IN HOT PURSUIT of Federal Criminal Justice

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Summer 2009

Sentencing Guidelines No Longer May Present Ex Post Facto Issue

Steven M. Goldsobel

When considering fraud loss or drug quantities, an analysis of a client's sentencing exposure used to begin by identifying the Sentencing Guidelines manual in effect at the time of the offense. If the current version of the guidelines imposed a harsher sentence than the guidelines in effect at the time of the offense, the Ex Post Facto Clause was implicated and the older guidelines manual would apply. U.S.S.G. §1B1.11(b).

Since *United States v. Booker*, 543 U.S. 220 (2005), however, which rendered the guidelines advisory, ex post facto concerns, according to the Department of Justice, have been eliminated. It is the position of the Department of Justice that under the advisory guidelines regime, the former ex post facto analysis is no longer good law and the manual in effect at the time of sentencing should always be used. *See* 18 U.S.C. §3553(a)(4)(A)(ii) (Congress directed that a defendant's sentencing range should be calculated under the guidelines that "are in effect on the date the defendant is sentenced").

Several courts have similarly rejected any ex post facto concerns in applying the current version of the guidelines. In *United States v. Demaree*, 459 F.3d 791 (7th Cir) (Posner, J.), *cert. denied*, 127 S. Ct. 3055 (2007), the Seventh Circuit held that the district court did not violate the Ex Post Facto Clause by applying the version of the guidelines in effect when the defendant was sentenced, rather than the less severe version of the guidelines that was in effect when she committed the offense. Although the government confessed error, the court rejected that confession, reasoning that "Booker demoted the guidelines from rules to advice," and that "the Ex Post Facto Clause should apply only to laws and regulations that bind rather than advise." *Demaree*, 459 F.3d at 794-95 (quoting *United States v. Roche*, 415 F.3d 614, 619 (7th Cir. 2005)). The Fifth and Sixth Circuits agree. *See United*

SINCE DEMAREE, THE SUPREME COURT HAS MADE CLEAR THAT A DEFENDANT NO LONGER HAS ANY EXPECTATION OF A SENTENCE WITHIN THE APPLICABLE GUIDELINES RANGE.

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Message From the Chair

Kevin McGrath

It is my pleasure to introduce the Summer 2009 edition of *In Hot Pursuit of Federal Criminal Justice*, the newsletter of the Criminal Law Section of the Federal Bar Association. This edition of the newsletter contains expanded substantive legal content that I am sure will be of value to many of our section members. The newsletter includes a handy yet thorough Supreme Court criminal law update, an article discussing the Justice Department's initiative to eliminate the U.S. Sentencing Guidelines' 100-to-1 disparity in the treatment of crack and powder cocaine for sentencing purposes and a related article discussing the origins of the 100-to-1 ratio, and a summary of various efforts to modify that ratio up to the present. The newsletter also contains an interesting article discussing the Department of Justice's position that, following *United States v. Booker*, 543 U.S. 220 (2005), ex post facto concerns regarding the use of the current version of the Sentencing Guidelines at sentencing are no longer valid and a developing split in the circuit courts concerning this question.

As I discussed in my last email message to the section, in lieu of our

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States v. Rodarte-Vasquez, 488 F.3d 316, 325 (5th Cir. 2007); *United States v. Barton*, 455 F.3d 649, 655 n. 4 (6th Cir. 2006) (stating in dicta that because guidelines are advisory, Ex Post Facto Clause is not implicated).

The Court of Appeals for the District of Columbia, however, rejected the reasoning of *Demaree*, *United States v. Turner*, 548 F.3d 1094, 1098 1100 (D.C. Cir. 2008), based largely on the fact that a sentence within the applicable guidelines range enjoyed a presumption of reasonableness. But since *Demaree*, the Supreme Court has made clear that a defendant no longer has any expectation of a sentence within the applicable guidelines range. *See e.g., Irizarry v. United States*, 128 S.Ct. 2198 (2008).

Regardless of the advisory nature of the guidelines, there is little doubt that a harsher version of the guidelines in effect on the date of sentencing will result in a greater sentence and defense counsel should continue to argue for application of the guidelines manual in effect at the time the offense was committed. While additional circuit courts may follow *Demaree*'s dismissal of ex post facto concerns, other constitutional rights appear to be at risk. For example, due process concerns surely exist if sentences for the same crime vary simply because defendants are sentenced at different points in time and, therefore, sentenced under different versions of the guidelines manual. In fact, strict adherence to the current version of the guidelines manual would ignore section 3553's command that district courts avoid unwarranted sentencing disparities, 18 U.S.C. 3553(a)(6), and counsel should emphasize the disparities resulting from post-offense amendments to the guidelines. ■

Steven Goldsobel is a former federal prosecutor and founder of the Law Office of Steven M. Goldsobel in Los Angeles where he focuses his practice on White Collar Criminal Defense.

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annual Criminal Law Section CLE, this year we are focusing on providing our membership with more substantive legal content through our newsletters and expanded website content, which is under development. Along these lines, we welcome contributions of ideas and, even better, articles by our members. Please forward any ideas or articles to Kathy Massing at kathy.massing@fowlerwhite.com.

In addition, we will be hosting a reception on June 11, 2009, for those of you attending the Federal Sentencing Guidelines Seminar in New Orleans. The reception will take place from 5:00–7:00 p.m. at One River Place Condominium, 3 Poydras Street, New Orleans, contiguous to the Hilton Riverside Hotel and overlooking the mighty Mississippi. Look for our Criminal Law Section table at the Seminar for a personal invitation, or email me at kmcgrath@seyfarth.com for more details. The reception will be a great opportunity for current and potential members to get together and share ideas and contacts. We also hope to have several distinguished guests in attendance.

In addition, the Criminal Law Section plans to play an active role in the FBA's upcoming Annual Meeting and Convention in Oklahoma City, Okla., on September 10–12, 2009. We welcome ideas from section members as to topics you would like to see addressed at the conference.

In the meantime, we are soliciting your views on whether the FBA should take a public position on any proposed legislation to eliminate the 100 to 1 crack to powder cocaine ratio for sentencing purposes and, if so, what position it should take. Your thoughts can be emailed to kmcgrath@seyfarth.com.

As always, we look forward to hearing from you as to how we can serve you better. ■

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Schedule at a Glance

Wednesday, Sept. 9

2:00–5:00 p.m.	Registration Desk Open

Thursday, Sept. 10

6:30 a.m.–5:00 p.m.	Registration Desk Open
8:00 a.m.–5:00 p.m.	Exhibits Open
8:00–9:15 a.m.	**Welcoming Remarks by Oklahoma City Mayor Mick Cornett; Plenary Keynote by Professor Charles Ogletree**
9:30–10:30 a.m.	Session 1A: Criminal Jurisdiction in Indian Country Session 1B: Energy and the Environment
10:45–11:45 a.m.	Session 2A: Ogletree Panel Session 2B: Sentencing After *Booker*
Noon–1:30 p.m.	Foundation of the FBA Luncheon
1:45–2:45 p.m.	Session 3A: Issues and Ethics for Lawyers Working with Corporate and Tribal General Counsel I Session 3B: Federal Court-Assisted Recovery Efforts: Innovations to Reduce Post-Conviction Substance Abuse and Recidivism
2:00–4:00 p.m.	Foundation of the FBA Board Meeting
3:00–4:00 p.m.	Session 4A: Issues and Ethics for Lawyers Working with Corporate and Tribal General Counsel II Session 4B: The Roberts Court on Criminal Law
4:15–5:15 p.m.	Session 5A: Delivery of Veterans Services in Indian Country Session 5B: How to Conduct a Jury Trial
6:00–9:00 p.m.	Reception at the Oklahoma History Center

Friday, Sept. 11

7:00 a.m.–5:00 p.m.	Registration Desk Open
8:00 a.m.–4:00 p.m.	Exhibits Open
8:00–8:30 a.m.	Tenth Circuit Swearing-In Ceremony
8:30–9:30 a.m.	**Welcoming Remarks by Oklahoma Governor Brad Henry; Plenary Keynote by Dean Erwin Chemerinsky**
9:45–10:45 a.m.	Session 6A: The Roberts Court on Indian Law Session 6B: Bankruptcy: Creditors' Rights and Fraud
11:00 a.m.–Noon	Session 7A: Chemerinsky Panel Session 7B: Expert Discovery Issues in Civil Cases
12:15–2:00 p.m.	FBA YLD Luncheon
2:30–3:30 p.m.	The Oklahoma City Bombing Through the Eyes of Those Who Were Here Held at the Museum Institute for the Prevention of Terrorism.
3:30–5:00 p.m.	Tours of the Memorial and Museum
2:00–4:00 p.m.	Vice Presidents for the Circuits Training
2:00–4:30 p.m.	Younger Lawyers Division Board Meeting
6:00–9:00 p.m.	Reception at the National Cowboy & Western Heritage Museum

Saturday, Sept. 12

7:00 a.m.–5:00 p.m.	Registration Desk Open
8:30–9:45 a.m.	Vice Presidents for the Circuits Meeting
8:30–11:00 a.m.	Section and Division Chairs Meeting
10:00–11:30 a.m.	Chapter Education Program Presented by the Vice Presidents of the Circuits
11:45 a.m.–1:45 p.m.	FBA Awards Luncheon
2:00–5:00 p.m.	National Council Meeting
7:00–10:30 p.m.	Reception and Presidential Installation Banquet

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Supreme Court Updates

Confessions

Corley v. United States
No. 07.10441 (Apr. 6, 2009)

In a decision addressing the tension between the McNabb-Mallory jurisprudence, which generally renders confessions during detentions which violate the "prompt presentment" rule of Federal Rule of Criminal Procedure 5 inadmissible, and 18 U.S.C. §3501(c), which deems pre-presentment confessions admissible so long as they are "voluntary" and within six hours of arrest, the Court outlined the proper analysis. Specifically, it held that §3501 merely modified the McNabb-Mallory rule, but did not supplant it. Under the rule as revised by §3501(c), when faced with the suppression issue, first, a court must determine whether the defendant confessed within six hours of arrest. If the confession came within that period, it is admissible, subject to the other Rules of Evidence, so long as it was "made voluntarily and . . . the weight to be given [it] is left to the jury." However, if the court finds that the confession occurred before presentment and beyond six hours, then the question turns to whether the delay was unreasonable or unnecessary under the McNabb-Mallory cases, and if it was, the confession is to be suppressed.

Montejo v. Louisiana
No. 07-1529 (May 25, 2009)

In *Michigan v. Jackson*, 475 U.S. 625, which extended *Edwards v. Arizona* to the Sixth Amendment context, the Court previously held that once a defendant invokes his right to counsel at an arraignment, the police may not initiate interrogation outside counsel's presence. In *Montejo*, the Court held that *Michigan v. Jackson*'s prophylactic measures were triggered only after a defendant actually requests counsel or otherwise asserts his Sixth Amendment right to counsel and did not apply when the defendant simply stood by mute when the court advised him of his right to counsel at arraignment. The police must still obtain a valid waiver of the right to counsel and the right to remain silent before they may speak to the defendant but they now have the opportunity to secure such a waiver and talk to the client even after appointment of counsel.

Due Process

Riviera v. Illinois
No. 07-9995 (Mar. 30, 2009)

Denial of peremptory challenge did not violate the Due Process Clause such that automatic reversal was required. Generally, an error is deemed structural requiring automatic reversal if it rendered the criminal trial fundamentally unfair or unreliable. Here, a first-degree murder defendant sought to strike a juror, who ended up being the jury foreperson. The Court held that where a defendant is tried before a qualified jury composed of individuals not challengeable for cause, the loss of a peremptory challenge due to a state court's good-faith error is not a matter of federal constitutional concern. Rather, the Court held that it is a matter for the state to address under its own laws, as there is no federal constitutional right to peremptory challenges.

Harbison v. Bell
No. 07-8521 (Apr. 1, 2009)

Federally appointed counsel may represent their clients in state clemency proceedings and are entitled to compensation pursuant to 18 U.S.C. § 3599, which provides representation to indigent defendants facing the death penalty. After both state and federal habeas actions were denied, Harbison's federal public defender sought to represent him in state clemency proceedings. The Supreme Court reversed the Sixth District in holding that the scope of appointed counsel's duties under § 3599(e) permits such representation in that counsel "shall also represent the defendant in such . . . proceedings for executive or other clemency as may be available to the defendant." §3599(e).

Preserving Error

Puckett v. United States
No. 07-9712 (Mar. 25, 2009)

Failure to raise issue of breached plea agreement in the district court level is subjected to "plain error" review. On appeal, Puckett raised for the first time the argument that the government had broken the plea agreement. The Fifth Circuit found that Puckett had forfeited that claim by failing to raise it below and applied Federal Rule of Criminal Procedure 52(b)'s plain-error standard for unpreserved claims. "Plain error review" involves four prongs: (1) there must be an error or defect that the appellant has not affirmatively waived, (2) it must be clear or obvious, (3) it must have affected the appellant's substantial rights, and (4) if the three other prongs are satisfied, the court of appeals has the discretion to remedy the error if it seriously affected the fairness, integrity or public reputation of judicial proceedings. The Court held that the question here was not whether plain-error review applies when a defendant fails to preserve a claim, "but what conceivable reason exists for disregarding its evident application." The Court noted that the breach undoubtedly violated the defendant''s rights, but stated that the defendant had the opportunity to seek vindication of those rights in district court; if he fails to do so, a plain error analysis is appropriate.

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The Crack Sentencing Disparity and the Road to 1:1

Virginia Schlueter

The Anti-Drug Abuse Act of 1986 Act[1,2] authorized a 100-to-1 ratio sentencing scheme, which equated a single gram of crack with 100 grams of powder. No rationale for the ratio was discussed in the legislative history.[3] The newly created U.S. Sentencing Commission[4] simply adopted the 19*mbrough*, 128 S. Ct. at 567, *see* U.S.S.G. § 1A1.1, cmt. pt. A, P3. However, since then, the Sentencing Commission repeatedly acknowledged the unwarranted disparity.

In a series of reports, the Sentencing Commission recognized distinct problems with the presumptions in the 1986 act's concerns about penalizing serious drug traffickers more severely than street-level dealers.[5] It found that a disparity resulted in "retail crack dealers get[ting] longer sentences than the wholesale drug distributors who supply them the powder cocaine."[6] Based on these findings, the Sentencing Commission proposed a reduction to the crack/powder differential which would have changed the ratio from 100-to-1 to 1-to-1.[7] Congress declined to implement the proposed change,[8] however it invited the Sentencing Commission to draft a modified ratio for its further consideration.[9] As invited, in 1997, the Sentencing Commission issued another report which suggested a 5-to-1 ratio.[10] Congress did not act upon the Sentencing Commission's 1997 proposal.

Then, in 2002, the Sentencing Commission's research showed that many of the concerns which drove the 2002 Report[11,12] found that 85 percent of the individuals sentenced under the 100-to-1 ratio were African-American, thus resulting in the most severe sentences imposed "primarily on black offenders."[13] In response, the Sentencing Commission recommended a reduction of the ratio to "at least" 20-to-1.[14] Congress, again, failed to act.

In its fourth report to Congress in 2007,[15] the Sentencing Commission re-urged a change to the inequitable ratio, however it did not await a congressional response. Instead, the Sentencing Commission enacted a series of amendments as a "partial remedy" for the disparate treatment between crack and powder cocaine.[16] On April 17, 2007, the Sentencing Commission amended the crack guidelines to address the disparity between crack cocaine and powder cocaine penalties.[17] The Sentencing Commission declared that Amendment 706[18,19] retroactive, effective March 3, 2008.[20]

As of March 5, 2009, a total of 19,239 sentences were reconsidered under the amended guidelines.[21] Of those cases, 13,408—or 69 percent—received a sentence reduction.[22] The majority of the cases in which the defendants were denied a reduction rested on the ruling that the defendant was ineligible under U.S.S.G. 1B1.10.[23] On average, defendants obtained a twenty-four month reduction of their sentence.[24]

Recently, Lanny Breuer, the head of the Department of Justice's Criminal Division, testified before Congress that the disparity between crack and powder cocaine should be "completely eliminated."[25] When he was asked specifically whether the Department of Justice supported the enactment of a 1-to-1 ratio, he clearly stated "yes."[26] Moreover, he suggested that federal prosecutors should inform the courts that sentences should be fashioned consistent with the objectives of 18 U.S.C. 3553(a). Although this testimony alone will change neither the Sentencing Commission's guidelines and nor Congress' statutory mandatory minimums, these statements certainly signal the administration's position as to this disparity. Hopefully, this will also encourage judges to exercise their considerable discretion in regard to the disparate treatment of crack sentences. ■

> In a series of reports, the Sentencing Commission found that a disparity resulted in "retail crack dealers get[ting] longer sentences than the wholesale drug distributors who supply them the powder cocaine."

Endnotes

[1]Pub. L. 99-570, 100 Stat. 3207Pub. L. 99-570, 100 Stat. 3207.

[2]"Congress apparently believed that crack was significantly more dangerous than powder cocaine in that: (1) crack was highly addictive; (2) crack users and dealers were more likely to be violent than users and dealers of other drugs; (3) crack was more harmful to users than powder, particularly for children who had been exposed by their mothers' drug use during pregnancy; (4) crack use was especially prevalent among teenagers; and (5) crack's potency and low cost were making it increasingly popular." *Kimbrough v. United States*, 128 S. Ct. 558,

DISPARITY continued on page 11

Justice Department Urges Congress to Eliminate Disparity Between Crack and Powder Cocaine Sentencing

Kathy Massing

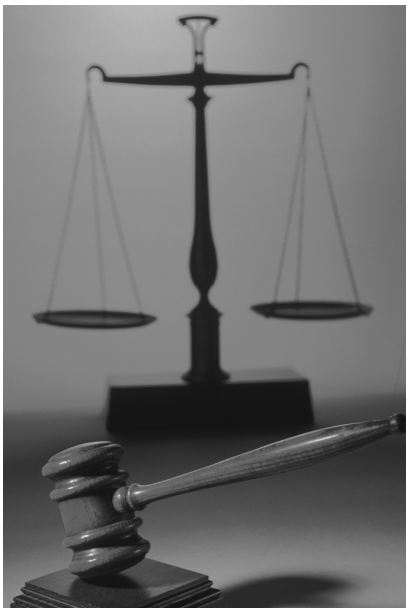
At a hearing on Apr. 29, 2009, Lanny A. Breuer, assistant attorney general, Criminal Division, U.S. Department of Justice, testified before the U.S. Senate Committee on the Judiciary Subcommittee on Crime and Drugs, urging Congress to eliminate the sentencing disparity between crack and powder cocaine under the federal sentencing guidelines.

Breuer testified that since the U.S. Sentencing Commission first reported 15 years ago on the difference in sentencing between crack and powder cocaine, a consensus has developed that the federal cocaine sentencing laws should be reassessed. Breuer explained that over the last 15 years, the country's understanding of crack and powder cocaine, their effects on the community, and the public safety concerns related to these drugs has been refined and has led to an awareness of a need to ensure fundamental fairness in the country's sentencing laws, policy and practice.

Breuer explained that the sentencing disparity between these two drugs is presently 100-to-1; selling five grams of crack cocaine triggers the same five-year mandatory minimum sentence as selling 500 grams of powder cocaine; those who sell 50 grams of crack are sentenced to the same ten-year mandatory minimum as those selling 5,000 grams of powder cocaine.

Breuer explained that powder cocaine and crack cocaine produce similar physiological and psychological effects once they reach the brain. Calling for change, Breuer stated that the current administration believes that the current federal cocaine sentencing structure fails to appropriately reflect the differences and similarities between crack and powder cocaine, the offenses involving each, and the goal of sentencing serious and major traffickers to significant prison sentences. Breuer urged that the goal of Congress should be to completely eliminate the sentencing disparity between crack cocaine and powder cocaine.

Breuer acknowledged that federal prosecutors will adhere to the existing law, and will continue to ask federal courts to calculate the guidelines in crack cocaine cases, as required by Supreme Court decisions. However, Breuer pointed out that federal courts have the authority to sentence outside the guidelines in crack cases or even to create their own quantity ratio and that prosecutors will inform courts that they should act within their discretion to fashion a sentence that is consistent with the objectives of 18 U.S.C. 3553(a). ■



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SAVE THE DATE

2010 Federal Bar Association Annual Meeting and Convention

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Search and Seizure

Arizona v. Johnson
No-07-1122 (Jan. 26, 2009)

Pat-down search of backseat passenger did not violate the Fourth Amendment. During the course of a traffic stop, the officer learned that a rear passenger was from out of town, had been to prison, and had a gang affiliation. As a result, she ordered him out of the car for further questioning regarding his gang affiliation. Once out of the car, the officer conducted a pat-down for safety because she thought he might be armed. A gun was discovered. In its unanimous decision, the Court held that the first prong of a Terry stop, a lawful investigatory stop, is met whenever the police lawfully detain a vehicle and its occupants for a traffic violation. The police do not need to have additional further cause to believe an occupant of the vehicle is involved in criminal activity. To justify a pat-down of the driver or a passenger during a traffic stop, however, the police simply must have a reasonable suspicion that the person subjected to the frisk is armed and dangerous.

Arizona v. Grant
No. 07-542 (April 21, 2009)

The Court ruled that police may not search the passenger compartment of a vehicle incident to arrest of the occupants, unless it is reasonable for the officers to believe that the arrestee(s) might access the vehicle at the time of the search, or unless the officers believe that the vehicle contains evidence of the offense of the arrest.

Speedy Trial

Vermont v. Brillon
No. 08-88 (Mar. 9, 2009)

Sixth Amendment right not violated where defense counsel sought delays. In July 2001, Brillon was arrested, then nearly three years later, in June 2004, he was tried. During the intervening time, at least six different attorneys were appointed to represent him. In applying the balancing test of Barker v. Wingo, 407 U. S. 514 (1972), the Court found that the Vermont Supreme Court erred in attributing delays to the State where several assigned counsel failed to move Brillon's case forward and found that it failed to adequately assess Brillon"s own disruptive behavior in the overall balance. Moreover, the Court held that assigned counsel, just as retained counsel, act on behalf of their clients, and delays sought by counsel are generally attributable to the clients they represent. The Court noted that delays resulting from a systemic breakdown in the public defender system could be charged to the state but found the nothing in the record suggested that institutional problems caused any part of the delay in Brillon's case.

Sufficient Evidence

United States v. Hayes
No. 07-608 (Feb. 24, 2009)

"Domestic relationship" not necessary element in predicate offense for conviction under 18 U.S.C. 922(g)(9), which criminalizes possession of a firearm by persons convicted of "misdemeanor crimes of domestic violence." Here, the Court held that the government need only prove that the existence of a domestic relationship beyond a reasonable doubt. In other words, "it suffices for the Government to charge and prove a prior conviction that was, in fact, for "an offense … committed by" the defendant against a spouse or other domestic victim." ■

The Supreme Court Updates were previously published in the Defense Never Rests Newsletter, *Published by the Federal Public Defender's Office for the Eastern District of Louisiana (April 2009).*

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- ❍ District of Connecticut

Delaware
- ❍ Delaware

District of Columbia
- ❍ Capitol Hill
- ❍ D.C.
- ❍ Pentagon

Florida
- ❍ Broward County
- ❍ North Central Florida
- ❍ Jacksonville
- ❍ Northwest Florida
- ❍ Orlando
- ❍ Palm Beach County
- ❍ South Florida
- ❍ Southwest Florida
- ❍ Tallahassee –$25
- ❍ Tampa Bay

Georgia
- ❍ Atlanta–$10

Hawaii
- ❍ Hawaii

Idaho
- ❍ Idaho

Illinois
- ❍ Chicago

Indiana
- ❍ Indianapolis

Iowa
- ❍ Iowa–$10

Kansas
- ❍ At Large

Kentucky
- ❍ Kentucky

Louisiana
- ❍ Baton Rouge
- ❍ Lafayette/ Acadiana
- ❍ New Orleans
- ❍ North Louisiana

Maryland
- ❍ Maryland

Maine*
- ❍ At Large

Massachusetts
- ❍ Massachusetts –$10

Michigan
- ❍ Eastern District of Michigan
- ❍ Western District of Michigan

Minnesota
- ❍ Minnesota

Mississippi
- ❍ Mississippi

Missouri
- ❍ At Large

Montana
- ❍ Montana

Nebraska*
- ❍ At Large

Nevada
- ❍ Nevada

New Hampshire*
- ❍ At Large

New Jersey
- ❍ Central Jersey Shore
- ❍ New Jersey

New Mexico*
- ❍ At Large

New York
- ❍ Eastern District of New York
- ❍ Southern District of New York

North Carolina*
- ❍ At Large

North Dakota*
- ❍ At Large

Ohio
- ❍ John W. Peck/ Cincinnati/ Northern Kentucky
- ❍ Columbus
- ❍ Dayton
- ❍ Northern District of Ohio–$10

Oklahoma
- ❍ Oklahoma City
- ❍ Northern/ Eastern Oklahoma

Oregon
- ❍ Oregon

Pennsylvania
- ❍ Eastern District of Pennsylvania
- ❍ Middle District of Pennsylvania
- ❍ Western District of Pennsylvania

Puerto Rico
- ❍ Hon. Raymond L. Acosta/ Puerto Rico–$10

Rhode Island
- ❍ Rhode Island

South Carolina
- ❍ South Carolina

South Dakota*
- ❍ At Large

Tennessee
- ❍ Chattanooga
- ❍ Memphis Mid-South
- ❍ Nashville
- ❍ Northeast Tennessee

Texas
- ❍ Austin
- ❍ Dallas–$10
- ❍ Del Rio–$25
- ❍ El Paso
- ❍ Fort Worth
- ❍ San Antonio
- ❍ Southern District of Texas–$25
- ❍ Waco

Utah
- ❍ Utah

Vermont*
- ❍ At Large

Virginia
- ❍ Northern Virginia
- ❍ Richmond
- ❍ Tidewater

Virgin Islands
- ❍ Virgin Islands

Washington*
- ❍ At Large

West Virginia*
- ❍ At Large

Wisconsin*
- ❍ At Large

Wyoming
- ❍ Wyoming

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169 L. Ed. 2d 481(2007)*Kimbrough v. United States*, 128 S. Ct. 558, 567, 169 L. Ed. 2d 481(2007), citing, U.S. Sentencing Commission, Report to Congress: Cocaine and Federal Sentencing Policy (May 2002) available at ussc.gov/r_congress/02crack/2002crackrpt.pdf; U.S. Sentencing Commission, Report to Congress: Cocaine and Federal Sentencing Policy (May 2002) (the 2002 Report) available at ussc.gov/r_congress/02crack/2002crackrpt.pdf (All Internet materials as visited Sept. 15, 2008.)

[3]William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 Ariz. L. Rev. p. 1252, n.1 (1996)William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 Ariz. L. Rev. p. 1252, n.1 (1996).

[4]The Sentencing Reform Act of 1984 created the U.S. Sentencing Commission, which was vested with the authority to develop guidelines and policy statements to aid federal courts. Pub. L. 98-473, Title II § 217(a), Oct. 12, 1984Pub. L. 98-473, Title II § 217(a), Oct. 12, 1984.Through the Sentencing Commission, Congress sought to foster honesty, uniformity and proportionality within federal sentences. 1A1.1 cmt. pt. A P3.

[5]U.S. Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy (Feb. 1995), available at www.ussc.gov/crack/exec.htm; U.S. Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy (Feb. 1995), available at www.ussc.gov/crack/exec.htm (hereinafter 1995 Report).

[6]*Id*. at 174.

[7]Amendments to the Sentencing Guidelines for U.S. Courts, 60 Fed. Reg. 25075-25077 (1995) Amendments to the Sentencing Guidelines for U.S. Courts, 60 Fed. Reg. 25075-25077 (1995).

[8]Pub. L. 104-38 § 1, 109 Stat. 334Pub. L. 104-38 § 1, 109 Stat. 334.

[9]Pub. L. 104-38 § 2(a)(2), 109 Stat. at 335Pub. L. 104-38 § 2(a)(2), 109 Stat. at 335.

[10]U.S. Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy 2 (Apr. 1997), available at www.ussc.gov/r_congress/newcrack.pdf; U.S. Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy 2 (Apr. 1997), available at www.ussc.gov/r_congress/newcrack.pdf. (Hereinafter 1997 Report).

[11]See the 2002 Report, supra.

[12]2002 Report pp. 94, 100.

[13]*Id*. at 103.

[14]*Id*. at viii.

[15]U.S. Sentencing Commission, Report to Congress: Cocaine and Federal Sentencing Policy 8 (May 2007), available at www.ussc.gov./r_congress/cocaine2007.pdf; U.S. Sentencing Commission, Report to Congress: Cocaine and Federal Sentencing Policy 8 (May 2007), available at www.ussc.gov./r_congress/cocaine2007.pdf (Hereinafter 2007 Report).

[16]2007 Report p.10.

[17]Amendments to the Sentencing Guidelines for United States Courts, 72 Fed. Reg. 28571-72 (2007)Amendments to the Sentencing Guidelines for United States Courts, 72 Fed. Reg. 28571-72 (2007).

[18]*Id*.

[19]*Id*.

[20]Amendments to the Sentencing Guidelines for the U.S. Courts, 73 Fed. Reg. 217-20 (2007) Amendments to the Sentencing Guidelines for the U.S. Courts, 73 Fed. Reg. 217-20 (2007).

[21]U.S. Sentencing Commission Preliminary Crack Cocaine Retroactivity Data Report, p. 5, Table 2 (March 2009), available at www.ussc.gov. The commission offered the caution that "the data in this report represents information concerning motions decided through March 5, 2009, and for which court documentation was received, coded and edited at the U.S. Sentencing Commission by March 9, 2009," and that it is only the preliminary report. *Id.* at p. 3.

[22]*Id*. at p. 5, Table 2.

[23]*Id.* at p. 14, Table 9. Specifically, the courts ruled, inter alia, that the defendants were subjected to mandatory minimums, career offender, armed career offender guidelines or had already served their sentence.

[24]*Id*. at p. 11, Table 8.

[25]judiciary.senate.gov/pdf/09-04-29BreuerTestimony.pdf

[26]judiciary.senate.gov/hearings/hearing.cfm?id=3798.

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