). Justice Alito chooses the other possible interpretation, "that sentencing judges must still give the Guidelines' policy decisions some significant weight and that the courts of appeals must still police compliance." *Id.* at 604.

169. The distinction between "consulting" the Guidelines, "taking [the Guidelines] into account," and "giving significant weight" to the Guidelines policy decisions is amorphous at best. The fact that there is no clear definition or consensus as to the meaning of "taking [the Guidelines] into account" results in difficulty with the consistent application of *Booker.* Is a district court judge only required to ensure that the record reflect that she "gave significant weight to Guidelines while taking them into account" prior to departing from the Guidelines range? *See supra* note 168 and accompanying text.

170. *Gall*, 128 S. Ct. at 604 (Alito, J., dissenting). Justice Alito reminds the majority that a "major theme" in *Booker* and *Rita* is that the Court should continue to promote the 1984 Act's "goal of reducing sentencing disparities." *Id.* (citing Rita v. United States, 127 S. Ct. 2456 (2007); *Booker*, 543 U.S. at 259–60).

171. *Id.* at 604–05. Other than a highly educated guess, Justice Alito offers little support for his prediction that "sentencing disparities will gradually increase . . . and the sentencing habits developed during the pre-*Booker* era will fade." *Id.* The pre-*Booker* versus post-*Booker* Guidelines departure statistics do, however, suggest a judicial tendency to vary from the Guidelines when afforded the flexibility to do so. *See* Appendix, *infra* (displaying Guidelines departure statistics from 2001 to 2006).

After a brief mention of the importance of avoiding disparate sentences,[172] Justice Alito shifts to an inquiry into the Sixth Amendment component of sentencing under the Guidelines.[173] Considering it was not raised by the majority, and because there was no real dispute over any fact considered during Gall's sentencing that might invoke a Sixth Amendment argument, this case is an unlikely forum for a Sixth Amendment analysis.[174] No matter, for Justice Alito offers a thoughtful "original intent"[175] inquiry of the Sixth Amendment in the context of the *Blakely–Booker* line of cases.[176]

Back on point, Justice Alito summarizes the central theme of the "issue" in this case as a determination of how much policy making authority was given back to the district courts under *Booker*.[177] The first part of Justice

172. *Gall*, 128 S. Ct. at 604 (Alito, J., dissenting) ("It is unrealistic to think [the goal of reducing sentencing disparities] can be achieved over the long term if sentencing judges need only give lip service to the Guidelines."). Justice Alito actually places a great deal of importance on avoiding sentencing disparities as a factor "slighted" by the district court. *Id.* at 607. He mentions it several times over the course of his dissent. *Id.* at 607–10. However, it seems that if Congress feels avoiding disparate sentences is of central importance and not to be trusted to the discretion of the federal judiciary, Congress could simply enact mandatory sentences for each offense.

173. *Id.* at 605.

174. Even Justice Alito admits that the Sixth Amendment has little to do with this particular case as presented. *See id.* at 604 ("[T]he rules set out in the Court's opinion in the present case have nothing to do with juries or factfinding and, indeed, that not one of the facts that bears on petitioner's sentence is disputed. What is at issue, instead, is the allocation of the authority to decide issues of substantive sentencing policy, an issue on which the Sixth Amendment says absolutely nothing. The yawning gap between the Sixth Amendment and the Court's opinion should be enough to show that the *Blakely–Booker* line of cases has gone astray.").

175. Original intent is defined as "[t]he mental state of the drafters or enactors of the U.S. Constitution, a statute, or another document." BLACK'S LAW DICTIONARY 826 (8th ed. 2004).

176. *Gall*, 128 S. Ct. at 605–06 & nn.1–2 (Alito, J., dissenting). Justice Alito raises the interesting criticism of the Court's distinction in *Blakely* between "judicial factfinding under a guidelines system and judicial factfinding under a discretionary sentencing system." *Id.* at 605 (citing Blakely v. Washington, 542 U.S. 296, 309–10 (2004)). He takes a strong originalist interpretation of the Sixth Amendment, citing several colonial sentencing statutes from the 18th century to make his point that judge-found facts have always been considered in raising sentences *within* a sentencing range. *Id.* ("It would be a coherent principle to hold that any fact that increases a defendant's sentence beyond the minimum required by the jury's verdict of guilt must be found by a jury. Such a holding, however, would clash with accepted sentencing practice at the time of the adoption of the Sixth Amendment."). That raises the question as to whether the sentencing practices of the individual States at the time the Sixth Amendment was enacted *necessarily* endorse the idea of increasing sentences based on judge-found facts, *or* do they indicate an intent on the part of the drafters to curb the practice of courts in increasing sentences based on facts that have not been admitted to or proven to a jury? *Cf.* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 35 (1991) (Scalia, J., concurring) ("[*Gideon v. Wainwright*] established that no matter how strong its historical pedigree, a procedure prohibited by the Sixth Amendment . . . violates 'fundamental fairness' and must be abandoned by the States.").

177. *Gall*, 128 S. Ct. at 606 (Alito, J., dissenting).

Alito's dissent ends with his adoption of a *Booker* interpretation "requir[ing] sentencing judges to give weight to the Guidelines" in order to "minimize the gap between what the Sixth Amendment requires and what [the Court's] cases have held."[178]

The second part of Justice Alito's dissent in *Gall* is broken down into two sections: Section A, which focuses on the treatment of *Gall* by the Eighth Circuit and the district court;[179] and Section B, which critiques the majority's holding.[180] Section A opens with the pronouncement that the Eighth Circuit was correct in its assessment of the district court's abuse of discretion for failing to "give sufficient weight to the policy decisions reflected in the Guidelines."[181] Justice Alito lists the factors he feels were "slighted" to the exclusion of the others.[182] He also offers a litany of cases to shore up support for the main theme of his dissent, that the district court

---

178. *Id.* ("I recognize that the Court is committed to the *Blakely–Booker* line of cases, but we are not required to continue along a path that will take us further and further off course.").

179. *Id.* at 606–09.

180. *Id.* at 609–10.

181. Again, this is a common theme in Justice Alito's dissent. *See supra* note 172 (discussing Justice Alito's view of the importance of avoiding sentencing disparities). Although he continuously stresses the district court's under-appreciation of at least three separate factors, he opens this section by outlining facts about the seriousness of Gall's crime and stating the extent of the district court's departure from the Guidelines. The tone suggests that Justice Alito, perhaps rightfully, just feels the sentence does not fit the crime, notwithstanding any mitigating factors present. *Gall*, 128 S. Ct. at 606–07 (Alito, J., dissenting) ("Petitioner was convicted of a serious crime, conspiracy to distribute 'ecstasy.' He distributed thousands of pills and made between $30,000 and $40,000 in profit. . . . The Sentencing Guidelines called for a term of imprisonment of 30 to 37 months, but the District Court imposed a term of probation."). Justice Alito also points out that the motivation for Gall's "voluntary" withdrawal from the conspiracy was fear of apprehension. *See supra* note 88 (discussing different perspectives of Gall's "voluntary" withdrawal from the conspiracy).

182. First, Justice Alito clearly concedes that at least one factor was satisfied. *See Gall*, 128 S. Ct. at 607 (Alito, J., dissenting) ("If the question before us was whether a reasonable jurist could conclude that a sentence of probation was sufficient in this case to serve the purposes of punishment set out in 18 U.S.C. § 3553(a)(2), the District Court's decision could not be disturbed. But because I believe that sentencing judges must still give some significant weight to the Guidelines sentencing range, the Commission's policy statements, and the need to avoid unwarranted sentencing disparities, I agree with the Eighth Circuit that the District Court did not properly exercise its discretion." (citation omitted) (citing 18 U.S.C. § 3553(a)(3)–(5) (2006)). Section 3553(a)(2) states that

> [t]he court shall impose a sentence sufficient, but not greater than necessary, to . . . reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; to afford adequate deterrence to criminal conduct; to protect the public from further crimes of the defendant; and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner . . . .

18 U.S.C. § 3553(a)(2). Also not mentioned by Justice Alito is § 3553(a)(1) ("the nature and circumstances of the offense and the history and characteristics of the defendant . . . ."). The district court likely considered the factors that Justice Alito ignored to be more compelling than those he relied upon.

abused its discretion in sentencing Gall because it "ignored or slighted [factors] that Congress has deemed pertinent."[183]

Continuing with a discussion of the sentencing factors, Justice Alito criticizes the district court's consideration of Gall's age and ties with family and friends,[184] his lack of criminal history,[185] his behavior while out on

183. *Gall*, 128 S. Ct. at 607 (Alito, J., dissenting) (quoting United States v. Taylor, 487 U.S. 326, 336 (1988)). None of the cases dealt with application of § 3553(a). Justice Alito relies on *Taylor*, citing it thrice to support his position in *Gall* that the Eighth Circuit aptly conducted an abuse-of-discretion review and correctly found the district court "slighted" factors under § 3553(a). *Id.* ("A decision calling for the exercise of judicial discretion 'hardly means that it is unfettered by meaningful standards or shielded from thorough appellate review.'" (quoting *Taylor*, 487 U.S. at 336)); *id.* ("And when a trial court is required by statute to take specified factors into account in making a discretionary decision, the trial court must be reversed if it 'ignored or slighted a factor that Congress has deemed pertinent.'" (quoting *Taylor*, 487 U.S. at 337)); *id.* at 609 ("[I]t is entirely proper for a reviewing court to find an abuse of discretion when important factors—in this case, the Guidelines, policy statements, and the need to avoid sentencing disparities—are 'slighted.'" (quoting *Taylor*, 487 U.S. at 337)). *Compare Taylor*, 487 U.S. at 337 ("[W]hen the statutory factors are properly considered, and supporting factual findings are not clearly in error, the district court's judgment of how opposing considerations balance should not lightly be disturbed."), *with* U.S. v. Gall, 446 F.3d 884, 889–90 (8th Cir. 2006) ("First, the district court gave *too much weight* to Gall's withdrawal from the conspiracy . . . . Second, the district court gave *significant weight* to an improper factor when it relied on general studies showing persons under the age of 18 display a lack of maturity, which often results in impetuous and ill-considered actions. . . . Third, the district court *did not properly weigh* the seriousness of Gall's offense. . . . Finally, the district court *placed too much emphasis* on Gall's post-offense rehabilitation." (emphasis added)). *See supra* note 100 (quoting the *Gall* Court's enumerated list of errors made by the Eighth Circuit). Moreover, the circumstances in *Taylor* are quite distinguishable from those in *Gall*. The Court in *Taylor* found the trial court abused its discretion after dismissing *with prejudice* the prosecution of a defendant charged with conspiracy to distribute cocaine and possession of 400 grams of cocaine with intent to distribute because of the government's noncompliance with the Speedy Trial Act. *See Taylor*, 487 U.S. at 343 ("[I]t is evident from the record before us that the District Court abused its discretion in this case. The court did not explain how it factored in the seriousness of the offenses with which respondent stood charged. The District Court relied heavily on its unexplained characterization of the Government conduct as 'lackadaisical,' while failing to consider other relevant facts and circumstances leading to dismissal. Seemingly ignored were the brevity of the delay and the consequential lack of prejudice to respondent, as well as respondent's own illicit contribution to the delay. At bottom, the District Court appears to have decided to dismiss with prejudice in this case in order to send a strong message to the Government that unexcused delays will not be tolerated. That factor alone, by definition implicated in almost every Speedy Trial Act case, does not suffice to justify barring reprosecution in light of all the other circumstances present.").

184. *Gall*, 128 S. Ct. at 608 (Alito, J., dissenting) (characterizing the majority's consideration of Gall's age and the support of his family and friends as "a direct rejection of the Sentencing Commission's authority to decide the most basic issues of sentencing policy"); *see supra* notes 138–141 and accompanying text (discussing the Court's misplaced reliance on Gall's age as a factor in departure from the Guidelines); *see also* U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 (2007) ("[F]amily ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted.").

185. *Gall*, 128 S. Ct. at 608 (Alito, J., dissenting). Justice Alito points out that Gall's lack of criminal history was a central factor considered in establishing his sentencing range under the

bond,[186] and his voluntary withdrawal from the conspiracy.[187] Justice Alito's closing sentence in Section A states his disapproval with Gall's lenient sentence of probation.[188]

In Section B of the second part of his dissent, Justice Alito responds to the majority holding, focusing on two main issues. [189] First, he disapproves of the majority's "mischaracterization" of the appellate court's proportionality approach to reviewing Guidelines departures.[190] Second, and lastly, he condemns the majority's determination that the Eighth Circuit misapplied the abuse-of-discretion review in *Gall.*[191]

B. Kimbrough v. United States[192]

The rule espoused in *Gall*, that sentencing courts are effectively free to depart from the Guidelines unrestricted by any tangible measure or standard,

---

Guidelines. "Consequently, giving petitioner additional credit for this factor was nothing more than an expression of [the district court's] disagreement with the policy determination reflected in the Guidelines range." *Id.* at 608–09.

186. *Id.* at 609 ("The District Court mentioned petitioner's 'exemplary behavior while on bond,' but this surely cannot be regarded as a weighty factor." (citation omitted)).

187. *Id.*; *see supra* note 88 (contrasting the differing perspectives of Gall's "voluntary" withdrawal from the conspiracy).

188. *Id.* (arguing that while the district court's positive consideration of Gall's withdrawal from the conspiracy and self-rehabilitation was appropriate, those factors are not sufficient to justify Gall's sentence of probation in lieu of the recommended prison term of thirty to thirty-seven months under the Guidelines).

189. *Id.* at 609–10.

190. *Id.* at 609. Justice Alito correctly notes that the majority overstates the appellate court's use of strict mathematical formulas in determining what constitutes a reasonable degree of departure from the Guidelines based on individual factors and circumstances. He accuses the majority of attacking "straw men." *See supra* note 120 (discussing the use of a "straw man" argument). He then defends the approach taken by the Seventh and Eighth Circuits in applying a proportionality approach in reviewing the degree of divergence from the Guidelines. *See Gall*, 128 S. Ct. at 609 (Alito, J., dissenting) ("This criticism is quite unfair. It is apparent that the Seventh and Eighth Circuits did not mean to suggest that proportionality review could be reduced to a mathematical equation, and certainly the Eighth Circuit in this case did not assign numbers to the various justifications offered by the District Court." (citing United States v. Claiborne, 439 F.3d 479 (8th Cir. 2006); United States v. Johnson, 427 F.3d 423 (7th Cir. 2005))).

191. Justice Alito calls attention to the fact that the "Eighth Circuit stated unequivocally that it was conducting abuse-of-discretion review . . . ." *Id.* (citing United States v. Gall, 446 F.3d 884, 888–89 (8th Cir. 2006)). This line of argument seems to imply that so long as the appellate court labels its review as "abuse-of-discretion," it must presumptively be what it purports to be. According to the majority, that is the problem with the Eighth Circuit's review in this case. *See Gall*, 128 S. Ct. at 600 ("Although the [Eighth Circuit] correctly stated that the appropriate standard of review was abuse of discretion, it engaged in an analysis that more closely resembled *de novo* review . . . ."). Justice Alito again cites *Taylor* for the proposition that important sentencing factors were "slighted" by the district court. *See supra* note 183 (discussing Justice Alito's citation of *United States v. Taylor*, 487 U.S. 326 (1988)).

192. 128 S. Ct. 558 (2007).

sets the stage for *Kimbrough*.[193] Here, the Court is asked to determine whether a district court should have the discretion to consider its own disagreement with the 100-to-1 crack/powder cocaine ratio as a factor in departing from the Guidelines ranges.[194]

1. Facts of *Kimbrough*[195]

In 2004, Derrick Kimbrough was indicted in district court on four separate criminal offenses.[196] He pled guilty to all of the charges: "conspiracy to distribute crack and powder cocaine; possession with intent to distribute more than 50 grams of crack cocaine; possession with intent to distribute powder cocaine; and possession of a firearm in furtherance of a drug trafficking offense."[197] After factoring in Kimbrough's false testimony in a codefendant's trial,[198] the district court found Kimbrough's offense level to be a 34.[199] Under the applicable Guidelines, Kimbrough's sentencing exposure was 168 to 210 months in prison on the three drug charges and an additional 60 months for the firearm charge, raising his final Guidelines range to 228 to 270 months (19 to 22.5 years).[200]

The district court held that such a lengthy sentence "would have been 'greater than necessary' to accomplish the purposes of sentencing set forth in 18 U.S.C. § 3553(a)."[201] Perhaps what made this case such a lightning rod was the district judge's general criticism of the disparate sentences for crack cocaine under the Guidelines.[202] In what would later seemingly be the burr

193. In order to take the focus off of the clear leniency given to Brian Gall in light of his individual facts, the Court cloaks its decision in reliance of the deferential abuse-of-discretion review. *See Gall*, 128 S. Ct. at 602.

194. *See infra* note 206 and accompanying text (quoting the Fourth Circuit's rigid rule barring consideration of the crack/powder disparity in sentencing).

195. *Kimbrough*, 128 S. Ct. 558, 564–66.

196. *Id.* at 564. Kimbrough was indicted in the United States District Court for the Eastern District of Virginia. *Id.*

197. *Id.* at 565 (discussing the district court's diligence in taking "into account the 'nature and circumstances' of the offense and Kimbrough's 'history and characteristics.'").

198. Some say, "No good deed goes unpunished."

199. *Id.* The base offense level for Kimbrough's three drug charges was 32. His false testimony increased the level to 34. *Id.* Additionally, the probation presentence report established Kimbrough's criminal history at Category II. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* ("The [district] court also commented that the case exemplified the 'disproportionate and unjust effect that crack cocaine guidelines have in sentencing.'").

under the Fourth Circuit's saddle,[203] the district court "contrasted Kimbrough's Guidelines range of 228 to 270 months with the range that would have applied had he been accountable for an equivalent amount of powder cocaine: 97 to 106 months, inclusive of the 5-year mandatory minimum for the firearm charge."[204] In light of all factors considered, the district court sentenced Kimbrough to 180 months in prison with five additional years of supervised release.[205] The sentence was forty-eight months below the Guidelines range.

The Fourth Circuit reversed the district court, holding 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."[206] The United States Supreme Court granted certiorari in order to quell the confusion as to whether the disparate cocaine Guidelines are "advisory" under *Booker*.[207]

2. Analysis and Critique of *Kimbrough*

a. *Justice Ginsburg's Majority Opinion*[208]

In another 7–2 decision,[209] the Supreme Court held that the Fourth Circuit erred in holding the district court must consider the disparity between crack and powder cocaine effectively mandatory under the Guidelines.[210] In other words, while a sentencing court must consider all of the Guidelines factors, it has the discretion to sentence outside the Guidelines range if it finds the powder/crack disparity results in a sentencing

203. I understand the Texas State Bar Exam covers such technical legal terms as "burr under the saddle."

204. *Id.*

205. *Id.*

206. United States v. Kimbrough, 174 F.App'x 798 (4th Cir. 2006) (citing United States v. Eura, 440 F.3d 625, 633–34 (4th Cir. 2006)), *rev'd*, 128 S. Ct. 558 (2007).

207. *Kimbrough*, 128 S. Ct. at 565–66 & n.4 (discussing several post-*Booker* appellate cases that conflicted with each other as to whether a district court could consider the crack/powder disparity in departing from the Guidelines). Several of these cases, which all held the disparity could not be considered as a factor, are ultimately abrogated by the holding in *Kimbrough*. *See* United States v. Leatch, 482 F.3d 790 (5th Cir. 2007); United States v. Johnson, 474 F.3d 515 (8th Cir. 2007); United States v. Castillo, 460 F.3d 337 (2nd Cir. 2006); United States v. Williams, 456 F.3d 1353 (11th Cir. 2006); United States v. Miller, 450 F.3d 270 (7th Cir. 2006); United States v. Eura, 440 F.3d 625 (4th Cir. 2006); United States v. Pho, 433 F.3d 53 (1st Cir. 2006)).

208. *Kimbrough*, 128 S. Ct. at 564–76.

209. *Id.* at 558. Justice Ginsburg delivered the opinion of the Court, joined by Chief Justice Roberts and Justices Stevens, Scalia, Kennedy, Souter, and Breyer. *Id.* Justice Scalia filed a concurring opinion. *Id.* Justices Thomas and Alito wrote separate dissenting opinions. *Id.*

210. *Id.* at 576, *rev'g* 174 F.App'x 798.

range "greater than necessary" to satisfy the objectives under the Guidelines.[211]

After laying out the facts in *Kimbrough*,[212] Justice Ginsburg provides some history and background information relating to the disparate treatment of crack and powder cocaine in sentencing.[213] She explains the differences in composition and use of powder versus crack cocaine, [214] then moves on to the origination of the crack/powder sentencing disparity.[215] In enacting the 1986 Act,[216] Congress created a two-tiered sentencing scheme intended to punish higher level manufacturers more severely than lower level traffickers.[217] Concerned over the perceived disproportionate impact crack was having on crime and society, Congress adopted the now notorious 100-to-1 ratio for sentencing of cocaine related offenses.[218]

Justice Ginsburg explains the ratio was created intentionally based on "assumptions" about crack,[219] but the Commission "later determined that the

---

211. *Kimbrough*, 128 S. Ct. at 564 (citing 18 U.S.C. § 3553(a)(2) (2006)).

212. *See supra* Part III.B.1 (discussing and analyzing facts in *Kimbrough*).

213. *Kimbrough*, 128 S. Ct. at 566–69.

214. *Id.* at 566 (citing 1995 REPORT, *supra* note 19, at 5, 12). For the purposes of this article, it suffices to know that crack cocaine is simply made from boiling down cocaine hydrochloride, also known as powder cocaine, with baking soda and water, thus creating a solid that is broken into small rocks for smoking. *Id.* Powder cocaine is most commonly inhaled but is sometimes dissolved in water and injected via syringe. *Id.* While the different delivery methods ultimately produce the same effect, smoking crack is more efficient, producing a more intense high. *Id.* at 566 & n.5.

215. *Id.* at 566.

216. 1986 Act, *supra* note 22.

217. *Kimbrough*, 128 S. Ct. at 566–67 ("The 1986 Act created a two-tiered scheme of five- and ten-year mandatory minimum sentences for drug manufacturing and distribution offenses [based on the weight of the drugs involved in the crime]. Congress sought 'to link the ten-year mandatory minimum trafficking prison term to major drug dealers and to link the five-year minimum term to serious traffickers.'"). As it relates to cocaine, this culminated in a 100-to-1 ratio. In other words, the Guidelines ranges are the same for offenses involving 5 grams of crack or 500 grams of powder cocaine. *Id.* at 567 (citing 21 U.S.C. § 841(b)(1)(B)(ii)–(iii) (2000)); *see* U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c) (2007). As an interesting historical fact, Justice Ginsburg explains that when the 1986 Act was being passed, the Commission was contemplating a sentencing scheme for drugs that was based on empirical evidence, including 10,000 presentence reports. *Kimbrough*, 128 S. Ct. at 567. However, this approach was abandoned and the weight-driven scheme was adopted. *Id.*

218. *See infra* note 219 (quoting the 1995 Report's characterization of crack as "a matter of great public concern").

219. *Kimbrough*, 128 S. Ct. at 567. It is clear that the majority is making its case for the unreasonableness of the crack/powder disparity, but it is not clear that the argument is intellectually honest. When describing the enactment of the provision, the majority implies Congress overreacted:

> Crack cocaine was a relatively new drug when the 1986 Act was signed into law, but it was already a matter of great public concern: "Drug abuse in general, and crack cocaine in particular, had become in public opinion and in members' minds a problem of

crack/powder sentencing disparity is generally unwarranted."[220] This leads to a rather detailed discussion of conclusions made by the Commission over the years in this arena, including the following observation:

> [T]he crack/powder sentencing differential "fosters disrespect for and lack of confidence in the criminal justice system" because of a "widely-held perception" that it "promotes unwarranted disparity based on race." Approximately 85 percent of defendants convicted of crack offenses in federal court are black; thus the severe sentences required by the 100-to-1 ratio are imposed "primarily upon black offenders."[221]

Justice Ginsburg makes the point that the Commission has on several occasions sought to reduce the sentencing ratio between powder cocaine and crack.[222] The most recent legal development in this area is an amendment to the Guidelines that reduces the base level under the Guidelines for crack offenses by two levels.[223]

> overwhelming dimensions." Congress apparently believed that crack was *significantly more dangerous* than powder cocaine in that: (1) crack was *highly addictive*; (2) crack users and dealers were *more likely to be violent* than users and dealers of other drugs.... Based on *these assumptions*, the 1986 Act adopted a "100-to-1 ratio" that treated every gram of crack cocaine as the equivalent of 100 grams of powder cocaine.

Id. (emphasis added) (citations omitted). Compare the characterization of those factors as "assumptions" to the following, from later in the majority opinion: "[T]he Commission's most recent reports do not urge identical treatment of crack and powder cocaine . . . because crack is *more addictive* than powder, crack offenses are *more likely to involve weapons or bodily injury*, and crack distribution is associated with *higher levels of crime*. . . ." *Id.* at 568 (emphasis added) (quoting 1995 REPORT, *supra* note 19).

220. *Id.* The Commission found that there were assumptions about crack that have largely not come to fruition, including the assumptions that prenatal crack exposure was more harmful than exposure to powder cocaine and that crack use would produce an epidemic of young crack users. *Id.* (citing 2007 REPORT, *supra* note 31, at 8). The Commission also realized that "[d]rug importers and major traffickers generally deal in powder cocaine, which is then converted into crack by street-level sellers." *See* 1995 REPORT, *supra* note 19, at 66–67. "But the 100-to-1 ratio can lead to the 'anomalous' result that 'retail crack dealers get longer sentences than the wholesale drug distributors who supply them the powder cocaine from which their crack is produced.'" *Kimbrough*, 128 S. Ct. at 568 (quoting 1995 REPORT, *supra* note 19, at 174).

221. *Kimbrough*, 128 S. Ct. at 568 (quoting U.S. SENTENCING COMM'N, REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY, at iv (2002), *available at* http://www.ussc.gov/r_congress/02crack/2002crackrpt.pdf [hereinafter 2002 REPORT]).

222. *Id.* at 568–69. Congress rejected the Commission's attempt to amend the crack/powder ratio to 1-to-1 in 1995, but directed the Commission to submit a proposal for a revised ratio. *Id.* at 569 (citing 1995 REPORT, *supra* note 19). In 1997, the Commission proposed a 5-to-1 ratio. *Id.* (citing U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 2 (1997), *available at* http://www.ussc.gov/r_congress/newcrack.pdf). In 2002, the Commission proposed dropping the ratio to at least 20-to-1. *Id.* (citing 2002 Report, *supra* note 221, at viii). Congress adopted neither proposal. *Id.*

223. *Id.* at 569 & nn.11–12 (citing Amendments to the Sentencing Guidelines for United States Courts, 72 Fed. Reg. 28571–72 (May 21, 2007) [hereinafter 2007 Amendments]). Under 28 U.S.C.

Having laid the historical foundation for *Kimbrough*, the majority makes the threshold acknowledgement that under *Booker*[224] the Guidelines are advisory and review of Guidelines departures is an abuse-of-discretion standard.[225] Justice Ginsburg explains the Government's position that the 100-to-1 sentencing ratio for crack/powder cocaine is "an exception to the 'general freedom that sentencing courts have to apply the [§ 3553(a)] factors.'"[226] This is "because the ratio is a 'specific policy determinatio[n] that Congress has directed sentencing courts to observe.'"[227] The Government levied three main arguments in support of this position, and the majority addresses all three in detail.[228]

First, the majority rejects the Government's supposition that the 1986 Act implicitly requires adherence of courts and the Commission to the 100-to-1 ratio.[229] The argument is grounded in the assumption that because Congress set statutory minimum sentences for certain drug offenses based on quantity ratios, the Commission must set its sentencing standards based

§ 994(p), the Commission promulgated amendments to the Guidelines in May 2007 that became effective on November 1, 2007. Congress could have rejected the amendments at any time prior to November 2007. So the amendment to the crack/powder sentencing was effected by Congressional inaction, which seems to indicate its tacit approval of the change. However, this was a minor change, and even with the amendment in place, Kimbrough's sentence given by the district court would still be fifteen months below the amended Guidelines range. *Kimbrough*, 128 S. Ct. at 569 n.11.

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

225. *Kimbrough*, 128 S. Ct. at 569–70; *see supra* note 109 (discussing of the abuse-of-discretion standard for appellate review of sentences). Justice Ginsburg agrees with the broad concession offered by the Government "that the Guidelines 'are now advisory' and that, as a general matter, 'courts may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines.'" *Kimbrough*, 128 S. Ct. at 570 (quoting Brief for United States at 16, *Kimbrough*, 128 S. Ct. 558 (No. 06-6330), 2007 WL 2461473). The Government's expansive reading of *Booker* and *Rita* offers little friction for the majority's opinion in *Kimbrough*. *Cf.* Rita v. United States, 127 S. Ct. 2456, 2465 (2007) (holding a district court may consider arguments that "the Guidelines sentence itself fails properly to reflect § 3553(a) considerations"). Perhaps in this sense, the Government had a clearer understanding of *Booker* than did the Eighth and Fourth Circuits.

226. *See supra* note 122 (listing all of the factors under § 3553(a)).

227. *Kimbrough*, 128 S. Ct. at 570 (citing Brief for the United States, *supra* note 225, at 16).

228. *Id.* at 570–74. The majority's answers to the three arguments offered by the Government are in Sections A, B and C of Part III of the majority opinion.

229. *Id.* at 570–71 ("The Government acknowledges that the 'Congress did not *expressly* direct the Sentencing Commission to incorporate the 100:1 ratio in the Guidelines.' Nevertheless, it asserts that the Act '[i]mplicit[ly]' requires the Commission and sentencing courts to apply the 100-to-1 ratio. Any deviation, the Government urges, would be 'logically incoherent' when combined with mandatory minimum sentences based on the 100-to-1 ratio." (citations omitted) (citing Brief for the United States *supra* note 225, at 32–33)).

on those same ratios.[230] The Court flatly rejects the Government's statutory interpretation of an implied Congressional directive to the Commission.[231]

Next, the Court addresses the Government's assertion that Congress signaled its commitment to the 100-to-1 sentencing scheme in its rejection of the proposed 1-to-1 ratio in 1995.[232] Further, the Government argues that Congress's reaction to the 1995 Report included comments concerned with maintaining the sentencing disparity between crack and powder cocaine.[233] The majority dismisses both claims.[234] Justice Ginsburg explains that Congress's reaction to the 1995 Report never endorsed a ratio of 100-to-1; in fact, Congress required a revision of the ratio from the Commission.[235]

---

230. *Id.* This is a difficult argument for someone not familiar with the federal sentencing scheme to fully comprehend. It is important to remember that the Guidelines are promulgated by the Commission, independent of the statutory mandatory minimum sentences for certain offenses set by Congress. The argument the Government was trying to make was that Congress established a 100-to-1 ratio by setting a mandatory minimum sentence of five years for offenses involving 500 grams of powder cocaine or only 5 grams of crack cocaine. The only logical conclusion, according to the Government, was that the Guidelines maintain the same 100-to-1 ratio between powder cocaine and crack.

231. *Id.* at 571 ("The [1986 Act], by its terms, mandates only maximum and minimum sentences: A person convicted of possession with intent to distribute 5 grams or more of crack cocaine must be sentenced to a minimum of 5 years and the maximum term is 40 years. A person with 50 grams or more of crack cocaine must be sentenced to a minimum of 10 years and the maximum term is life. The statute says nothing about the appropriate sentences within these brackets, and we decline to read any implicit directive into that congressional silence." (citing Jama v. Immigration and Customs Enforcement, 543 U.S. 335, 341 (2005))). The Court goes on to point out that Congress has made it clear that it knows how to set express terms for sentencing when it wishes to do so. *Id.* To illustrate its assertion that there is no obligation for the Guidelines standards to comport with those of the mandatory minimum statutes, the Court cites *Neal v. Unites States*, 516 U.S. 284 (1996), which held that the Commission's revised standard for calculating weight of LSD was not imputed to mandatory minimum statute. *See Kimbrough*, 128 S. Ct. at 572 ("[O]ur opinion in *Neal* never questioned the validity of the altered Guidelines. To the contrary, we stated: 'Entrusted within its sphere to make policy judgments, the Commission may abandon its old methods in favor of what it has deemed a more desirable "approach" to calculating LSD quantities.' If the 1986 Act does not require the Commission to adhere to the Act's method for determining LSD weights, it does not require the Commission—or, after *Booker*, sentencing courts—to adhere to the 100-to-1 ratio for crack cocaine quantities other than those that trigger the statutory mandatory minimum sentences." (quoting *Neal*, 516 U.S. at 295)).

232. *Id.* at 572. This argument is discussed in Section B of Part III of the majority opinion.

233. *Id.* ("Congress 'not only disapproved of the 1:1 ratio,' the Government urges; it also made clear 'that the 1986 Act required the Commission (and sentencing courts) to take drug quantities into account, and to do so in a manner that respects the 100:1 ratio.'" (quoting Brief for the United States, *supra* note 225, at 35)).

234. *Id.*

235. *Id.* The Court agrees with the Government that Congress rejected the 1-to-1 ratio in 1995, but notes that while "Congress . . . expressed the view that 'the sentence imposed for trafficking in a quantity of crack cocaine should generally exceed the sentence imposed for trafficking in a like quantity of powder cocaine.' But nothing in Congress'[s] 1995 reaction . . . suggested that crack sentences must exceed powder sentences by a ratio of 100 to 1. To the contrary, Congress's 1995 action required the Commission to recommend a 'revision of the drug quantity ratio of crack cocaine to powder cocaine.'" *Id.* (citation omitted) (quoting Act of Oct. 30, 1995, Pub. L. No. 104-38, § 2(a), 109 Stat. 334 (1995) (codified as amended in 28 U.S.C. § 994 note (2000))).

Also, it would be paradoxical in light of Congress's adoption of the 2007 amendment to the ratio to read its rejection of the 1-to-1 ratio in 1995 to mean Congress intended to bar any deviation whatsoever from the 100-to-1 ratio.[236]

The third argument advanced by the Government is that freedom of district courts to depart from the Guidelines "based on disagreements with the crack/powder ratio" would result in two kinds of unwarranted sentencing disparities.[237] The first concern is that "sentencing cliffs" would be created around drug quantities that set off mandatory minimum sentences.[238] To illustrate, the Court provides a hypothetical example of a defendant who was convicted of an offense involving forty-nine grams of crack.[239] The sentencing judge would have the discretion to grant a significant downward departure based on the advisory guidelines, but another defendant in the same situation with only one more gram of crack would be subject to the mandatory minimum sentencing statute, thus potentially creating a sentencing cliff between the two similarly situated defendants.[240] The second disparity posited by the Government would be created as the natural result of varying opinions regarding the crack/powder disparity from one sentencing judge to the next.[241] The Court dismisses both arguments with the reassurance that "advisory Guidelines combined with appellate review for reasonableness and ongoing revision of the Guidelines in response to sentencing practices will help to 'avoid excessive sentencing disparities.'"[242]

---

236. *Id.* at 572–73. The Government argued that Congress's requirement of the "Commission to propose changes to the 100-to-1 ratio in *both* the 1986 Act and the Guidelines . . . implicitly foreclosed any deviation from the 100-to-1 ratio in the Guidelines (or by sentencing courts) in the absence of a corresponding change in the statute." *Id.* (citing Brief for the United States, *supra* note 225, at 35–36). The 2007 amendment resulted in a crack/powder ratio of between 25-to-1 and 80-to-1, depending on the offense level. *Id.* at 573 (citing 2007 Amendments, *supra* note 223). The fact that Congress allowed the 2007 amendment to take effect conflicts with the Government's analysis of the 1986 Act and Congress's 1995 action. *Id.*

237. *Id.* at 573–74. This argument is discussed in Section C of Part III of the majority opinion.

238. *Id.* at 573.

239. *Id.*

240. *Id.*

241. *Id.* ("[I]f district courts are permitted to vary from the Guidelines based on their disagreement with the crack/powder disparity, 'defendants with identical real conduct will receive markedly different sentences, depending on nothing more than the particular judge drawn for sentencing.'" (quoting Brief for the United States, *supra* note 225, at 40).

242. *Id.* at 573–74 (quoting United States v. Booker, 543 U.S. 220, 264 (2005)). The Court also mentions that, to some extent, the mandatory minimums act as control on disparities. To support this point, the Court quotes a "Sentencing Commission report[] that roughly 70% of crack offenders are responsible for drug quantities that yield base offense levels at or only two levels above those that correspond to the statutory minimums." *Id.* at 574 (citing 2007 REPORT, *supra* note 220, at 25).

After addressing the Government's main arguments, the opinion moves on to a commentary of the importance of the Commission, particularly in the wake of *Booker*, *Rita*, and *Gall*.[243] The Court makes the observation that the Commission's role is vital in that it has the capacity to make policy decisions based on analysis of empirical sentencing data collected on a national level.[244] However, the sentencing judge is in the superior position to weigh the appropriate sentencing factors in each case.[245] Accordingly, the Court declares "it would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence 'greater than necessary' to achieve § 3553(a)'s purposes, even in a mine-run case."[246]

Having provided such a thorough refutation of the Government's position on Guidelines operation and such a detailed analysis of its own position, the Court finally arrives at Kimbrough's situation.[247] First, Justice Ginsburg endorses the sentence imposed, recounting the district court's consideration of "the nature and circumstances" of Kimbrough's crime[248] and his personal "history and characteristics."[249] Next, Justice Ginsburg recognizes the district court's criticism of the unwarranted disparity that would result from applying 100-to-1 ratio to Kimbrough's sentence and deems it to be an appropriate consideration.[250] Lastly, the Court weighs in

243. *Id.* at 574 (citing *Booker*, 543 U.S. 220; Rita v. United States, 127 S. Ct. 2456 (2007); Gall v. United States, 128 S. Ct. 586 (2007)).

244. *Id.* ("[T]he Commission fills an important institutional role: It has the capacity courts lack to 'base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise.'" (quoting United States v. Pruitt, 502 F.3d 1154, 1171 (10th Cir. 2007) (McConnell, J., concurring))).

245. *Id.* ("The sentencing judge, on the other hand, has 'greater familiarity with . . . the individual case and the individual defendant before him than the Commission or the appeals court.' He is therefore 'in a superior position to find facts and judge their import under § 3353(a)' in each particular case." (citations omitted)).

246. *Id.* at 575 (citing 18 U.S.C. § 3553(a) (2006)); *see supra* note 122 (listing all of the factors under § 3553(a)).

247. *Kimbrough*, 128 S. Ct. at 575.

248. *Id.* The Court begins its analysis of Kimbrough's sentencing by observing that the district court first calculated the sentencing range under the Guidelines and then considered the relevant factors under § 3553. *Id.* This is exactly the procedure outlined in *Gall*. *See supra* notes 121–125 and accompanying text. Justice Ginsburg then characterizes Kimbrough's crime as "unremarkable," in that "[Kimbrough] and another defendant were caught sitting in a car with some crack cocaine and powder by two police officers—that's the sum and substance of it—[and they also had] a firearm." *Id.*

249. *Id.* (noting that "Kimbrough had no prior felony convictions, that he had served in combat during Operation Desert Storm and received an honorable discharge from the Marine Corps, and that he had a steady history of employment").

250. *Id.* The Court compares Kimbrough's *actual* sentence as awarded by the district court of fifteen years to the sentence he would have gotten under the Guidelines of at least nineteen and a half years, concluding the district court "appropriately framed its final determination in line with § 3553(a)'s overarching instruction to 'impose a sentence sufficient, but not greater than necessary' to accomplish the sentencing goals advanced in § 3553(a)(2)." *Id.* (quoting 18 U.S.C. § 3553). The

on the issue of whether the Guidelines departure was an abuse-of-discretion on the part of the district court, ultimately holding that in "[g]iving due respect to the District Court's reasoned appraisal, a reviewing court could not rationally conclude that the four-and-a-half-year sentence reduction Kimbrough received qualified as an abuse of discretion."[251] As such, the Supreme Court reverses the Fourth Circuit's judgment and remands the case.[252]

b. *Justice Scalia Concurs*[253]

Rare is the occasion when Justice Scalia will abstain from expressing his concern for Sixth Amendment violations relating to sentencing under the Guidelines.[254] Here, he offers a short concurrence that quotes several cases from *Booker*-to-present in order to illustrate the "advisory" nature of the Guidelines.[255] With that in mind, he expresses his concern that

---

Court approves of the district court's conclusion that "the crack cocaine guidelines [drove Kimbrough's] offense level to a point higher than is necessary to do justice in this case." *Id.* Thus, under the criteria set forth in *Gall*, the district court "committed no procedural error." *Id.* at 575–76 (quoting Gall v. United States, 128 S. Ct. 586, 600 (2007)).

251. *Id.* at 576 (citing *Gall*, 128 S. Ct. at 601–02; Rita v. United States, 127 S. Ct. 2456, 2469–70 (2007)). In justifying its rationale, the majority relies heavily on the sentiments expressed over the years by the Commission regarding the crack/powder ratio. *See id.* ("The sentence the District Court imposed on Kimbrough was 4.5 years below the bottom of the Guidelines range. But in determining that 15 years was the appropriate prison term, the District Court properly homed in on the particular circumstances of Kimbrough's case and accorded weight to the Sentencing Commission's consistent and emphatic position that the crack/powder disparity is at odds with § 3553(a)."). Remarkably, the majority also comments on the Government's failure to argue that the "downward variance [was] unsupported by § 3553(a)." *Id.* However, this seems implied given the central theme of the Government's argument, that the 100-to-1 sentencing ratio is mandatory. It would weaken the Government's position to advance the alternative theories that on one hand, the sentence under the Guidelines is absolutely mandatory, but on the other hand, even if it is not mandatory, a downward variance pursuant to § 3553(a) is unsupported by the facts in *Kimbrough*.

252. *Id.*

253. *Id.* at 576–77 (Scalia, J., concurring).

254. *See, e.g.*, *Rita*, 127 S. Ct. at 2478 (2007) (Scalia, J., concurring); *Gall*, 128 S. Ct. at 602 (Scalia, J., concurring); United States v. Booker, 543 U.S. 220, 272–313 (2005) (Scalia, J., dissenting in part); Apprendi v. New Jersey, 530 U.S. 466, 498–523 (2000) (Scalia, J., concurring).

255. *Kimbrough*, 128 S. Ct. at 576–77 (Scalia, J., concurring) ("[Our remedial opinion] requires a sentencing court to consider Guidelines ranges, . . . but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a). . . . [W]ithout this provision—namely the provision that makes 'the relevant sentencing rules . . . mandatory and impose[s] binding requirements on all sentencing judges'—the statute falls outside the scope of requirement. . . . The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing." (quoting *Booker*, 543 U.S. at 245–46, 259, 264)); Cunningham v. California, 127 S. Ct. 856, 867 (2007) ("Under the system described in Justice Breyer's opinion for the Court in *Booker*, judges would no longer be tied to the sentencing range indicated in the

> If there is any thumb on the scales; if the Guidelines *must* be followed even where the district court's application of the § 3553(a) factors is entirely reasonable; then the "advisory" Guidelines would, over a large expanse of their application, *entitle* the defendant to a lesser sentence *but for* the presence of certain additional facts found by judge rather than jury. This, as we said in *Booker*, would violate the Sixth Amendment.[256]

Justice Scalia seems to be articulating the same concern he voiced in *Gall*, that "[w]hether a sentencing scheme uses mandatory Guidelines, a 'proportionality test' for Guidelines variances, or a deferential abuse-of-discretion standard, there will be some sentences upheld only on the basis of additional judge-found facts."[257] He is rightfully dismayed by the reality that under the current sentencing scheme, defendants will still sometimes be sentenced relying on judge-found facts. Otherwise, § 3553(a), by and large, serves only as a "one-way [downward] ratchet," generally resulting in lesser sentences except for those cases in which judicial fact-finding is used for sentencing increases.[258]

Guidelines. But they would be obliged to 'take account of' that range along with the sentencing goals Congress enumerated in the [Sentencing Reform Act] at 18 U.S.C. § 3553(a)."); *Rita*, 127 S. Ct. at 2466 ("A nonbinding appellate presumption that a Guidelines sentence is reasonable does not *require* the sentencing judge to impose that sentence. Still less does it *forbid* the sentencing judge from imposing a sentence higher than the Guidelines provide for the jury-determined facts standing alone. As far as the law is concerned, the judge could disregard the Guidelines and apply the same sentence (higher than the statutory minimum or the bottom of the unenhanced Guidelines range) in the absence of the special facts (say, gun brandishing) which, in the view of the Sentencing Commission, would warrant a higher sentence within the statutorily permissible range.").

256. *Kimbrough*, 128 S. Ct. at 577.

257. *Gall*, 128 S. Ct. at 602 (Scalia, J., concurring).

258. *Rita*, 127 S. Ct. at 2477–78 n.2 (2007) (Scalia, J., concurring in part and dissenting in part) ("[S]ince reasonableness review should not function as a one-way ratchet, we must forswear the notion that sentences can be too low in light of the need to abandon the concept that sentences can be too high." (citation omitted) (citing *Booker*, 543 U.S. at 257–58, 266)); *see Booker*, 543 U.S. at 257–58 ("Congress would not have enacted sentencing statutes that make it more difficult to adjust sentences *upward* than to adjust them *downward*. As several United States Senators have written in an *amicus* brief, 'the Congress that enacted the 1984 Act did not conceive of—much less establish—a sentencing guidelines system in which sentencing judges were free to consider facts or circumstances not found by a jury or admitted in a plea agreement for the purpose of adjusting a base-offense level *down*, but not *up*, within the applicable guidelines range. Such a one-way lever would be grossly at odds with Congress's intent.'" (quoting Brief for Senator Orrin G. Hatch et al. as Amici Curiae Supporting Petitioner at 22, *Booker*, 543 U.S. 220 (Nos. 04-104, 04-105), 2004 WL 1950640)).

c. *Justices Thomas and Alito Dissent*[259]

Justice Thomas offers his dissent in *Kimbrough* to reiterate his disagreement with the Court's remedial decision in *Booker*.[260] As mentioned previously,[261] Justice Thomas rejects his earlier acceptance of the *Booker* remedy in *Rita* as "'statutory *stare decisis*,' [and is] now convinced that there is no principled way to apply the *Booker* remedy—certainly not one based on [§ 3553]."[262] He believes the only prudent way forward is to apply the Guidelines as mandatory, allowing the legislature to make any necessary changes.[263] Like Justice Scalia, Justice Thomas argues for a return to a mandatory sentencing scheme that requires any facts considered in sentencing be admitted to by the defendant or found by a jury.[264] He concedes that while the outcome of *Kimbrough* might be reasonable from a policy standpoint, it has "no basis in law."[265] Justice Thomas ends his dissent by stating that, because the district court departed from the "mandatory" Guidelines range, the judgment of the Fourth Circuit should be affirmed, and the case should be remanded for resentencing.[266]

Following Justice Thomas's dissent, Justice Alito's dissent in *Kimbrough* is only three sentences long:

---

259. *Kimbrough*, 128 S. Ct. at 577–78 (Thomas, J., dissenting); *id.* at 578–79 (Alito, J., dissenting).

260. *Id.* at 577–78 (Thomas, J., dissenting); *see Gall*, 128 S. Ct. at 603 (Thomas, J., dissenting) ("Consistent with my dissenting opinion in *Kimbrough v. United States*, I would affirm the judgment of the Court of Appeals because the District Court committed statutory error when it departed below the applicable Guidelines range." (citation omitted)); *supra* notes 158–162 and accompanying text.

261. *See supra* Part III.A.2.c.

262. *Kimbrough*, 128 S. Ct. at 578 (Thomas, J., dissenting) (quoting *Rita*, 127 S. Ct. at 2475 (Scalia, J., dissenting)).

263. *Id.* While ignoring *Booker* as controlling is certainly an unconventional approach, Justice Thomas makes perhaps the most logical conservative (strict constructionist) argument that can be made: Why struggle with Congressional intent? Congress passed mandatory sentencing guidelines. The Court could have simply severed the unconstitutional provisions and provided for, in those cases in which it would apply, a mechanism that would require any fact increasing a defendant's sentence to either be admitted to or proven by jury, thus not running afoul the Sixth Amendment.

264. *Id.* at 577–78. Indeed, keeping mandatory Guidelines intact but severing unconstitutional applications of those "would have achieved compliance with the Sixth Amendment while doing the least amount of violence to the mandatory sentencing regime that Congress enacted. The Court, however, chose a more sweeping remedy. Despite acknowledging that under the mandatory Guidelines not 'every sentence gives rise to a Sixth Amendment violation,' the Court rendered the Guidelines advisory in their entirety and mandated appellate review of all sentences for 'reasonableness.'" *Id.* (citation omitted) (citing Booker v. United States, 543 U.S. 220, 322–26 (2005) (Thomas, J., dissenting))).

265. *Id.* at 578.

266. *Id.*

> For the reasons explained in my dissent in [*Gall*,] I would hold that, under the remedial decision in [*Booker*,] a district judge is still required to give significant weight to the policy decisions embodied in the Guidelines. The *Booker* remedial decision, however, does not permit a court of appeals to treat the Guidelines' policy decisions as binding. I would not draw a distinction between the Guideline at issue here and other Guidelines. Accordingly, I would vacate the decision of the Court of Appeals and remand for reconsideration.[267]

However brief, Justice Alito's dissent deserves a closer look in light of his dissent in *Gall*. He would elect to vacate the Fourth Circuit's judgment and remand the case because *Booker* "does not permit a court of appeals to treat the Guidelines' policy decisions as binding."[268] This is an interesting position because, in a sense, it is conspicuously vague. His dissent would be complete based solely on his disagreement with the appellate court's reversal. He does not weigh in, as does the majority, on the reasonableness of the district court. However, by including the language "under . . . *Booker*, a district judge is still required to give significant weight to the policy decisions," he suggests that the district court's downward departure did not give significant weight to the policy decision that crack offenses should carry harsher penalties than corresponding powder offenses.[269]

So maybe both courts got it wrong. Unfortunately, because of the brevity of Justice Alito's dissent, we are left guessing whether the district court in *Kimbrough* merely "consulted" the Guidelines or sufficiently "took them into account."[270] Did the district court give "significant weight" to the relevant sentencing range?[271]

Having conducted a lengthy Sixth Amendment analysis relying on numerous eighteenth century cases in *Gall*,[272] Justice Alito now replaces his "original intent" hat with his "strict constructionist"[273] hat, drawing "[no] distinction between the Guideline at issue here and other Guidelines," thus abridging the analysis.[274] Switching from the Guidelines policy decisions to the Guidelines themselves, Justice Alito makes clear the point he eluded to in *Gall*: it is the responsibility of Congress and the Commission to establish

---

267. *Id.* at 578–79 (Alito, J., dissenting) (citing Gall v. United States, 128 S. Ct. 586 (2007); *Booker*, 543 U.S. at 258–65).

268. *Id.* (citing *Booker*, 543 U.S. at 258–65).

269. *Id.* at 578 (citation omitted) (citing *Booker*, 543 U.S. at 258–65).

270. *See Gall*, 128 S. Ct. at 603–10 (Alito, J., dissenting).

271. *Id.*

272. *See supra* note 176 and accompanying text (discussing Justice Alito's view of the Sixth Amendment implications of sentencing under the Guidelines).

273. *See supra* note 165 (defining the term "strict constructionism").

274. *Kimbrough*, 128 S. Ct. at 578–79 (Alito, J., dissenting).

the Guidelines; it is not up to the courts to pick and choose amongst the Guidelines as to which ones merit adherence.

While Justice Alito's dissents in *Gall* and *Kimbrough* are consistent, they offer little guidance for future analysis of Guidelines departure cases. We are left to understand that district courts must not only "consult" the Guidelines but must "take them into account."[275] Further, they must give "significant weight" to the sentencing range under the Guidelines.[276] Of course, appellate courts cannot "bind" district courts to the Guidelines policy decisions.[277] This is probably not the type of clarification lower courts are looking for in this conflicted area of the law.

IV. IMPACT OF *KIMBROUGH* AND *GALL*

A. Legal Impact

Kimbrough and *Gall* have an enormous impact on federal sentencing. The holdings not only result in thousands of potential federal petitions for sentence vacatures[278] but also change the manner in which federal defendants are now to be sentenced.[279] While perhaps too late, *Kimbrough* has finally addressed the crack/powder disparity to ostensibly temper the harshness of crack sentencing.[280] Together, they establish a more clearly defined application of *Booker*.[281]

However, some important questions become apparent in the wake of the *Kimbrough* and *Gall* decisions. What sentencing rules are we to glean from the holdings? How do these two decisions impact the future roles of the district courts, federal circuit courts, defense attorneys, and federal probation officers? What is the state of the Guidelines in the wake of *Kimbrough* and

275. *See Gall*, 128 S. Ct. at 604 (Alito, J., dissenting) ("District courts must not only 'consult' the Guidelines, they must 'take them into account.'" (quoting United States v. Booker, 543 U.S. 220, 264 (2005))); *see also supra* note 169 (discussing the difference, if any, between "consulting" versus "taking into account").

276. *Gall*, 128 S. Ct. at 604 (Alito, J., dissenting) ("[S]entencing judges must still give the Guidelines' policy decisions some significant weight and that the courts of appeals must still police compliance."); *see supra* note 169.

277. *Kimbrough*, 128 S. Ct. at 579 (Alito, J., dissenting) ("*Booker* . . . does not permit a court of appeals to treat the Guidelines' policy decisions as binding.").

278. *See infra* Part IV.B.

279. *See infra* Part IV.A.3.

280. *See infra* notes 350–352 and accompanying text (discussing the Guidelines amendment for crack in relation to *Kimbrough*).

281. *See supra* notes 56–60 and accompanying text (discussing the "advisory" application of the Guidelines pursuant to *Booker*).

Gall? Should the new standards established be applied retroactively or only prospectively? Is there added stability and predictability to *Booker* under the *Gall* majority's holding? This section of the article addresses those questions and others, illustrating the significant consequences of these two cases.

1. What the Holdings Clearly Establish

Against the backdrop of the "advisory" nature of the Guidelines pursuant to *Booker*,[282] *Gall* ultimately stands for the proposition that district courts are free to depart from the Guidelines[283] and, in doing so, are not required to justify the departure with any sort of proportionality test devised to weigh the amount of departure against the circumstances giving rise to it.[284] A district court must, however, still "give serious consideration to the extent of any departure . . . and must explain [its] conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications."[285] This is really nothing new, except the Court wants to curb the appellate court practice of devising proportionality tests to justify the degree of departure from the Guidelines.[286]

Perhaps the most clearly defined "rule" to be taken from *Gall* is that the standard of review for district court sentences under the Guidelines is abuse-of-discretion.[287] The *Gall* Court has now made "pellucidly" clear what it meant in *Booker* when it established a "reasonableness" standard of

282. *See supra* notes 56–60 and accompanying text (discussing the "advisory" application of the Guidelines pursuant to *Booker*).

283. *See supra* note 108 (reiterating the "advisory" nature of the Guidelines).

284. *See supra* notes 112–115 and accompanying text (discussing the Court's dismissal of a proportionality requirement in Guidelines departures).

285. Gall v. United States, 128 S. Ct. 586, 594 (2007).

286. *Id.* at 596 ("Most importantly, both the exceptional circumstances requirement and the rigid mathematical formulation reflect a practice—common among courts that have adopted 'proportional review'—of applying a heightened standard of review to sentences outside the Guidelines range. This is inconsistent with the rule that the abuse-of-discretion standard of review applies to appellate review of all sentencing decisions—whether inside or outside the Guidelines range."). It is not clear that the standard set in *Gall* for departure from the Guidelines is any different than the Eighth Circuit's approach, which the Court reverses and criticizes so harshly. *Compare id.* at 594 ("It is . . . clear that a district judge must give serious consideration to the extent of any departure from the Guidelines and must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications."), *and id.* at 597 ("We find it uncontroversial that a major departure should be supported by a more significant justification than a minor one."), *with* United States v. Claiborne, 439 F.3d 479, 481 (8th Cir. 2006) ("An extraordinary reduction must be supported by extraordinary circumstances." (quoting United States v. Dalton, 404 F.3d 1029, 1033 (8th Cir. 2005))).

287. *See supra* note 109 and accompanying text (discussing the abuse-of-discretion standard for review of sentences under *Booker*).

appellate review.[288] Whether *Gall* is intended to clarify the Court's holding in *Booker* or broaden it, there can be only one interpretation of its effect: a win for proponents of judicial sentencing discretion.[289]

Kimbrough extends the *Gall* analysis to cases involving cocaine sentencing, addressing the crack/powder disparity.[290] The *Kimbrough* rule is simply this: a district court judge is free to consider its disagreement with the crack/powder cocaine disparity as a factor in its departure from the Guidelines.[291] At first blush, this appears to be a straightforward principle. However as discussed below, *Kimbrough* unleashes a flurry of practical implications.[292]

2. Perhaps Not Quite the Majority It Appears to Be

An important point to consider is that in no way should these two cases be considered a clear majority of the Court. One might be tempted to see a 7–2 decision and chalk it up to an ironclad majority. However, that is simply not the case in *Kimbrough* and *Gall*. A closer look reveals a substantive 5–4 split in the Court—still every bit as fractured as it was in *Booker*.[293] Justices Thomas and Souter do not conceal the fact that they would happily return to a system of mandatory sentencing guidelines with an enhancement provision consistent with the Sixth Amendment.[294] Justices Scalia and Alito seem to be in the same camp.[295] Examining their individual

288. *See supra* note 109 and accompanying text (discussing the varying views as to whether the *Booker* Court really made it "pellucidly" clear that a "reasonableness" review of sentences actually meant an abuse-of-discretion standard).

289. *See* Robert Barnes, *Justices Reinforce Leeway on Sentences*, WASH. POST, Dec. 11, 2007, at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/12/10/AR2007121000558.html?sid=ST2007121000825 (discussing the characterization of *Kimbrough* and *Gall* by Ohio State University's Douglas A. Berman, law professor and sentencing expert, as "a major victory for criminal defendants and for district court judges who can use discretion in sentencing now that the guidelines are advisory only").

290. *See* Kimbrough v. United States, 128 S. Ct. 558 (2007).

291. *See supra* text accompanying note 246 (quoting the Court's declaration that sentencing judges can consider their disagreement with the crack/powder disparity as a sentencing factor). Also, it is important to remember that the Commission's November 2007 amendment to the Guidelines has tempered the crack/powder sentencing disparity. *See supra* note 33 (discussing the two level reduction for crack offenses pursuant to the 2007 Guidelines amendment).

292. *See* discussion *infra* Parts IV.A.3–V.

293. *See infra* notes 296–310 and accompanying text (discussing the views of Justices Scalia, Thomas, Souter, and Alito regarding their dissatisfaction with the remedy fashioned in *Booker*).

294. *See infra* notes 296–300 and accompanying text (discussing the disapproval of *Booker* by Justices Thomas and Souter).

295. *See infra* notes 301–310 and accompanying text (discussing the disapproval of *Booker* by

commentaries on the issue reveals that all four would be more content under a mandatory sentencing scheme.

The most obvious place to start is with Justice Thomas, who simply refuses to accept *Booker* as stare decisis.[296] Many criticize Justice Thomas as frequently being unwilling to operate under the doctrine of stare decisis altogether.[297] While that might be an overly broad generalization, it certainly holds true in his *Gall* dissent, where he expressly dismisses *Booker* as binding precedent.[298] He makes his position crystal clear in his *Kimbrough* dissent: "I think it best to apply the [sentencing statute excised under *Booker*] as written . . . which makes the Guidelines mandatory."[299] It seems fair to characterize Justice Thomas's position as an unequivocal endorsement for a return to "mandatory" Guidelines.

Justice Souter's stance on the issue is equally clear. In his *Gall* concurrence, Justice Souter states the following:

> After *Booker*'s remedial holding, I continue to think that the best resolution of the tension between substantial consistency throughout the system and the right of jury trial would be a new Act of Congress: *reestablishing a statutory system of mandatory sentencing guidelines* (though not identical to the original in all points of detail), but providing for jury findings of all facts necessary to set the upper range of sentencing discretion.[300]

It would be hard to imagine a more vivid pronouncement of his position on the matter.

Like Justice Souter, Justice Scalia never wanted to make the Guidelines "advisory." In *Rita*, Justice Scalia reiterated this viewpoint:

Justices Scalia and Alito).

296. *See supra* notes 158–162 and accompanying text (discussing Justice Thomas's refusal to accept *Booker* as stare decisis).

297. *See, e.g.*, Natalie Rainforth, Note, *Campaign Finance and* Randall v. Sorrell*: How Much Is Too Much and Who Decides? The Court's Splintering Devotion to Its Own Problematic Framework*, 35 PEPP. L. REV. 161, 198 n.229 (2007) ("Unlike Justice Breyer, Justice Thomas has no qualms about dispensing with long-existing precedent." (citing Randall v. Sorrell, 126 S. Ct. 2479, 2502 (2006) (Thomas, J., concurring only in the judgment))); Douglas T. Kendall, *A Big Question About Clarence Thomas*, WASH. POST, Oct. 14, 2004, at A31, *available at* http://www.washingtonpost.com/wp-dyn/articles/A31117-2004Oct13.html (quoting Justice Scalia as saying Justice Thomas "doesn't believe in *stare decisis*, period").

298. *See* Gall v. United States, 128 S. Ct. 586, 603 (2007) (Thomas, J., dissenting); *see also supra* notes 158–162 and accompanying text.

299. Kimbrough v. United States, 128 S. Ct. 558, 578 (Thomas, J., dissenting); *see also supra* note 162 (quoting Justice Thomas in his abandonment of *Booker* as stare decisis).

300. *Gall*, 128 S. Ct. at 603 (Souter, J., concurring) (emphasis added) (citing Rita v. United States, 127 S. Ct. 2456, 2463–64 (2007)).

> I disagreed with [*Booker*], believing instead that the proper remedy was to *maintain the mandatory character of the Guidelines* and simply to require, for that small category of cases in which a fact was legally essential to the sentence imposed, that the fact be proved to a jury beyond a reasonable doubt or admitted by the defendant.[301]

Justice Scalia did not repeat this sentiment in *Gall* or *Kimbrough*,[302] but it follows from his tone in both concurrences and from his ongoing discussions about the Sixth Amendment implications that he only grudgingly accepts the Guidelines system in place.[303]

Justice Alito is the only of the four justices not to expressly state his wish to go back to a mandatory sentencing scheme, yet. However, his dissents in *Kimbrough* and *Gall* strongly suggest he would be a more-than-willing participant in a movement to abandon the "advisory" Guidelines for something less amorphous.[304] In *Gall*, he spent a great deal of time disagreeing with the deference accorded to district courts in sentencing under the majority view.[305] The tone of his dissent is apparent in his expression of concern that since "sentencing judges need only give lip service to the Guidelines" the result will be that "sentencing disparities will gradually increase."[306] He goes to great lengths to distinguish between "consulting" the Guidelines and "taking the Guidelines into account."[307] That distinction may sound like an exercise in semantics, but it seems unsubtle that when Justice Alito says sentencing courts must "take the Guidelines into account," he means "follow the Guidelines." Perhaps more pointed is the cutting remark from his dissent in *Gall*: "I recognize that the Court is committed to the *Blakely–Booker* line of cases, but we are not required to continue along a path that will take us further and *further off*

---

301. *Rita*, 127 S. Ct. at 2475 (Scalia, J., concurring) (emphasis added) (citing United States v. Booker 543 U.S. 220, 272–91 (2005) (Stevens, J., joined by Scalia & Souter, JJ., dissenting in part)).

302. *See Gall*, 128 S. Ct. at 602–03 (Scalia, J., concurring); *Kimbrough*, 128 S. Ct. at 576–77 (Scalia, J., concurring).

303. *See infra* text accompanying note 311 (quoting Justice Scalia as reluctantly accepting *Booker* as stare decisis).

304. *See Kimbrough*, 128 S. Ct. at 578–79 (Alito, J., dissenting); *Gall*, 128 S. Ct. at 603–10 (Alito, J., dissenting).

305. *See Gall*, 128 S. Ct. at 603–10 (Alito, J., dissenting).

306. *Id.* at 604.

307. *See supra* notes 168–169 and accompanying text (discussing the semantic confusion between the terms "consulting" the Guidelines, "taking [the Guidelines] into account," and "giving significant weight" to the Guidelines).

course."[308] That statement follows his discussion over *Booker* "und[oing]" the Sentencing Reform Act[309] and seems to denote his opinion that mandatory sentencing must have been *on course*.[310] Even if the tone of his dissent is not persuasive, the fact that he is one of the two dissenters in both cases broadening judicial sentencing discretion should be a convincing indicator of his disposition toward the advisory application of the Guidelines.

So with four Justices clearly unhappy with the current sentencing scheme, what is the likelihood of going back to mandatory sentencing? Probably not very high. Even if the Court were to acquire a fifth Justice in support of regression back to mandatory Guidelines, Justice Scalia has made it clear he does "not mean to reopen that debate. As a matter of statutory *stare decisis*, [he] accept[s] *Booker*'s remedial holding that district courts are no longer bound by the Guidelines . . . ."[311] So as intriguing as such a possibility might be, the reality is that Congress and the Commission will likely continue to refine the Guidelines as "advisory."

3. Application of Guidelines Post-*Kimbrough/Gall*

The next questions that should be addressed are: How does *Kimbrough* and *Gall* change the day to day operations of the district courts? And what new responsibilities are now faced by district courts, appellate courts, federal probation officers, and defense attorneys?

The majority opinion in *Gall* laid out a four-step procedure for district courts to follow when departing from the Guidelines.[312] Stated most simply, the court must:

---

308. *Gall*, 128 S. Ct. at 606 (Alito, J., dissenting) (emphasis added).

309. 1984 Act, *supra* note 16.

310. *Gall*, 128 S. Ct. at 606 (Alito, J., dissenting) ("A sentencing system that gives trial judges the discretion to sentence within a specified range not only permits judicial factfinding that may increase a sentence, such a system also gives individual judges discretion to implement their own sentencing policies. This latter feature, whether wise or unwise, has nothing to do with the concerns of the Sixth Amendment, and a principal objective of the Sentencing Reform Act was to take this power out of the hands of individual district judges. The *Booker* remedy, however, *undid this congressional choice*. In curing the Sentencing Reform Act's *perceived* defect regarding judicial factfinding . . . ." (emphasis added)).

311. Rita v. United States, 127 S. Ct. 2456, 2475 (2007) (Scalia, J., concurring).

312. *See Gall*, 128 S. Ct. at 596–97. While the Court did not actually number the steps of the procedure, it took a very formulated approach in laying out its expectations. *Id.* (citing *Rita*, 127 S. Ct. 2456).

1. Correctly calculate the applicable range under the Guidelines.[313]
2. Allow both sides the opportunity to argue for an appropriate sentence.[314]
3. Consider all of the § 3553(a) factors to see if they support a requested sentence.[315]
4. Adequately explain the sentence chosen to provide for a meaningful appellate review.[316]

This procedure is probably not much different than that used by district courts post-*Booker*, except that much more emphasis will be placed on the § 3553(a) factors and record-building.[317]

While it always seems convenient to get a clear, established rule or test from the Court, this one turns out being a bit of a double-edged sword. With such bright-line instruction, district courts are now free to tailor their sentencing colloquy to solidify what might otherwise be an excessive departure from the Guidelines.[318] Conversely, a sentencing judge could

313. *Id.* at 596 ("As we explained in *Rita*, a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range. As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark." (citation omitted) (citing *Rita*, 127 S. Ct. 2456)).

314. *Id.*

315. *Id.* at 596–97 ("[A]fter giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party. In so doing, he may not presume that the Guidelines range is reasonable. He must make an individualized assessment based on the facts presented. If he decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance. We find it uncontroversial that a major departure should be supported by a more significant justification than a minor one." (footnote omitted) (citing *Rita*, 127 S. Ct. 2456)). It is quite likely the application of number three has the potential of creating lengthy records in which the sentencing judges must discuss all of the individual § 3553(a) factors as they relate to the defendant being sentenced. There is one more very important point to make about the requirement of the sentencing court to discuss all of the § 3553(a) factors. In applying these criteria to the facts in *Gall*, the court reasoned that "[s]ince the District Judge correctly calculated and carefully reviewed the Guidelines range, he *necessarily* gave significant weight and consideration to the need to avoid unwarranted disparities." *Id.* at 599 (emphasis added). The court appears to suggest that by simply calculating the Guidelines, the district court has fulfilled its responsibility of considering the need to avoid unwarranted disparities under § 3553(a).

316. *Id.* at 597 ("After settling on the appropriate sentence, he must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing." (citing *Rita*, 127 S. Ct. 2456)).

317. *See supra* note 315 (discussing the criteria outlined by the Supreme Court in *Gall* for consideration of the § 3553(a) factors by district courts prior to departure from the Guidelines).

318. There is always the possibility that a sentencing judge could meticulously build the type of

virtually slam the door shut on any hope for an appeal by making it clear, on the record, that her thoughtful consideration of all of the § 3553 factors led her to unequivocal agreement with the Guidelines range.

Gall did not focus solely on the sentencing courts, but included the expectations of reviewing courts.[319] Enumerated, the procedure would appear as follows:

1. Ensure the district court did not commit procedural error.[320]
2. If no procedural error occurred, review for substantive error under abuse-of-discretion standard.[321]
3. If the sentence is within the Guidelines range, the court *may* apply a presumption of reasonableness.[322]
4. If the sentence falls outside the Guidelines range, the reviewing court cannot apply a presumption of unreasonableness.[323]

Although this is a highly deferential standard, district courts are not free to "give lip service to the Guidelines."[324] The Supreme Court in *Gall* was careful in its admonition that "even though the Guidelines are advisory rather than mandatory, they are . . . the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions."[325] Prior to *Gall*, appellate courts reviewed sentences for "reasonableness," so not much has changed in the way of

---

record *Gall* calls for, but overstate the § 3553 factors in order to accomplish an extraordinary departure from the Guidelines. In fact, it did not take long for sentencing judges to push *Gall* to its outer limits. *See* United States v. Pugh, 515 F.3d 1179 (11th Cir. 2008) (vacating a district court sentence of five years *probation* awarded to a defendant for a child pornography offense that yielded a Guidelines range of 97 to 120 months).

319. *See Gall*, 128 S. Ct. at 597.

320. *Id.* ("[T]he appellate court . . . under an abuse-of-discretion standard . . . must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range.").

321. *Id.* ("When conducting this review, the court will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range.").

322. *Id.*

323. *Id.* ("[I]f the sentence is outside the Guidelines range, the court *may not* apply a presumption of unreasonableness. It may consider the extent of the deviation, but must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance. The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court." (emphasis added)).

324. *Id.* at 604 (Alito, J., dissenting).

325. *Id.* at 594 (majority opinion).

standard of review. The biggest impact on the appellate courts is the wave of sentencing appeals likely to result from *Kimbrough* and *Gall*.[326]

Rarely mentioned is the burden placed on federal probation departments by changes in sentencing practice. Federal probation officers are generally responsible for conducting presentencing investigations and preparing reports used by district courts for sentencing.[327] The presentence report includes all of the relevant sentencing information about the defendant, including a calculation of his Guidelines range for the offense committed.[328] The holdings in *Kimbrough* and *Gall* make it clear that probation officers now need to conduct a more thorough examination of § 3553(a) factors for consideration in possible Guidelines departures cases.

As discussed below, the crack Guidelines amendment is applied retroactively.[329] That means federal probation officers have to go through their files in order to determine who is eligible for the two level sentence reduction for their crack-related offenses.[330] They must then formulate a triage system with which to determine priority of resentencing hearings. It would be likely that those with release dates in the very near future and those with release dates in the distant future would not be affected as acutely as someone with a release date a few years away. Also, sentences of those convicted for offenses involving larger amounts of cocaine are still bound by statutory minimum terms.

Finally, defense attorneys must change the way they do business in light of *Kimbrough* and *Gall*. A defense attorney who does not argue vigorously for a reduced sentence based on any applicable § 3553(a) factors would be neglecting his responsibilities, particularly in crack prosecutions. That raises the question of whether a criminal defense attorney could be held liable for failure to make such an argument when compelling § 3553(a) factors exist but were overlooked in the pre-sentencing investigation.

---

326. *See* discussion *infra* Parts IV.B–V.

327. *See* FED. R. CRIM. P. 32(c) ("The probation officer must conduct a presentence investigation and submit a report to the court before it imposes sentence . . . .").

328. *See* FED. R. CRIM. P. 32(d).

329. *See infra* note 331 and accompanying text (discussing press release of the crack Guidelines amendment issued by the Commission).

330. *See supra* note 33 (discussing the two level reduction for crack offenses pursuant to Guidelines amendment).

B. Unanswered Questions and Practical Implications

1. The High Price of Retroactivity

An issue also exists as to the cost effectiveness of any retroactive applications of *Kimbrough* and *Gall.* In December 2007, the Commission issued a press release stating that pursuant to the Guidelines amendment, a two level sentence reduction for crack offenses would be retroactively applied effective March 2008.[331] What about those who argue their sentences should be reduced further than two levels, based on compelling § 3553(a) factors in light of *Gall*?

The result of *Kimbrough* and *Gall* is essentially the creation of three types of resentencing petitions. First, there are those petitioners who just want their two level reduction in accordance with the retroactive sentencing amendment. Second, there are those who qualify for the two level reduction but wish to argue for a further downward departure based on their § 3553(a) factors.[332] A third category consists of those not necessarily charged with a cocaine offense who argue, and perhaps have a record to support their argument, that the only reason they were not awarded a sentence below the Guidelines range is because their sentencing judge was bound by the pre-*Gall* Guidelines. Even if courts limit sentence appeals to those qualifying for the amended crack sentence, the impact is enormous.[333]

In November 2007, the Assistant Director of the Witness Security and Prisoner Operations Division of the U.S. Marshall's Service (the USMS) testified before the Commission regarding the impact of retroactivity of the crack amendment on the USMS.[334] He estimated that as many as 19,500 inmates could be eligible for travel back to district courts for resentencing at

---

331. Press Release, U.S. Sentencing Comm'n, U.S. Sentencing Commission Votes Unanimously To Apply Amendment Retroactively For Crack Cocaine Offenses (Dec. 11, 2007), http://www.ussc.gov/PRESS/rel121107.htm. While the amendment provided courts with a three-month lag to prepare, courts have granted resentencing hearings for qualifying cases prior to the effective date of the amendment. *See, e.g.*, United States v. Wood, No. CR-88-0723 (CPS), 2008 WL 399253 (E.D.N.Y. Feb. 12, 2008) (reducing a convict's sentence based on the retroactive amendments before March 3, 2008).

332. Aside from stating that any amended sentence must still comply with statutory minimum sentencing, the amendment also generally prohibits reductions when the original sentence was reduced pursuant to *Booker*. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.10(b)(2)(B) (2007) (amended 2008), *available at* http://www.ussc.gov/2007guid/030308rf.pdf ("However, if the original term of imprisonment constituted a nonguideline sentence determined pursuant to 18 U.S.C. § 3553(a) and United States v. Booker, 543 U.S. 220 (2005), a further reduction generally would not be appropriate.").

333. *See infra* text accompanying note 335.

334. *See Hearing on Impact of Crack Cocaine Amendment If Made Retroactive Before the U.S. Sentencing Comm'n* (Nov. 13, 2007) (briefing statement of Sylvester E. Jones, Assistant Director, Witness Security and Prisoner Operations, U.S. Marshall Service), *available at* http://www.ussc.gov/hearings/11_13_07/Jones_Testimony.pdf [hereinafter Jones Briefing Statement].

a cost of $38 million for housing alone.[335] The average transportation cost for one prisoner resentencing is $1,100, which would be an aggregate transportation cost of $42.9 million.[336] His testimony concluded with a summary of the enormous cost and strain on personnel that would be incurred by the USMS if the retroactivity was to be instituted.[337]

Those figures do not consider the second and third category of sentence appeals outlined above.[338] In order to maintain any sort of order and uniformity, sentencing courts are best served by only reducing sentences pursuant to the amended Guidelines and not creating "*Gall* motions" or "*Kimbrough* motions" based on § 3553(a) considerations.[339] This position is grounded in statutory support. Section 3582(c)(2)[340] allows for resentencing based on Guidelines revisions by the Commission but the amended Guidelines do not provide for a *full* resentencing.[341]

---

335. *Id.* at 1–2; *see* Darryl Fears, *Crack-Sentencing Reductions Decried*, WASH. POST, Feb. 7, 2008, at A02, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/02/06/AR2008020603822.html ("In a statement prepared for his scheduled appearance before the House Judiciary Committee today, Attorney General Michael B. Mukasey said that unless Congress acts, '1,600 convicted crack dealers, many of them violent gang members, will be eligible for immediate release into communities nationwide' under a decision by the U.S. Sentencing Commission.").

336. Jones Briefing Statement, *supra* note 334, at 4.

337. *Id.* at 5–6 ("In summary, bringing 19,500 prisoners back for resentencing hearings would result in an enormous additional workload and may require that manpower and funding be diverted from task forces, protection details and new initiatives like the Adam Walsh Child Protection and Safety Act for which the USMS is the lead agency. Add this to the burden 19,500 prisoners would place on a transportation system, JPATS, already working at maximum capacity; a prisoner housing shortage in key areas of the country and the strain on manpower due to the high volume of drug, terrorism and immigration cases . . . with which the USMS is already dealing and you can see why the USMS is concerned with the possibility of the Crack Cocaine Amendment becoming retroactive.").

338. *See supra* text accompanying note 332. Consider cases involving defendants who have been sentenced for federal crack cocaine offenses under the Guidelines prior to *Kimbrough* and *Gall*. If they are able to construct a colorable argument that they would have been given a sentence reduced by more than two levels based on their individual records *but for* strict adherence to the 100-to-1 ratio, should their claim be foreclosed by the crack amendment?

339. *See supra* note 122 (listing all of the factors under § 3553(a)).

340. 18 U.S.C. § 3582(c)(2) (2006) ("[I]n the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.").

341. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.10(a)(3) (2007) (amended 2008), *available at* http://www.ussc.gov/2007guid/030308rf.pdf ("[P]roceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant.").

2. Correcting One Disparity Only to Create Another

It is often said that the road to hell is paved with good intentions. While perhaps well-intentioned, *Kimbrough* and *Gall* have the potential of moving courts further away from the consistency envisioned by the Commission. In *Booker*, Justice Scalia stated that "logic compels the conclusion that the sentencing judge, after considering the recited factors (including the Guidelines), has full discretion, as full as what he possessed before the [1984] Act was passed, to sentence anywhere within the statutory range."[342] Failure to practice judicial restraint will result in the return of sentencing courts to the slippery indeterminate slope upon which they operated prior to the Guidelines.[343] *Kimbrough* and *Gall* illustrate this point.

In *Kimbrough*, the Government argued that sentencing disparities would arise based on varying views of the crack/powder disparity from one district court to the next.[344] Instead of addressing that very legitimate concern, the Court responded with the assurance that the system would "take care of it."[345] That response is less than comforting. As demonstrated in Figures 1–8, district courts have clearly departed from the Guidelines at an increased rate post-*Booker*.[346] District court sentences fell within the Guidelines ranges around 70% of the time in 2003, 2004, and pre-*Booker* 2005.[347] However, those "within Guidelines" percentages dropped to less than 62% in post-*Booker* 2005 and throughout 2006.[348] Will that percentage continue to decrease insomuch as *Gall* and *Kimbrough* allow it to happen?[349]

---

342. United States v. Booker, 543 U.S. 220, 305 (2005) (Scalia, J., dissenting).

343. *See supra* note 18 (discussing the failure of indeterminate sentencing to provide any sort of uniformity or consistency between sentences for similarly situated defendants).

344. *See supra* notes 241–242 and accompanying text (outlining the Government's argument that different judges would sentence defendants inconsistently based on each judges' feeling towards the crack/powder disparity).

345. *See supra* notes 241–242 and accompanying text (quoting the Court's assertion that advisory Guidelines coupled with appellate review will help ensure consistent sentencing practices). *But cf. Booker*, 543 U.S. at 305 (Scalia, J., dissenting) ("'[A]void[ing] unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct' . . . would require a judge to adhere to the Guidelines only if all other judges had to adhere to the Guidelines (which they certainly do not, as the Court holds today) or if all other judges could at least be expected to adhere to the Guidelines (which they certainly cannot, given the notorious unpopularity of the Guidelines with many district judges)" (quoting 18 U.S.C. § 3553(a)(6))).

346. *See* Appendix, *infra* (displaying Guidelines departures statistics from 2001 to 2006).

347. *See* Appendix, *infra* figs. 3–6 (displaying Guidelines departures statistics from 2003 to pre-*Booker* 2005).

348. *See* Appendix, *infra* figs. 7–8 (displaying Guidelines departures statistics from post-*Booker* 2005 to 2006).

349. Somehow, the *Gall* Court managed to both marginalize the Guidelines and praise them at the same time. *See* Gall v. United States, 128 S. Ct. 586, 594 (2007) ("[E]ven though the Guidelines are advisory rather than mandatory, they are, as we pointed out in *Rita*, the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions." (citing Rita v. United States, 127 S. Ct. 2456 (2007))). The Court then goes

Even more disturbing is the idea that the *Kimbrough* Court acknowledges the amendment to the Guidelines reducing the 100-to-1 ratio but fails to factor that into its analysis.[350] Instead, the Court turns its collar to the cold reality that not only will convicted crack traffickers be subject to a lower Guidelines range in the future,[351] but thanks to *Kimbrough*, judges will have the option of disagreeing with *any* remaining "disparity" in the crack/powder ratio and reducing the sentence even further. This is expressly the reason why Justice Alito states, in the closing line of *Kimbrough*, that "[he] would not draw a distinction between the Guideline at issue . . . and other Guidelines."[352] If a sentencing judge is free to disagree with the crack/powder disparity, why not disagree with the amount of heroine or any other drug on the sentencing schedule under the Guidelines? This is the precarious precedent set by *Kimbrough*.

To fully appreciate the effects of *Kimbrough* and *Gall*, consider the following hypothetical situation: Imagine a scenario with a twenty-year-old college student and a twenty-year-old drug dealer. The drug dealer has been selling crack and committing other related crimes for the last two years. Somehow he has managed to evade law enforcement, thus having no criminal record. The college student has never committed a crime and lived an exemplary life, but in a terrible lapse of judgment, he agrees to accept payment of a large sum of money in exchange for driving a car with a sealed trunk from point A to point B. He knows he is probably doing something wrong, but needing the money, he gives into the pressure. He is pulled over by the police to discover he is trafficking 4.9 grams of crack. Coincidentally the drug dealer is arrested on the same evening in the adjacent federal court district carrying the exact same amount of crack.

---

on to distinguish drugs as the exception because the drug Guidelines ranges were keyed off of Congress's mandatory minimum statutes. *Id.*

350. *Kimbrough* was decided on December 10, 2007 and included the following statement in a footnote: "The Commission has not yet determined whether the [crack] amendment will be retroactive to cover defendants like Kimbrough." Kimbrough v. United States, 128 S. Ct. 558, 569 n.11 (2007). The following day, on December 11, 2007, the Commission issued a press release entitled "U.S. Sentencing Commission Votes Unanimously to Apply Amendment Retroactively for Crack Cocaine Offenses." *See* Press Release, *supra* note 331 (discussing the Commission's press release that crack offenses would receive a two level reduction under the Guidelines). Does the U.S. Supreme Court not have the Commission's phone number?

351. *See supra* notes 33–36 and accompanying text (discussing the two level reduction for crack offenses after the Guidelines amendment was passed).

352. *Kimbrough*, 128 S. Ct. at 579 (Alito, J., dissenting); *see supra* notes 267–269 and accompanying text (discussing Justice Alito's dissent in *Gall*).

Lucky for both of them, 4.9 grams falls just beneath the mandatory minimum sentencing statute.[353] On sentencing day the judge rejects the college student's deliberate ignorance defense.[354] The two different judges calculate the sentencing range under the Guidelines and both arrive at thirty-three to forty-one months.[355] The judge sentencing the drug dealer, sympathetic to first-time offenders, delivers an extensive and moving colloquy, listing all of the § 3553(a) factors in detail.[356] Just as in *Gall*, the judge relies heavily on the drug dealer's age and substance abuse problems, ultimately deciding to sentence the drug dealer to probation.[357] In contrast, the judge sentencing the college student launches into a tirade about the evils of drug use and the need to make examples of drug traffickers. The judge relies on the identical § 3553(a) factors to prove that the college student squandered his opportunity at a good life and sentences the student to forty-one months in prison.[358]

Given that scenario, the seemingly excessive sentence given to the student would fall within the Guidelines and therefore be presumptively reasonable upon appellate review.[359] Because the drug dealer's sentencing judge built such a thorough and compelling record, the drug dealer's probation sentence would likely be upheld, vis-à-vis *Gall*.[360] Upon reading such an extreme hypothetical situation, one's first reaction might be to

353. *See supra* note 24 and accompanying text (citing federal statute prescribing five year minimum prison sentence for crack offenses involving at least five grams of crack).

354. "Deliberate ignorance" is the term often used by courts to describe the actions of defendants who are aware of a high probability that they are committing a crime but intentionally choose to avoid or ignore the truth regarding their own criminal wrongdoing. *See generally* Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 J. CRIM. L. & CRIMINOLOGY 191 (1990) (discussing the different practical and philosophical approaches to the doctrine of deliberate ignorance); *see also* Jessica A. Kozlov-Davis, *A Hybrid Approach to the Use of Deliberate Ignorance in Conspiracy Cases*, 100 MICH. L. REV. 473 (2001) (comparing different approaches to deliberate ignorance, including that of the Model Penal Code, but with more of a focus on how courts have used the deliberate ignorance instruction in the context of conspiracy cases).

355. This hypothetical involves two individuals with no criminal history, which would place them in Criminal History Category I under the Guidelines. *See* U.S. SENTENCING GUIDELINES MANUAL § 4A1.1 (2007). Trafficking 4.9 grams of crack would place the base offense level at 20. *See id.* § 2D1.1. Considering no other sentencing factors, a defendant in Criminal History Category I who committed a crime at offense level 20 would be subject to a sentencing range of thirty-three to forty-one months under the Guidelines. *See id.* §5A.

356. *See supra* note 122 (listing all of the factors under § 3553(a)).

357. *See supra* notes 137–145 and accompanying text (discussing the courts inappropriate reliance on Gall's age and chemical dependency as factors in an extraordinary downward departure from the Guidelines).

358. *See supra* note 122 (listing all of the factors under § 3553(a)).

359. *See supra* notes 66–67 and accompanying text (discussing the rule from *Rita*, that a sentence within its prescribed Guidelines range is presumptively reasonable for purposes of appellate review).

360. *See supra* note 316 and accompanying text (stating the importance of adequately explaining the sentence chosen by the sentencing judge on the record to provide for meaningful review upon appeal).

dismiss it. But consider the facts of *Gall*: Brian Gall was convicted of conspiracy to sell over 2,500 grams of ecstacy over the course of seven months and he was sentenced to probation.[361] That sentence is trivial by any standard, except perhaps that of the Supreme Court.[362]

That raises the issue of Brian Gall's individual situation. The record indicates that Gall really did rehabilitate while out on bail awaiting trial.[363] He turned his life around, which is the central purpose of the criminal justice system. But what facilitated this turnaround? Why did he quit selling drugs in the first place? He quit over "concerns that [one of his co-conspirators] was telling too many people about their ecstasy distribution business."[364] This is a crucial point. Brian Gall quit selling drugs because he was afraid of prosecution.

The majority portrayed Gall's withdrawal much more favorably than the facts in the record.[365] Some might argue: "What difference does it make *why* he withdrew? He withdrew." That is the logic of the majority, but it misses the mark. Brian Gall likely never would have withdrawn from such a lucrative conspiracy had he known the penalty would be probation. The only reasonable inference to be drawn is that Gall was operating under the reasonable assumption that the penalty for his criminal conduct was a lengthy prison term, which in fact it was under the Guidelines.[366] So

361. *See supra* Part III.A.1 (reciting the facts of *Gall*, including his earning of over $30,000 during his participation in the conspiracy).

362. *See supra* notes 116–117 and accompanying notes (questioning the Court's description of the "hardships" of probation). The district court in *Gall* relies on three cases, one unreported, to support its assertion that "[o]ther courts have recognized . . . the Guidelines calculations based on drug amount may overrepresent the actual offense conduct." *See* United States v. Gall, 374 F. Supp. 2d 758, 764 n.5 (S.D. Iowa 2005), *rev'd*, 446 F.3d 884 (8th Cir. 2006), *rev'd*, 128 S. Ct. 586 (2007). However, all three cases cited, even after significant downward departures, resulted in lengthy prison sentences. *See id.* (citing United States v. Smith, 359 F. Supp. 2d 771, 776 (E.D. Wis. 2005) (departing from Guidelines range of 121 to 151 months to sentence defendant to *18 months in prison* followed by five years of supervised release based in large part on the court's disagreement with the 100-to-1 cocaine ratio); United States v. Nellum, No. 2:04-CR-30-PS, 2005 WL 300073, at *5 (N.D. Ind. Feb. 3, 2005) (departing from Guidelines range of 168 to 210 months to sentence defendant to *108 months in prison* followed by four years of supervised release relying, in part, on 100-to-1 cocaine ratio); United States v. Huerta-Rodriguez, 355 F. Supp. 2d 1019, 1026 n. 6 (D. Neb. 2005) (departing from proposed Guidelines range of 57 to 70 months to sentence defendant to *36 months in prison* followed by three years of supervised release if not deported)). Remarkably, the district court offers no cases involving a sentence of only probation, like that given to Gall. *See id.*

363. *See supra* Part III.A.1 (reciting the facts of *Gall*, including his quitting drugs, turning his back on crime, and successfully starting his own business).

364. United States v. Gall, 446 F.3d 884, 886 (8th Cir. 2006), *rev'd*, 128 S. Ct. 586 (2007).

365. *See supra* note 88 (discussing the very different perspectives of Gall's "voluntary" withdrawal from the conspiracy).

366. *See supra* note 95 and accompanying text (explaining that Gall's sentencing range under the

according to the record, the Guidelines actually worked to deter Gall from further criminal behavior. The Court's reaction to this reality is to dismiss the Guidelines, thus doing a disservice to the next drug dealer with the sanguine hopes that if he gets caught he will receive a sentence of probation.

V. CONCLUSION

Federal judges need a certain amount of discretion in sentencing criminal defendants. If sentencing is to be nothing more than a calculation of numbers predetermined by a probation officer, then why have sentencing judges at all? The Court in *Gall* was faced with a very difficult choice between blindly applying the rule of law with the unfortunate outcome of sending a potentially rehabilitated defendant to prison or rewriting the individual facts of the case around the existing law. The Court chose the latter, fitting a square peg into a round hole in order to give Gall a second chance.[367]

Justices Scalia, Souter, Thomas, and Alito provide the only certain alternative to inconsistent sentencing: re-institute the mandatory Guidelines but provide for a Sixth Amendment provision requiring additional sentencing facts to be put to a jury or pled by the defendant.[368] Unfortunately, that solution would completely strip federal judges of their much-needed discretion.

Kimbrough on the other hand, offers an overreaching, too-little-too-late remedy.[369] Enacting federal criminal sentencing statutes and Guidelines is the sole province of Congress and the Commission.[370] It is not the

---

Guidelines was thirty to thirty-seven months in prison).

367. In order to somehow justify a sentence of probation for Gall, the majority overstated Gall's immaturity, the impact of his drug use, and the harshness of probation. *See supra* notes 137–145 and accompanying text (discussing the courts inappropriate reliance on Gall's age and chemical dependency as factors in an extraordinary downward departure from the Guidelines); *supra* notes 116–117 and accompanying text (debating the Court's description of the "hardships" of probation). Furthermore, the majority completely mischaracterizes Gall's withdrawal from the conspiracy. *See supra* note 88 (discussing the conflicting perspectives of Gall's "voluntary" withdrawal from the conspiracy).

368. *See supra* Part IV.A.2 (discussing the preference of the four Justices for returning to a mandatory sentencing scheme).

369. *See supra* notes 350–352 and accompanying text (discussing Guidelines amendment for crack in relation to *Kimbrough*).

370. Mistretta v. United States, 488 U.S. 361, 371 (1989) (discussing delegation of power); *see* Goldberg v. Kelly, 397 U.S. 254, 273–74 (1970) (Black, J., dissenting).

> Representatives of the people of the Thirteen Original Colonies spent long, hot months in the summer of 1787 in Philadelphia, Pennsylvania, creating a government of limited powers. They divided it into three departments—Legislative, Judicial, and Executive. The Judicial Department was to have no part whatever in making any laws. In fact proposals looking to vesting some power in the Judiciary to take part in the legislative process and veto laws were offered, considered, and rejected by the Constitutional Convention. In my judgment there is not one word, phrase, or sentence from the

responsibility of the Supreme Court to issue directives to sentencing courts to disregard some Guidelines they might disfavor and not others. The Court's holding that the sentencing Guidelines for crack-related offenses are as advisory as any other under *Booker* presents little issue.[371] However, the declaration that district courts are free to "conclude . . . that the crack/powder disparity yields a sentence 'greater than necessary' . . . even in a mine-run case" is too vague and expansive.[372] Clearly, the intent of Congress is not to eliminate all disparity in the ratio.[373] Can sentencing judges now ignore any disparity all together and sentence 1-to-1 or would that be going too far?

In the end, it seems highly unlikely that *Kimbrough* and *Gall* will result in any sort of exodus from the Guidelines. When justice requires, district courts should continue to depart from the Guidelines as prescribed by *Kimbrough* and *Gall*. In doing so, however, sentencing judges must be wary of pitfalls awaiting jurists who fail to zealously protect the delicate balance between fairness and consistency.

Chris Gaspard[374]

> beginning to the end of the Constitution from which it can be inferred that judges were granted any such legislative power. . . . [W]hen federal judges use this judicial power for legislative purposes, I think they wander out of their field of vested powers and transgress into the area constitutionally assigned to the Congress and the people.

Id. (footnote omitted).

371. *See supra* note 225 and accompanying text (discussing advisory nature of Guidelines post-*Booker*).

372. Kimbrough v. United States, 128 S. Ct. 558, 575 (2007).

373. *See supra* note 222 (discussing Congress's rejection of a 1-to-1 ratio in 1995, and non-response to recommendations by the Commission to reduce the ratio to 5-to-1 in 1997, and again to 20-to-1 in 2002).

374. Juris Doctor, December 2008, Pepperdine University School of Law. I would like to thank the Honorable Rebecca F. Doherty at the United States District Court for the Western District of Louisiana and her law clerks, Heather Edwards and Kohlie Franzen. I could not have written this article without the extensive counsel and advice of Mrs. Edwards. However, this article in no way reflects her remarkable legal writing ability. I would also be remiss in failing to thank my editor, Tarak Anada, for his patience and inspiration.

APPENDIX

Fig. 1: Fiscal Year 2006 Guidelines Departure Status[375]

TOTAL	70,187	100.0%
Sentenced Within Guideline Range	43,307	61.7%
Upward Departure from Guideline Range	412	0.6%
Upward Departure with *Booker*/18 U.S.C. § 3553	177	0.3%
Above Guideline Range with *Booker*/18 U.S.C. § 3553	455	0.6%
All Remaining Cases Above Guideline Range	85	0.1%
§ 5K1.1 Substantial Assistance Departure	10,139	14.4%
§ 5K3.1 Early Disposition Program Departure	5,166	7.4%
Other Government-Sponsored Below Guideline Range	1,939	2.8%
Downward Departure from Guideline Range	1,903	2.7%
Downward Departure with *Booker*/18 U.S.C. § 3553	1,432	2.0%
Below Guideline Range with *Booker*/18 U.S.C. § 3553	4,243	6.0%
All Remaining Cases Below Guideline Range	929	1.3%

375. U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS app. A n.2 (11th ed. 2006), *available at* http://www.ussc.gov/ANNRPT/2006/appendix_A.pdf ("Cases with missing or inapplicable departure information are excluded. Nationally, this involves the exclusion of 2,398 cases.").

Fig. 2: Post-*Booker* Fiscal Year 2005 Guidelines Departures Status (01/12/05–09/30/05)[376]

TOTAL	51,346	100.0%
Sentenced Within Guideline Range	31,623	61.6%
Upward Departure from the Guideline Range	100	0.2%
Upward Departure with *Booker*/18 U.S.C. § 3553	36	0.1%
Above the Range with *Booker*/18 U.S.C. § 3553	343	0.7%
All Remaining Cases Above the Guideline Range	342	0.7%
§ 5K1.1 Substantial Assistance Departure	7,524	14.7%
§ 5K3.1 Early Disposition Program Departure	3,208	6.2%
Government-Sponsored Departure	1,481	2.9%
Downward Departure from the Guideline Range	1,197	2.3%
Downward Departure with *Booker*/18 U.S.C. § 3553	487	0.9%
Below the Range with *Booker*/18 U.S.C. § 3553	3,199	6.2%
All Remaining Cases Below the Guideline Range	1,806	3.5%

376. U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS app. A n.2 (Post-*Booker*) (10th ed. 2005), *available at* http://www.ussc.gov/ANNRPT/2005/Appendix_A_Post.pdf. ("Cases with missing or inapplicable departure information are excluded. Nationally, this involves the exclusion of 2,327 cases.").

Fig. 3: Pre-*Booker* Fiscal Year 2005 Guidelines Departures Status (10/01/04–01/11/05)[377]

TOTAL	17,504	100.0%
Sentenced Within Guideline Range	12,406	70.9%
Substantial Assistance Departure	2,575	14.7%
Government Sponsored Downward Departure	1,643	9.4%
Other Downward Departure	752	4.3%
Upward Departure	128	0.7%

Fig. 4: Post-*Blakely* Fiscal Year 2004 Guidelines Departures Status (06/25/04–09/30/04)[378]

TOTAL	16,792	100.0%
Sentenced Within Guideline Range	12,059	71.8%
Substantial Assistance Departure	2,425	14.4%
Government Sponsored Downward Departure	1,441	8.6%
Other Downward Departure	772	4.6%
Upward Departure	95	0.6%

377. U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS app. A n.2 (Pre-*Booker*) (10th ed. 2005), *available at* http://www.ussc.gov/ANNRPT/2005/Appendix_A_Pre.pdf ("Cases with missing or inapplicable departure information are excluded. Nationally, this involves the exclusion of 1,284 cases.").

378. U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS app. A n.2 (Post-*Blakely*) (9th ed. 2004), *available at* http://www.ussc.gov/ANNRPT/2004/Appendix_A_Post.pdf ("Cases with missing or inapplicable departure information are excluded. Nationally, this involves the exclusion of 1,411 cases.").

Fig. 5: Pre-*Blakely* Fiscal Year 2004 Guidelines Departures Status (10/01/03–06/24/04)[379]

TOTAL	48,251	100.0%
Sentenced Within Guideline Range	34,815	72.2%
Substantial Assistance Departure	7,484	15.5%
Government Sponsored Downward Departure	3,071	6.4%
Other Downward Departure	2,499	5.2%
Upward Departure	382	0.8%

Fig. 6: Fiscal Year 2003 Guidelines Departures Status[380]

TOTAL	65,171	100.0%
Sentenced Within Guideline Range	45,253	69.4%
Substantial Assistance Departure	10,360	15.9%
Government Initiated Downward Departure	4,121	6.3%
Other Downward Departure	4,896	7.5%
Upward Departure	541	0.8%

379. U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS app. A n.2 (Pre-*Blakely*) (9th ed. 2004), *available at* http://www.ussc.gov/ANNRPT/2004/Appendix_A_Pre.pdf ("Cases with missing or inapplicable departure information are excluded. Nationally, this involves the exclusion of 3,614 cases.").

380. U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS app. A n.2 (8th ed. 2003), *available at* http://www.ussc.gov/ANNRPT/2003/AppA_03.htm ("Cases with missing or inapplicable departure information are excluded. Nationally, this involves the exclusion of 5,087 cases.").

Fig. 7: Fiscal Year 2002 Guidelines Departures Status[381]

TOTAL	58,684	100.0%
Sentenced Within Guideline Range	38,159	65.0%
Substantial Assistance Departure	10,203	17.4%
Other Downward Departure	9,865	16.8%
Upward Departure	457	0.8%

Fig. 8: Fiscal Year 2001 Guidelines Departures Status[382]

TOTAL	54,851	100.0%
Sentenced Within Guideline Range	35,128	64.0%
Substantial Assistance Departure	9,390	17.1%
Other Downward Departure	10,026	18.3%
Upward Departure	307	0.6%

381. U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS app. A n.2 (7th ed. 2002), *available at* http://www.ussc.gov/ANNRPT/2002/AppA_02.htm ("Cases with missing or inapplicable departure information are excluded. Nationally, this involves the exclusion of 5,682 cases.").

382. U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS app. A n.2 (6th ed. 2001), *available at* http://www.ussc.gov/ANNRPT/2001/AppA_01.htm ("Cases with missing or indeterminable departure information are excluded. Nationally, this involves the exclusion of 5,046 cases.").