

Sentencing with Discretion: Crack Cocaine Sentencing After *Booker*

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SENTENCING WITH DISCRETION: CRACK COCAINE SENTENCING AFTER *BOOKER*

“A judge should be hesitant before sentencing so severely that he destroys all hope and takes away all possibility of useful life. Punishment should not be more severe than that necessary to satisfy the goals of punishment.” – Judge Hellerstein, *United States v. Carvajal*

Perhaps no element of federal sentencing has garnered more attention and analysis over the past two decades than the sentencing structure for crack and powder cocaine. As a result of legislation adopted by Congress in 1986 and 1988, the penalty structure for crack cocaine is far harsher than for powder cocaine. A conviction for sale of 500 grams of powder cocaine results in a 5-year mandatory minimum sentence, while the same penalty is triggered for sale or *possession* of only 5 grams of crack cocaine. Thus, the federal sentencing system applies a 100-to-1 quantity disparity when dealing with crack and powder cocaine, which are essentially the same drug. These laws have had devastating consequences for the African American community and resulted in severe sentences that many have identified as unjust. In the 20 years since the passage of this legislation, there have been numerous calls for reform from advocates, policymakers and the United States Sentencing Commission (“Commission”), but the 100-to-1 sentencing disparity between powder and crack cocaine still remains controlling law.

The dynamics of crack cocaine sentencing were significantly affected by the Supreme Court decision in the case of *United States v. Booker*.¹ That decision was in regard to the issue of whether certain sentencing procedures in the federal court system were able to pass constitutional muster in light of the previous year’s ruling in *Blakely v. Washington*. In *Blakely*, the Court had struck down a provision of the Washington State sentencing guidelines system as unconstitutional because it permitted a judge, when deciding whether to enhance a sentence above the guideline range, to consider factors that had not been proven beyond a reasonable doubt in front of a jury. The ruling in *Booker* confirmed that the holding in *Blakely* was applicable to the Federal Guidelines. In the remedial opinion, the Court severed two provisions from the Sentencing Reform Act, while keeping intact the rest of the Guidelines system. However, in doing so, the Guidelines, formerly mandatory, were rendered advisory. This dramatically changed the sentencing landscape and raised one of the federal system’s most contentious characteristics to center-stage.

The *Booker* decision’s potential impact on crack cocaine sentencing is significant due to the volume of cases, although this is tempered by the pervasiveness of mandatory minimum sentences. In fiscal year 2003 (the most recent year for which data are available), federal courts sentenced 5,462 persons for crack cocaine offenses. Three-fourths of this group were sentenced to mandatory prison terms of either five years (28.9%) or ten years (47.5%). Thus, the *Booker* decision permits judges to exercise greater discretion only in two types of cases: 1) the one-quarter of cases where a mandatory sentence does not apply; or, 2) in the consideration of enhancements beyond the baseline sentence in the vast majority of cases where a mandatory does apply.

This briefing paper analyzes 24 written federal court decisions in 2005 that specifically implicate *Booker* (see table on page 4) to assess how courts have adjusted sentencing strategies for crack

¹ *United States v. Booker*, 125 S.Ct. 738 (2005).

cocaine under this new system.² While these represent a very modest proportion of crack cocaine sentences, it should be noted that in the vast majority of sentencing cases no written decision is produced. Practitioners in the federal courts suggest that many of the dynamics noted in this analysis apply to significant numbers of additional crack cocaine cases.

Key findings of this analysis include:

FEDERAL JUDGES CONTINUE TO IMPOSE STIFF PRISON SENTENCES DESPITE DEVIATIONS FROM THE GUIDELINES

Most of the crack cocaine defendants covered by these written opinions received substantial prison terms, averaging nearly 11 years. But judicial consideration of sentencing factors now required by the Supreme Court's *Booker* decision resulted in sentences below the Guideline range.

JUDGES CONSIDER MULTIPLE FACTORS IN SENTENCING PROCESS

Federal judges are employing the discretion permitted by the *Booker* decision to carefully assess individual case characteristics and, in selected cases, to calibrate sentences that more appropriately meet the statutory goals of sentencing.

Key sentencing factors include:

Relative Weight of Guidelines

- Crack cocaine sentencing is affected by the relative weight given to the advisory Guideline sentence compared to other factors for which judges now have greater latitude of consideration.
- Overall, of the 24 cases analyzed, 22 decisions granted equal weight to relevant case factors and the Guidelines when determining sentence and two courts explicitly granted the Guidelines greater weight than other criteria.

Goals of Sentencing

- Federal courts frequently held that the 100-to-1 powder/crack cocaine ratio would have produced sentences “greater than necessary” to achieve the statutorily prescribed sentencing goals.

Individual Circumstances

- Most courts considered the circumstances of the offense and the characteristics of the defendant, which introduced elements that warranted departure from the Guideline-suggested range.

² While every effort was made to identify and document all written decisions, we make no claim to this report being a complete enumeration of written decisions. We do not analyze cases that are an appeal of a sentence or a re-sentence order in light of the *Booker* decision, nor do we examine cases addressing the “reasonableness” criteria of the *Booker* decision.

Sentencing Commission Recommendations

- Most of the courts granted significant weight to United States Sentencing Commission recommendations, particularly regarding a reduction in the 100-to-1 ratio to 20-to-1 or 10-to-1.

RECOMMENDATIONS FOR SENTENCING POLICY

No Need for “Booker Fix”

Current evidence suggests that the adoption of new mandatory provisions to enforce the Guidelines is unnecessary. Our analysis demonstrates that when judges are given flexibility to consider the full merits of each case, they are likely to impose stiff penalties for serious offenses but will distinguish these from cases in which the defendant is less culpable or less of a threat to public safety.

Reconsider Crack Cocaine Penalty Structure

Post-*Booker* sentencing in crack cocaine cases lends support to the need for a reconsideration of the mandatory penalty structure. Congress should review the recommendations of the Sentencing Commission regarding the powder/crack cocaine sentencing disparity and reconsider proposals to amend the law. Such a change would permit judges to consider the full range of sentencing criteria in all crack cocaine cases, rather than in just the relatively modest number of cases permissible under the current sentencing structure.

CASE OUTCOMES

CASE NAME	GUIDELINE RANGE (months)	SENTENCE (months)	RATIONALE
<i>Simon v. US</i>	324-405	262	Guideline range “indisputably severe”
<i>US v. Avilez</i>	46-57	Probation; one year of community confinement	Defendant suffered from diminished mental capacity; “disconnected” from the crack cocaine transactions; acted at the control of co-defendant and no evidence to indicate that he played an operational role in the enterprise
<i>US v. Beamon</i>	108-135	51	Defendant offered substantial assistance to government investigation; also noted defendant’s community service, importance to family
<i>US v. Carvajal</i>	262-327	168	Guideline sentence provides no incentive for rehabilitation
<i>US v. Castillo</i>	135-168	87	Follows holding in <i>Smith</i> ; 20:1 ratio
<i>US v. Clay</i>	188-235	156	Guidelines should be followed except when “clearly outweighed” by other factors; Court considers personal characteristics and 100:1 disparity, which outweigh presumption of Guideline range
<i>US v. Fisher</i>	295-353	211	10:1 ratio; includes 60 month mandatory minimum
<i>US v. Harris</i>	120-150	96	Guideline range is “greater than necessary,” while the mandatory minimum sufficiently reflects the seriousness of the offense
<i>US v. Hubbard</i>	360-Life	262	It was not proven in front of jury that substance was crack; judge substituted powder Guideline range
<i>US v. Leroy</i>	100-125	70	20:1 ratio
<i>US v. Lewis</i>	235-293	188	20:1 ratio; this sentence “sufficient to accomplish the statutory purposes;” sentenced above the 10-year mandatory minimum
<i>US v. Moreland</i>	360-Life	120	Career offender enhancement overstates the criminal history of the defendant; without the enhancement the Guideline range would have been 78-97 months; sentence exceeds “pure” Guideline range and is more than sufficient to address the seriousness of the offense.
<i>US v. Nellum</i>	168-210	108	Guideline range “greater than necessary”
<i>US v. Perry</i>	188-235	120	Mandatory minimum; Guideline range too severe and cannot withstand statutory analysis

<i>US v. Person</i>	262-327	84	“career offender status would grossly overstate the seriousness of the defendant’s criminal history;” defendant participated in low-level sale and has a “high capacity for rehabilitation;” he has employment prospects and familial support
<i>US v. Phelps</i>	144-165	150	Court examines all of the relevant sentencing criteria and concludes that the characteristics of the defendant and the circumstances of the offense do not warrant a non-Guideline sentence.
<i>US v. Pho</i>	87-108	64	20:1 ratio; the 100:1 ratio is “excessive” and “not reasonable;” sentenced above the 5-year mandatory minimum
<i>US v. Roundtree</i>	70-87	60	Guideline range is “greater than necessary;” while the mandatory minimum sufficiently reflects the seriousness of the offense
<i>US v. Smith</i>	121-151	18	20:1 ratio ³
<i>US v. Stukes</i>	46-57	33	Follows <i>Smith</i> holding; 20:1 ratio “will mitigate the disparity between this sentence and one imposed on a defendant that engaged in substantially similar conduct that involved powder cocaine rather than crack.”
<i>US v. Tabor</i>	188-235	200	Guidelines should be given “heavy weight;” departure would be an overextension of judicial powers
<i>US v. Thomas</i>	360-Life	262	It was not proven in front of jury that substance was crack; judge substituted powder Guideline range
<i>US v. Valentin</i>	2-8; or probation	5	No measurable disparity between powder and crack cocaine sentence in this low-level possession case; characteristics of defendant do not warrant a non-Guideline sentence
<i>US v. Williams</i>	360-Life	204	Guideline sentence far too severe to meet goals of sentence; does not promote respect for the law

³ The Court used 20:1 as a framework, but held that other factors under §3553(a) required a further departure. See pp. 16-17.

UNITED STATES V. BOOKER

In light of the decision in *Booker*, there is renewed attention paid to the manner in which judges assess the sentencing criteria in the Sentencing Reform Act, which established the Federal Sentencing Guidelines. Prior to *Booker*, the federal Guidelines were mandatory, and absent exceptional circumstances, judges were limited in their ability to depart from the prescribed range. Moreover, judges were constrained as to the types of factors that could be considered in determining if a departure was warranted. During this period, the most frequent reason for sentencing below the Guideline range was in response to a governmental request due to the defendant supplying substantial assistance to an ongoing investigation. Other factors, such as the defendant's age, health or personal circumstances were generally deemed not relevant to sentencing.

The decision in *Booker* changed these mechanics of sentencing. Judges are now instructed to consider a host of relevant conduct factors, with the Guidelines being just one of these elements. In doing so, judges are still governed by the dictates of the sentencing statutes, but are given wider latitude in examining factors that previously had been discouraged.

In the wake of *Booker*, there has been significant variance in the interpretation of a number of critical elements of the Sentencing Reform Act both among the circuits as well as the district courts. The lack of precise guidance by the Supreme Court in *Booker* regarding certain components of federal sentencing has amplified the importance of understanding how courts are operating post-*Booker*. One way to measure change in the operations of federal courts is to analyze trends in court sentencing data. In the ten months between the *Booker* decision and October 31, 2005, 61.7% of all federal sentences issued were within the Guideline range.⁴ This figure is consistent with Guideline compliance rates from past years and does not indicate a break from the trend of the last decade. Historically, the primary catalyst for fluctuations in compliance rates (notably the declining trend in the 1990s) was the growth in government-initiated requests for departure. This continues in the post-*Booker* era, where 24.2% of sentences were outside of the Guideline-recommended range at the behest of Government counsel, usually as the result of the defendant cooperating with an ongoing investigation.

One in eight defendants (12.8%) were sentenced below the Guideline range for reasons other than a Government recommendation. It is in this category where the "*Booker* departures" are located. Seven percent of all post-*Booker* federal sentences have been identified by the United States Sentencing Commission as those which mention *Booker* as a reason for a non-Guideline sentence.

Thus, despite concerns by critics of the *Booker* decision that it would result in a flood of downward departures issued by federal judges, the data indicate that judges have been sentencing in much the same fashion as in the past. Only 1 in 14 federal sentences even mention *Booker* as a reason for departure (a conservative proxy for identifying the impact of *Booker* on sentencing dynamics), while nearly two-thirds of all downward departures come at the request of federal prosecutors. Moreover, mean and median sentence lengths for all offenses over the last five

⁴ UNITED STATES SENTENCING COMMISSION, SPECIAL POST-BOOKER CODING PROJECT, DATA EXTRACTION AS OF NOVEMBER 1, 2005 (2005).

years have remained stable, and post-*Booker* measures are identical to 2004 and *higher* than any other year between 2000 and 2003.

These trends do not suggest a seismic shift in federal sentencing, and seem more illustrative of “business as usual.” However, as effective as statistical data may be at identifying aggregate-level trends, it frequently obscures the specific machinations of case processing that can provide greater insight into the impact of the *Booker* decision. In order to focus on the impact that *Booker* may be exerting at the individual case level, it is instructive to sample a number of sentencing memoranda and analyze sentencing outcomes and judicial reasoning. It is at this level of analysis where the tangible impact of *Booker* may be best observed.

CRACK COCAINE SENTENCING: A *BOOKER* CASE STUDY

One area where the struggle between the judicial and legislative branch has been most evident over the last two decades has been in response to crack cocaine sentencing. For this reason, the unanswered questions that have emerged after *Booker* have taken on particular significance in regard to federal crack cocaine sentencing. While the *Booker* decision does not directly affect the mandatory minimum penalties that still apply to many crack offenses, judges are increasingly using its remedial prescription in their consideration of enhancements that go above the mandatory minimum.

Background of Federal Crack Cocaine Sentencing

In the late summer of 1986 the Controlled Substances Act was amended in a political climate described by Eric Sterling, former counsel to the House Judiciary Subcommittee on Crime, as “frenzied.”⁵ That summer had witnessed a substantial degree of media coverage dedicated to crack cocaine, which was portrayed as an epidemic that was threatening the nation’s cities. In the month before the hearings, the three major television networks dedicated 74 segments to drugs on their evening news programs, with about half of these focusing on crack cocaine.⁶ Many of these segments, as well as hundreds of news stories and magazine features, used words such as “plague,” “epidemic,” and “crisis” to describe the impact of crack cocaine on American communities.⁷ It was in this atmosphere that Congress drafted and passed the Anti-Drug Abuse Act of 1986.

The Anti-Drug Abuse Act of 1986

Sterling describes a process within Committee to draft the language of a comprehensive federal anti-drug bill as one that moved forward with breakneck speed and little time for deliberation or to consider the consequences of the penalties that were being proposed. The Anti-Drug Abuse Act of 1986 passed rapidly with a host of severe sentencing provisions and little legislative history to document the intent of policymakers in their choice of punishment levels. Perhaps the most notable of these punishments was in response to crack cocaine violations. The final bill, signed in October of 1986, contained a 100-to-1 disparity between powder and crack cocaine in terms of the drug quantities required to trigger mandatory penalties. Despite crack and powder cocaine being pharmacologically identical, with the primary difference being the production and means of consumption, Congress established drastically different penalty structures for each, under the belief that crack cocaine was more dangerous than powder cocaine and posed a greater threat. During the discussion of the appropriate penalties for each offense, Sterling notes, numbers were being pulled out of the air with no empirical foundation. “It was the crassest

⁵ Hearings Before the United States Sentencing Commission on Proposed Guideline Amendments for Public Comment (March 22, 1993) (Testimony of Eric E. Sterling, President of the Criminal Justice Policy Foundation).

⁶ Craig Reinerman & Harry G. Levine, *The Crack Attack: Politics and Media in the Crack Scare*, in *CRACK IN AMERICA: DEMON DRUGS AND SOCIAL JUSTICE* 18, 20 (Craig Reinerman & Harry G. Levine, ed., 1997).

⁷ *Id.*

political power game,” said Sterling when describing the process by which politicians tried to “one-up” each other with calls for more severe penalties.⁸

The 1986 Anti-Drug Abuse Act created a host of mandatory minimum penalties for drug violations based on quantity. A crack cocaine possession conviction of 5 grams results in a 5-year mandatory minimum, while a sale conviction of 500 grams of powder cocaine – or 100 times the drug quantity – is required to trigger the same 5-year mandatory. This 100-to-1 weight ratio was subsequently codified in the federal Sentencing Guidelines the following year and was used to set mandatory sentencing ranges. As the Guidelines were mandatory, departure from that range was permissible only under exceptional circumstances and as the result of a prescribed list of specific factors that could be considered.

The Legacy of the 100-to-1 Ratio

The 100-to-1 ratio has had a disproportionate impact on defendants of color, primarily as the result of differential practices by law enforcement. Despite the fact that less than half of crack cocaine users in the general population are African American, more than 80% of persons convicted in federal court for crack cocaine offenses are African American. Crack cocaine defendants also tend to fare worse under many of the criteria of federal sentencing. Relative to other drug defendants, persons sentenced for a crack cocaine offense are more likely to receive a mandatory minimum, less likely to be eligible for a “safety-valve” departure, and less likely to be offered a downward departure from the Guideline range.

The Commission took note of many emerging issues following the adoption of the 100-to-1 ratio. One of the Commission’s statutory duties is to monitor the operation of the Guidelines and Federal sentencing system and to propose amendments to Congress for appropriate modifications.⁹ In 1995, the Commission released a report concluding that “Congress’s objectives with regard to punishing crack cocaine trafficking can be achieved more effectively without relying on the current federal sentencing scheme . . . that includes the 100-to-1 quantity ratio.”¹⁰ In reaching this conclusion, the Commission noted that the ratio punishes low-level crack offenders more harshly than wholesale powder distributors. The Commission also cited the disproportionate impact of the ratio on African American defendants as part of the rationale for reform. A subsequent recommendation by the Commission to Congress later that year to equalize the ratio was rejected.¹¹

In 1997, the Commission returned to Congress with a report once again recommending a modification to the 100-to-1 ratio.¹² This time the Commission focused on the disproportionality of crack cocaine sentences to the measured harm to society from the use and sale of the drug. Although the Commission stated that there was a need to treat crack cocaine more harshly than powder due to perceived differences in dangers to society, it questioned whether the current

⁸ Michael Isikoff & Tracy Thompson, Getting Too Tough on Drugs: Draconian Sentences Hurt Small Offenders More Than Kingpins, WASHINGTON POST, Nov. 4, 1990, at C2.

⁹ Title 28 U.S.C. §994.

¹⁰ UNITED STATES SENTENCING COMMISSION, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1995).

¹¹ 60 Fed. Reg. 25074.

¹² UNITED STATES SENTENCING COMMISSION, SPEICAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1997).

scheme was accurately tuned to address the most harmful behaviors. “[I]t is our view that federal sentencing policy should reflect federal priorities by targeting the most serious offenders in order to curb . . . drug trafficking and violent crime,” but “current federal cocaine policy inappropriately targets limited federal resources by placing the quantity triggers for the five-year minimum penalty for crack cocaine too low.” The Commission’s goal was to modify mandatory minimums and the Guidelines to target higher-level offenders, and to achieve this goal, recommended a 5-to-1 ratio, which received little support in Congress.

In December of 2001, Senators Hatch (R-UT) and Sessions (R-AL) introduced the Drug Sentencing Reform Act of 2001, which would have reduced the powder/crack cocaine sentencing disparity from 100-to-1 to 20-to-1.¹³ Hearings were held in 2002 in conjunction with the release of a third report by the Commission recommending changes to the 100-to-1 sentencing disparity.¹⁴ The Commission reiterated its call for reform, but was more forthright in criticizing the status quo than it had been in the past. “[T]he Commission firmly and unanimously believes that the current federal cocaine sentencing policy is unjustified and fails to meet the sentencing objectives set forth by Congress in both the Sentencing Reform Act and the 1986 Act.”¹⁵ The Commission noted that much of the underlying rationale that led Congress to choose the 100-to-1 ratio, such as the belief that crack cocaine was more addictive, would result in a lost generation of “crack babies,” and was frequently associated with violent crimes, had been shown over time to have been exaggerated. In short, the Commission concluded that the 100-to-1 ratio “is excessive to account for the differences in harms between the two drugs.” Based on this reasoning the Commission recommended a 20-to-1 ratio as an appropriate calibration. While support for reform was widespread in testimony before the Commission, the Department of Justice expressed its strong support for the existing ratio, and no action was taken in Congress.

Despite three separate reports and recommended amendments to the 100-to-1 ratio, the original sentencing structure still remains in place. The Drug Sentencing Reform Act of 2001 never left committee and subsequent efforts for reform have failed. The past two decades have witnessed a growing chorus of interested parties demanding reform, but Congress has remained steadfast in its refusal to amend the original language. However, on January 12th, 2005, a momentous Supreme Court decision in *United States v. Booker* changed the terrain of federal sentencing, and in doing so, opened up room for reform within the federal system.

¹³ 2002 S.1874.

¹⁴ UNITED STATES SENTENCING COMMISSION, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (2002).

¹⁵ *Id.* at 91.

SENTENCING CASE ANALYSIS

This study analyzes 24 written sentencing memoranda from crack cocaine cases in federal court in order to gauge the impact of the *Booker* decision. Following the recommendations of the Supreme Court in *Booker*, it examines how judges are assessing statutorily mandated considerations of sentencing under the provisions of the Sentencing Reform Act,¹⁶ which provide for the consideration of a broad range of factors in addition to the Guidelines.

Four central questions emerge which courts have considered in the wake of the *Booker* decision in regard to crack cocaine sentencing. These are the following:

- What is the relative weight of the guidelines sentencing range compared to other sentencing factors?
- What sentence length levels constitute punishment that is “not greater than necessary” to achieve the goals of sentencing in various cases?
- In what ways are courts now taking into account the circumstances of the offense and the defendant?
- What has been the impact of the Sentencing Commission’s past policy statements on crack cocaine sentencing in developing appropriate sentences in individual cases?

1. Relative Weight of the Guidelines

FINDING: Most of the cases analyzed addressed the relative weight of the Guidelines, and nearly all of the courts agreed that the proper course of action was to evaluate additional sentencing criteria equally relative to the Guideline recommendations. The result was that courts frequently held that the Guideline range sentences were too severe relative to other relevant criteria.

In the remedial course of the decision written by Justice Breyer, the Supreme Court saved the Sentencing Guidelines from extinction by excising two sections of the Sentencing Reform Act, thereby making the Federal Guidelines advisory.¹⁷ Interpretation of this ruling represents a critical flashpoint of disagreement among the different courts, and where a court falls along the spectrum of approaches is frequently dispositive of how it will treat crack cocaine sentencing under the *Booker* scheme. The *Booker* remedy states that the Guideline range should be considered *in addition to* other sentencing factors such as the goals of punishment, the circumstances of the offense and defendant, prospects for rehabilitation, and cogent statements on policy issued by the Commission.¹⁸ However, there remains substantial debate as to how much weight the Guidelines should be accorded relative to such factors.

Justice Breyer cautioned that the remedial action of *Booker* should not be read to encourage an outright dismissal of the Guideline recommendations, nor to signify a return to the days of discretionary sentencing. “Without the ‘mandatory’ provision, the Act nonetheless requires

¹⁶ Title 18 U.S.C. §3553(a); see Appendix for full text.

¹⁷ 125 S.Ct. at 764.

¹⁸ The criteria for consideration in determining sentence are contained in §3553(a).

judges to take account of the Guidelines together with other sentencing goals.”¹⁹ It is the phrase “together with other sentencing goals” that has redefined the way in which federal sentencing operates. What is most noticeable about this remedy is the lack of precision by the Court in instructing judges how these factors should be evaluated with respect to one another. The Court’s silence created a scenario in which a sentencing court must first answer the question about how much deference the Guidelines are due relative to “other sentencing goals” prior to continuing with its deliberations.

Nationally, approaches have ranged from a presumption in favor of a Guideline sentence absent exceptional circumstances (*United States v. Wilson*)²⁰ to complete equity (*United States v. Ranum*).²¹ The Court in *Simon v. United States* reasoned that there is no explicit reference in the statutory language to any one factor being accorded greater authority.²² Moreover, giving the Guidelines more weight than other factors draws the Court closer “to committing the act that *Booker* forbids,” by creating “a *de facto* mandatory sentence.” Finally, under the mandatory system, a court can only consider the characteristics of the defendant as criteria for departure in “exceptional cases,” but those individual-specific factors – “the nature and circumstances of the offense and the history and characteristics of the defendant” – are now explicitly called for in the *Booker* remedial decision. The Court in *United States v. Fisher* agreed, holding that to consider the 100-to-1 sentencing ratio as binding would render the *Booker* remedy “a nullity.”²³ Seeking to strike a balance, the Court in *United States v. Phelps* noted that the “Guidelines should be treated as a major and persuasive factor,” but that does not mean they are “*per se* reasonable or that sentences should fall within that range absent some exceptional or extraordinary circumstance.”²⁴ They should be respected because they were created as a result of the deliberations of a legislative body; however, to give them any measurable deference over other sentencing factors would be to flout the *Booker* remedy.

While a majority of the courts applied the approach of evaluating the Guidelines equally relative to other sentencing elements, two decisions disagreed, and followed the *Wilson* model of granting deference. In *United States v. Tabor*, the Court held that “a judge ought not to play legislator and should instead give the crack cocaine Guidelines substantial or heavy weight after *Booker*.”²⁵ The Court believed that categorizing the harshness of offense type and subsequent punishment should only be undertaken by legislators and that any judicial efforts to alter crack cocaine sentences from the Guidelines are likely to exacerbate problems that may have existed under the mandatory system. In *United States v. Clay*, the Court also granted substantial deference to the Guidelines, noting that departure is only appropriate “when [the statutory range is] clearly outweighed by some other factor(s) set forth in §3553(a). . .”²⁶ In that case, the Court did, after considering the defendant’s personal characteristics and the “unjustified disparity in the 100:1 quality [sic] ratio,” depart below the Guideline range.

¹⁹ *Supra* at Note 14.

²⁰ *United States v. Wilson*, 350 F.Supp.2d 910, 925 (D. Utah 2005).

²¹ *United States v. Ranum*, 353 F.Supp.2d 984 (E.D. Wis. 2005).

²² *Simon v. United States*, 361 F.Supp.2d 35 (E.D. N.Y. 2005).

²³ *United States v. Fisher*, No. S3-03-CR-1501 (S.D. N.Y. 2005).

²⁴ *United States v. Phelps*, 366 F.Supp.2d 580 (E.D. Tenn. 2005).

²⁵ *United States v. Tabor*, 365 F.Supp.2d 1052 (D.Neb. 2005).

²⁶ *United States v. Clay*, 2005 U.S. Dist. LEXIS 22601 (E.D. Tenn. 2005).

On balance, the majority of the courts have decided to apply equal weight between the Guideline recommendations and other sentencing factors. The general trend has been that when other relevant factors are considered alongside the Guidelines, a balancing test leads a judge to levy a sentence divergent from the Guideline range in order to remain compliant with other statutory requirements. Perhaps the most compelling argument in support of this approach comes from the *Booker* decision itself. As noted in *Simon and Fisher*, granting the Guidelines any deference more than equal weight relative to other factors is antithetical, and perhaps unconstitutional, in light of *Booker*'s excision of the mandatory provision. The silence by the Court is noteworthy insofar as Justice Breyer could easily have inserted language instructing a judge to accord the Guidelines "heavy weight" relative to "other sentencing goals," but chose not to do so.

The Supreme Court has yet to provide any guidance on this question. However, these decisions indicate that there is a growing sentencing model subscribing to the principle that any approach that grants the Guidelines greater weight than other factors risks moving the court in the direction of making the Guidelines more than merely advisory.

2. Punishment that is "Not Greater than Necessary" to Meet the Goals of Sentencing

FINDING: Under the post-Booker structure, a number of the courts in this analysis concluded that the Guideline-recommended sentences are grossly disproportionate to meet such sentencing goals as punishment, deterrence, and rehabilitation.

The statutory language regarding sentence length requires the sentencing court to "impose a sentence sufficient, but not greater than necessary," to meet the four goals of a sentence.²⁷ In the past, the Guideline range was deemed reasonable for these purposes, and by definition, anything within that prescribed range would meet the criteria of a sentence that was "not greater than necessary." However, under the remedial decision in *Booker*, the court is now required when devising a sentence to consider if it is too severe based on behavior that has been proven in front of a jury.

In *United States v. Carvajal*, the Court sentenced the defendant to 168 months, down from the Guideline prescribed range of 262 to 327 months, for counterfeiting and conspiracy to distribute crack cocaine.²⁸ In considering the relevant sentencing factors, the Court observed "[a] judge should be hesitant before sentencing so severely that he destroys all hope and takes away all possibility of useful life. Punishment should not be more severe than that necessary to satisfy the goals of punishment."

In the case of *United States v. Harris*, the sentencing judge was faced with a choice between the Guideline range for a crack cocaine offender versus the mandatory minimum.²⁹ In this case, the two defendants, convicted of possession with intent to distribute cocaine base (crack cocaine), faced a mandatory sentence of 60 and 96 months, or Guideline range minimums of 70 and 120 months, respectively. The Court, in departing from the Guideline minimums and sentencing to the mandatory, consulted the Commission's past recommendations regarding a reduction in the

²⁷ §3553(a)(2)(A-D).

²⁸ *United States v. Carvajal*, 2005 U.S. Dist. LEXIS 3076 (S.D.N.Y. 2005).

²⁹ *United States v. Harris*, 2005 U.S. Dist. LEXIS 3958 (U.S. Dist. D.C. 2005).

United States v. Moreland

Guideline Sentence: 30 Years to Life Imposed Sentence: 10 Years

Brian Moreland was arrested for selling crack cocaine valued at \$450 to an undercover detective in the summer of 2004 and convicted of distribution of more than 5 grams of crack and possession with intent to distribute.

Moreland had two prior state-level convictions. The first, dating back to 1992, was for “delivering a marijuana cigarette to an inmate in a prison,” for which he received a 60-day sentence and 5 years of probation. Four years later, Moreland was convicted of possession of cocaine base, for which he received a suspended sentence and lifetime probation. The two prior offenses, when applied to his current federal conviction, resulted in Moreland’s classification as a career offender. The Career Offender enhancement raised the Guideline sentence of 78 to 97 months for his current offense to 360 months to life.

Moreland’s current conviction, as well as his two prior offenses, was non-violent with no threat of violence nor presence of a weapon. Despite his two prior offenses occurring 8 and 12 years before the current charge, and having spent less than 6 months in custody, Moreland was now facing what would amount to a life sentence. Judge Goodwin, using the discretion afforded by the *Booker* decision, sentenced Moreland to 10 years, remarking that “Moreland is neither the ‘repeat violent offender’ nor ‘drug trafficker’ targeted by the Career Offender enhancement” and to “base the length of a sentence on the number of Mr. Moreland’s convictions without looking further into the details and circumstances of each offense would not produce justice in this case.” Furthermore, “a life sentence would not only be unreasonable, but also unconscionable.”

disparity between powder and crack cocaine sentencing ranges. “Those findings are persuasive authority for the proposition that the sentencing ranges prescribed for Harris’s and Roundtree’s crime by the Guidelines are greater than necessary,” thereby running afoul of the mandate to “impose a sentence sufficient, but not greater than necessary.”

The Court in *United States v. Perry*, in which the defendant was convicted of possession with intent to distribute more than 5 grams of cocaine base which was coupled with an enhancement based on the conduct occurring within 1,000 feet of a school, took into consideration a range of sentencing criteria, but paid particular attention to the severity of the sentence.³⁰ In comparing the Commission’s recommendations, the requirements under sentencing, and the Guideline recommendations, the Court noted that, in light of *Booker*, it must consider the consequences of the 100-to-1 sentencing disparity between powder and crack cocaine. The Court chose to sentence the defendant to no more than the mandatory minimum of 120 months, holding that to adhere to the 100-to-1 ratio would produce a Guideline range that “cannot stand up to the scrutiny of analysis under 18 U.S.C. §3553.”

The Court concluded that “the advisory Guideline range sentence (188 to 235 months) is substantially greater than is necessary to reflect the seriousness of the offense, to promote respect for the law, and to provide adequate general and specific deterrence.” Moreover, “gross sentencing disparities actually promote less respect for the law because the penalties suggest untoward discrimination . . .” Finally, in choosing to employ a 20-to-1 sentencing ratio, the Court took note of the recent trend in post-*Booker* crack cocaine cases to depart from the Guideline range while using the recommendations of the Commission as a guide.

³⁰ *United States v. Perry*, 389 F.Supp.2d 278 (D.R.I. 2005).

A similar rationale was noted in the case of *United States v. Williams*.³¹ In that case, a criminal history enhancement to the defendant’s conviction for sale of crack cocaine resulted in a Guideline sentence of 360 months to life. The Court noted that the “double-compounding effect” of the criminal history enhancement created “such a harsh sentence [which] would be totally out of character with the seriousness of the offense and . . . not necessary to afford adequate deterrence.” In evaluating other 3553(a) criteria, leading to an eventual sentence of 204 months, the Court remarked that sentences that are so out of proportion to the conduct not only violate the “not greater than necessary” component of the sentencing statute, but also promote less respect for the law because the outcomes are seen as unjust.

These decisions indicate a reluctance by the courts to sentence within the Guideline range when the recommended durations are disproportionate to the convicted offense. Under the mandatory system, Guideline sentences were deemed reasonable and not greater than necessary by default due to their statutory origin. However, the new advisory system requires judges to determine on an individual basis if a sentence is “greater than necessary” by taking into consideration all sentencing factors. Absent the statutory seal of reasonability, the crack cocaine Guideline ranges are no longer presumed to be reasonable and the decisions in many of these cases suggest that this added judicial scrutiny is leading to a higher likelihood of non-Guideline sentences.

3. Considering the Circumstances of the Offense and Defendant

FINDING: Most courts carefully considered the elements of the offense and the background of the defendant when sentencing and balanced their relevance with other important criteria such as the deterrent value of the punishment and the emergence or exacerbation of any unwarranted disparities.

Sentencing courts are now charged with taking into account “the nature and circumstances of the offense and the history and characteristics of the defendant . . .”³² The ascendancy of this section represents one of the most profound changes in the way that courts conduct affairs in the post-*Booker* landscape. As the courts are now required to consider a range of important factors that are germane to the crafting of a sentence, the open discussion by judges in their sentencing memoranda illustrates a new perspective that has been added to federal sentencing.

Before the decision in *Booker*, the circumstances of the offense and the characteristics of the defendant were frequently unavailable for consideration by a judge when he or she performed the calculus necessary to generate a sentencing “score.” Instead, the elements that were included in determining the “score” did not adequately consider many of the factors that may have served to mitigate the sentence. The Guidelines’ notorious rigidity in calculating criminal scores and their inability to sufficiently take into consideration the specific circumstances of each case were the attributes most often criticized by legal experts. In *Simon*, the Court noted the unforgiving nature of the Guidelines when remarking on their inability to satisfy the deterrent criteria under the goals of sentencing.³³ The fact that the Guidelines do not consider the diminishing impact of long sentences on deterrence as people age “renders it an imperfect measure of how well a

³¹ *United States v. Williams*, 372 F.Supp.2d 1335 (M.D. Fla. 2005).

³² §3553(a)(1).

³³ §3553(a)(2)(B).

United States v. Avilez

Guideline Sentence: 46 to 57 Months *Imposed Sentence: Probation; Treatment*

William Avilez, a borderline mentally retarded defendant, pleaded guilty to conspiracy to possess with intent to distribute crack cocaine in 2003. After sentencing adjustments, he was eligible for a Guideline range of 46 to 57 months. In its decision to sentence the defendant to probation, the Court cited Avilez's reduced mental capacity, diminished culpability, and peripheral role in the enterprise. Avilez was "an errand boy" for the principal operator and co-defendant in the conspiracy. His job was to retrieve \$20 bags of crack cocaine for the co-defendant, and he was periodically paid \$20 "whenever he was in need of financial assistance." The evidence indicated that Avilez merely enjoyed "hanging out" on the couch of his co-defendant, and the inconsistent method of payment did not suggest that he was engaged in the transactions for financial benefit.

Avilez was also described as having "reduced mental capacity" and appeared "totally disconnected" from the court proceedings. A subsequent mental exam and IQ test revealed that Avilez had an IQ of 70. His examination indicated that he "acted virtually entirely at [the co-defendant's] direction." In departing from the Guideline range, Judge Block noted the importance of evaluating the circumstances of the offense, taking into consideration Avilez's limited role, and importantly, the mental capacity of the defendant at the sentencing hearing. Judge Block wrote that anyone who might think the probation and treatment sentence unreasonably lenient "will have never seen the emotionally disconnected, blank, expressionless look on the defendant's face when he stood before the Court."

sentence protects the public from further crimes of the defendant." Thus, particularly in the case of the growing number of aging defendants who are frequently subject to severe repeat offender enhancements, this results in a system that fails to satisfy either the deterrence³⁴ or public protection criteria.³⁵

One of the first cases to address these issues in regard to crack cocaine sentencing was *United States v. Nellum*.³⁶ The defendant was convicted of distribution of five grams of cocaine base (crack cocaine) plus the presence of a weapon, which combined with the defendant's criminal history resulted in a guideline range of 168-210 months. The eventual sentence was 108 months, below the government's request for a sentence within the range, but well above the mandatory minimum of 60 months. The Court considered the defendant's age (57 years old) when evaluating statutory goals of punishment, deterrence, and likelihood of recidivism. It also relied upon Commission research on recidivism rates by different categories of offenders and noted the failure of the Guidelines to incorporate the probability of re-offending when calibrating a sentence. "Under the guidelines, the age of the offender is not ordinarily relevant in determining the sentence. But under §3553(a)(2)(c), age of the offender is plainly relevant to the issue of 'protect[ing] the public from further crimes of the defendant.'" The Court also considered the defendant's extended period of crime- and drug-free conduct, his record as an Army veteran, his history of medical problems and the role that his checkered history of addiction played as an indication of his "need for correctional treatment."³⁷

³⁴ *Id.*

³⁵ §3553(a)(2)(C).

³⁶ *United States v. Nellum*, 2005 U.S. Dist. LEXIS 1568 (N.D. Ind. 2005).

³⁷ All of these factors are relevant in determining sentence under §3553(a)(2)(D).

In *United States v. Beamon*, the defendant faced a Guideline range of 108-135 months for distribution of five grams of cocaine base coupled with possession of a firearm.³⁸ The Court sentence was 51 months, which was based on both a government-initiated departure due to substantial assistance in an ongoing investigation plus an examination of the personal characteristics of the defendant. The calculus the Court employed was to first depart based on the substantial assistance waiver, and then use the 20:1 ratio suggested by the Commission to develop the eventual sentence. The evidence indicated that the defendant played a valuable role in his children's lives, most strongly illustrated by a letter submitted to the court from one of his daughter's asking for leniency in sentencing. The Court also noted that the defendant had been taking care of his ailing father, had been engaged in a Men Mentoring Program to help at-risk youth, and had worked helping people suffering through drug addiction. These factors were critical in the Court's decision-making process.

As courts are now required to consider elements of the offense and the defendant in ways in which they had been discouraged from in the past, a new terrain has emerged in crack cocaine sentencing. As a result, by evaluating a defendant's age, health, employment history, etc. in the context of the offense, sentences more accurately reflect the offense in question and are more likely to meet the criteria elucidated in the statutory sentencing goals. In addition, this approach is more faithful to the founding principles of the Sentencing Reform Act, in which the Guidelines must "[maintain] sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices . . ."³⁹

4. Considering the Commission's Past Policy Statements

FINDING: The Commission's consistent call for reform for more than a decade was granted serious consideration by virtually all of the sentencing courts. Its recommendation for a step-down from the 100-to-1 ratio to a more reasonable level was heeded by most judges and provided valuable guidance in the crafting of a non-Guideline sentence.

The Commission has called for reform to the Guideline recommendations for crack cocaine on three separate occasions since its inception. Each time Congress declined to adopt the modifications and the 100-to-1 ratio remained the rule of law.⁴⁰ However, sentencing courts are now instructed to take into account "any pertinent policy statement issued by the Sentencing Commission" regardless of whether the recommendations have been officially submitted as amendments to Congress.⁴¹ Thus, the Commission's reports documenting the problems with the current crack cocaine Guidelines and its recommended reforms to sentencing laws are crucial ingredients for judges to contemplate at sentencing.

An expansive discussion of the role of the Commission's recommendations occurred in *United States v. Smith*.⁴² In that case, the defendant was convicted of possession with intent to distribute

³⁸ *United States v. Beamon*, 373 F.Supp.2d 878 (E.D. Wis. 2005).

³⁹ Title 28 U.S.C. §991(b)(1)(B).

⁴⁰ It is important to remember that Congress never expressly rejected the 20-to-1 ratio recommendation of 2002.

⁴¹ §3553(a)(5)(A).

⁴² *United States v. Smith*, 359 F.Supp.2d 771 (E.D. Wisc. 2005).

more than 50 grams of crack cocaine which, after evaluating the pre-sentence report, produced a guideline range of 121-151 months, as well as triggered a 10-year mandatory minimum. In considering the Guideline range, the Court in *Smith* evaluated the underlying rationale for the 100-to-1 ratio and concluded that “none of the . . . offered reasons for the 100:1 ratio withstand scrutiny.” The Court considered the fact that “two-thirds of federal crack cocaine defendants are street level dealers,” “significantly less systemic violence . . . is associated with crack cocaine trafficking than was reported earlier,” and there is little evidence to support the claim that any difference in harmfulness between powder and crack cocaine is sufficient to warrant the 100-to-1 sentencing disparity.

In a further indictment of the differential treatment of powder and crack cocaine, the Court noted that, in practice, the 100-to-1 ratio has exacerbated disparity in sentencing by race, a factor that courts are directed to take into consideration when a sentence leads to “unwarranted disparities” between similarly situated defendants.⁴³ After establishing that the 100-to-1 ratio was founded in principles rendered false by further Commission evaluation, the resulting conclusion was that any disparity that results from this ratio is unwarranted. The *Fisher* Court made this exact observation noting that rather than alleviating disparity, the 100-to-1 ratio “currently results in unwarranted disparities.”

For example, in *Simon*, the defendant received a Guideline range of 324 to 405 months, but had he been convicted for the same offense with powder cocaine, the range would have been reduced to 108 to 135 months. In considering the Commission recommendations, and weighing those recommendations against the requirements of the sentence,⁴⁴ the Court concluded that a 10-to-1 or 20-to-1 ratio was appropriate. The Court noted that following the Guideline range “create[s] unjust sentencing disparities and deterrence greater than necessary to protect the public.”

In deciding to employ the 10-to-1 ratio, the *Fisher* Court observed that the crack Guideline range of 151 to 188 months was grossly disproportionate to the range for the same offense with powder cocaine, 63 to 78 months. The codification of this disparity in the crack/powder cocaine sentencing guidelines produces a cruel irony in light of the fact that one of the founding mandates of the Guidelines, noted in the Sentencing Reform Act, was to “[avoid] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct.”⁴⁵

Finally, the *Smith* Court noted that the disparate structure in sentencing imbues the criminal justice system with “irrationality and harmful mischief” by creating a perverse incentive for law enforcement to encourage persons to process powder cocaine into crack cocaine before sale in order to achieve more severe offense eligibility as a product of the arrest. The Court concluded that the sentencing range suggested by the Guidelines was unduly harsh and substantially more than was necessary to achieve prescribed sentencing objectives.

⁴³ §3553(a)(6).

⁴⁴ §§3553(a)(2)(A-D).

⁴⁵ 28 U.S.C. §991(b)(1)(B).

In order to calculate an appropriate length of departure, the *Smith* Court considered “pertinent policy statements issued by the Sentencing Commission.”⁴⁶ The Court applied a 20-to-1 ratio, creating a Guideline range of 27-33 months, but noted that the range “did not take into account [the] defendant’s good conduct since he committed this offense over four years ago, his employment history and community involvement, and his importance to his family.” In addition, the government had issued a motion permitting a sentence below the mandatory minimum due to the defendant providing substantial assistance to an ongoing investigation at great personal risk.⁴⁷ The eventual sentence of 18 months employed a combination of considerations regarding the crack cocaine sentencing structure coupled with additional mitigating factors.

Perhaps one of the most significant changes in post-*Booker* sentencing of crack cocaine offenders has been the adoption of Commission recommendations calling for a reduction in the 100-to-1 powder/crack cocaine sentencing disparity. Although it is likely not an error for a court to ignore the 100-to-1 sentencing differential when deliberating,⁴⁸ the modified sentencing system post-*Booker* certainly allows for its consideration as a relevant sentencing factor. Most of the courts explicitly referred to the recommendations when sentencing outside the Guideline range. For some, the Commission’s recommendations for reform were in tension with other sentencing requirements, forcing a balancing of all criteria. But the most valuable impact that the Commission recommendations have is to provide a standardized model of review that a court can employ when determining a defendant’s sentence.

In the absence of a Guideline range, the lack of a framework within which a judge can craft a sentence creates a higher risk that the outcome will lack the uniformity that is one of the intended hallmarks of the Sentencing Reform Act. This was the locus of Judge Cassell’s warning in the *Wilson* ruling, in which that Court held that the Guidelines should be given substantial deference. However, the recommendations of the Commission, coupled with their exhaustive analysis of the implications of the current policy and the benefits of a reduced ratio, provide a valuable roadmap for judges to employ in sentencing. Consequently, this more systematized model of review is likely to lend legitimacy to a sentence that would have been absent had it seemed to be purely the work of an individual judge’s discretion. Ultimately, this permits a court to meet all of the goals of the Sentencing Reform Act and pass the constitutional standard of *Booker* without the requirements of a mandatory sentencing structure.

⁴⁶ §3553(a)(5).

⁴⁷ The defendant made “controlled buys and [wore] a wire” and “exposed himself to serious risk of injury from many dangerous persons.”

⁴⁸ See *United States v. Herron*, 139 Fed. Appx. 750, 752 (7th. C. 2005).

CONCLUSION

A survey of the sentencing memoranda of the written decisions on crack cocaine cases post-*Booker* reveals the emergence of a new methodology of judicial deliberation. While not an exhaustive analysis of every post-*Booker* crack cocaine sentence in the federal system, this report indicates the emergence of a sentencing model that judges are employing which is grounded in rational jurisprudence and thoughtful statutory interpretation. *Booker*'s remedy directing the courts to evaluate all statutorily prescribed factors has had a significant impact on the sentencing landscape. Generally, the courts appear to be granting all such factors equal deference, and the former hierarchical approach, with the Guideline range preeminent, is unable to satisfy the statutory requirements of sentencing. Once the courts consider all factors on equal footing, the memoranda illustrate mounting tension between the Guideline range and the other elements related to the circumstances of the offense and the characteristics of the defendant.

Most notably, the severity of Guideline ranges seemed to many courts to mandate sentences greater than necessary to meet the prescribed goals of sentencing. In addition, the 100-to-1 disparity exacerbated inequalities in enforcement practices that frequently resulted in unwarranted sentencing disparities. For these courts, the solution was to turn to the Commission recommendations for reform of the 100-to-1 ratio and to use these as a framework for sentencing. The post-*Booker* world has changed the mechanics of crack cocaine sentencing and opened up opportunities for judges to contemplate a host of relevant factors to determine a sentence that is appropriate for the defendant, while still maintaining principles of fairness, equity, and the opportunity for rehabilitation.

Appendix: Title 18 U.S.C. §3553(a)

(a) **Factors To Be Considered in Imposing a Sentence.**— The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) 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;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for—
 - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
 - (i) issued by the Sentencing Commission pursuant to section 994 (a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994 (p) of title 28); and
 - (ii) that, except as provided in section 3742 (g), are in effect on the date the defendant is sentenced; or
 - (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994 (a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994 (p) of title 28);
- (5) any pertinent policy statement—
 - (A) issued by the Sentencing Commission pursuant to section 994 (a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994 (p) of title 28); and
 - (B) that, except as provided in section 3742 (g), is in effect on the date the defendant is sentenced
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to any victims of the offense.

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