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United States v. Pho: Defining the Limits of Discretionary Sentencing

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UNITED STATES V. PHO: DEFINING THE LIMITS OF DISCRETIONARY SENTENCING

John G. Wheatley[*]

I. INTRODUCTION

In the consolidated case of *United States v. Pho*,[1] the government appealed two district court rulings that imposed criminal sentences outside of the range provided in the Federal Sentencing Guidelines Manual (Guidelines).[2] At separate trials, both defendants pled guilty to the crime of possession with intent to distribute five grams or more of cocaine base (commonly known as crack).[3] Rejecting the Guidelines' disparate treatment of crack and powder cocaine, the district court imposed sentences that were below the Guidelines' range, but above the statutory mandatory minimum.[4] The Court of Appeals for the First Circuit vacated both sentences and remanded the case for reconsideration, holding that a federal judge does not have the authority to go outside the Guidelines' range based solely on a "categorical, policy-based rejection" of the disparate treatment of crack cocaine in relation to powder cocaine.[5]

The central issue in *Pho* was the status of the Federal Sentencing Guidelines after the Supreme Court decided the landmark case of *United States v. Booker*,[6] in which the Court held that the Guidelines are merely advisory.[7] Despite the Guidelines' lack of a mandatory provision, the First Circuit concluded that courts must still abide by policy choices reflected therein, although there may be individualized circumstances that warrant imposing a sentence outside of the Guidelines' range.[8] In so doing, the court curbed the newfound judicial discretion that *Booker* provided. Given the court's decision in *Pho*, the question arises whether the Guidelines once again impose a mandatory sentencing range, even in limited circumstances, and even though the Supreme Court excised the statutory provision that had made the Guidelines mandatory. In resolving this issue, to what extent should the courts look to the intent of Congress? More importantly, how should courts approach sentencing in the wake of *United States v. Pho*?

This Note first examines the rationale behind the Supreme Court's decision to make the Guidelines advisory. It then addresses the historical background of the disparate treatment of crack and powder cocaine and the objections to this choice of

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1. 433 F.3d 53 (1st Cir. 2006). The two defendants in this case were tried separately, and their crimes did not involve each other. The cases were consolidated on appeal because the issue in both cases was the same. *Id.* at 54.

2. *Id.* at 58-59.

3. *Id.* at 57-58. The Sentencing Guidelines define "cocaine base" to mean "crack." U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c) cmt. n.(D) (2005).

4. *Pho*, 433 F.3d at 57-59.

5. *Id.* at 62, 64-65.

6. 543 U.S. 220 (2005).

7. *Id.* at 245.

8. *Pho*, 433 F.3d at 62.

policy. After briefly observing how district courts have used the *Booker* decision to avoid the perceived harsh treatment of crack offenders, this Note analyzes the First Circuit's decision in *Pho*. This Note also addresses subsequent decisions regarding similar cases in other Federal Circuits and attempts to reconcile the conclusions reached therein. Determining that the appropriate inquiry requires a proper construal of federal statutes, this Note examines relevant canons of statutory interpretation. This Note then considers how the Supreme Court's ruling in *Booker* affects the appropriate statutory construction. Although the once mandatory Guidelines are now merely advisory in all cases, this Note concludes that judges must nevertheless restrict their sentencing discretion within the limited confines of the federal statutes when reaching their ultimate sentencing decisions.

II. *UNITED STATES V. BOOKER*: THE RETURN OF JUDICIAL DISCRETION?

Prior to the Sentencing Reform Act of 1984 (Sentencing Act), federal judges were granted great latitude over setting the sentences for criminals.[9] Congressional concern over the disparity between the sentences imposed by different judges for similar conduct led to various bill proposals advocating an overhaul of the sentencing process.[10] After nearly a decade of consideration in Congress, discussions culminated in the passage of the Sentencing Act, which mandated that all federal judges impose a sentence within the limited range provided under the Guidelines.[11]

In *Booker*, the Supreme Court analyzed Sixth Amendment concerns stemming from the mandatory sentences.[12] At trial, defendants Booker and Fanfan were found guilty of possessing 92.5 grams of crack and 500 grams of cocaine, respectively.[13] At post-trial sentencing hearings, however, the probation officers' presentencing reports concluded that Booker had possessed 658.5 grams of crack, and that Fanfan was responsible for 2.5 kilograms of cocaine and 261.6 grams of crack.[14] Under the Guidelines, these amounts dictated that each defendant receive a much stiffer penalty

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9. 21A AM. JUR. 2D *Criminal Law* § 839 (2005). Penalties for various criminal acts were still set by statute, but sentencing judges were granted wide discretion over the term and type of sentence to be imposed. Mistretta v. United States, 488 U.S. 361, 363 (1989).

10. *See* United States v. Booker, 543 U.S. at 292-93 (Stevens, J., dissenting in part).

11. *Id.* at 294-95. This provision of the Sentencing Act was codified in pertinent part in 18 U.S.C. § 3553 [hereinafter Sentencing Statute].

12. *Id.* at 226 (majority opinion). The Sixth Amendment provides, in relevant part, for the right to a jury trial in criminal prosecutions. U.S. CONST. amend. VI.

13. *Booker*, 543 U.S. at 227-28.

14. *Id.* In a probation officer's presentencing report, the officer is able to prove to the judge, by a preponderance of the evidence, the quantity of the drug(s) the defendant was guilty of possessing/distributing. *See* U.S. SENTENCING GUIDELINES MANUAL § 6A1.3(a) cmt. (2005). The report can include, and the court may consider, evidence that would otherwise have been inadmissible at trial, such as hearsay, uncharged conduct, or other conduct of the defendant that was neither proven at trial nor admitted by the defendant; *any* relevant evidence may be included. *Id.* Thus, a defendant can be sentenced according to a much higher drug quantity than was presented at trial. This is particularly true in situations when large quantities of drugs are attributed to a criminal defendant by way of his involvement in a conspiracy to distribute. *See* Michael S. Walsh & Joseph K. Scott III, *Sentencing Guidelines Unconstitutional, Make Guidelines "Advisory,"* 52 LA. B.J. 466, 466-67 (2005); *see also* United States v. Watts, 519 U.S. 148, 157 (1997) (holding that sentencing courts are permitted to consider a defendant's conduct relating to charges of which the defendant was acquitted).

than he would have received based on the evidence heard at trial.[15] The Supreme Court ruled that a mandatory sentence based on evidentiary findings not made by a jury constituted a Sixth Amendment violation.[16]

The Court concluded that the Sentencing Statute's mandatory provision was inconsistent with the requirement of jury-found facts and thus needed to be severed and excised.[17] The Court subsequently set the standard of appellate review of sentencing decisions to be a review for unreasonableness.[18]

By striking the mandatory provision from the Sentencing Statute, the Supreme Court ruled that the Guidelines are now "effectively advisory."[19] The Court considered and explicitly rejected the option of keeping the Guidelines mandatory, with a "Sixth Amendment requirement engrafted onto it."[20] This remedy would have required that the *jury* find any fact that would enhance sentencing, thereby preventing a judge from increasing a sentence based on facts that the jury did not find, or were not admitted by the defendant.[21] Noting that "Congress would not have enacted sentencing statutes that make it more difficult to adjust sentences *upward* than to adjust them *downward*," the Court chose to sever and excise that portion of the statute requiring judges to impose a sentence within the Guidelines' range.[22] Although federal judges are still required to take the Guidelines into account, the Court ruled that they are no

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15. *Booker*, 543 U.S. at 227-28. Booker's sentence under the Guidelines would have been 210 to 262 months if calculated without the additional facts presented at sentencing. *Id.* at 227. The additional facts, however, raised the applicable sentence to 30 years to life imprisonment. *Id.* In Fanfan's case, the post-trial facts raised the sentencing range from 5-6 years to 15-16 years behind bars. *Id.* at 228.

16. *Id.* at 244; *see also* Blakely v. Washington, 542 U.S. 296, 303 (2004) (holding that a state court judge violated the Sixth Amendment by imposing a sentence above the statutory range based on facts not submitted to the jury); Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"). The *Booker* decision extended the holdings in *Apprendi* and *Blakely* to the Federal Sentencing Guidelines. *Booker*, 543 U.S. at 243-44.

17. *Booker*, 543 U.S. at 245. The Court also severed and excised 18 U.S.C. § 3742(e), which provided for *de novo* review on appeal of departures from the Guidelines. *Id.*

18. *Id.* at 261.

19. *Id.* at 245.

20. *Id.* at 249-50. Justices Stevens, Scalia, Souter, and Thomas advocated this remedy. *Id.* at 284 (Stevens, J., dissenting in part); *id.* at 313 (Thomas, J., dissenting in part) (agreeing with Justice Stevens's suggested remedy, but choosing to write separately for other reasons). Stevens also wrote the portion of the majority opinion that held that the Guidelines are subject to the jury trial requirements of the Sixth Amendment. *Id.* at 226-27 (majority opinion). The *Booker* opinion was the product of a great split between the justices, with Justice Ginsberg being the swing vote. The Stevens faction (Stevens, Scalia, Souter, and Thomas) with the support of Ginsberg found that the Guidelines' approach to sentencing was inconsistent with the Sixth Amendment requirement that facts be found by the jury beyond a reasonable doubt. *Id.* at 243-44. The Breyer faction (Breyer, Rehnquist, O'Connor, and Kennedy) disagreed with this contention and, with the support of Ginsberg, adopted a remedy that would continue to allow judges to use facts in the probation officer's presentence investigation report when making their sentencing decision. *Id.* at 326 (Breyer, J., dissenting in part) ("[N]othing in the Sixth Amendment . . . forbids a sentencing judge to determine . . . the manner or way in which the offender carried out the crime of which he was convicted." (emphasis omitted)). This same split of Justices occurred in both *Apprendi* and *Blakely*, although Justice Ginsburg sided with the Stevens faction in both those decisions (in their entirety). *See supra* note 16.

21. *Booker*, 543 U.S. at 246.

22. *Id.* at 257, 259.

longer bound to apply them.[23] District courts were thus granted greater discretion in the imposition of criminal sentences, with their sentencing decisions reviewed in appellate courts for unreasonableness.[24]

III. THE REBUFFED 100:1 RATIO AND THE POST-*BOOKER* WORLD

A. Historical Overview of the 100:1 Ratio

The Guidelines use a 100:1 ratio for units of crack to units of powder cocaine when calculating prison terms.[25] In other words, possession of one unit of crack is treated the same as possession of one hundred units of powder cocaine for purposes of determining the sentencing range.

The 100:1 ratio first appeared in the Anti-Drug Abuse Act of 1986, prompted in large part by the death of rising basketball star Len Bias, who purportedly died from a crack cocaine overdose in June 1986.[26] That summer, the Act was passed amidst a "frenzied" political climate.[27] The legislation established two mandatory minimum sentences for certain drug crimes—five years and ten years.[28]

Despite the nearly identical chemical makeup of crack and powder cocaine (the primary difference being the method of production and the means of consumption), Congress set drastically different threshold quantities for the two drugs.[29] For example, to reach the mandatory minimum sentence of ten years, a defendant need only be found guilty of possessing fifty grams of crack, while the threshold quantity of powder cocaine was set at five kilograms (5,000 grams).[30] Congress found that crack was more dangerous than powder cocaine. This conclusion was based on Congress's belief that crack was: 1) more addictive; 2) more often associated with other serious crimes; 3) more likely to trigger harsh physiological effects; 4) more likely to be used by young people; and 5) more likely to lead to widespread use because it is relatively easy to

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23. *Id.* at 264.

24. *Id.*

25. *See* U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c) (2005).

26. *See* William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1249, 1251 (1996). Spade notes that, ironically, Len Bias most likely died from the inhalation of powder cocaine, not crack. *Id.* at 1250-51.

27. *See id.* at 1250 (quoting Eric E. Sterling, President of the Criminal Justice Policy Foundation).

28. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified in pertinent part at 21 U.S.C. § 841 (2000)).

29. *See id.* Crack is a processed or "cooked" form of cocaine, derived simply from powder cocaine, sodium bicarbonate (baking soda), and water. U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 16 (May 2002), *available at* http://www.ussc.gov/r_congress/02crack/2002crackrpt.pdf [hereinafter 2002 SENTENCING COMM'N REPORT]. One gram of powder cocaine converts to roughly 0.89 grams of crack. *Id.* Crack is typically smoked; powder cocaine is usually inhaled through the nose (snorted), although users sometimes smoke it as well. OFFICE OF NATIONAL DRUG CONTROL POLICY, PULSE CHECK: TRENDS IN DRUG ABUSE 29, 37 (April 2002), *available at* http://www.whitehousedrugpolicy.gov/publications/drugfact/pulsechk/apr02/ impact_of_sept11.pdf.

30. 21 U.S.C. § 841(b)(1)(A)(ii), (iii) (2000). For further comparison, the ten-year threshold for heroin is set at one kilogram (1,000 grams), and for marijuana at 1,000 kilograms (100,000 grams). *Id.* § 841(b)(1)(A)(i), (vii).

manufacture and distribute, and tends to be more potent and pure.[31] Subsequent to the Act's passage, the same 100:1 weight ratio was codified in the Federal Sentencing Guidelines.[32]

Discontent with the unequal treatment of crack and powder cocaine is not a modern trend. Even the Sentencing Commission has expressed its concern. In 1995, the Commission released a report that indicated that the 100:1 ratio disproportionately impacts low-level street dealers.[33] The report also identified statistics that demonstrated that the harsh sentences primarily affect African-American defendants.[34] That same year, the Commission recommended eliminating the differential treatment of the two drugs, but Congress rejected this proposal.[35] The concerns of the

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31. U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 118 (February 1995), *available at* http://www.ussc.gov/crack/exec.htm [hereinafter 1995 SENTENCING COMM'N REPORT]. Noting that the drug was not well known at the time the 100:1 ratio was formulated by Congress, the U.S. Sentencing Commission suggested that some of the assumptions relied on by Congress when setting the penalty structure have proven unsound or at least overstated. 2002 SENTENCING COMM'N REPORT, *supra* note 29, at 91. Nevertheless, the Commission agreed that crack cocaine is more dangerous than powder cocaine; thus some disparity was justified. *Id.* at 92, 107 (recommending a ratio of no more than 20:1).

32. *See* U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c) (2005).

33. 1995 SENTENCING COMM'N REPORT, *supra* note 31, at xii-xiii; *see also* RYAN S. KING ET AL., THE SENTENCING PROJECT, INCARCERATION AND CRIME: A COMPLEX RELATIONSHIP 7 (2005), *available at* http://www.sentencingproject.org/pdfs/incarceration-crime.pdf (noting that 66.5% of all crack offenders sentenced in the year 2000 were low-level dealers or "mules"). The 1995 Sentencing Commission Report provided an example of a federal court case where two defendants purchased 255 grams of powder cocaine from their supplier. 1995 SENTENCING COMM'N REPORT, *supra* note 31, at 159. After they had brought the cocaine home, they cooked it into crack. *Id.* Unhappy that they were only able to get 88 grams of crack out of the supply (ordinarily they would have been able to get 200 grams), they called their supplier and complained. *Id.* Being told that they could replace the crack with another batch of powder cocaine at no extra cost, the buyers returned to their supplier with the 88 grams of crack in hand, but were arrested prior to completing the transaction. *Id.* Both the two defendant buyers and the supplier were first time offenders. *Id.* The supplier's sentencing range under the Guidelines for selling 255 grams of powder cocaine was 33-41 months; the buyers who purchased the powder and cooked it into crack ended up with a sentencing range of 121-151 months. *Id.* To make a similar comparison in terms of value, the report noted that a crack dealer with five grams of crack (10-15 doses), worth an average retail price of $275-750 would be subject to a five-year mandatory minimum sentence. *Id.* at 159-60. A powder cocaine dealer would need to traffic 500 grams of powder cocaine (2,500-5,000 doses) worth an average retail price of $32,500-$50,000 in order to be subject to the same five-year mandatory minimum sentence. *Id.* at 160.

34. 1995 SENTENCING COMM'N REPORT, *supra* note 31, at xi-xii. The report found that in the year 1993, 88.3% of all defendants convicted of crack offenses were African-American. *Id.* at xi. Crack has been found to be more prominently used among black individuals, while powder cocaine is more commonly used by whites. *See* OFFICE OF NATIONAL DRUG CONTROL POLICY, *supra* note 29, at 29, 36. For a discussion of American drug policy's "prisoner-generating machine" and its impact on African-American communities, see Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1275 (2004).

35. *See* Amendments to the Sentencing Guidelines for United States Courts, 60 Fed. Reg. 25,074, 25,076 (proposed May 10, 1995); Act of Oct. 30, 1995, Pub. L. No. 104-38, § 1, 109 Stat. 334, 334 (rejecting the Sentencing Commission's proposal).

Commission were reiterated in 1997 (proposing a 5:1 ratio)[36] and in 2002 (proposing a 20:1 ratio),[37] but its recommendations did not receive the support of Congress.

In December 2001, some of the Commission's concerns were echoed by members of the Senate Judiciary Committee.[38] Senators Jeff Sessions (R-AL) and Orrin Hatch (R-UT) introduced a bill that would have reduced the sentencing disparity down to 20:1 by increasing the applicable quantity of crack and decreasing the applicable quantity of powder cocaine that would trigger the mandatory minimum sentences.[39] The bill directed that the Sentencing Guidelines be adjusted accordingly.[40] This proposed bill was never able to make it out of the committee, however, and subsequent efforts to reform have failed.[41]

Challenges to the 100:1 ratio in the courtroom have been attempted both on Equal Protection grounds, due to the disproportionate impact the penalties have on African-American defendants, and on Eighth Amendment grounds that the sentences constitute cruel and unusual punishment.[42] Both these efforts, however, have proven futile.[43]

*B. Post-*Booker*: The Return of Legal Challenges to the Treatment of Crack Cocaine Offenses*

With the Federal Sentencing Guidelines labeled advisory, district courts have taken advantage of their new freedom to go outside the once mandatory sentencing ranges. Their judicial discretion no longer shackled to the Guidelines, many federal judges have gone as far as rejecting the Guidelines' sentencing range outright. Particularly under attack, once again, is the harsh treatment of crack offenses in relation to offenses involving its sister drug, cocaine.

Numerous courts have come to the conclusion that the sentencing range in the Guidelines for crack offenses is excessive. Courts have pronounced such treatment

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36. *See* U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 2 (April 1997), *available at* http://www.ussc.gov/r_congress/NEWCRACK.PDF.

37. *See* 2002 SENTENCING COMM'N REPORT, *supra* note 29, at viii. The Sentencing Commission also reaffirmed its conclusion that the harsh penalties for crack offenses fall primarily on low-level criminals and African-Americans. *Id.* at vi-viii.

38. *See* Drug Sentencing Reform Act of 2001, S. 1874, 107th Cong. (2002).

39. *See id.* § 101.

40. *Id.* § 102.

41. *See* RYAN S. KING & MARC MAUER, THE SENTENCING PROJECT, SENTENCING WITH DISCRETION: CRACK COCAINE SENTENCING AFTER *BOOKER* 10 (2006), *available at* http://www.sentencingproject.org/pdfs/crackcocaine-afterbooker.pdf.

42. *See* David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1298, 1304-05 (1995); *see also* Matthew F. Leitman, *A Proposed Standard of Equal Protection Review for Classifications Within the Criminal Justice System that Have a Racially Disparate Impact: A Case Study of the Federal Sentencing Guidelines' Classification Between Crack and Powder Cocaine*, 25 U. TOL. L. REV. 215 (1994).

43. *See, e.g.*, United States v. Graciani, 61 F.3d 70, 74-75 (1st Cir. 1995) (noting that there was no "racial animus or discriminatory intent" in setting such a policy); United States v. Fisher, 58 F.3d 96, 99-100 (4th Cir. 1995) (rejecting due process and equal protection challenges to the 100:1 ratio); United States v. Bynum, 3 F.3d 769, 775 (4th Cir. 1993) (finding that the ratio was not enacted "for the discriminatory purpose of punishing blacks more than whites for similarly culpable conduct"); United States v. Avant, 907 F.2d 623, 627 (6th Cir. 1990) (noting that the legislature is granted broad authority to set the contours of criminal law and punishment).

"indisputably severe,"[44] "greater than necessary,"[45] and "unreasonable."[46] As a result, many defendants have received a more lenient sentence than they would have under mandatory Guidelines.

A number of courts have chosen to use a revised ratio to guide their sentencing decisions.[47] The question arises whether this decision to use an alternate ratio when calculating a sentence encroaches on legislative power, or if it is a permissible use of judicial discretion.

IV. THE *PHO* DECISION: REIGNING IN JUDGES' DEPARTURE POWER

Defendants Pho and Lewis each pled guilty to possession with intent to distribute cocaine base in violation of 21 U.S.C. § 841(a).[48] Under the Federal Sentencing Guidelines, Pho's sentence was calculated to be in the range of 87-108 months, and Lewis' sentence between 235-293 months.[49] The United States District Court for the District of Rhode Island determined, however, that because the Guidelines were no longer mandatory in light of *Booker*, the court's task was to "impose a sentence that is reasonable whether it's in the guideline range or not," so long as the sentence was within the statutory minimums and maximums prescribed by Congress.[50] Rejecting the 100:1 ratio as "excessive" and "not reasonable," the court recalculated the defendants' sentences using a 20:1 ratio instead.[51] This approach resulted in a sentencing range of 57-71 months for Pho and 188-235 months for Lewis.[52] The court ultimately settled on a sentence of 64 months for Pho and 188 months for Lewis.[53] The government appealed both decisions to the U.S. Court of Appeals for the First Circuit.[54]

Although the government acknowledged that the Guidelines are no longer mandatory, and that federal judges have the authority to tailor sentences based on case-specific circumstances and the criteria provided by federal statute, it maintained that courts were not free to substitute their own preferred ratios for those provided in the Guidelines.[55] The government emphasized that it was the goal of Congress in creating

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44. Simon v. United States, 361 F. Supp. 2d 35, 47 (E.D.N.Y. 2005).

45. United States v. Nellum, No. 2:04-CR-30 PS, 2005 U.S. Dist. LEXIS 1568, at *15 (N.D. Ind. Feb. 3, 2005).

46. United States v. Williams, 435 F.3d 1350, 1355 (11th Cir. 2006).

47. *See, e.g.*, United States v. Fisher, No. S3 03 CR 1501 (SAS), 2005 U.S. Dist. LEXIS 23184, at *24 (S.D.N.Y. Oct. 11, 2005) (10:1 ratio); United States v. Perry, 389 F. Supp. 2d 278, 307-08 (D.R.I. 2005) (20:1 ratio); United States v. Leroy, 373 F. Supp. 2d 887, 896 (E.D. Wis. 2005) (20:1 ratio); United States v. Castillo, No. 03 Cr. 835 (RWS), 2005 U.S. Dist. LEXIS 9780, at *13-14 (S.D.N.Y. May 17, 2005) (20:1 ratio); United States v. Smith, 359 F. Supp. 2d 771, 781-82 (E.D. Wis. 2005) (20:1 ratio).

48. United States v. Pho, 433 F.3d 53, 57, 58 (1st Cir. 2006).

49. *Id.* at 57, 59.

50. *Id.* at 58. The mandatory minimums imposed by statute were five years (60 months) for Pho and ten years (120 months) for Lewis. *Id.* at 57-58; *see also* 21 U.S.C. § 841(b)(1)(A), (B) (2000).

51. *Pho*, 433 F.3d at 58-59.

52. *Id.* Lewis was also convicted of a charge of possession of a firearm by a felon in violation of 18 U.S.C. § 922(g)(1). *Id.* at 58. This second conviction is irrelevant to the analysis of this Note and will not be discussed further. The 188-month sentence was the sentence imposed solely on account of the drug offense. *Id.* at 59.

53. *Id.* at 58, 59.

54. *Id.*

55. Brief for Appellants at 10, 15, 32, United States v. Pho, 433 F.3d 53 (1st Cir. 2006) (Nos. 05-2455 & 05-2461).

the Guidelines to have sentence uniformity across the country and that this goal should be given substantial weight when setting punishments.[56] It argued that to achieve uniformity, most sentences should continue to fall within the Guidelines' range.[57] The government considered sentences within the Guidelines to be "presumptively reasonable," whereas sentences outside the Guidelines require justification based on unique circumstances and statutory considerations.[58]

By imposing a non-Guidelines sentence based solely on the district court's rejection of the 100:1 ratio, the government claimed that the court committed an error of law.[59] As an error of law, the appropriate standard of appellate review is *de novo*.[60]

The government argued that the dangers of crack warranted the disparity between crack and powder cocaine sentences, and noted that it was the intent of Congress to impose severe penalties for criminal violations involving even small amounts of crack.[61] Rejecting the Guidelines' sentence, the government argued, frustrates the will of Congress.[62] The government maintained that it is within the exclusive authority of Congress to set policy and determine the severity of punishments.[63] The government contended that because it is not proper for the court to question the policy choice of Congress when such a policy does not violate the Constitution, courts should adhere to the 100:1 ratio.[64]

The government insisted that selecting a ratio that deviated from the Guidelines would result in unwarranted sentencing disparities.[65] Such an approach, it claimed, would frustrate one of the goals embodied by Congress in federal statute.[66] The government concluded that imposing a sentence based on the court's own policy view was error as a matter of law.[67]

The defendants, on the other hand, contended that according to *Booker*, the court should only review the reasonableness of the sentence imposed.[68] Noting that the First Circuit reviews sentences for reasonableness under the abuse of discretion standard, Defendant Lewis argued that the sentence was reasonable given that the district court properly considered the factors Congress provided in the Sentencing Statute, including the Federal Sentencing Guidelines.[69]

The defendants argued that *Booker* instructs courts to follow 18 U.S.C. § 3353(a), which "directs the court to impose a sentence 'sufficient, but not greater than

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56. *Id.* at 12.
57. *Id.* at 11.
58. *Id.* at 14-15.
59. *Id.* at 15.
60. *Id.*
61. *Id.* at 17, 25.
62. *Id.* at 33.
63. *Id.*
64. *Id.* at 34-35.
65. *Id.* at 37.
66. *See id.* at 39; *see also* 18 U.S.C. § 3553(a)(6) (2000) (noting the "need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct").
67. Brief for Appellants, *supra* note 55, at 49.
68. Brief for Appellee Lewis at 6, United States v. Pho, 433 F.3d 53 (1st Cir. 2006) (No. 05-2461); Brief for Appellee Pho at 4, *Pho*, 433 F.3d 53 (No. 05-2455).
69. Brief for Appellee Lewis, *supra* note 68, at 7-8.

necessary,' to support the purposes of sentencing."[70] Acknowledging that *Booker* does require consideration of the Guidelines, as well as all the factors listed under the Sentencing Statute, the defendants contended that greater justification for a sentence outside the Guidelines' range is not required.[71] The defendants rejected the government's contention that a "non-Guidelines sentence is presumptively unreasonable."[72]

The defendants maintained that the district court properly considered all of the factors under the Sentencing Statute[73] and, after careful consideration, selected a sentence that was both appropriate and reasonable.[74] Noting that the Sentencing Commission itself believed the Guidelines overstate the seriousness of crack offenses, the defendants contended that following the Commission's recommendations in their report while staying above the mandatory minimum sentence does not frustrate the will of Congress.[75] Taking into account all of the relevant factors, including the Guidelines, the Commission Report, and the considerations identified in the Sentencing Statute, the defendants maintained that the sentence imposed by the district court was fair and reasonable.[76]

The First Circuit determined that the issue on appeal was not whether the sentence imposed was reasonable, but whether the procedure used by the district court was correct as a matter of law.[77] Given that the challenge was to a legal conclusion of the district court, the court exercised *de novo* review.[78]

Rejecting the defendants' claim that refusing to follow the 100:1 ratio would not thwart the will of Congress, the First Circuit concluded that federal judges are bound to follow the policy judgments of Congress, including the appropriate penalties for federal crimes.[79] The court analyzed the legal history surrounding the crack to powder cocaine sentencing disparity and recognized that the Sentencing Commission had

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70. *Id.* at 9; Brief for Appellee Pho, *supra* note 68, at 11.

71. Brief for Appellee Lewis, *supra* note 68, at 10.

72. *Id.* at 11.

73. *See* 18 U.S.C. § 3553(a)(1)-(7) (2000).

74. Brief for Appellee Lewis, *supra* note 68, at 11-12; Brief for Appellee Pho, *supra* note 68, at 17-18.

75. Brief for Appellee Lewis, *supra* note 68, at 12-14; Brief for Appellee Pho, *supra* note 68, at 13, 17.

76. Brief for Appellee Lewis, *supra* note 68, at 15-16; Brief for Appellee Pho, *supra* note 68, at 17-18. Although both of the Appellees' briefs claim that the district court properly considered the factors delineated under the Sentencing Statute, neither of the briefs mention how the district court applied the facts of the defendants' cases to the sentencing factors. Pho's brief did, however, come to the conclusion that the judge based his sentencing decision on the 2002 Sentencing Commission Report, which recommended a 20:1 ratio between crack and powder cocaine. Brief for Appellee Pho, *supra* note 68, at 18; *see also* 2002 SENTENCING COMM'N REPORT, *supra* note 29, at 107. Although pertinent policy statements of the Sentencing Commission that have been *distributed to federal courts* are an appropriate sentencing consideration, the report cited was prepared for use by *Congress*, not the courts. *See* 18 U.S.C. § 3553(a)(5) (2000) (providing that courts shall consider policy statements made by the Sentencing Commission pursuant to 28 U.S.C. § 994(a)(2)); 28 U.S.C. § 994(a)(2) (2000) (providing that the Sentencing Commission "shall promulgate and distribute to all courts of the United States . . . general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation"). For an example of a policy statement that should be considered by a sentencing court when appropriate, see U.S. SENTENCING GUIDELINES MANUAL § 4A1.3 (2005).

77. United States v. Pho, 433 F.3d 53, 59-60 (1st Cir. 2006).

78. *Id.* at 60-61.

79. *Id.* at 62.

repeatedly advocated eliminating or substantially reducing the sentencing differential.[80] The court emphasized, however, that Congress had at times either rejected the Commission's proposed guideline amendments or taken no action in support thereof.[81]

To be consistent with the separation of powers in the Constitution, the court indicated that it was the proper role of Congress, not the judiciary, to set the penalties for federal crimes.[82] Although the court recognized that the Supreme Court's decision in *Booker* allows sentencing courts to "tailor individual sentences in light of the factors enumerated in [the Sentencing Statute]," the court ruled that it is impermissible for judges to reject a policy determination of Congress.[83] The court acknowledged that *Booker's* holding did allow sentencing courts to take case-specific circumstances into consideration when imposing a sentence, but held that this discretion does not entitle judges to base their decisions on policy considerations.[84] Rejection of the 100:1 ratio, the court reasoned, "impermissibly usurps Congress's judgment about the proper sentencing policy for cocaine offenses."[85] Concluding that the district court based the defendants' reduced sentences entirely on the court's disagreement with the harsh treatment of crack offenses under the Guidelines, the First Circuit held that the district court erred as a matter of law and remanded the case for resentencing.[86]

V. SUBSEQUENT CIRCUIT COURT DECISIONS

A. A Different Result in the Eleventh Circuit?

A mere eight days after the First Circuit decision in *Pho*, the Eleventh Circuit issued an opinion in a remarkably similar case. In *United States v. Williams*,[87] the Eleventh Circuit upheld a district court's decision to sentence a crack offender to 90 months in prison, even though the sentencing range under the Guidelines would have resulted in 188 to 235 months behind bars.[88] Are the Circuits thus split in their interpretation of *Booker* and application of the Sentencing Statute?

In *Williams*, the Eleventh Circuit determined that once a district court has calculated the sentence under the Guidelines, the court may then impose a sentence outside that range as long as the sentence is reasonable.[89] In the view of the Eleventh Circuit, the factors listed under the Sentencing Statute remain to guide the sentencing courts, but the courts are not required to state on the record either that they have considered or discussed each of those factors.[90] Finding that the final sentence was reasonable, the court affirmed the sentence.[91]

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80. *Id.* at 54-57.
81. *Id.* at 56-57.
82. *Id.* at 61.
83. *Id.* at 61-62.
84. *Id.* at 62.
85. *Id.* at 63.
86. *Id.* at 64-65.
87. 435 F.3d 1350 (11th Cir. 2006).
88. *Id.* at 1351.
89. *Id.* at 1353.
90. *Id.* at 1353-54.
91. *Id.* at 1356.

Although the *Williams* and *Pho* decisions appear to be at odds with one another, the two can be reconciled. The court in *Williams* concluded that the district court did not base its decision solely on its disagreement with the Guidelines' treatment of crack offenses; rather it found that the district court considered the defendant's individual history and the nature of the offense.[92] In the words of the court: "This is not a case where the district court imposed a non-Guidelines sentence based solely on its disagreement with the Guidelines. In this case, the district court correctly calculated the Guidelines range and gave specific, valid reasons for sentencing lower than the advisory range."[93]

Interestingly, the Eleventh Circuit did not mention any case-specific circumstances that justified deviating from the Guidelines. Instead, the court focused on the district court's belief that "a sentence of 188 months was unreasonable for a crime involving the sale of only $350 of crack cocaine."[94] The court also recognized the district court's conclusion that imposing a longer sentence "would not promote respect for the law."[95] Although the legal conclusions in both *Williams* and *Pho* therefore appear to be consistent, the district court in both cases (at least in so far as the record reflects) seemed only to focus on its belief that the sentence calculated under the Guidelines was in itself too harsh.

B. The Fourth Circuit Follows Pho

The Fourth Circuit followed the lead of the First Circuit decision in *Pho* on very similar facts.[96] In *United States v. Eura*, the defendant was convicted of possession with intent to distribute five grams or more of crack cocaine.[97] The sentencing judge imposed a sixty-month sentence for this crime (the mandatory minimum five-year sentence), even though the Guidelines suggested a range of seventy-eight to ninety-seven months.[98] This decision was based largely on the Sentencing Commission's reports that recommended narrowing the 100:1 ratio.[99]

The Fourth Circuit ruled that the district court failed to properly consider the provisions of the Sentencing Statute, particularly "the need to avoid unwarranted sentencing disparities."[100] The court concluded that "giving a sentencing court the authority to sentence a defendant based on its view of an appropriate ratio between crack cocaine and powder cocaine would inevitably result in an unwarranted disparity

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92. *Id.* at 1355.

93. *Id.*

94. *Id.* The defendant agreed to sell to an undercover agent half a "cookie" of crack cocaine for $350. *Id.* at 1351. The cookie weighed five grams. *Id.* At the street level, crack is typically sold in units of one gram or less. *See* OFFICE OF NATIONAL DRUG CONTROL POLICY, *supra* note 29, at 26-27.

95. *Williams*, 435 F.3d at 1355.

96. *See* United States v. Eura, 440 F.3d 625 (4th Cir. 2006). Since *Eura* was decided, several other Circuits have also followed the First Circuit in holding that sentencing judges are not free to reject the Guidelines' sentencing disparity between crack and powder cocaine offenses. *See* United States v. Miller, 450 F.3d 270, 275 (7th Cir. 2006); United States v. Williams, 456 F.3d 1353, 1367 (11th Cir. 2006); United States v. Castillo, 460 F.3d 337, 353 (2d Cir. 2006).

97. *Eura*, 440 F.3d at 628.

98. *Id.* at 628, 630.

99. *Id.* at 630-31.

100. *Id.* at 633 (quoting the sentencing factor located at 18 U.S.C. § 3553(a)(6) (2000)).

between similarly situated defendants in direct contradiction to the [Sentencing Statute]."[101] Noting that there can certainly be instances where crack cocaine offenders could be sentenced outside the Guidelines range, the court emphasized that the decision to do so must be based on "individual aspects of the defendant's case" that impact the factors to be considered under the Sentencing Statute.[102] Concluding that the sentencing judge relied not on the sentencing factors, but upon the unfairness of the 100:1 ratio, the court remanded the case for resentencing.[103]

C. *Of Utmost Concern: The Process*

The *Pho* and *Eura* cases differ from *Williams* primarily in the process used by the sentencing court. None of the courts in these cases found that the *length* of the sentence ultimately imposed was unreasonable.[104] The criticism, rather, was in the *means* of reaching the sentence.

The First Circuit in *Pho* and the Fourth Circuit in *Eura* each found that the sentencing court did not base its sentence on the "real conduct"[105] of the defendant or the factors enumerated in the Sentencing Statute, but instead relied on their disagreement with Congress's choice to treat crack offenders much more harshly than powder cocaine offenders.[106] The Eleventh Circuit in *Williams*, on the other hand, found that the decision to deviate from the Guidelines was based on the individual circumstances of the case.[107] At no point was the 100:1 ratio or the treatment of violations of different crimes even discussed.

VI. INTERPRETING THE SENTENCING STATUTE

As the Supreme Court has noted, defining the elements of crimes and setting penalties are legislative, rather than judicial, functions.[108] With respect to crack cocaine offenses, Congress has codified mandatory minimum and maximum sentences under federal statute.[109] This sentencing range, however, was narrowed even further when Congress mandated that sentences correspond with those under the Federal Sentencing Guidelines. With the mandatory provision of the statute excised, it is difficult to ascertain how the Guidelines are to be applied in a post-*Booker* world.

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101. *Id.*

102. *Id.* at 634 (emphasis omitted).

103. *Id.*

104. *But cf.* United States v. Moreland, 437 F.3d 424, 434-37 (4th Cir. 2006) (concluding that the district court was justified in sentencing below the Guidelines range, but holding that a sentence of only ten years was unreasonable given that the Guidelines called for a sentence between thirty years and life imprisonment).

105. The Supreme Court noted that the goal of uniformity in sentencing is not simply to have the same sentence for violations of the same statute, but to have "similar relationships between sentences and [the] real conduct" of the defendants. United States v. Booker, 543 U.S. 220, 253-54 (2005).

106. United States v. Pho, 433 F.3d 53, 62-63 (1st. Cir. 2006); United States v. Eura, 440 F.3d 625, 632-33 (4th Cir. 2006).

107. 435 F.3d 1350, 1355 (11th Cir. 2006).

108. *See* United States v. Evans, 333 U.S. 483, 485-86 (1948).

109. *See* 21 U.S.C. § 841(b)(1)(A)(iii), (B)(iii) (2000).

A. A Plain Reading of 18 U.S.C. § 3553(a)

The Supreme Court severed and excised the portion of the Sentencing Statute that required sentencing courts to impose a sentence within the Guidelines' range.[110] With that provision gone, the Court instructed that the "remainder of the Act 'function[] *independently*.'"[111] With the absence of the mandatory provision, a plain reading of the remainder of the statute reveals that courts are now simply required to *consider* the Guidelines as but one of several factors to assist the court in reaching a sentencing decision.[112] The only mandate remaining is that the court "shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth [in the statute]."[113]

In particular, § 3553(a)(2)(A) directs the court to consider the "seriousness of the offense." Given that the Guidelines is a separate factor to be considered,[114] it would be superfluous to interpret this provision as meaning the seriousness of the offense as reflected in the Guidelines. Thus, it appears acceptable for a court to conclude that because the sentence as calculated under the Guidelines does not reflect the seriousness of the offense, a more appropriate sentence would be one outside the Guidelines' range. Similarly, the various other factors to be considered by the court should also warrant a sentence outside the range provided by the Guidelines, such as "the nature and circumstances of the offense and the history and characteristics of the defendant."[115]

With the statute functioning independently, and without the mandate that sentencing courts abide by the ranges provided by the Guidelines, as instructed by the Supreme Court, judges have the discretion to impose sentences anywhere within the mandatory minimum and maximum. This was also the interpretation of Justice Scalia in his dissent in *Booker*: "[L]ogic compels the conclusion that the sentencing judge, after considering the recited factors (including the Guidelines), has full discretion . . . to sentence anywhere within the statutory range."[116] Because the Guidelines are no longer binding, "the sentencing judge need only state that 'this court does not believe that the punishment set forth in the Guidelines is appropriate for this sort of offense.'"[117]

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110. *See* discussion *supra* Part II.

111. *Booker*, 543 U.S. at 259 (2005) (quoting Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987) (emphasis added).

112. *See* 18 U.S.C. § 3553(a) (2000); *see also Booker*, 543 U.S. at 304-06 (Scalia, J., dissenting in part) ("If the majority . . . thought the Guidelines not only had to be 'considered' (as the amputated statute requires) but had generally to be followed[,] its opinion would surely say so."); Sandra D. Jordan, *Have We Come Full Circle? Judicial Sentencing Discretion Revived in* Booker *and* Fanfan, 33 PEPP. L. REV. 615, 673 (2006) ("Courts that are resisting the change announced in Booker, by continuing to give great weight to the Guidelines, are missing the point."). The sentencing factors are discussed *infra* Part VI.C.

113. 18 U.S.C. § 3553(a) (2000). For a list of the purposes to be served in sentencing, see *infra* Part VI.C.

114. *See* 18 U.S.C. § 3553(a)(4) (2000).

115. *Id.* § 3553(a)(1).

116. *Booker*, 543 U.S. at 305 (Scalia, J., dissenting in part).

117. *Id.* Justice Stevens came to a similar conclusion in his dissent, stating that "the sentencing range contained in the Guidelines . . . is now nothing more than a suggestion that may or may not be persuasive to a judge when weighed against the numerous other considerations listed in [the Sentencing Statute]." *Id.* at 300 (Stevens, J., dissenting in part).

Under the remainder of the Sentencing Statute, therefore, it appears that the district court was completely justified in sentencing defendants Pho and Lewis outside the Guidelines' range. Because the district court concluded that the sentence as calculated under the Guidelines was unfair, it chose to impose a lower sentence, still within the statutory range, which it considered to be "a fair and reasonable sentence."[118] The plain language of the statute does not preclude such a result.

B. Congressional Intent and Statutory Interpretation

When the plain meaning of a statute expresses the intent of Congress, courts can follow the words of the statute alone.[119] The plain meaning is not, however, conclusive.[120] In situations where the language of a statute is inconsistent with the intent of the drafters, the intent of the drafters controls.[121] The Supreme Court has placed great emphasis on the importance of following Congressional intent, proclaiming that "even the most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent."[122]

The intent of Congress, of course, was clearly to have the Guidelines binding on sentencing courts.[123] Does that mean that the Guidelines are mandatory after all?

It would appear that the Guidelines remain mandatory unless a conflict with the Sixth Amendment arises (such as the situation in *Booker*). This option, however, was considered and expressly rejected by a majority of Justices in *Booker*.[124] The Court was quite clear in this respect, repeatedly indicating that a "mandatory system is no longer an open choice,"[125] and that it could not "see how it is possible to leave the Guidelines as binding in other cases."[126] The Court then left it up to Congress to devise a statute that would be consistent with the Constitution.[127]

The Court reached this conclusion through its interpretation of Congressional intent. Since the Guidelines had the potential to violate the Sixth Amendment, the Court concluded that if Congress were to have realized this fact prior to enacting the statute, they would have left the Guidelines advisory in all cases.[128] Thus, according to the Supreme Court's interpretation of the intent of Congress, the Guidelines must always be consulted, but do not need to be followed when a sentencing decision is made.

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118. United States v. Pho, 433 F.3d 53, 58 (1st Cir. 2006).

119. *See* United States v. Am. Trucking Ass'ns, 310 U.S. 534, 543 (1940).

120. *See id.* at 543-44; United States v. Ron Pair Enters., 489 U.S. 235, 242 (1989).

121. *Ron Pair Enters.*, 489 U.S. at 242.

122. Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974) (citing Neuberger v. Comm'r, 311 U.S. 83, 88 (1940)).

123. The excised provision dictated that "the court shall impose a sentence of the kind, and within the range [set forth in the Guidelines]." 18 U.S.C. § 3553(b) (2000); *see also* United States v. Booker, 543 U.S. 220, 292-99 (2005) (Stevens, J., dissenting in part) (setting forth the historical backdrop of the Federal Sentencing Guidelines).

124. *Booker*, 543 U.S. at 249-50.

125. *Id.* at 263, 265.

126. *Id.* at 266.

127. *Id.* at 265.

128. *Id.* at 258.

Even where the Guidelines are advisory, Congressional intent plays a vital role in the analysis. It is the proper function of the legislature, not the court, to establish criminal punishments.[129] The judiciary is not entitled to interpret criminal statutes so as to defeat the will of Congress.[130]

With respect to the punishment of crack offenders, Congress has expressed both its intention of imposing harsh sentences and its desire to have sentencing disparity exist between crack and powder cocaine punishments. Congress has made its support of the 100:1 ratio apparent not only by utilizing the ratio in setting statutory minimum and maximum sentences, but also by rejecting any proposals for changing the treatment of the two offenses in the Guidelines.[131] Thus Congress has made its intention clear that a defendant who sells crack is more culpable than a defendant who sells powder cocaine. Even though the chemical composition of the two drugs is essentially the same, Congress has expressed its belief that crack poses a greater threat to society.[132] The power to establish intentional sentencing disparities is within the province of the legislature.[133]

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129. Arroyo v. United States, 359 U.S. 419, 424 (1959); *see also* United States v. Bajakajian, 524 U.S. 321, 336 (1998) ("[J]udgments about the appropriate punishment for an offense belong . . . to the legislature."); Gore v. United States, 357 U.S. 386, 393 (1958) ("Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility, these are peculiarly questions of legislative policy.") (internal citation omitted). The extent to which Congress can set punishments is, of course, limited by the Constitutional protection against excessive bail, excessive fines, and, most importantly, cruel and unusual punishment. *See* U.S. CONST. amend. VIII. It is rare, however, for a court to determine that the length of a sentence constitutes cruel and unusual punishment; the focus is usually on the type of punishment rather than the duration. 21A AM. JUR. 2D *Criminal Law* § 973 (1998).

130. *Arroyo*, 359 U.S. at 424; *see also* 16 C.J.S. *Constitutional Law* § 337 (2005) (explaining the separation of powers with respect to defining crimes and ordaining punishments).

131. *See* discussion *supra* Part III.A. Ordinarily, when the Sentencing Commission submits to Congress proposed amendments to the Guidelines, the amendments become operational as a matter of law on the date that the Commission specifies. 28 U.S.C. § 994(o), (p) (2000). The proposed amendment fails only when Congress specifically acts to alter or reject the amendment. *See id.* § 994(p). Congress did so act when the Commission attempted to alter the 100:1 ratio. *See supra* note 35 and accompanying text.

132. One district court made use of an analogy to support its conclusion that judges are not entitled to categorically reject the Guidelines' disparate treatment of what could arguably be considered "similar conduct." *See* United States v. Doe, 412 F. Supp. 2d 87, 95 (D.D.C. 2006). The court pointed out two separate criminal acts that have different penalties under both the Criminal Code and the Guidelines—possession of a concealed dangerous weapon on an aircraft (carrying a statutory maximum penalty of "not more than 10 years" and has a Guidelines sentencing range of four to twenty-seven months) and possession of a dangerous weapon in a federal establishment other than a federal court (carrying a statutory maximum penalty of "not more than 1 year" and has a Guidelines sentencing range of zero to eighteen months). *Id.* Although the two offenses could be considered "similar conduct," they are not "similar conduct" within the meaning of the Sentencing Act. *Id.* (referring to the sentencing factor of 18 U.S.C. § 3553(a)(6) (2000)). Noting that Congress made its intention of punishing the airplane offense greater than the federal establishment offense, the court concluded that it would be improper for a sentencing judge to reject this disparate treatment. *Id.*

133. *See* United States v. Duhon, 440 F.3d 711, 720 (5th Cir. 2006) ("[A] sentencing disparity intended by Congress is not unwarranted."); United States v. Sebastian, 436 F.3d 913, 916 (8th Cir. 2006) ("[I]t is . . . within the province of the policymaking branches of government to determine that certain disparities are warranted.").

Having advisory, rather than mandatory, Sentencing Guidelines does not strip from Congress the roles of setting policy choices and fixing criminal penalties and turn these duties into judicial functions. Therefore, when applying the Sentencing Statute, courts must still adhere to the will of the legislature, including the policy choices of Congress as expressed in the Guidelines. Although the sentencing range in the Guidelines is now advisory and other statutory concerns may very well demand a sentence that is outside the Guidelines, courts are not entitled to base their sentencing decision on their disagreement with Congress's choice of policy.

C. An Example of How to Properly Apply the Sentencing Statute

The Sentencing Statute requires the court to "impose a sentence sufficient, but not greater than necessary, to comply" with the following purposes:

> (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[.][134]

In addition, the statute further directs sentencing courts to consider: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the kinds of sentences available; (3) the applicable sentence under the Guidelines; (4) pertinent policy statements of the Sentencing Commission; (5) the need to avoid unwarranted sentencing disparities; and (6) the need to provide restitution to victims.[135] Upon proper consideration of the above factors, the sentence imposed will then be subject only to review for unreasonableness.[136]

The district court in *United States v. Avilez*[137] applied the statute to a case involving the distribution of crack.[138] After first calculating the sentencing range under the Guidelines,[139] the court examined the nature and circumstances of the offense and the history and characteristics of the defendant.[140] The court found that Avilez was merely an "errand boy" for the primary culprit, co-defendant LaJara.[141] Avilez's role in LaJara's crack business was to retrieve small bags of crack ($20 worth) from LaJara's bedroom and bring them to LaJara, who would then sell the crack to

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134. 18 U.S.C. § 3553(a)(2)(A)-(D) (2000).

135. *Id.* § 3553(a)(1), (3)-(7).

136. *See* United States v. Booker, 543 U.S. 220, 261 (2005).

137. No. 02-CR-999 (FB), 2005 U.S. Dist. LEXIS 14145 (E.D.N.Y. July 12, 2005).

138. Avilez was convicted of conspiracy to possess with intent to distribute cocaine base in violation of 21 U.S.C. §§ 841(b)(1), 846. *Id.* at *9.

139. *Id.* at *9-10. Avilez was subject to a base offense level of 30, which provides for a sentencing range of 97-121 months imprisonment for someone with little or no criminal history (such as Avilez). *Id.* at *9; *see also* U.S. SENTENCING GUIDELINES MANUAL § 5A (2005) (sentencing table). Due to several Guidelines-based reductions (safety valve provision, being a minor participant, and accepting responsibility), the applicable Guidelines range ended up being 46-57 months. *Avilez*, No. 02-CR-999 (FB), 2005 U.S. Dist. LEXIS 14145, at *9-10.

140. *Id.* at *10-15. The court was thus applying the sentencing factor located at 18 U.S.C. § 3553(a)(1).

141. *Id.* at *11.

customers.[142] Avilez would also at times collect money from customers, but all the proceeds were given to LaJara.[143] The only compensation Avilez received was an occasional gift of $20 when he was in need of money.[144] The court characterized Avilez as an eighteen-year-old boy that was "just hanging out" at LaJara's apartment.[145]

Furthermore, the evaluation of a neuropsychologist indicated that Avilez was "borderline mentally defective . . . [with] profoundly impaired thought processes, defective problem-solving capacities, and faulty reasoning [that] rendered him unable to make effective decisions and appropriate judgments."[146] The doctor also found that Avilez tended to "defer to others with little analysis of their intentions."[147] This testimony confirmed the court's own observation that the defendant had a "reduced mental capacity."[148] In the doctor's opinion, Avilez was in need of psychotherapy, not incarceration.[149]

The court next addressed the statutory purposes of sentencing. The court again noted Avilez's minimal involvement in the crime, and his reduced mental capacity.[150] Moreover, in the one and a half year period between Avilez's arrest and sentencing, during which time he was out of jail on bond, he complied with the probation officer's reporting requirements.[151] In the court's opinion, imprisoning Avilez was not needed to "reflect the seriousness of the offense, to promote respect for the law, to afford adequate deterrence to criminal activity, or to protect the public from further crimes of the defendant."[152] The court stressed that the sentence should be focused on the need to provide the defendant with educational training, medical assistance, and effective correctional treatment.[153]

Having identified the sentencing purpose the court found to be of the greatest concern under the facts of the case, the court next turned to the kinds of sentences available.[154] As recommended by the neuropsychologist that evaluated Avilez, the court believed that a one-year term of confinement at a halfway house (community confinement center) would best rehabilitate Avilez.[155] The court believed that the center was quite successful at providing mental health treatment and assistance in locating employment, while still imposing strict supervision.[156] Therefore, the court concluded that confinement at a halfway house would more adequately satisfy the

142. *Id.* at *10.
143. *Id.*
144. *Id.*
145. *Id.* at *11.
146. *Id.* at *14.
147. *Id.*
148. *Id.* at *11.
149. *Id.* at *15.
150. *Id.*
151. *Id.* at *16.
152. *Id.* (quoting 18 U.S.C. § 3553(a)(2)(A)-(C)).
153. *Id.* at *16-17 (addressing the statutory purpose found at 18 U.S.C. § 3553(a)(2)(D)).
154. *Id.* at *16-17 (considering the sentencing factor located at 18 U.S.C. § 3553(a)(3)).
155. *Id.*
156. *Id.* at *17-18.

sentencing purposes than forty-six to fifty-seven months of conventional incarceration as called for by the Guidelines.[157]

As this case illustrates, there may very well be circumstances that warrant imposing a non-Guidelines based sentence. Sentencing judges must, however, utilize the statutory framework in order to guide their decision. This entails both the calculation of the advisory Guidelines' sentencing range, and careful consideration of the statutory purposes and factors found in the Sentencing Statute. As shown by the *Avilez* case, some factors will be more relevant than others depending on the unique characteristics of the case at hand. Although it is not necessary to categorically recite each of the factors under the Sentencing Statute when imposing a sentence, courts must still use them as a guide to direct their decisions.[158] A sentence that is reached by proper application of those factors is subject only to review for reasonableness, whereas a rejection of Congress's policy choice constitutes an error as a matter of law.

VII. CONCLUSION

The problem with the decisions of the district courts in both *Pho* and *Eura* was not that they viewed the Guidelines as advisory, but that they did not use the statutory considerations as the basis for their sentencing decision. Both the First and Fourth Circuits have made this point clear.[159]

The decisions in *Pho* and *Eura*, however, must not be read as adding a mandatory element back into the Sentencing Statute.[160] Rather, they should be construed as a warning to the sentencing courts: although courts once again have the discretion to

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157. *Id.*

158. The Circuit Courts are uniform in their determination that sentencing courts do not need to expressly consider each of the sentencing factors. *See* United States v. Rojo-Quintero, 175 F. App'x. 253, 255 (10th Cir. 2006) ("[T]he sentencing court is not required to consider individually each factor listed in [the Sentencing Statute] before issuing a sentence."); United States v. Fernandez, 443 F.3d 19, 30-31 (2d Cir. 2006) (noting that a district court is not required to "categorically rehearse each of the [sentencing] factors on the record") (quoting United States v. Walker, 439 F.3d 890, 892 (8th Cir. 2006)); United States v. Duhon, 440 F.3d 711, 715 (5th Cir. 2006) ("The court need not make 'a checklist recitation of the [sentencing] factors.'") (quoting United States v. Smith, 440 F.3d 704, 707 (5th Cir. 2006)); United States v. Dieken, 432 F.3d 906, 909 (8th Cir. 2006) (noting that the sentencing judge does not need to "categorically rehearse" the sentencing factors); United States v. George, 403 F.3d 470, 472-73 (7th Cir. 2005) ("Judges need not rehearse on the record all of the considerations that [the Sentencing Statute] lists; it is enough to calculate the range accurately and explain why (if the sentence lies outside it) this defendant deserves more or less."); United States v. Chandler, 419 F.3d 484, 488 (6th Cir. 2005) ("Although 'there is no requirement that a district court . . . engage in a ritualistic incantation of' the . . . factors it considers, the district court's sentence should nonetheless reflect the considerations listed in the [Sentencing Statute].") (quoting United States v. Washington, 147 F.3d 490, 491-92 (6th Cir. 1998)); United States v. Scott, 426 F.3d 1324, 1329 (11th Cir. 2005) ("[N]othing in Booker or elsewhere requires the district court to state on the record that it has explicitly considered each of the . . . factors or to discuss each of the . . . factors.").

159. *See also* United States v. Crosby, 397 F.3d 103, 114-15 (2d Cir. 2005) ("A sentence explicitly based upon a non-existent statutory provision, even if 'reasonable' in length, constitutes error . . . because of the unlawful method by which it was selected.").

160. *Cf.* United States v. Dowell, 430 F.3d 1100, 1112-13 (10th Cir. 2005) (finding that the district court committed error by treating the Sentencing Guidelines as mandatory, but that such error was harmless where it did not affect the sentence imposed).

sentence outside the Guidelines' range, they must still follow the procedure that Congress directs.

Although in most cases a sentence within the Guidelines' range will be appropriate, this does not mean that the Guidelines should be *presumed* to be reasonable, for there are other statutory factors that *must* be considered as well.[161] Instead, the Guidelines provide a starting point from which the sentencing court can deviate in light of other statutory concerns. The unique facts and circumstances of each defendant's case will establish which factors are most appropriate for considering whether a different (or "variant") sentence is warranted.

The Sentencing Statute provides an all-inclusive list of considerations, however, and disagreement with a Congressional policy decision certainly is not one of them. The will of Congress must still be taken into account when making sentencing decisions. Even though in *Booker* the Supreme Court interpreted that the intent of

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161. The Circuit Courts are split on whether a sentence within the Guidelines' range should be *presumptively reasonable*. A majority of Circuit Courts—the Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits—have ruled that a Guidelines-based sentence is entitled to a presumption of reasonableness. *See* United States v. Moreland, 437 F.3d 424, 433 (4th Cir. 2006) (ruling that a sentence within the Guidelines is "entitled to a rebuttable presumption of reasonableness"); United States v. Alonzo, 435 F.3d 551, 554-55 (5th Cir. 2006) (holding that "a sentence within a properly calculated Guideline range is presumptively reasonable[,]" but is not "reasonable per se."); United States v. Richardson, 437 F.3d 550, 553, 554 n.2 (6th Cir. 2006) (giving a sentence within the Guidelines' range a "rebuttable presumption of reasonableness," but noting that this does not mean a Guidelines-based sentence is "per-se reasonable"); United States v. Jordan, 435 F.3d 693, 696 (7th Cir. 2006) ("A sentence within a properly calculated advisory guidelines range is entitled to a rebuttable presumption of reasonableness."); United States v. Myers, 439 F.3d 415, 417 (8th Cir. 2006) ("[A] sentence imposed within the guidelines range is presumptively reasonable."); United States v. Kristl, 437 F.3d 1050, 1054 (10th Cir. 2006) ("[W]e join our sister circuits and hold that a sentence that is properly calculated under the Guidelines is entitled to a rebuttable presumption of reasonableness."). The First, Second, and Eleventh Circuits, on the other hand, have refused to create such a presumption. *See* United States v. Jiménez-Beltre, 440 F.3d 514, 518 (1st Cir. 2006) ("We do not find it helpful to talk about the guidelines as 'presumptively' controlling or a guidelines sentence as 'per se reasonable' .... *Booker*'s remedial solution makes it possible for courts to impose non-guideline sentences that override the guidelines, subject only to the ultimate requirement of reasonableness."); United States v. Fernandez, 443 F.3d 19, 28 (2d Cir. 2006) ("[W]e do *not* hold that a Guidelines sentence, without more, is 'presumptively' reasonable."); United States v. Lisbon, 166 F. App'x 457, 460 (11th Cir. 2006) ("A sentence within the guidelines range is not presumptively reasonable."). The Third Circuit appears to be leaning in favor of *not* making the Guidelines' range presumptively reasonable, although an earlier "unpublished" case conflicts with this conclusion. *Compare* United States v. Cooper, 437 F.3d 324, 331-32 (3d Cir. 2006) (noting that a sentence within the Guidelines is more likely to be reasonable, but declining to accord Guidelines-based sentences a rebuttable presumption of reasonableness), *with* United States v. Gonzalez, 134 F. App'x 595, 598 (3d Cir. 2005) ("Although the Sentencing Guidelines are not mandatory, sentences within the prescribed range are presumptively reasonable."). The Ninth Circuit apparently could not make up its mind which way to go. An opinion issued by the Ninth Circuit that adopted the "presumptively reasonable" standard was later amended to delete this portion of the opinion. *See* United States v. Guerrero-Velasquez, 434 F.3d 1193, 1195 n.1 (9th Cir. 2006) (original opinion); United States v. Guerrero-Velasquez, No. 05-30066, 2006 U.S. App. LEXIS 2908, at *1 (9th Cir. Feb. 7, 2006) (deleting "presumptively reasonable" language). Even though some Circuits have held that sentences within the Guidelines are presumptively reasonable, they have declined to hold that a non-Guidelines sentence is presumptively *un*reasonable. As the Fourth Circuit noted, creating a rule that a sentence outside the Guidelines' range is presumptively unreasonable would "transform an 'effectively advisory' system ... into an effectively mandatory one," and therefore be inconsistent with the Supreme Court's ruling in *Booker*. *Moreland*, 437 F.3d at 433 (internal citation omitted).

Congress was to have an advisory Guidelines system, the underlying policies of Congress—including the determination that crack offenses should be more severely punished than powder cocaine offenses—must still be respected.

Imposing a sentence outside the Guidelines because of the decision that the "real conduct" of the defendant does not warrant a Guidelines-based sentence is quite different from imposing a sentence based on the belief that Congress's disparate treatment of two seemingly similar offenses is a poor choice of policy. Courts are free to sentence outside the Guidelines, but can only select a sentence (regardless of whether it is within the Guidelines or not) by using the factors delineated by the Sentencing Statute in reaching their decision, rather than relying on their disagreement with the disparate treatment of certain offenses.[162]

An old adage beckons that the ends must justify the means. This case demonstrates that the reverse can also be true, for here it is the means that must justify the ends. Since the problem with the district court's approach was with the means employed rather than the end result, there remains the question: What is to prevent a court from imposing whatever sentence it desires by using the reasoning of the policies and factors set forth under the Sentencing Statute?[163] The answer is, quite simply: Nothing. As long as statutory minimums and maximums are abided by, and the sentence ultimately imposed is reasonable, the court may impose whatever sentence it desires. The Guidelines, even in light of *Pho* and *Eura*, are still advisory. Whether they shall remain so, and whether the sentencing disparity between crack and cocaine offenses will continue, is left to Congress.[164]

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162. *See Jiménez-Beltre*, 440 F.3d at 517 (noting that sentences both within and outside the Guidelines' range are reviewed on appeal for unreasonableness).

163. There is, of course, the concern that judges might use the rationale of permissible considerations as a pretext to support a non-Guidelines sentence when their real motivation is a disagreement with Congressional policy. The integrity and good faith of judges should largely preclude this result. *Cf. id.* at 528 (Lipez, J., concurring) ("The key is the faithful performance of the statutory duties set forth in section 3553."). Since the Supreme Court's decision in *Booker*, there does not appear to be a significant rise in the number of sentences imposed outside of the Guidelines range. Statistics gathered by the Sentencing Commission show that post-*Booker*, 61.2% of sentences have been within the Guidelines, as compared to 64.0%, 65.0%, 69.4%, and 72.2% for the years 2001-2004, respectively. U.S. SENTENCING COMM'N, SPECIAL POST-*BOOKER* CODING PROJECT 7 (2006), *available at* http://www.ussc.gov/Blakely/PostBooker_010506.pdf (note that the data for the year 2004 includes only those cases decided prior to the Supreme Court's decision in *United States v. Blakely*); *see also* U.S. SENTENCING COMM'N, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 131 (March 2006), *available at* http://www.ussc.gov/booker_report/Booker_Report.pdf (concluding that "courts infrequently are using Booker to impose non-government-sponsored, below-range sentences" on the basis of disagreement with the 100:1 ratio). Given that Congress has the authority to curtail judicial discretion by setting mandatory minimum and maximum sentences, or by amending the Sentencing Statute, sentencing judges should, for the most part, limit their exercise of discretion to appropriate cases. *See* Kevin R. Reitz, *The Enforceability of Sentencing Guidelines*, 58 STAN. L. REV. 155, 167 (2005) (predicting that the mere threat that Congress could eliminate judicial sentencing discretion should cause judges to carefully consider the Guidelines).

164. United States v. Booker, 543 U.S. 220, 265 (2005) ("The ball now lies in Congress' court."). For a discussion of the Booker decision and the options available to Congress, see Amanda Farnsworth, Comment, United States v. Booker*: How Should Congress Play the Ball?* 83 DENV. U. L. REV. 579 (2005); *see also* Reitz, *supra* note 163 (providing an excellent analysis of the extent of judicial discretion in both federal courts and selected states and identifying various actions that Congress could take to alter the current system).